

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 28 May 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

THE PROSECUTOR

v. Germain Katanga and Mathieu Ngudjolo Chui

Public

**Decision on Prosecution's Urgent Application for the Admission of the Evidence
of Witnesses 132 and 287**

Decision/Order/Judgment 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 for Germain Katanga

Mr David Hooper
Ms Caroline Buisman

Counsel for the Defence for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi
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

Detention Section

Victims Participation and Reparations Section

Other

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

NOTING the Warrant of Arrest against Germain Katanga issued by Pre-Trial Chamber I (“the Chamber”) on 2 July 2007;¹

NOTING the Warrant of Arrest against Mathieu Ngudjolo Chui issued by the Chamber on 6 July 2007;²

NOTING the “Prosecution’s Submission of the Document Containing the Charges and List of Evidence”³ (“the Prosecution’s Charging Document”) filed by the Prosecution on 21 April 2008;

NOTING 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”⁴ (“the Decision”) issued by the Single Judge on 21 April 2008;

NOTING the “Decision on the Defence Request for Postponement of the Confirmation Hearing” (“Decision on the Postponement”) issued by the Single Judge on 25 April 2008;⁵

NOTING the “Prosecution’s Application for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation”⁶ filed by the Prosecution on 28 April 2008;

¹ ICC-01/04-01/07-1

² ICC-01/04-01/07-260

³ ICC-01/04-01/07-422

⁴ ICC-01/04-01/07-411, ICC-01/04-01/07433-Conf, ICC-01/04-01/07-428-Corr

⁵ ICC-01/04-01/07-446

NOTING the “Decision Establishing a Calendar According to the Date of the Confirmation Hearing: 27 June 2008”⁷ (“Decision on the Calendar”) issued by the Single Judge on 29 April 2008;

NOTING the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”⁸ (“the First Appeals Chamber Judgment”) issued by the Appeals Chamber on 13 May 2008;

NOTING the “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”⁹ (“the Second Appeals Chamber Judgment”) issued by the Appeals Chamber on 13 May 2008;

NOTING the “Registrar’s Report on the Protective Measures Afforded to Witnesses 132, 238 and 287” (“the Registrar’s Report”), filed by the Registry on 19 May 2008;

NOTING the “Decision on the Requests 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 Rules 77 of the Rules”¹⁰ (“the Decision on Leave to Appeal”), issued by the Single Judge on 20 May 2008;

⁶ ICC-01/04-01/07-453

⁷ ICC-01/04-01/07-459

⁸ ICC-01/04-01/07-475

⁹ ICC-01/04-01/07-476

¹⁰ ICC-01/04-01/07-484

NOTING the “Prosecution’s Urgent Application for the Admission of the Evidence of Witnesses 132 and 287”¹¹ (“Prosecution Application”) filed by the Prosecution on 27 May 2008;

NOTING articles 57(3)(c), 61 and 68 of the *Rome Statute* (“the Statute”), rules 76, 77, 86, 87, 88, 89 and 121 of the *Rules of Procedure and Evidence* (“the Rules”), regulation 86 of the *Regulations of the Court* (“the Regulations”) and regulation 96 of the *Regulations of the Registry* (“RoR”);

CONSIDERING that, according to the Decision:

The Single Judge is of the view that, except for the particular case of witness 238 which is addressed below, the appropriate remedy for the Prosecution’s unauthorised preventive relocations of witnesses 132 and 287 is the exclusion of their statements, interview notes and interview transcripts for the purpose of the confirmation hearing.¹²

CONSIDERING that in the Decision on Leave to Appeal, the Single Judge further explained that:

[...] in the Decision, the Single Judge found that the type of protection provided for Witnesses 132 and 287 was only their unlawful relocation by the Prosecution; that therefore they were to be considered at the time the Decision was issued as being unprotected; and that as Witnesses 132 and 287 were unprotected even redacted or summary versions of their evidence could not be admitted for the purpose of the confirmation hearing in order to ensure their protection since the content of their statements would inevitably disclose their identities.¹³

CONSIDERING that at the time the Decision was issued on 18 April 2008, (i) the confirmation hearing was scheduled for 21 May 2008 and (ii) the Prosecution had to make available to the Defence the evidence on which it intended to rely at the confirmation hearing with the redactions authorised by the Single Judge by 21 April 2008;

¹¹ ICC-01/04-01/07-516-Conf-Exp

¹² ICC-01/04-01/07-411-Conf Exp, 39.

¹³ ICC-01/04-01/07-484, p 10

CONSIDERING that, under these circumstances, and due to the Prosecution's unlawful preventive relocation of Witnesses 132 and 287, no adequate protection for Witnesses 132 and 287 could have been provided prior to 21 April 2008 that would have permitted the use of their evidence at the confirmation hearing scheduled for 21 May 2008;

CONSIDERING that on 21 April 2008, the Prosecution, in the "Prosecution's Submission of the Document Containing the Charges and List of Evidence", notified the Chamber and both Defences that the Prosecution:

- (i) was not alleging a count of sexual slavery against Germain Katanga and Mathieu Ngudjolo Chui as a result of the exclusion of the evidence of Witnesses 132 and 287;
- (ii) would be seeking leave to appeal the Decision in relation to the exclusion of the evidence of Witnesses 132 and 287; and
- (iii) if the appeal was granted, would be in a position to reintroduce the charge of sexual slavery as well as to add charges of rape and outrage upon personal dignity;

CONSIDERING that on 25 April 2008, the Chamber postponed the commencement of the confirmation hearing to 27 June 2008;¹⁴

CONSIDERING that on 19 May 2008, the Registrar, in the Registrar's Report, informed the Chamber that Witnesses 132 and 287 had been accepted into the Court's Witness Protection Programme and had been relocated within the scope of the programme;¹⁵

¹⁴ ICC-01/04-01/07-446

¹⁵ ICC-01/04-01/07-482-Conf-Exp

CONSIDERING therefore, that the Single Judge is of the view that at present, the security concerns that led the Single Judge to exclude the evidence of Witnesses 132 and 287 as a result of their unlawful preventive relocation by the Prosecution no longer exist;

CONSIDERING that according to rule 121 (4) of the Rules, the Prosecution has 15 days prior to the commencement of the confirmation hearing, that is to say until 12 June 2008, to file the Prosecution Amended Charging Document as well as the list of evidence in support of the new charges;

CONSIDERING further that, according to the current calendar for the proceedings leading to the 27 June 2008 confirmation hearing, the Prosecution shall:

- (i) no later than 2 June 2008, request authorisation for redactions, pursuant to rule 81 of the Rules, concerning the documents to be included in the Prosecution Additional List of Evidence;
- (ii) no later than 12 June 2008 (a) shall disclose to the Defences the document contained in the Prosecution Additional List of Evidence with the redactions authorised by the Single Judge; and (b) shall file with the Registry the originals of such documents, as well as electronic copies with the redactions authorised by the Single Judge and with the details required by the e-Court Protocol used in the present case;¹⁶

CONSIDERING that in the view of the Single Judge, these two deadlines must also be applied to any document to be included in the Prosecution's List of Additional Evidence in support of any new charges to be contained in the Prosecution Amended Charging Document;

CONSIDERING further that the Single Judge shall reject *in limine* any Prosecution request for redactions pursuant to rule 81 of the rules, which does not provide the necessary information to carry out the type of analysis required by the First and Second Appeals Chamber Judgments;

¹⁶ ICC-01/04-01/07-459

FOR THESE REASONS,

RECALL that the Prosecution has until 12 June 2008 to file the Prosecution Amended Charging Document in which, if the Prosecution so decides, it may introduce the charges of sexual slavery, rape and outrages upon personal dignity;

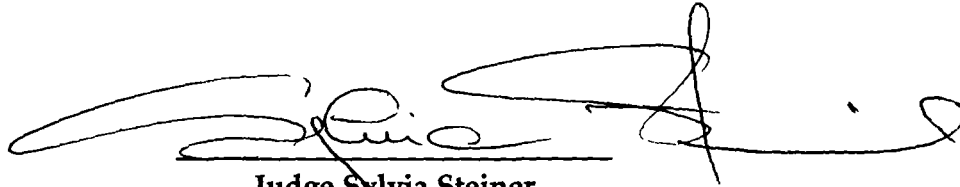
DECIDE that the security concerns that led to the finding of inadmissibility of the evidence of Witnesses 132 and 287 no longer exist, and that therefore there is currently no impediment based on such security concerns for the inclusion in the Prosecution List of Additional Evidence of the statements, interview notes and interview transcripts of Witnesses 132 and 287;

RECALL that the Prosecution shall:

- (i) no later than 2 June 2008, request authorisation for redactions, pursuant to rule 81 of the Rules, concerning the documents to be included in the Prosecution Additional List of Evidence pursuant to rule 121(4) and (5), including the statements, interview notes and interview transcripts of Witnesses 132 and 287, and
- (ii) no later than 12 June 2008, (a) disclose to the Defence for Germain Katanga and for Mathieu Ngudjolo Chui the document contained in the Prosecution Additional List of Evidence with the redactions

authorised by the Single Judge; and (b) file with the Registry the originals of such documents, as well as electronic copies with the redactions authorised by the Single Judge and with the details required by the e-Court Protocol used in the present case.

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



Judge Sylvia Steiner
Single Judge

Dated this Wednesday 28 May 2008

At The Hague, the Netherlands