

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/07
Date: 14 December 2007

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

**URGENT
Public Document**

**Decision on the Prosecution Request for Leave to Appeal the First Decision on
Redactions**

The Office of the Prosecutor

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Counsel for the Defence

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

NOTING the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (“First Decision on Redactions”),¹ by which the Single Judge partially granted the Prosecution’s request for authorisation to redact information in the interview notes and statements of witnesses 1, 3, 7, 8, 12, 13 and 14;

NOTING the “Prosecution’s Application for Leave to Appeal and Urgent Application for Confined Variation of the First Decision on Redaction of Witness Statements” (“Prosecution’s Application for Leave to Appeal”), filed by the Prosecution on 10 December 2007;²

NOTING articles 54, 61, 67 and 82 (1) (d) of the *Rome Statute* (“the Statute”) and rules 76 to 83, 87, 88, 121 and 155 of the *Rules of Procedure and Evidence* (“the Rules”);

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,³ in order to grant leave to appeal under article 82(1)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial;
- and

¹ ICC-01/04-01/07-84-US-Exp, filed on 3 December 2007, the confidential, *ex parte*, only available to the Office of Prosecutor and the Defence version (ICC-01/04-01/07-88-Conf-Exp) issued on 6 December 2007, and the public redacted version (ICC-01/04-01/07-90) filed on 7 December 2007.

² ICC-01/04-01/07-92-Conf.

³ See *inter alia* the “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal” issued by Pre-Trial Chamber I on 23 June 2006 (ICC-01/04-01/06-165-Conf-Exp); the “Decision on Defence Motion for Leave to Appeal” issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); the “Decision on Second Defence Motion for Leave to Appeal” issued by Pre-Trial Chamber I on 28 September 2006 (ICC-01/04-01/06-489); and the “Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58” issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20-US-Exp; unsealed according to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular para. 20 .

- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING that, according to the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”,⁴ issued by the Appeals Chamber on 13 July 2006 (“the Appeals Chamber Judgment”):

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;⁵
- (ii) “[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;⁶
- (iii) “[n]ot every issue may constitute the subject of an appeal”,⁷ but “it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”⁸; and
- (iv) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’”;⁹

⁴ ICC-01/04-168.

⁵ Appeals Chamber Judgment, para. 9.

⁶ Appeals Chamber Judgment, para. 9.

⁷ Appeals Chamber Judgment, para. 9.

⁸ Appeals Chamber Judgment, para. 10.

⁹ Appeals Chamber Judgment, para. 14.

CONSIDERING that the Prosecution is seeking leave to appeal in relation to the following two issues:

- (a) whether “Article 54(3)(f) authorises the Prosecution to seek, and Rule 81(4) read in conjunction with that article empower the Chamber to authorise, redactions for the protection of “innocent third parties”, i.e. persons who are not victims, current or prospective Prosecution witnesses or sources, or members of their families” (“the first issue”);¹⁰ and
- (b) whether the Single Judge erred in the application of the test prescribed by the Appeals Chamber in its 14 December 2006 Decisions¹¹ by refusing to authorise the redaction of information concerning the location where witnesses were interviewed by the Prosecution, and the identifying information of current and former staff members of the Office of the Prosecutor (“the OTP”) and the Victims and Witnesses Unit (“the VWU”) at this particular stage of the proceedings;¹²

CONSIDERING that, in the view of the Single Judge, the first and second issues arise from the Decision;

CONSIDERING that the first issue concerns the power of the Pre-Trial Chamber to redact the identity and identifying information of individuals (i) who are referred to by the Prosecution witnesses in their statements; and (ii) who are not victims, current or prospective Prosecution witnesses or sources, or members of their families;

CONSIDERING that, in the view of the Single Judge, the fact that the drafters of the Statute and the Rules did not provide for the exceptional measure of redactions to

¹⁰ Prosecution’s Request for Leave to Appeal, para. 7(i).

¹¹ ICC-01/04-01/06-773 and ICC-01/04-01/06-774.

¹² Prosecution’s Request for Leave to Appeal, para. 7(ii).

protect those who fall under the category of “innocent third parties” does not mean that such innocent third parties are left unprotected, because: (i) an effective way to protect them is to make clear that they have not been contacted by the Prosecution and that they are not part of the Prosecution investigation; and (ii) their names and identities can always remain confidential and not be made public;

CONSIDERING that the Defence may have an interest in contacting such individuals for the preparation of the confirmation hearing, and that the redaction of their identity and identifying information would prevent the Defence from contacting them for the purpose of the preparation of the confirmation hearing;

CONSIDERING, therefore, that the first issue would significantly affect the fair conduct of the proceedings;

CONSIDERING that, in relation to the second issue, the Single Judge stated in her First Decision on Redactions that “the identification of, at least, the staff members of the Office of the Prosecutor and the VWU present when the witness statements were taken is a key guarantee of procedural propriety in the taking of the statements, as well as a formal requirement for their admissibility, and redacting this information would be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial”;¹³

CONSIDERING, therefore, that the second issue would also significantly affect the fair conduct of the proceedings;

¹³ First Decision on Redactions, para. 62.

CONSIDERING that the first and second issues would significantly affect the expeditious conduct of the proceedings because, depending on the approach taken in relation to such issues, certain investigative steps of the Prosecution and/or the Defence may be delayed;

CONSIDERING further that a number of *ex parte* Prosecution requests for authorisation for redactions are still pending before the Chamber, that additional Prosecution requests for authorisation for redactions will likely be made by the Prosecution by 14 January 2008. and that, according to rule 121 of the Rules, the Single Judge must rule upon the requests prior to 29 January 2008, given that the confirmation hearing has been scheduled to start on 28 February 2008.¹⁴

CONSIDERING, therefore, that an immediate resolution of the first and second issues by the Appeals Chamber may materially advance the proceedings in the case of *The Prosecutor v. Germain Katanga*, and that, given that the Single Judge must rule upon all Prosecution requests for authorisation for redactions prior to 29 January 2008, there is a need for an urgent ruling by the Appeals Chamber on the issues for which leave to appeal is sought in the Prosecution's Application for Leave to Appeal;

FOR THESE REASONS,

GRANT the Prosecution's Application for Leave to Appeal in relation to the following issues:

- (a) whether "Article 54(3)(f) authorises the Prosecution to seek, and Rule 81(4) read in conjunction with that article empower the Chamber to authorise, redactions for the protection of 'innocent third parties', i.e. persons who

¹⁴ "Decision Establishing Time Limits for Decisions on Protective Measures and Requests for Redactions", issued by the Single Judge on 12 December 2007 (ICC-01/04-01/07-97-Conf-Exp-Corr)

are not victims, current or prospective Prosecution witnesses or sources, or members of their families”; and

- (b) whether the Single Judge erred in the application of the test prescribed by the Appeals Chamber in its 14 December 2006 Decisions by refusing to authorise the redaction of the location of interviews of witnesses, and the identifying information of current and former staff members of the OTP and the VWU at this particular stage of the proceedings.

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



Judge Sylvia Steiner
Single Judge

Dated this Friday 14 December 2007

At The Hague, The Netherlands