

**Cour
Pénale
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**International
Criminal
Court**

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Date: 2 May 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 Document

**Prosecution's Response to Defence Application for Leave to Appeal the Decision
on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and
Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules**

Source: Office of the Prosecutor

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

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Introduction

1. The Defence of Germain KATANGA seeks leave to appeal the Decision, which regulates *inter alia* disclosure for the purposes of the confirmation hearing, on the basis that it appears that the Decision may have purported to authorise redactions for the purposes of trial, and placed a burden on the Defence to seek the lifting of those redactions prior to trial. The Prosecution submits that the Decision did not authorise any restrictions on disclosure for the purposes of trial. As a result, the issue for which leave is sought does not arise from the Decision, and the Application for Leave to Appeal should therefore be denied.

Procedural Background

2. On 18 April 2008, the Single Judge issued the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" ("the Decision").¹
3. On 28 April 2008, the Defence of Germain KATANGA ("the Defence") sought leave to appeal the Decision.²
4. The Prosecution hereby files its response pursuant to Regulation 65(3).

The Issue for which Leave to Appeal is Sought

5. The Defence sought leave to appeal a single issue of whether the Decision "considers it appropriate that these unauthorized redactions stay even after confirmation, unless the Defence requests the Trial Chamber for them to be disclosed", which it submitted would mean that "the burden for redactions has been reversed in the sense that rather than the Prosecution being required to seek redactions, the Defence is required to seek judicial intervention from the Trial

¹ ICC-01/04-01/07-411-Conf-Exp. Confidential and public redacted versions of the Decision were issued on 21 April 2008 (ICC-01/04-01/07-423-Conf; ICC-01/04-01/07-428). The history of the applications, hearings and predicate decisions leading up to the Decision are extensively set out in the Decision, pp. 4-9.

² ICC-01/04-01/07-456 ("Application for Leave to Appeal").

Chamber to obtain the information which has been withheld.”³ In identifying the issue, the Defence refers to section VI of the Decision: “Witness Statements, Interview Notes and Interview Transcripts which contain excerpts which are potentially exculpatory or otherwise material for the Defence's preparation of the confirmation hearing”.⁴

6. The Defence clarified that it was “only concerned with the position post confirmation”, and stated that “[a]lternatively, if the Defence have incorrectly interpreted the impugned Decision, it hereby seeks clarification.”⁵

The Issue identified by the Defence does not arise

7. The Prosecution submits that the Defence, which recognises that it only “seems” as though the Decision has an impact after the confirmation hearing,⁶ has indeed misinterpreted the Decision. The Decision, on the Prosecution’s understanding, does not authorise any redactions for the purposes of disclosure prior to trial.
8. The Prosecution submits that the Decision only authorises the restrictions on disclosure for the purposes of the confirmation hearing.⁷ The Prosecution submits that this is confirmed by the practice in the case of *Prosecutor v Lubanga*, in which (as recognised by the Defence⁸) any redaction authorised by the Pre-Trial Chamber had to be reviewed by the Trial Chamber if the Prosecution wished to maintain that redaction in disclosure during the trial phase.⁹ The Decision itself recalls that the Trial Chamber will have to revise all redactions which had been authorised for the purposes of the confirmation hearing.¹⁰

³ Application for Leave to Appeal, para. 11.

⁴ Decision, paras. 96-138. See Application for Leave to Appeal, paras. 4-11.

⁵ Application for Leave to Appeal, para. 11.

⁶ Application for Leave to Appeal, para. 11.

⁷ Indeed the restrictions on disclosure referred to in para. 138 of the Decision, which are the core of the Defence’s concern (Application for Leave to Appeal, para. 11 and footnote 11), are implemented through summaries based on Article 61(5) – see Decision, para. 110. Given that this procedural device applies only to the confirmation hearing, it could not authorise such restricted disclosure for the purposes of trial.

⁸ Application for Leave to Appeal, para. 23.

⁹ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-1019, 9 November 2007, in particular paras. 25-28.

¹⁰ Decision, para. 108.

9. The Prosecution thus submits that the Decision does not authorise redactions to stay after the confirmation hearing, or in any way reverse the burden for redactions. As a result, the issue raised by the Defence does not arise from the Decision.

Relief Sought

10. For the reasons set out above, the Prosecution requests that the Single Judge deny the application for leave to appeal.



Luis Moreno-Ocampo, Prosecutor

Dated this 2nd day of May, 2008

At The Hague, The Netherlands