

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07

Date: 30 May 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

URGENT

Decision on Limitations of Set of Procedural Rights for Non-Anonymous Victims

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric MacDonald, Senior Trial Lawyer

Counsel for the Defence of

Germain Katanga
Mr David Hooper
Ms Caroline Buisman

Counsel for the Defence of

Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Bujagandu
Mr Joseph Keita
Mr J. L. Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Mr Simo Väätäinen

Detention Section

**Victims Participation and Reparations
Section**

Mr Didier Preira
Ms Fiona McKay

Other

I, Judge Sylvia Steiner, judge at the International Criminal Court (“the Court”);

NOTING the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements¹ (“the First Decision on Redactions”) issued by the Single Judge on 14 December 2007;

NOTING the “Decision on the set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”² (“the Decision”) issued by the Single Judge on 13 May 2008;

NOTING the “Prosecution’s Request for Limitations pursuant to the Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”³ (“the Prosecution Request”) filed by the Prosecution on 20 May 2008;

NOTING the “Registry’s considerations on victims’ rights to access the record of the case and to attend closed session hearings”⁴ (“the Registry Considerations”), filed by the Registry on 20 May 2008;

NOTING the “*Observations sur les documents déposés par l’Accusation et le Greffe, au sujet des limitations à apporter aux droits procéduraux des victimes tels qu’établis par la Juge unique dans sa décision du 13/5/2008*”⁵ (“the Victims Observations”) filed on 24 May 2008 by Victims a/0327, a/0329, a/0330/07 and a/0331/07;

¹ ICC-01/04-01/07-88-Conf-Exp, ICC-01/04-01/07-90.

² ICC-01/04-01/07-474

³ ICC-01/04-01/07-485, p.8.

⁴ ICC-01/04-01/07-486, p.5.

⁵ ICC-01/04-01/07-505.

NOTING the Prosecution's Observations on the "Registry's considerations on victims' rights to access the record of the case and to attend closed session hearings"⁶ ("the Prosecution Observations") filed by the Prosecution on 26 May 2008;

NOTING the "*Réponse et observations de la Défense de Monsieur Mathieu Ngudjolo sur la requête du Procureur et les considérations émises par le Greffe quant à la limitation des droits des victimes durant la phase préliminaire du procès*"⁷ ("the Defence Observations") filed by the Defence for Mathieu Ngudjolo Chui on 26 May 2008;

NOTING the "Corrigendum to the Decision on Request of Mathieu Ngudjolo Chui for Leave to Appeal the 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre- Trial Stage of the Case'"⁸ issued by the Single Judge on 29 May 2008;

NOTING articles 57 and 68 of the *Rome Statute* ("the Rules"), rules 76 to 83, 91, 92, 121 and 122 of the *Rules of Procedure and Evidence* ("the Rules"), and article 15 of the ICC Code of Professional Conduct for Counsel;

I. Submissions of the Prosecution, Defence for Mathieu Ngudjolo Chui, Victims a/0327, a/0329, a/0330/07 and a/0331/07 and the Registry

1. The Prosecution requests the Single Judge to:

[...] limit the access that participating victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 (as well as any future victim participants that fall into this category) have to the confidential case index, filings, decisions, transcripts and evidence filed in the case record to material that does not contain identities or information that tends to identify witnesses who have not consented to their identities being disclosed beyond the Defence. This would include witnesses currently within the ICCPP who have not consented to the provision of their personal information to the victim participants.⁹

⁶ ICC-01/04-01/07-506.

⁷ ICC-01/04-01/07-508.

⁸ ICC-01/04-01/07-527-Corr.

⁹ The Prosecution Request, para. 10.

It is submitted that a proportional limit on the access granted to these victim participants would be to permit them access to confidential material in the case record that has been formatted, where necessary, to remove the identities of witnesses who have not consented to victim participant disclosure. This proposal would effectively establish a second tier of confidential material, available to the victim participants and would permit the Legal Representative (s) to have access to sufficient information for the purpose of participating at the Confirmation Hearing, while at the same time respecting the interests of the witnesses.¹⁰

2. The Prosecution also explains that “if the Chamber determines this request for limitations has merit and the proposed modality of limitation is acceptable, the Prosecution will be in a position to indicate to the Chamber the degree of proposed restrictions in a future filing.”¹¹ Moreover, the Prosecution makes the following final observations:

Finally, the Prosecution notes that it has reviewed the confidential case record following the rendering of the Decision for the purpose of identifying categories or specific confidential material for which a request might be made to the Single Judge for proportional limitations on access by the victim participants. As of the date of this filing, the Prosecution has not identified any such additional categories or confidential information. The Prosecution will continue to review the confidential filings, decisions and transcripts in the case record, and if any additional categories or information are identified, that are not covered by the instant filing, it will identify this information to the Single Judge immediately.¹²

3. In the view of the Prosecution, the proposed restrictions would be justified for the following reasons:

- (i) [...] the Procedural rule for access as currently delineated in the Decision – that the non-anonymous victims would obtain access to all confidential material in the case record, including evidence, when filed, without the consent of the witnesses – is incongruent with the system established by the Single Judge that requires consents to be obtained for use of the witnesses’ evidence by the Prosecution for the purpose of the Confirmation Hearing. [...] The witnesses consented on the basis that their identity and information would be disclosed to the Defence, not to victim participants in the case. To grant a participating victim access to the identity and evidence of a witness who may also be a similarly-situated victim, without the latter’s knowledge and informed consent, risks creating a hierarchical system of victim-witnesses entitlements. It would permit the interests of the victim participant to trump the interests of a witness to limit, if desired, the scope of the pre-trial disclosure of his or her identity.¹³
- (ii) The witnesses are uniquely situated to recognize and identify potential risks that may flow from the further dissemination of their identities and evidence beyond the Defence, and especially to persons who might be known to them, as may be the case for some victim participants. The Prosecution also submits that permitting a victim

¹⁰ The Prosecution Request, para. 11.

¹¹ The Prosecution Request, para. 11.

¹² The Prosecution Request, para. 13.

¹³ The Prosecution Request, paras. 7 and 8.

participant to access the identity and evidence of a witness, absent a relevant consent, undermines the value of the original consent provided, namely that the witness voluntarily, after being made aware of the hazards, undertakes to accept a certain degree of risk resulting from the disclosure and use of his or her information and evidence.¹⁴

- (iii) [...] it is not operationally feasible at this point in the proceedings to require the Prosecution to re-approach all such witnesses to seek their consent to disclosure to participating victims. Furthermore, even if witnesses were to be re-approached to provide such consent, that it would be given or obtained in all cases cannot be guaranteed and, consequently, the issue of access to information in the absence of a consent still may remain unresolved.”¹⁵

4. The Registry proposes the limitation of “the right to access the confidential record of the case and to attend closed session hearings to the legal representative of the victims only.”¹⁶ According to the Registry, although there is no information indicating that Victims a/0327, a/0329, a/0330/07 and a/0331/07 would cause any threat to other victims and witnesses, confidentiality and the secure handling of information is a key ingredient of any meaningful protective measure, and the risk that the information is compromised inevitably increases with the number of individuals who have access to it.¹⁷ Consequently, the Registry observes that:

While the Registry does not wish to interfere with the judicial process of granting procedural rights to recognised victims, it would still like to note that there are no safeguards in place on how such confidential information could be secured in the field. This relates in particular to the individual circumstances of the victims and their means of maintaining the confidentiality of the information, such as secure communication and storage. Moreover, the victims are neither specifically trained in handling such sensitive information nor are they under a specific professional obligation to adhere to a code of conduct.¹⁸

5. The Prosecution does not oppose the Registry’s proposal, although it highlights that it is just one of the many mechanisms available to enhance the security of witnesses and confidential information in the case record and to permit victims to participate in the proceedings pursuant to the Decision.¹⁹

6. Victims a/0327, a/0329, a/0330/07 and a/0331/07 oppose the Registry’s proposal because it would prevent their legal representative from adequately representing

¹⁴ The Prosecution Request, para. 8.

¹⁵ The Prosecution Request, para. 11.

¹⁶ The Registry Considerations, para. 5.

¹⁷ The Registry Considerations, paras. 1 and 2.

¹⁸ The Registry Considerations, para. 4.

¹⁹ The Prosecution’s Observations, para. 2.

them insofar as their legal representative would not be able to obtain useful information from their clients as a result of the prohibition to communicate the information that inevitably affects them. Victims a/0327, a/0329, a/0330/07 and a/0331/07 also oppose the Prosecution's Request because the Prosecution has neither identified the specific witnesses covered by the Prosecution's Request nor has it explained the real and concrete risks that such witnesses would face if the victims are given access to the confidential part of the case record.

7. The Defence for Mathieu Ngudjolo Chui also opposes the Prosecution Request as well as the Registry's proposal and requests that the rights of non-anonymous victims to have access to the confidential part of the case record and to closed session hearings be suspended until the Appeals Chamber decides on the matter.²⁰

8. Finally, the Single Judge notes that the Defence for Germain Katanga did not file any observations within the time-limit given by the Single Judge in the Decision.

II. Discussion

9. At the outset, the Single Judge recalls that the request for leave to appeal against the Decision filed by the Defence for Mathieu Ngudjolo Chui has been rejected by the Single Judge on 29 May 2008.²¹ Consequently, the request made in the Defence Observations must be rejected *in limine*.

10. The Single Judge also highlights that the deadline for requesting limitations to the set of procedural rights for non-anonymous victims set out in the Decision expired on 20 May 2008. Hence, the Single Judge is puzzled by the several references in the Prosecution Request to future filings in which further limitations will be requested and/or specified. In this regard, the Single Judge underlines that any further requests for limitations filed by the Prosecution or by either of the Defences, will be rejected *in limine* in light of the expiration of the 20 May 2008 deadline.

²⁰ The Defence's Observations, para. 16.

²¹ ICC-01/04-01/07-527-Corr.

11. Moreover, the Single Judge is also seriously concerned by the Prosecution practice of making general statements questioning the merits of decisions taken by the Single Judge, as opposed to seeking the procedural remedies provided for in the Statute and Rules. In this regard, the Single Judge observes that while the Prosecution decided not to request leave to appeal the Decision, it submitted in the Prosecution's Request that "the Single Judge's interpretation of a non-anonymous victim participant's blanket entitlement to question witnesses at a Confirmation Hearing does not appear to be compatible with the procedure set out in Rule 91 (3), which envisions the process of a witness-by-witness application and determination."²²

12. In the view of the Single Judge, the fact that the Prosecution consciously decided not to request leave to appeal this specific aspect of the Decision will have to be a factor to be taken into consideration in deciding whether to grant future applications for leave to appeal in relation to the very same matter.

13. Turning now to the Prosecution's Request, the Single Judge observes that the Prosecution is now requesting the redaction of all confidential documents and evidence contained in the record of the present case so as to give Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 access to them in a format that would not disclose the identity of the witnesses on which the Prosecution intends to rely at the confirmation hearing.

14. In this regard, the Single Judge would like first to highlight that the Prosecution does not put forward any concrete proposal as to the specific redactions to be performed in such documents and evidence. Furthermore, the Prosecution does not address the question of the specific test to be met for redactions *vis-à-vis* non-anonymous victims in relation to documents and evidence to which, in principle, they have been granted access by the Decision.

²² The Prosecution's Request, para. 3.

15. Indeed, in the view of the Single Judge, had the Prosecution made a conscious effort to propose within the 20 May 2008 deadline the specific redactions to the confidential documents and evidence contained in the case record, it would have realised the unfeasibility of the “two case-record system” advanced in the Prosecution’s Request.

16. More importantly, the Single Judge observes that the ultimate justification for the Prosecution’s Request lies in a fundamental misunderstanding of the nature of the consent required by the Single Judge from those witnesses on whose evidence the Prosecution intends to rely at the confirmation hearing.

17. In this regard, the Single Judge highlights that all statements in the present case have been taken during the stage of investigation into the Situation in the Democratic Republic of the Congo (“the DRC”) – and thus prior to the initiation of the case against Germain Katanga and Mathieu Ngudjolo Chui. Thus, at the time the statements were taken, the initial consent given by the witnesses for the use of their statements by the Prosecution referred generally to “proceedings before the Court”. Under these circumstances, the Single Judge considered that the “first and foremost” measure of protection of those witnesses on which the Prosecution intended to rely at the confirmation hearing was to make sure that the relevant witnesses were properly informed and voluntarily accepted the use of their statements in the confirmation hearing of the specific case against Germain Katanga and Mathieu Ngudjolo Chui.

18. As a result, the Single Judge requested the consent of all witnesses to the use of their statements by the Prosecution in the present case, and not – as wrongly portrayed by the Prosecution - to the disclosure of their identities to the Defence. Indeed, the Single Judge notes that this second type of written consent was only requested in relation to three witnesses, two of whom had rejected the adoption of any protective measures and a third one who had not been admitted by the Registrar into the Court’s Witness Protection Programme.

19. Turning now to the Registry's proposal referred to above at paragraph 4, the Single Judge observes that while only four non-anonymous individuals have so far been granted the procedural status of victim in the present case, on 26 May 2008, 97 additional applications related *prima facie* to the alleged 24 February 2003 joint FNI/FRPI attack against the village of Bogoro were filed in the case record. As a result, in the coming days it is most likely that the number of non-anonymous victims in the present case will notably increase.

20. The Single Judge also notes that: (i) all crimes in the present case have allegedly taken place in the village of Bogoro; (ii) some of the non-anonymous victims are current or former neighbours of the witnesses, and/or their family members, on whom the Prosecution intends to rely at the confirmation hearing; and (iii) the security situation and context in the Ituri district (in which Bogoro is located) remains the same as the one described in the First Decision on Redactions;

21. Moreover, the Single Judge agrees with the Registry that, as of today, there are no safeguards in place to secure confidential information in the field. In particular, there are no means available by which non-anonymous victims could maintain the confidentiality of the information. There is also a lack of secure communication and storage of information, a lack of appropriate training in handling such sensitive information and a lack of any specific professional obligation to adhere to a code of conduct.

22. Under these conditions, the Single Judge agrees with the Registry and the Prosecution that disclosing the names of the witnesses to non-anonymous victims will increase the risk to the safety of the said witnesses and/or their family members at this early stage of the proceedings;

23. In this regard, the Single Judge considers that the approach proposed by the Registry in the Registry's Considerations and endorsed by the Prosecution in the Prosecution's Observations, will effectively minimise such risk because:

- (i) the identity of all current witnesses of the present case is confidential;
- (ii) it would prevent non-anonymous victims, as opposed to their Legal Representatives, from: (a) having access to the confidential part of the case record; (b) being present at closed session hearings in the proceedings of the present case; and (c) receiving copies from the Legal Representative of any document or evidence included in the confidential part of the case record or transcripts of closed session hearings.

24. The Registry's proposal is not only a feasible measure but it is also the least intrusive measure that would effectively minimise the above-mentioned risk. In this regard, the Single Judge considers that the "two case record system" proposed in the Prosecution Request, besides being unfeasible, is also far more restrictive of the procedural rights of non-anonymous victims. Other measures, such as the exclusion of the Legal Representatives of non-anonymous witnesses from accessing the case record and attending closed session hearings, on the basis that no restriction can be imposed to the communication between them and their clients, would be even more restrictive.

25. In this regard, the Single Judge considers that the Registry's proposal would not prevent the Legal Representatives of non-anonymous victims from discussing with their clients the information to which they are privy through accessing the confidential part of the case record and attending closed session hearings as long as they do not provide to their clients the names of the specific witnesses of the confirmation hearing in the present case, as well as information that would allow their clients to identify them.

26. As a result, in the view of the Single Judge, the Registry's proposal would not prevent the Legal Representatives of non-anonymous victims from providing their clients with the type of "reasonably needed" explanations referred to in article 15 of

the ICC Code of Professional Conduct for Counsel²³ or from being in a position to adequately represent their interests at the confirmation hearing.

FOR THESE REASONS,

DECIDE to reject the Prosecution Request;

DECIDE to reject *in limine* the Request of the Defence for Mathieu Ngudjolo Chui;

DECIDE that:

- (i) only the Legal Representatives of non-anonymous victims shall have the rights to access the confidential part of the record of the present case and to attend closed session hearings; and that therefore
- (ii) non-anonymous victims (Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07) shall not have access to the confidential part of the case record nor shall they attend closed session hearings;

DECIDE that the Legal Representatives of non-anonymous victims shall be prohibited from transmitting to their clients copies of any document or evidence included in the confidential part of the case record, as well as any transcript of hearings held in closed session;

DECIDE that:

- (i) the above limitations shall not extend to a general prohibition on the Legal Representatives of non-anonymous victims from

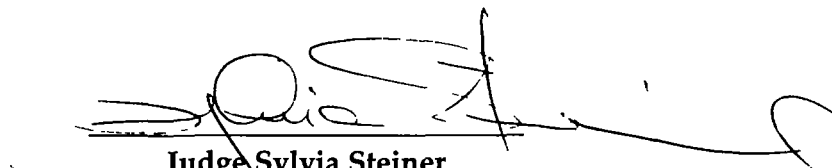
²³ Code of Professional Conduct ICC-ASP/4/3/Res.1.

discussing with their clients the information and evidence to which they are privy through accessing the confidential part of the case record and attending closed session hearings; and

- (ii) the Legal Representatives of non-anonymous victims shall only be prohibited from discussing with their clients the above-mentioned information and evidence insofar as it would allow the non-anonymous victims that they represent to identify the specific witnesses in the confirmation hearing of the present case.

DECIDE that the set of procedural rights granted by the Decision to the non-anonymous victims of the present case shall only be made effective after the expiration of the five day time-limit to request leave to appeal the present decision.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner
Single Judge

Dated this Friday 30 May 2008

At The Hague, the Netherlands