

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 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

Decision on Request of Mathieu Ngudjolo Chui for Leave to Appeal the 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case'

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Senior Trial Lawyer

Counsel for the Defence

of Germain Katanga
Mr David Hooper
Ms Caroline Buisman

Counsel for the Defence of Mathieu

Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J.L. Gilissen

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants for
Participation/Reparation****The Office of Public Counsel for
Victims****The Office of Public Counsel for the
Defence****States Representatives****Amicus Curiae****REGISTRY**

Registrar

Ms Silvana Arbia

Defence Support Section**Victims and Witnesses Unit**

Mr Simo Väättäinen

Detention Section**Victims Participation and Reparations
Section****Other**

I, Judge Sylvia Steiner, judge at the International Criminal Court ("the Court");

NOTING the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case"¹ ("the Decision") issued by the Single Judge on 13 May 2008;

NOTING the "*Demande d'autorisation d'interjeter appel contre la 'Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case' rendue par la Chambre Préliminaire I*"² ("the Defence's Application") filed by the Defence for Mathieu Ngudjolo Chui on 19 May 2008;

NOTING the "Prosecution's Response to the Defence Application for Leave to Appeal the Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case"³ ("the Prosecution Response") filed by the Prosecution on 23 May 2008;

NOTING the "*Réponse à la demande d'interjeter appel de la défense de Mathieu Ngudjolo contre the decision on set of procedural status of victim at the Pre-Trial stage of the Case*"⁴ ("the Victims' Response") filed by the Legal Representatives of Victims a/0327/07, a/0329/07, a/0330/07 and a/0331/07 on 23 May 2008;

NOTING articles 61, 67 and 82(1)(d) of the *Rome Statute* ("the Statute"), rules 155 and 156 of the *Rules of Procedure and Evidence* ("the Rules") and regulation 64 of the Regulations of the Court;

¹ ICC-01/04-01/07-474.

² ICC-01/04-01/07-481

³ ICC-01/04-01/07-499

⁴ ICC-01/04-01/07-503

CONSIDERING that, as Pre-Trial Chambers I and II have repeatedly stated,⁵ for the Chamber 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
- 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",⁶ 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";⁷
- (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";⁸
- (iii) "[n]ot every issue may constitute the subject of an appeal",⁹ 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'";¹⁰ and

⁵ 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), the "Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions", issued by Pre-Trial Chamber I on 14 December 2007 (ICC-01/04-01/07-108), 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 pursuant to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular para 20

⁶ ICC-01/04-168

⁷ Appeals Chamber Judgment, para 9

⁸ Appeals Chamber Judgment, para 9

⁹ Appeals Chamber Judgment, para 9

¹⁰ Appeals Chamber Judgment, para 10

- (iv) "[identification 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'";¹¹

CONSIDERING that the Defence for Mathieu Ngudjolo Chui is seeking leave to appeal in relation to the following three issues:

- (i) whether the Single Judge erred in her interpretation of the terms "personal interests" and "stages of the proceedings determined to be appropriate by the Court" in article 68(3) of the Statute ("The First Issue");¹²
- (ii) whether the Single Judge conflated the role of the Prosecution and of those granted the procedural status of victim by permitting non-anonymous victims (i) to make submissions on issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing ("The Second Issue");¹³ and
- (iii) whether the Single Judge erred in permitting those granted the procedural status of victim who are not anonymous to access the evidence proposed by the Prosecution and the Defence;¹⁴

CONSIDERING that in relation to the First Issue, as the Single Judge highlighted in paragraphs 45 and 46 of the Decision, the interpretation of the expressions "personal

¹¹ Appeals Chamber Judgment, para 14

¹² The Defence Request, para 11

¹³ The Defence Request, para. 26

¹⁴ The Defence Request, para. 36

interests” and “stages of the proceedings determined to be appropriate by the Court” in article 68(3) of the Statute:

- (i) is not the subject of the Decision;
- (ii) is the subject of several previous decisions issued by the Single Judge in the present case;
- (iii) is consistent with the approach taken to date by the Appeals Chamber in relation to interlocutory appeals insofar as the Appeals Chamber considers each interlocutory appeal as “a distinct and separate procedure before the Appeals Chamber”;

CONSIDERING therefore, that in the view of the Single Judge, the First Issue does not arise out of the Decision;

CONSIDERING that, as the Defence for Mathieu Ngudjolo Chui states, the Second Issue concerns the rights of non-anonymous victims (i) to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing; and that, in the view of the Single Judge, the Second Issue arises out of the Decision;

CONSIDERING that, unlike what the Prosecution states, the Second Issue is fully distinguishable from any other issue currently before the Appeals Chamber insofar as, according to the Single Judge, the Appeals Chamber is only seized, in relation to modalities of participation, with the issue of whether anonymous victims have the right to:

- (i) lead at trial the evidence proposed by such anonymous victims (according to the plain meaning of the expression to “lead

evidence", only the party or participant proposing the evidence could hypothetically lead such evidence); and

- (ii) challenge at trial the admissibility or relevance of evidence.¹⁵

CONSIDERING that, in the view of the Single Judge, the type of participation for non-anonymous witnesses which the Second Issue involves will not affect the date of commencement of the confirmation hearing and will only account for a few extra days at the confirmation hearing;

CONSIDERING further that after two postponements, the confirmation hearing is currently scheduled to start on 27 June 2008, less than a month away; that according to article 61(1) of the Statute, Germain Katanga and Mathieu Ngudjolo Chui have the right to have the confirmation hearing held within a reasonable period of time after their surrender before the Court; and that Germain Katanga has been at the Court's Detention Centre in the Hague since 18 October 2007 and Mathieu Ngudjolo Chui since 8 February 2008;

CONSIDERING that due, to a certain extent, to the length of the current deadlines provided for in Regulation 64 of the Regulations for the filing of documents in support of interlocutory appeals and responses,¹⁶ the issuance of a decision on an interlocutory appeal takes an average of four to five months from the time the leave to appeal is granted for the relevant issue.

CONSIDERING therefore that, under the present circumstances: (i) the Second Issue would not affect the expeditious conduct of the proceedings in the present

¹⁵ The only individuals currently granted the procedural status of victim in the case of the *Prosecution v. Thomas Lubanga Dyilo* remain anonymous

¹⁶ According to regulation 64 of the Regulations of the Court: (i) the appellant shall have 21 days to file a document in support of the interlocutory appeal since the day of notification of the decision granting leave to appeal; and (ii) the other parties and participants shall have 21 additional days to file a response.

case; and that (ii) “an immediate resolution by the Appeals Chamber” of the Second Issue will not materially advance the proceedings in the present case;

CONSIDERING therefore that regardless of whether, as the Defence for Mathieu Ngudjolo Chui affirms, the Second Issue could hypothetically significantly affect the fair conduct of the proceedings in the present case,¹⁷ none of the other criteria provided for in article 82(1)(d) of the Statute is met;¹⁸

CONSIDERING that the Defence for Mathieu Ngudjolo Chui bases its allegations in relation to the Third Issue on the alleged incongruity of, on the one hand, having the right to access the confidential part of the record of the case for the purpose of the confirmation hearing and, on the other hand, subsequently becoming a witness at trial; that this is a question that can only arise in the event that the charges are confirmed; that should this question finally arise, it will be up to the competent Trial Chamber to decide on it;¹⁹ and that, therefore, in the view of the Single Judge the Third Issue does not arise out of the Decision;

¹⁷ Thus, in the view of the Single Judge, is far from clear given the approach taken by international and regional human rights bodies *vis-à-vis* those systems in which the type of victim participation which the Second Issue involves is permitted

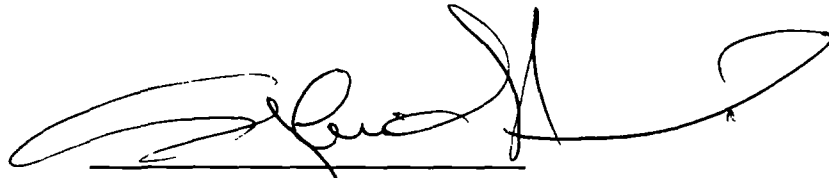
¹⁸ The Single Judge observes that the Defence for Mathieu Ngudjolo Chui does not allege that the Second Issue would affect the outcome of the trial, and therefore will not entertain the analysis of this criterion

¹⁹ See also ICC-01/04-01/07-496.

FOR THESE REASONS

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

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



Judge Sylvia Steiner
Single Judge

Dated this Thursday 29 May 2008

At The Hague, the Netherlands