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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain Katanga and Mathieu Ngudjolo Chui***

Public Document

**Application for Leave to Appeal the Decision on the Prosecution Request for
Authorisation to Redact Statements of Witnesses 4 and 9**

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I. PROCEDURAL BACKGROUND

1. On 6 July 2007, Pre-Trial Chamber I of the International Criminal Court issued a warrant of arrest for Mr Mathieu Ngudjolo.¹
2. On 7 February 2008, Pre-Trial Chamber I rendered a decision to unseal the warrant of arrest issued for Mr Mathieu Ngudjolo.²
3. On 7 February 2008, the Pre-Trial Chamber scheduled Mathieu Ngudjolo's first appearance for 11 February 2008.³
4. The appointment of Mr Kilenda as permanent Counsel was registered on 25 February 2008.⁴
5. On 10 March 2008, the Pre-Trial Chamber rendered a decision ordering the joinder of the Katanga and Ngudjolo cases on the ground of their alleged joint criminal participation in the events described in their respective warrant of arrest.⁵
6. That same day, the Pre-Trial Chamber rendered a decision establishing a calendar in the new joint case. Mr Ngudjolo's Defence had until 28 March

¹ *Warrant of Arrest for Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 6 July 2007, ICC-01/04-02/07-1-tENG.

² *Decision to Unseal the Warrant of Arrest Against Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 7 February 2008, ICC-01/04-02/07-10.

³ *Decision Scheduling the First Appearance of Mathieu Ngudjolo Chui and Authorising Photographs at the Hearing of 11 February 2008*, Pre-Trial Chamber I, 7 February 2008, ICC-01/04-02/07-14.

⁴ *Enregistrement de la désignation de maître Jean Pierre Kilenda Kakengi Basila par M. Mathieu Ngudjolo Chui comme conseil et de la déclaration d'acceptation du mandat par le conseil*, Pre-Trial Chamber I, 25 February 2008, ICC-01/04-02/07-42 [only available in French].

⁵ *Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI*, Pre-Trial Chamber I, 10 March 2008, ICC-01-04-01-07-257.

2008 to submit the requests for reconsideration or for leave to appeal the decisions rendered in the case of *The Prosecutor v. Germain Katanga*.⁶

7. By this application, Mr Ngudjolo's Defence requests leave to appeal the *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9* rendered by the Single Judge on 23 January 2008.⁷

II. THE LEGAL STANDARD FOR APPEALING DECISIONS

8. According to article 82(1)(d) of the *Rome Statute* ("Statute"), "[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".
9. The jurisprudence of Pre-Trial Chambers I and II reaffirms these criteria and establishes that an application for leave to appeal a decision will be granted only if the application has identified at least one appealable issue raised by the decision and if the following two criteria have been met:
 - a- that the issue raised significantly affects (i) the fair and expeditious conduct of the proceedings or (ii) the outcome of the trial; and

⁶ *Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI*, Pre-Trial Chamber I, 10 March 2008, ICC-01-04-01-07-259.

⁷ *The Prosecutor v. Germain Katanga, Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, Pre-Trial Chamber I, 23 January 2008, ICC-01/04-01/07-160.

b- that, in the opinion of the Pre-Trial or Trial Chamber, immediate resolution by the Appeals Chamber may materially advance the proceedings.⁸

10. The Defence must therefore identify issues (without addressing the merits) in the impugned decision which may immediately be resolved and result in material advancement of the proceedings because they are such as to significantly affect the fair and expeditious conduct of the proceedings.
11. According to established precedent, only an issue raised in a decision may form the subject matter of an appeal⁹
12. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.¹⁰ 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” and (c) “for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

⁸ See, in particular, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, Pre-Trial Chamber I, 14 December 2007, ICC-01/04-01/07-108; *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, Pre-Trial Chamber I, 19 December 2007, ICC-01/04-01/07-116.

⁹ See, for example, the *Decision on Request for leave to appeal to the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor*, Pre-Trial Chamber I, 23 January 2008, ICC-01/04-438, as well as the references to jurisprudence in the footnote on page 6 to that end.

¹⁰ The Appeals Chamber specified that an issue is constituted by “an identifiable subject or topic”, “a subject the resolution of which is essential for the determination of matters arising in the judicial cause (...)”, *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, para. 9, Appeals Chamber, 13 July 2006, ICC-01/04-168.

13. On the fairness and expeditiousness of proceedings, the Appeals Chamber, in a decision of 13 July 2006, noted that: “The term ‘fair’ in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1) and article 21 (3)), making its interpretation and application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.¹¹ The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime,” This is a fact directly borne out by the provisions of articles 55 and 54(1)(c) of the Statute. Disregarding the rules of a fair trial at the pre-trial stage of the proceedings may have implications for the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors with serious consequences within the meaning of this

¹¹ Article 14 of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171 reads: “1. [...] in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...] 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (c) To be tried without undue delay”; Article 6 (1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950, European Treaty Series), reads: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Article 7 (1) (d) of the *African Charter on Human and Peoples’ Rights*, signed on 27 June 1981, entered into force on 21 October 1986 reads: “1. Every individual shall have the right to have his cause heard. This comprises: [...] d. The right to be tried within a reasonable time by an impartial court or tribunal”. The *American Convention on Human Rights*, “Pact of San José, Costa Rica”, signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Series 17955, provides under the heading “Article 8. Right to a Fair Trial” in paragraph 1: “Every person has the right to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal [...]”.

paragraph is designed as a safeguard for the integrity of the proceedings. This is at the core of article 82(1)(d) of the Statute.¹²

14. As for the term ‘proceedings’, it also covers all prior and subsequent proceedings.¹³ The outcome of the trial is a separate consideration requiring the submission of an issue to the Appeals Chamber, where the possibility of error in regard to such issue in an interlocutory or intermediate decision may have a bearing on the outcome of the trial. The Pre-Trial and Trial Chamber must seriously consider this in order to avoid any repercussions that may prejudice the outcome and fairness of the trial.¹⁴

III. IDENTIFICATION OF THE ISSUE RAISED BY THE IMPUGNED DECISION

15. A systematic and teleological interpretation of rule 81(4) of the *Rules of Procedure and Evidence* (RPE) governing redactions of identity and information making it possible to identify alleged victims of sexual offences not connected to the charges in the relevant case is, in the opinion of the Defence, an error of law warranting an immediate submission of the issue to the Appeals Chamber.
16. The Defence submits that broadening the scope of rule 81(4) of the Rules following the interpretation of the Pre-Trial Chamber will result in a characterisation of ‘victim’ in this case of persons who have suffered

¹² *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, para. 11, Appeals Chamber, 13 July 2006, ICC-01/04-168.

¹³ *Ibid.*, para. 12.

¹⁴ *Ibid.*, para. 13.

sexual offences unrelated to the charges or facts of the case, and also the redaction of the identity and other information making it possible to identify such persons pursuant to rule 81(4) of the Rules.

17. Nothing justifies such interpretation of rule 81(4), even on an exceptional basis, whether with regard to the statutory framework of the Court or the fundamental legal principles of a criminal trial such as the principles of exception, proportionality, necessity, legality and respect of the rights of the accused person.

18. The Single Judge recognizes that “the procedural status of victim in case proceedings held before the Pre-Trial Chamber can be granted only to those for whom there are reasonable grounds to believe that they have suffered physical or moral harm as a result of a crime within jurisdiction of the Court expressly included in the warrant of arrest or summons to appear – and, subsequently, in the charging document”.¹⁵

19. The Single Judge goes on to consider that “the three above-mentioned alleged victims of sexual offences which are unrelated to the Bogoro attack cannot, in principle, be considered as victims for the purpose of rule 81(4) of the Rules”.¹⁶

20. It is therefore totally unexpected when, a few paragraphs further on, the Single Judge departs from rule 81(4) of the RPE, relying on the statutory provisions governing the protection of the alleged victims of sexual

¹⁵ *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, para. 14, Pre-Trial Chamber I, 23 January 2008, ICC-01/04-01/07-160.

¹⁶ *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, para. 15, Pre-Trial Chamber I, 23 January 2007, ICC-01/04-01/07-160.

offences,¹⁷ and establishes an exception to the principle of rule 81(4) of the RPE.¹⁸

21. The Defence does not contest the importance of the protection for the alleged victims of sexual offences provided for in article 68(1) of the Statute and rules 70 and 80 of the RPE, but does object to the characterisation of victim in this case and the resulting redactions for alleged victims who have no connection whatsoever with the charges and the events of the case, whether they are alleged victims of sexual or other offences, whether or not on an exceptional basis.

22. Such extrapolation runs counter to the spirit and letter of the Court's statutory framework¹⁹ and to the decisions of the Chambers in respect of redactions.²⁰

23. The Defence draws the attention of the Pre-Trial Chamber to the fundamental distinction that must be taken into account with regard to redactions, that is, redactions for the general public and redactions for the defence teams.

¹⁷ *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, para. 17, Pre-Trial Chamber I, 23 January 2007, ICC-01/04-01/07-160.

¹⁸ *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, para. 19, Pre-Trial Chamber I, 23 January 2007, ICC-01/04-01/07-160: "...leads to the conclusion that, on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of 'victim' under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand".

¹⁹ None of the provisions governing the protection of victims of sexual offences makes explicit provision for the type of measure taken here by the Single Judge.

²⁰ For example, in the first decision on redactions, the Single Judge decided not to adopt this interpretation for innocent third parties. See *First Decision on the Prosecution's Request for Authorisation to Redact Witness Statements*, paras. 44-56, Pre-Trial Chamber I, 7 December 2007, ICC-01/04-01/07-90.

24. The jurisprudence of the ad hoc tribunals is particularly relevant and explicit here.

25. In the case of *The Prosecutor v. Dusko Tadic*, Judge Stephen acknowledged the need to protect the alleged victims of sexual offences,²¹ while emphasising that the need to protect this type of particularly vulnerable victim did not justify redactions of identity or information that would enable the Defence to identify them.²²

26. In this case, other less extreme measures might have afforded the same protection to these alleged victims of sexual offences not connected with the charges in the case, such as, for example, the redactions for the general public. The protection of the alleged victims by refraining from disclosing their identities to the Defence is not justified in light of the particular

²¹ "What is special about such witnesses [victims of rape or sexual assault] is not, of course, that by giving evidence they or their family, more than other victims who give evidence, have reason to fear retaliation. What does make their case special is the combination of possible social consequences of it becoming generally known in communities in the former Yugoslavia that a woman has been a rape victim and also the often acute trauma of facing one's attacker in court and being made to relive the experience of the rape. The customary protection measures to guard against these two possible consequences are in camera proceedings, devices to avoid confrontation with the accused in court and careful control of cross examination." *Prosecutor v. Dusko Tadic*, Separate Opinion of Judge Stephen, in the *Decision on the Prosecution's Motion Requesting Protective Measures for Victims and Witnesses*, 10 August 1995, IT-94-1. See <http://www.un.org/icty/tadic/trial2/decisione/100895pm.htm>.

²² "That being so, it leads me to the conclusion that it is measures such as those, and not any wholesale anonymity of witnesses, that Article 22 primarily contemplates. [...] [I]t seems clear that the according of anonymity to prosecution witnesses in the way proposed in the present application, which is likely substantially to disadvantage the defendant, is not a measure contemplated by the terms of the Statute. [...] My conclusion therefore is that the Statute does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused specified in Article 21 and in particular the "minimum guarantee" in (4). Of course, the Statute clearly mandates the protection of victims and witnesses, including protection of their identity. But this is not to say that it mandates unqualified anonymity of witnesses. Simple protection of identity is something that in appropriate cases, as with offences involving minors, in certain matrimonial cases and where gross indecency and rape are involved, has been habitually accorded by Courts in many jurisdictions for very many years but by recourse to in camera proceedings or restrictions on media reporting without involving the ultimate step of concealing the identity of a witness from the accused and his counsel." Separate Opinion of Judge Stephen, *ibid*.

circumstances surrounding this case. The three alleged victims have not made statements relating to the acts being prosecuted; furthermore, Mr Ngudjolo is not mentioned in these statements. There is no rational, necessary or proportionate justification for such redactions or for a broad interpretation of rule 81(4) of the RPE.

27. It is important to note that the Prosecutor acknowledges that the Chamber's decision raises such an issue and that this issue significantly affects the fairness and expeditiousness of the proceedings.²³

The fairness of the proceedings has been significantly affected

28. The Defence submits that a broad interpretation of rule 81(4) significantly affects the fairness of the proceedings against Mr Ngudjolo.

(a) The characterisation of 'victim' within the Court's statutory framework

29. Rule 85(a) of the *Rules of Procedure and Evidence* (RPE) provides that "[v]ictim' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".

30. Further to this rule, the Defence submits that the four criteria set out below must be satisfied for participation in the proceedings:

- The victim must be a natural person;
- The victim must have suffered harm;
- The crime which resulted in harm must fall within the jurisdiction of the Court; and
- There must be a causal link between the crime and the harm.²⁴

²³ "Prosecution's Response to Defence Application for Leave to Appeal the *Decision on Prosecution's Request for Authorisation to Redact Statements of Witnesses 4 and 9*", paras. 5-6, 4 February 2008, ICC-01/04-01/07-177.

31. It is important to state that under the terms of the Statute and the RPE, the definition of a victim pursuant to rule 85(a) is not restricted to issues pertaining to participation, but encompasses the victims to whom protective measures will be granted pursuant to article 68(1) of the Statute. Accordingly, the Defence is of the view that a strict interpretation of the definition must be adhered to in keeping with the *in dubio pro reo* principle,²⁵ and in order to respect the rights of the accused.²⁶
32. In the instant matter, the three alleged victims cannot be characterised as victims in the case. No causal link has been established as a result of the events described in the statements.
33. It would be dangerous and prejudicial to depart from these criteria for assigning the status of “victim”.

²⁴ The Defence is relying on the jurisprudence of the Court in this instance. See, in particular, *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo*, pages 6-8, 29 June 2006, ICC-01/04-01/06-172; *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo*, pages 8-9, 28 July 2006, ICC-01/04-01/06-228; *The Prosecutor v. Thomas Lubanga Dyilo, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo*, page 9, 20 October 2006, ICC-01/04-01/06-601.

²⁵ The *in dubio pro reo* principle applies in procedural and substantive criminal law. See *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, *Judgment*, 21 May 1999, para 319; *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, *Judgment*, 21 May 1999, para. 103; *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, *Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence*, 15 October 1998, para. 73.

²⁶ Regarding the rights of the accused, see article 67(1) of the Statute; see also the conditions under which there is no prejudice to the rights of the defence and fair trial requirements. Mr Luc Walleyne rightly submits that [TRANSLATION] “the nature of the crimes tried in international courts does not justify an excessive curtailing of the rights of the accused. On the contrary, international courts must also show the example as concerns the rights of the defence”. Accordingly, Mr Walleyne considers that [TRANSLATION] “in each situation, the respective interests [rights of victims and witnesses to protection and the rights of the accused] should be balanced and that in case of doubt, the scale should tilt towards the accused, regardless of the seriousness of the crimes charged.” ICRC, March 2002, Vol 84, No. 845 “Victims and Witnesses of International Crimes”, [www.icrc.org/Web/Fre/sitefre0.nsf/htmlall/5FZJES/\\$File/irrc_845_001_Walleyne.pdf](http://www.icrc.org/Web/Fre/sitefre0.nsf/htmlall/5FZJES/$File/irrc_845_001_Walleyne.pdf)

(b) Consequences for the preparation of the Defence in view of the confirmation of charges

34. Such redactions have a significant impact on the preparation of the Defence in view of the confirmation hearing scheduled to begin on 21 May this year. They limit, if not eradicate, any opportunity to challenge the information contained in such statements. Although these statements cannot be used for the purposes of confirming the charges themselves, they may nevertheless be used to establish a background of “sexual slavery”, which may support the alleged systematic or widespread nature of an attack directed against civilians, whereby the Defence would be unable to verify or challenge these allegations expeditiously and with appropriate preparation.

(c) Consequences prejudicial to the rights of the Defence

35. The provisions on which the Single Judge relied with respect to her findings on the protection of alleged victims of sexual offences are not restricted to that category of victim. For instance, rule 88(1) of the RPE provides for “special measures [...] [for] a traumatized victim or witness, a child, an elderly person or a victim of sexual violence [...]”. A legal basis of this nature for the exception granted for the purpose of redactions leaves the way open for redactions to statements of any traumatised victim or witness in the Democratic Republic of the Congo. In the view of the Defence, this is unacceptable and contrary to the rights of the Defence under article 67(1) of the Statute. The Pre-Trial Chamber’s extrapolation here goes beyond the case of the aforementioned three alleged victims, to the detriment of any accused person before this Court.

Expeditious conduct of the proceedings significantly affected

36. The issue raised by the impugned decision also significantly affects the expeditious conduct of the proceedings. Clarification of the Chambers' position on the interpretation of rule 81(4) of the RPE is required in order to avoid recurrent disputes between the parties which may arise with future requests from the Prosecutor for authorisation to redact the statements of witnesses and victims.

IV. IMMEDIATE RESOLUTION OF THE ISSUE RAISED BY THE IMPUGNED DECISION MAY MATERIALLY ADVANCE THE PROCEEDINGS

37. An immediate resolution of the issue raised may materially advance the proceedings.

38. The principles arising from the Court's jurisprudence at this stage in the proceedings may become criteria or guidelines in future requests for redactions, whether in the case at hand or in other trials. It is therefore essential to the development of jurisprudence in international criminal law that the interpretation of the rules for disclosure and redactions be clear and fair and that it be decided by the Appeals Chamber.

39. Accordingly, it is absolutely imperative that this matter be referred immediately to the Appeals Chamber. As is established in the case law of the International Criminal Tribunal for Rwanda, clarification of a legal standard which may be applied in the cases of the Tribunal is an issue whose resolution may materially advance the proceedings.²⁷

²⁷ *The Prosecutor v. Joseph Nzirorera, Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK*, in particular, para. 8, 9 October 2007, ICTR-98-44, available on the ICTR Website: <http://69.94.11.53/default.htm>.

40. Once again, the Defence notes that the Prosecutor has acknowledged that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.²⁸

FOR THESE REASONS,

41. The Defence most respectfully requests leave of Pre-Trial Chamber I to appeal the *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9* on the grounds set out above and pursuant to article 82(1)(d) of the Statute, rule 155 of the RPE and regulation 65 of the *Regulations of the Court*.

[signed]

Mr Jean Pierre Kilenda Kakengi Basila
Permanent Defence Counsel for Mr Mathieu Ngudjolo Chui

Dated this 26 March 2008

At Brussels, Belgium

²⁸ "Prosecution's Response to Defence Application for Leave to Appeal the 'Decision on Prosecution's Request for Authorisation to Redact Statements of Witnesses 4 and 9'", para. 7, 4 February 2008, ICC-01/04-01/07-177.