

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 June 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. Germain Katanga and Mathieu Ngudjolo Chui

Public redacted version of the "Decision on the Use of Summaries of the Statements of Witnesses 267 and 243" issued on 3 April 2008

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, Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper
Ms Caroline Buisman
Mr Göran Sluiter

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J. L. Gilissen
Mr Hervé Diakiese
Mr Jean-Christostome Mulamba
Nsokoloni

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

Detention Section

**Victims Participation and Reparations
Section**

Other

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

NOTING the “Prosecution’s Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related materials to be relied Upon at the Confirmation Hearing”¹ (“the Prosecution’s Application for Redactions”), filed by the Prosecution on 15 January 2008, by which the Prosecution requested, *inter alia*, redactions to be authorised in a number of interview transcripts, interview notes and statements of witnesses, and submitted summaries of the statements of Witnesses 267² and 243³;

NOTING the “Corrigendum to Prosecution’s Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to Be Relied Upon at the Confirmation Hearing dated 14 January 2008 and Submission of Additional Materials” (“the Prosecution’s Corrigendum to the Prosecution’s Application for Redactions”),⁴ filed by the Prosecution on 16 January 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution and the Victims and Witnesses Unit (“the VWU”) on 3 March 2008, in which the Single Judge, *inter alia*, ordered the Prosecution to submit, by 10 March 2008, its observations on whether it is absolutely necessary for the Prosecution to rely on these witnesses at the Confirmation Hearing and the reasons for summaries to be presented instead of redacted versions of the witnesses statements, interview notes or interview transcripts;⁵

¹ ICC-01/04-01/07-145-Conf-Exp

² ICC-01/04-01/07-145-Conf-Exp-AnxN.

³ ICC-01/04-01/07-145-Conf-Exp-AnxO.

⁴ ICC-01/04-01/07-147-Conf-Exp

⁵ ICC-01/04-01/07-T-20-Conf-Exp-ENG ET., p.4. lines 8-19

NOTING the “Prosecution’s Application on the Use of Summaries of Anonymous Witnesses 243 and 267, pursuant to Articles 61(5) and 68(5) of the Statute and Rule 81(4) of the Rules” (“the Prosecution’s Application for the Use of Summaries”),⁶ filed by the Prosecution on 10 March 2008, by which the Prosecution submitted its observations on the use of summaries of the statements of Witnesses 267 and 243 and requests that such summaries be admitted as evidence upon which the Prosecution intends to rely at the Confirmation Hearing;

NOTING articles 61(5), 68(5) and 69(4) of the *Rome Statute* (“the Statute”), and rules 64 and 81(2), (4) and (5) of the *Rules of Procedure and Evidence* (“the Rules”);

CONSIDERING further that article 68(5) of the Statute allows the Prosecution to, “for the purpose of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information [which may lead to the grave endangerment of the security of a witness or his or her family] and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial;”

CONSIDERING that according to the Appeals Chamber, the submission of summary of evidence includes the presentation of summaries at the confirmation hearing pursuant to article 61(5) of the Statute;⁷

CONSIDERING that rule 81(5) of the Rules states that material or information in the possession or control of the Prosecution, which is withheld under article 68(5) of the Statute, may not be introduced into evidence during the confirmation hearing or the

⁶ ICC-01/04-01/07-254-Conf-Exp

⁷ ICC-01/04-01/07-773, para. 46.

trial without adequate prior disclosure to the accused; and that, rule 81(4) of the Rules allows the Chamber to authorise the non-disclosure of witnesses and victim's identities prior to the commencement of the trial, in order to protect their safety;

CONSIDERING that, in analysing the issue of the use of summaries, the Appeals Chamber, in its "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'" ("the Appeals Chamber Judgment"), found that:

- (i) "[The] use of summaries by the Prosecutor at the confirmation hearing pursuant to article 61(5), second sentence, of the Statute is not subject to any explicit condition. Neither the Statute nor the Rules of Procedure and Evidence foresee that such summaries must be approved by the Pre Trial Chamber prior to their presentation at the confirmation hearing [...]"⁸
- (ii) "[The Appeals Chamber] is not persuaded by the argument of the appellant that pursuant to rule 81(5) of the Rules of Procedure and Evidence, the Prosecutor may only rely on the summaries at the confirmation hearing if the underlying statements and other documents have been disclosed to the defence prior to the confirmation hearing [...]"⁹ and that
- (iii) "[The] presentation of summaries at the confirmation hearing without disclosure of the identities of the relevant witnesses to the defence, as envisaged by the Pre-Trial Chamber, is not *per se* prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial [...]"¹⁰

⁸ ICC-01/04-01/06-773, para 43

⁹ *Idem*, para.47

¹⁰ *Idem*, para 50

CONSIDERING that according to article 69(4) of the Statute, “the Court may rule on the relevance and admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness;” and that, in the Prosecution’s Application for the Use of Summaries, the Prosecution submitted that the “information provided by Witnesses 243 and 267 is necessary for confirming the charges because it is highly relevant and corroborates other material currently in the list of evidence”;¹¹

CONSIDERING furthermore that, according to the Appeals Chamber Judgment:

[where] the Pre-Trial Chamber takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of summaries is permissible. This will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing;¹²

CONSIDERING that, in the current case, [REDACTED] at this stage of the proceedings, the Single Judge is of the view that the use of summaries that corroborates other evidence is not prejudicial to, or inconsistent with the rights of the suspects;

CONSIDERING, in addition, that Witness 243 is allegedly a victim of sexual violence who has been victimised in events other than the alleged 24 February 2003 joint FRPI/FNI attack on the village of Bogoro; and that the Single Judge has already established, in her Second and Third Decisions on Redactions¹³ that:

“a systematic and teleological interpretation of rule 81(4) of the Rules – in light of the particular emphasis placed by the drafters of the Statute and the Rules on the protection of alleged victims of sexual offences resulting from crimes within the jurisdiction of the Court – leads to the conclusion that, on an exceptional basis and

¹¹ ICC-01/04-01/07-254-Conf-Exp, para 6.

¹² ICC-01/04-01/07-773, para.50

¹³ ICC-01/04-01/07-123-Conf-Exp, para.19 ; its confidential redacted version ICC-01/04-01/07-124-Conf, para.19 and its public redacted version ICC-01/04-01/07-160, para.19, See also ICC-01/04-01/07-247-Conf-Exp-Corr, para.37, its confidential redacted version ICC-01/04-01/07-248-Conf-Corr, para 37 and its public redacted version, ICC-01/04-01/07-249, para 37

only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of "victim" under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand."

CONSIDERING, further that, in the current case, the victim of the alleged sexual violence is also a witness; and that, she is therefore entitled to protective measures in accordance with article 68(5) of the Statute and rule 81(4) of the Rules;

CONSIDERING that Witness 267 was [REDACTED]; that, in the view of the Single Judge, the nature of [REDACTED]; that, according to the Prosecution, redactions to his statement would not adequately protect him [REDACTED], since the disclosure of his statement even in a redacted form would undoubtedly reveal his identity; and that, accordingly, the witness is entitled to protective measures in accordance with article 68(5) of the Statute and rule 81(4) of the Rules;

CONSIDERING further that the Fourth Decision on Redactions¹⁴ confirmed the security situation and context in the territory of the DRC, as described in Section II of the First Decision on Redactions, in which the Single Judge found that:¹⁵

[t]he risk of disclosing to the Defence the types of information for which authorisation for redactions have been requested must be assessed against the backdrop of the above-mentioned context. In particular, the Single Judge considers that particular weight should be given to (i) the current volatile situation in the Ituri and Kinshasa areas; (ii) the influence of Germain Katanga and Mathieu Ngudjolo in the Ituri and Kinshasa areas today, and their close connections to FNI and/or FRPI supporters currently living in these areas; (iii) the capabilities of the supporters of Germain Katanga and Mathieu Ngudjolo to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families; and (iv) the several precedents of interference with Prosecution witnesses by FNI and/or FRPI members [REDACTED].¹⁶

¹⁴ ICC-01/04-01/07-358-Conf-Exp, para. 8.

¹⁵ ICC-01/04-01/07-223-Conf-Anx, paras.13-22 and ICC-01/04-01/07-224-Anx, paras 13-22

¹⁶ ICC-01/04-01/07-223-Conf-Anx, para.22 and ICC-01/04-01/07-224-Anx, para.22.

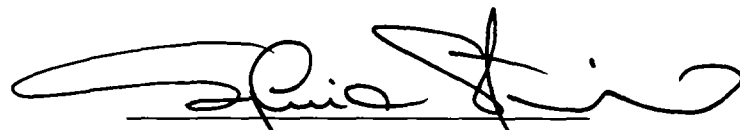
CONSIDERING that in this security situation and context, [REDACTED] at this stage of the proceedings, the use of summaries of these witnesses' statements, interview notes and interview transcripts is not prejudicial to, or inconsistent with the rights of the suspects, since they will nevertheless have access (i) to the information relevant to the case at hand and (ii) to the potentially exculpatory or exonerating information that may be contained in the statements, interview notes and interview transcripts;

CONSIDERING finally that, in the view of the Single Judge, the burden of providing the relevant incriminating information in the summaries as well as the obligation to provide all potentially exculpatory or exonerating information in such summaries lies with the Prosecution; and that, therefore, the Single Judge will not analyse the content of the summaries presented by the Prosecution in its Application for the Use of Summaries;

FOR THESE REASONS,

GRANT the anonymity of the summaries of the statements, interview notes and interview transcripts of Witnesses 243 and 267 for the purpose of the Confirmation Hearing.

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



Judge Sylvia Steiner
Single Judge

Dated this Wednesday 25 June 2008

At The Hague, The Netherlands