

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07
Date: 4 February 2008

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 vs. GERMAIN KATANGA***

PUBLIC

Prosecution's Response to Defence Application for Leave to Appeal the "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9"

The Office of the Prosecutor

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Introduction

1. On 23 January 2008, the Single Judge of Pre-Trial Chamber I issued the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” (“Decision”).¹ The Decision
 - a) found that “on an exceptional basis and 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” and on this basis authorised redactions of the names and identifying information of three victims of sexual offences referred to in the statement of Witness 9, which are unrelated to the Bogoro attack;² and
 - b) ruled that the need for protection of Witness 4, who can no longer be considered a witnesses for the purpose of Rule 81(4) “overrides any prejudice that might be caused to the Defence at this stage”, and on that basis granted authorisation pursuant to Rule 81(4) for the redaction of Witness 4’s name and identifying information in his statement.³
2. On 29 January 2008, the Defence of Germain Katanga (“Defence”), pursuant to Article 82(1)(d), filed a “Defence Application for Leave to Appeal the ‘Request for leave to appeal the ‘Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9’” (“Application”),⁴ in which it raised the following two issues:⁵

¹ ICC-01/05-01/07-160.

² Decision, paras. 19-20.

³ Decision, paras. 22, 30 and 32.

⁴ ICC-01/05-01/07-169.

⁵ Application, para. 6.

- a) the Pre-Trial Single Judge incorrectly interpreted the term “victim” in Rule 81(4) to encompass alleged victims of sexual offences which are unrelated to the charges in the case at hand (“Issue 1”); and
 - b) the Pre-Trial Single Judge incorrectly found that the need for protection of Witness 4, through the redaction of his name and identifying information, overrides any prejudice that might be caused to the Defence (“Issue 2”).
3. Pursuant to Regulation 65(3), the Prosecution hereby responds to the Application.
 4. The Prosecution considers that the Defence has, in part, met the requirements for leave to be granted under Article 82(1)(d). In relation to Issue 1, the Prosecution does not oppose the Application. However, the Prosecution opposes the Application in relation to Issue 2 as the requirements for leave to be granted under Article 82(1)(d) are not met.⁶

Arguments

Issue 1 – Interpretation of the term “victim” in Rule 81(4)

5. The Prosecution agrees with the Defence that this issue arises from the Decision.⁷ Although the Prosecution does not agree with all of the arguments set out by the Defence in its Application,⁸ and is of the view that many of the arguments pertain to the merits of the issue,⁹ the Prosecution submits that

⁶ The Prosecution takes this position on the basis of its independent examination of the issues raised in the Application in light of the requirements of Article 82(1)(d). These requirements do not involve consideration of, or in any way reflect the Prosecution’s position on, the merits of the Decision. If and when leave to appeal is granted, the Prosecution will advance its position on the merits of the Decision before the Appeals Chamber. In that case, the Prosecution’s substantive position and arguments will depend, in part, on – and may differ from – the grounds of appeal proposed, and arguments employed, by the Defence.

⁷ In the view of the Prosecution, this issue arises from paras. 19-20 of the Decision.

⁸ The Prosecution disagrees with the Defence’s submissions that the redactions at hand affect the ability of the Defence to challenge the Prosecution evidence (Application, para. 17). The Defence concedes that the victims in question have not made any allegations against Mr. Katanga and that this fact affects Mr. Katanga’s interests in relation to these victims (Application, para. 11). The Prosecution further disagrees that the Single Judge’s interpretation of Rule 81(4) opens the door for future applications which are not limited to alleged victims of sexual offences, wherever and by whomever committed in the DRC (Application, paras. 18 and 20). The Decision is clear in that it grants redactions under Rule 81(4) for “victims of sexual offences” and “on an exceptional basis” (Decision, para. 19).

⁹ See for instance paras. 8 and 10-14.

Issue 1 meets the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.

6. This issue affects the fair conduct of the proceedings and also affects the expeditious conduct of the proceedings.
7. The Prosecution also agrees that an immediate resolution by the Appeals Chamber may materially advance the proceedings. In particular, Issue 1 has implications for all future applications for redaction, at all stages of the proceedings; the proceedings will be materially advanced by the Appeals Chamber being afforded the opportunity to provide comprehensive guidance on this issue.¹⁰

Issue2 – Redaction of Name and Identifying Information of Witness 4

8. The Prosecution understands Issue 2 as cast in the Application¹¹ to be one of alleged abuse of discretion by the Single Judge when balancing the need for protection of Witness 4 pursuant to Rule 81(4) against the right of Germain Katanga to fair proceedings.¹² The Prosecution agrees that this issue arises from the Decision.¹³ However, Issue 2 does not meet the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.
9. In the view of the Prosecution, the Defence has not made a showing that Issue 2 affects the fair conduct of the proceedings. The Single Judge found that it cannot be excluded “that authorising the redaction of Witness 4’s name and identifying information would not cause any prejudice to the Defence, which

¹⁰ See, Application, paras. 24-26.

¹¹ Application paras. 6(ii) and 27-50.

¹² The title of the section of the application dealing with Issue 2 (prior to para. 27) reads as follows: “Disclosure of the identity and identifying information of Witness 4 – Scope of rule 81(4)”. In the view of the Prosecution, this title does not properly cast Issue 2, as it is presented in that section (see in particular para. 30). This title appears to cast the issue as one related to the scope of Rule 81(4), i.e. whether a person who is not a witness or a victim may be protected pursuant to Rule 81(4).

¹³ In the view of the Prosecution, this issue arises from paras. 26-32 of the Decision.

may have an interest in contacting him to verify his version of the events".¹⁴ However, the Defence has not demonstrated how the protection of Witness 4, when balanced against the possible prejudice to the Defence, affects the fairness of the proceedings.

10. Contrary to the contention of the Defence, Germain Katanga can still effectively challenge the legality of the arrest warrant pursuant to Article 60(2).¹⁵ The Chamber being seized with such a challenge will decide whether the conditions set forth in Article 58(1) are met without taking into consideration the statement of Witness 4, as he can no longer be considered a Prosecution witness or a Prosecution source.¹⁶ Moreover, the Defence's arguments pertain to the merits of the issue and do not demonstrate how the issue affects the fairness of the proceedings.¹⁷ Furthermore, the Defence's reference to the jurisprudence of the ICTY¹⁸ is misplaced, as the balancing exercise between (i) the need for protection of a victim or witness against (ii) the rights of an accused to a fair trial must be made on a case-by-case basis taking into consideration the specific circumstances at hand.

11. In the view of the Prosecution, the Defence has also not demonstrated that Issue 2 affects the expeditious conduct of the proceedings.¹⁹ The suggestion that clarification of the scope of Rule 81(4) would facilitate the expeditious conduct of the proceedings is not relevant to Issue 2,²⁰ which pertains not to the scope of Rule 81(4), but to the exercise of discretion by the Single Judge.²¹

¹⁴ Decision, para. 29.

¹⁵ Application, paras. 36-39.

¹⁶ Decision, paras. 22-23.

¹⁷ Application, para. 41.

¹⁸ Decision, para. 39.

The Prosecution has submitted above that the Defence has not demonstrated that the issue affects either the fair conduct or the expeditious conduct of the proceedings. As previously argued, the Prosecution maintains that once an applicant has demonstrated that an issue affects either the fairness or expeditiousness of the proceeding, the Chamber should move to assess whether in its opinion an immediate resolution by the Appeals Chamber may materially advance the proceedings. See *Situation in the DRC*, Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-141, 25 April 2006, paras. 50-52.

²⁰ Application, para. 44.

²¹ See also para. 10 above.

Moreover, the Defence's observations of the general importance of disclosure²² are abstract and do not show how disclosure of the statement(s) of Witness 4 in particular, or lack thereof, affects the expeditious conduct of the proceedings.

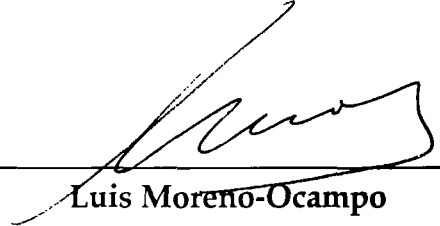
12. Since the Defence has not demonstrated that the issue affects the fair and expeditious conduct of the proceedings, the Prosecution opposes the granting of leave to appeal with respect to Issue 2, regardless of whether immediate resolution of Issue 2 by the Appeals Chamber may materially advance the proceedings.

²² Application, paras. 45-47.

Conclusion

13. For the reasons referred to above, the Prosecution respectfully requests the Chamber to consider:

- a. granting the Application for leave to appeal with respect to Issue 1; and
- b. denying the Application for leave to appeal with respect to Issue 2.



Luis Moreno-Ocampo
Prosecutor

Dated this 4th day of February 2008
At The Hague, The Netherlands