

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 27 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 v. Germain Katanga***

Public Document

Decision on the Defence Application for Leave to Appeal the "Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08"

The Office of the Prosecutor

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

NOTING applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08 filed as confidential and *ex parte* on 30 January 2008 in the record of the case *The Prosecutor v. Germain Katanga* in which the applicants request recognition of the right to participate as victims in the proceedings of the case;¹

NOTING the “Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08”² (“the Decision”) by which the Single Judge *inter alia*:

- (i) ordered the Registry to provide as soon as possible, to the Prosecution, a non-redacted version of applications for participation a/0327/07 to a/0337/07 and a/0001/08 and to provide by Monday 18 February 2008, to the Defence Counsel, a redacted version of the aforesaid applications for participation in which any information which might lead to the applicants being identified has been redacted; and
- (ii) authorised the Prosecution and the Defence to file their observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08.

NOTING the “Defence Application for Leave to Appeal the “Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08”” (“the Defence Request”) filed by the Defence on 13 February 2008;³

¹ ICC-01/04-01/07-171-Conf-Exp-Anx1 to ICC-01/04-01/07-171-Conf-Exp-Anx12.

² ICC-01/04-01/07-182.

³ ICC-01/04-01/07-193.

NOTING articles 57 (3) (c), 68 and 82 (1) (d) of the Rome Statute (“the Statute”), rules 86 and 89 of the Rules of Procedure and Evidence (“the Rules”) and regulation 86 of the Regulations of the Court,

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁴ for the Chamber to grant leave to appeal under article 82(l)(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
- 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”⁵ (“the Appeals Chamber Judgment”), issued by the Appeals Chamber on 13 July 2006:

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;⁶

⁴ 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 I’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.

⁵ ICC-01/04-168.

⁶ Appeals Chamber Judgment, para. 9.

- (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”;⁷
- (iii) “[n]ot every issue may constitute the subject of an appeal”,⁸ but “[i]t must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘[t]he fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”;⁹ 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 “[t]he 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’”;¹⁰

CONSIDERING that the Defence is seeking leave to appeal in relation to the following three issues:

- (i) whether the Single Judge’s order to redact for the Defence the identities and identifying information of the applicants for victim participation in the case against Mr. Katanga exceeds the Pre-Trial Chamber’s discretionary powers under the Statute, the Rules and the Regulations of the Court (“First Issue”);
- (ii) whether in relying on the general insecurity in the Democratic Republic of the Congo (“the DRC”), particularly the Ituri district, rather than the insecurity of the particular applicants to justify the need for redactions, the Single Judge failed to respect the exceptional nature of this protective measure (“Second Issue”); and

⁷ Appeals Chamber Judgment, para. 9.

⁸ Appeals Chamber Judgment, para. 9.

⁹ Appeals Chamber Judgment, para. 10.

¹⁰ Appeals Chamber Judgment, para. 14.

- (iii) whether in relying simply on the general insecurity in the DRC, particularly the Ituri district, without providing further detailed reasoning as to why the redactions ordered are necessary, the Single Judge failed to sufficiently state the reasons for her order to redact (Third Issue).¹¹

CONSIDERING that the Defence alleges in regards to the First Issue that “none of the legal provisions the Single Judge relied on authorises her to order redactions of applications for victim participation”;¹²

CONSIDERING that the Pre trial Chamber I (“the Chamber”) has already rejected a similar issue in its “Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation” rendered in the case of *The Prosecution v. Thomas Lubanga Dyilo* on 6 November 2006 because that was not an issue arising out that decision insofar as:

“rule 89 (1) specifically refers to the applications for the participation of victims in the proceedings and that, accordingly, the non-disclosure of the identity of the applicants to the Defence at this stage of the proceedings is a measure decided proprio motu by the Chamber in application of article 68 (1) of the Statute and rule 89 (1) of the Rules”.¹³

CONSIDERING that this reasoning is also applicable to the First Issue and that therefore it cannot be considered as an issue arising out of the Decision;

CONSIDERING that in the view of the Single Judge the Second and Third Issues are inextricably linked since both refer to the factual basis of the Single Judge’s findings namely the security situation in the Ituri district;¹⁴

¹¹ ICC-01/04-01/07-193, para.7.

¹² ICC-01/04-01/07-193, para.4

¹³ ICC-01/04-01/06-672-tEN.

¹⁴ In this regard the Defence argues that by basing her decision on a general and broad reference to the security situation in the Ituri district, the Single Judge (i) failed to address the individual subjective and objective fears of

CONSIDERING that the Second and Third Issues relate to the application process and not to the specific modalities of participation at the pre-trial stage of the case of *The Prosecutor v. Germain Katanga*; and that in relation to the application process, the Single Judge has already held that:

“the process to decide upon applications for the procedural status of victim in situation and case proceedings before the Pre-Trial Chamber (“the application process”) is a specific procedural feature provided for in rule 89 of the Rules and regulation 86 of the Regulations. Its object and purpose is limited to the determination of whether such procedural status should be granted to applicants. Hence, the application process is prior to, distinct and separate from, the determination and exercise of the modalities of participation by those to whom the procedural status of victim has been granted”¹⁵,

“the application process is not related to questions pertaining to the guilt or innocence of the suspect or accused person or to the credibility of Prosecution witnesses as it only aims at determining whether the procedural status of victim should be granted to applicants. Hence, it can be distinguished from criminal proceedings before the Court, which include the investigation of a situation, the initiation of a case and the pre-trial, trial and appeal stages of a case, which are governed by specific articles, rules and regulations. Moreover, the Single Judge considers that the application process is not related to questions pertaining to the award of reparations, which are the subject of the proceedings provided for in article 75 of the Statute and rule 94 of the Rules”¹⁶, and that

CONSIDERING that the Single Judge ordered the redactions of the identities and identifying information of the applicants in light of the security situation in the DRC (and in particular in the Ituri district) referred to and explained in Section II of the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements,¹⁷ issue that has not been appealed by either parties; and that due to the fact that the applicants’ places of residence are located in the areas covered by the security situation analysis made in the aforementioned decision, the Single Judge ordered the redaction of the identities and identifying information of the applicants in so far as it was the only protective measure available and which might have been implemented to duly protect the applicants who have not yet been granted the status of victims;

each applicant and to use redaction as an exceptional measure, and (ii) failed to provide details explaining why it was necessary to order the redactions of the identities and identifying information of the applicants.

¹⁵ ICC-02/05-110, para. 5 and ICC-01/04-417-tENG, para.5.

¹⁶ ICC-02/05-110, para. 6 and ICC-01/04-417-tENG, para.6.

¹⁷ ICC-01/04-01/07-88-Conf and its public version ICC-01/04-01/07-90.

CONSIDERING therefore that, unlike the Defence's allegations, the Single Judge has taken into consideration the security situation of the particular applicants and has provided sufficient reasoning as to why the ordered redactions were necessary; and thus the Second and Third Issues are not issues arising out of the Decision;

CONSIDERING further that the Single Judge wishes to recall that if the status of victim is granted to applicants, the Chamber must then exercise its discretion to delineate the modalities of participation "in a manner which is not prejudicial to or inconsistent with the rights of the accused";¹⁸ that in this regard, the Chamber has already held that if the victims insistently request that their identities to remain confidential during the proceedings leading to and at the confirmation of charges hearing (i) they will be precluded from adding any point of fact or any evidence in order not to violate the fundamental principle prohibiting anonymous accusations: and (ii) that:

"in principle, the anonymous participation of the said victims at this stage of the proceedings should be limited to: i) access to the public documents only; and ii) presence at the public hearing only, but that the Chamber retains the option to make an exception to this principle in the event of exceptional circumstances"¹⁹,

"only if the victims agree to the disclosure of their identities to the Defence, will the Chamber examine the issue of determining whether they could be granted leave to participate in another manner in the proceedings taking place before the Pre-Trial Chamber";²⁰

FOR THESE REASONS,

¹⁸ ICC-01/04-100-Conf-Exp-tEN-Corr; ICC-01/04-01/06-162-Conf-Exp-tEN and ICC-01/04-170-Conf-Exp-tEN. See also ICC-01/04-01/06-462-tEN.

¹⁹ ICC-01/04-01/06-462-tEN, page 6.

²⁰ ICC-01/04-01/06-462-tEN, page 8.

REJECT the Defence Request in relation to the First, Second and Third Issues.

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



Judge Sylvia Steiner
Single judge

Dated this Wednesday 27 February 2008

At The Hague, The Netherlands