

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 20 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 Request for Limitations pursuant to the Decision on the Set of
Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of
the Case**

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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Background

1. In the 13 May 2008 Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case¹ (the “Decision”), the Single Judge of Pre-Trial Chamber I (the “Chamber”) permitted, *inter alia*, the Prosecution to propose proportional limitations to the modalities of participation granted to the victims with procedural standing to participate leading up to and at the Confirmation Hearing in the instant case. The Prosecution herein proposes such limitations for the consideration of the Chamber.

Overview

2. The Prosecution requests limitations on the modalities of participation of non-anonymous victims regarding the access to the confidential case record by the victim participants a/0327/07, a/0329/07, a/0330/07 and a/0331/07.² The Prosecution submits that it is appropriate and justifiable for the Single Judge to limit access to the confidential material that identifies Prosecution witnesses who have not consented to the disclosure of their identity beyond that of the Defence. The Prosecution proposes to provide to these victim participants, through their Legal Representative(s), confidential material that has been formatted to remove the identity of these witnesses.³

3. The Prosecution, in the instant filing, does not request limitations on the participation relating to the questioning of witnesses, pursuant to Rule 91(3) of the Rules of Procedure and Evidence, on the basis that the Prosecution has indicated that it does not intend to submit evidence by *viva voce* witnesses at the upcoming Confirmation Hearing. Because of these circumstances, the Prosecution is not requesting that the Single Judge consider limitations on this mode of participation. However, the Prosecution submits that the Single Judge’s interpretation of a non-

¹ ICC-01/04-01/07-474.

² The Prosecution extends these submissions to include any future victim participants who would fall within the same category as these victims due to their participation in a non-anonymous form.

³ The Prosecution submits that, in terms of identifying information, this would include the names of the witnesses, their family members as well as any other information that tends to identify the person.

anonymous victim participant's blanket entitlement to question witnesses at a Confirmation Hearing does not appear to be compatible with the procedure set out in Rule 91(3), which envisions the process of a witness-by-witness application and determination. Consequently, the Prosecution's decision not to seek a limitation in this case is not an agreement with the Decision's interpretation of Rule 91(3).⁴

Current Issues before the Appeals Chamber

4. The Prosecution also observes that several of the modalities of victim's participation granted in the Decision are currently the subject matter of litigation before the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.⁵ Specifically, the ability of a victim participant to make submissions regarding the admissibility or relevance of evidence at the trial proceeding is also before the Appeals Chamber in the *Lubanga* case. It is also possible that in rendering its judgment, the Appeals Chamber may provide guidance on other issues addressed in the Decision. The Prosecution may request that the Single Judge, or the Pre-Trial Chamber, where applicable, reconsider the Decision in light of the Appeals Chamber's pronouncements.

Submissions on Limitations on the Victim's a/0327/07, a/0329/07, a/0330/07 and a/0331/07 Access to the Confidential Case Record

5. The Single Judge observes, at paragraphs 166 and 167 of the Decision, the current situation in the case regarding the level of confidentiality of material relating to the disclosure identities of witnesses:

166. The Single Judge also underlines that in the present case *only the names of those witnesses who have been relocated - alone or with their families - or who have consented to the disclosure of their identities to the Defence* after rejecting the adoption of protective measures are included in documents filed as confidential in the record of the case.

⁴ The Prosecution makes this submission also noting the Appeals Chamber's recent decision on victim participation, wherein that Chamber circumscribed the mode of participation for victims permitted to participate in the appeal, based on an interpretation of the scope of their personal interests. Decision *in limine* on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation", ICC-01/04-01/06-1335 OA9 and OA10 at para. 50.

⁵ ICC-01/04-01/06-1191.

167. The names of the other few witnesses on which the Prosecution intends to rely at the confirmation hearing and for whom anonymity vis-a-vis the Defence has been granted are either not part of the record of the case or included in documents classified as "ex parte only available to the Prosecution" or "ex parte only available to the Registry." [emphasis added]

6. The Single Judge's Decision grants these victim participants access to the complete confidential case record, concluding that there is "*prima facie* no reason that could justify any limitation to the set of procedural rights referred to above in section V.1.4.3."⁶ The Single Judge then provides the parties and the Registry until 20 May 2008 to propose reasons, if any, that could justify such limitations.

7. The Prosecution respectfully submits that it would be justifiable to restrict access to confidential material, for the reason that the witnesses have not consented to have their information communicated to victims who have been granted participatory rights in the case. It is submitted that the procedural rule for access as currently delineated in the Decision – that the non-anonymous victims would obtain access to all confidential material in the case record, including evidence, when filed, without the consent of the witnesses – is incongruent with the system established by the Single Judge that requires consents to be obtained for use of the witnesses' evidence by the Prosecution for the purpose of the Confirmation Hearing.⁷

8. The witnesses consented on the basis that their identity and information would be disclosed to the Defence,⁸ not to victim participants in the case. To grant a participating victim access to the identity and evidence of a witness, who may also be a similarly-situated victim, without the latter's knowledge and informed consent, risks creating a hierarchal system of victim-witness entitlements. It would permit the interests of the victim participant to trump the interests of a witness to limit, if desired, the scope of the pre-trial disclosure of his or her identity. It is also a

⁶ Decision, para. 169.

⁷ "Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12", ICC-01/04-01/07-412, at pp. 7-8.

⁸ ICC-01/04-01/07-411, para. 17.

protection issue. The witnesses are uniquely situated to recognize and identify potential risks that may flow from the further dissemination of their identities and evidence beyond the Defence, and especially to persons who might be known to them, as may be the case for some victim participants. The Prosecution also submits that permitting a victim participant to access the identity and evidence of a witness, absent a relevant consent, undermines the value of the original consent provided, namely that the witness voluntarily, after being made aware of the hazards, undertakes to accept a certain degree of risk resulting from the disclosure and use of his or her information and evidence.

9. The Prosecution further submits that possessing the specific identities of Prosecution witnesses, at this distinctive stage of the proceedings, is not an essential requirement for the non-anonymous victims to participate.

10. The Prosecution proposes, therefore, that the Single Judge limit the access that participating victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 (as well as any future victim participants that fall into this category) have to the confidential case index, filings, decisions, transcripts and evidence filed in the case record to material that does not contain identities or information that tends to identify witnesses who have not consented to their identities being disclosed beyond the Defence. This would include witnesses currently within the ICCPP who have not consented to the provision of their personal information to the victim participants.

11. It is submitted that a proportional limit on the access granted to these victim participants would be to permit them access to confidential material in the case record that has been formatted, where necessary, to remove the identities of witnesses who have not consented to victim participant disclosure. This proposal would effectively establish a second tier of confidential material, available to the victim participants and would permit the Legal Representative(s) to have access to sufficient information for the purpose of participating at the Confirmation Hearing,

while at the same time respecting the interests of the witnesses. The Prosecution submits that it is not operationally feasible at this point in the proceedings to require the Prosecution to re-approach all such witnesses to seek their consent to disclosure to participating victims. Furthermore, even if witnesses were to be re-approached to provide such consent, that it would be given or obtained in all cases cannot be guaranteed and, consequently, the issue of access to information in the absence of a consent still may remain unresolved. The Prosecution submits that if the Chamber determines this request for limitations has merit and the proposed modality of limitation is acceptable, the Prosecution will be in a position to indicate to the Chamber the degree of proposed restrictions in a future filing.

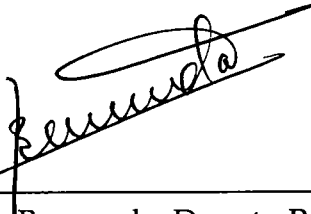
12. The Prosecution additionally submits that if the Single Judge agrees that limitations ought to be imposed on these participating victims' access to the confidential material in the case record, for the reasons outlined above, there may also arise circumstances in which, in order to guard the identities of these witnesses, the Legal Representative(s) should be excluded from non-public portions of the Confirmation Hearing. It is submitted that such situations will be rare, particularly if the Chamber and the parties endeavour to structure the Confirmation Hearing, including the proffering of evidence and submissions on that evidence, in a manner that would not refer directly to witnesses' identities (such as referring to witnesses by their assigned witness number or a pseudonym). Notwithstanding this proposed best practice, there may be conditions that require the tendering of evidence or the discussion of evidence during which identifying the witness would be unavoidable, and the Prosecution submits that in such cases it would be appropriate to exceptionally exclude the Legal Representative(s) from the hearing.

13. Finally, the Prosecution notes that it has reviewed the confidential case record following the rendering of the Decision for the purpose of identifying categories or specific confidential material for which a request might be made to the Single Judge for proportional limitations on access by the victim participants. As of the date of

this filing, the Prosecution has not identified any such additional categories or confidential information. The Prosecution will continue to review the confidential filings, decisions and transcript in the case record, and if any additional categories or information are identified, that are not covered by the instant filing, it will identify this information to the Single Judge immediately.

Order Requested

14. The Prosecution respectfully requests that the Single Judge limits the access that non-anonymous victim participants have to the confidential case record and confidential proceedings in the manner proposed so as to protect the identities of Prosecution witnesses who have not consented to the provision of their identities to that class of participants.



Fatou Bensouda, Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 20th day of May 2008

At The Hague, The Netherlands