

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 17 June 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 the Procedure for Leave to Appeal pursuant to article 82 (1)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations and on the Pending Requests for Leave to Appeal Concerning Witnesses 132 and 287.

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
Mr Hervé Diakese
Mr Jean-Christostome Mulamba
Nsokoloni

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 "Decision Establishing a Calendar according to the date of the Confirmation Hearing: 27 June 2008",¹ issued by the Single Judge on 29 April 2008, by which the Single Judge decided to convene a hearing on 3 June 2008, to be held before the Presiding Judge of the Chamber, to discuss the order and conditions under which the evidence shall be presented at the confirmation hearing;

NOTING the "Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287"² issued by the Single Judge on 28 May 2008;

NOTING the "*Demande d'interjeter appel sur la décision intitulée 'Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287'*"³ filed by the Defence for Mathieu Ngudjolo Chui on 3 June 2008;

NOTING the "Defence Application for Leave to Appeal the Single Judge's Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287"⁴ filed by the Defence for Germain Katanga on 3 June 2008;

NOTING the "Decision Distributing the Proposed Schedule for the Confirmation hearing"⁵ issued by the Single Judge on 4 June 2008; whereby the Single Judge decided to distribute the proposed schedule for the confirmation hearing in Annex I to the decision to the parties and the participants;

NOTING the public hearing held on 10 June 2008 ("the Hearing"), during which the Single Judge presented a proposal in relation to the procedure for requests for leave

¹ ICC-01/04-01/07-459

² ICC-01/04-01/07-523

³ ICC-01/04-01/07-544

⁴ ICC-01/04-01/07-545

⁵ ICC-01/04-01/07-547 and the Annex

to appeal any decisions of the Chamber relating to the procedural issues to be dealt with prior to, or at the start, of the confirmation hearing ("the Single Judge's Proposal"),⁶

NOTING the "Prosecution's Response to Proposed Procedure for Leave to Appeal as Suggested and Discussed in the Hearing of 10 June 2008"⁷ ("the Prosecution's Submission"), filed by the Prosecution on 10 June 2008, whereby the Prosecution was, in principle, amenable to the Single Judge's Proposal;

NOTING the oral and written submissions of the Defence for Germain Katanga, whereby the Defence for Germain Katanga also expressed its acceptance of the procedure for requests for leave to appeal proposed by the Single Judge during the 10 June 2008 hearing;⁸

NOTING the oral and written submissions of the Defence for Mathieu Ngudjolo Chui, whereby the Defence for Mathieu Ngudjolo Chui submitted that (i) all procedural issues that have already been raised by a party, should be ruled upon prior to the confirmation hearing; (ii) all other questions that might arise between the 10 June 2008 hearing and the beginning of the confirmation hearing, should be ruled upon prior to the confirmation hearing or, at the latest, on 3 July 2008; and (iii) the Single Judge's Proposal is not acceptable to the Defence for Mathieu Ngudjolo Chui as the Chamber should apply the procedures established by the statutory documents, in particular the Rules of Procedure and Evidence;⁹

⁶ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, p 7, lines 2 *et fine*

⁷ ICC-01/04-01/07-580 See also ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, p 8, lines 10-17

⁸ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, p 8, lines 20 *in fine*, and an e-mail from the Defence team for Germain Katanga received on 10 June 2008

⁹ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, p 9, lines 12-15, and an e-mail from the Defence team for Mathieu Ngudjolo Chui received on 10 June 2008

NOTING articles 61 and 82 (1) (d) of the *Rome Statute* ("the Statute"); rules 101, 122(1) and 155 of the *Rules of Procedure and Evidence* ("the Rules") and regulation 65 of the *Regulations of the Court* ("the Regulations");

I. The Submissions by the Parties and Participants

1. At the hearing, the Single Judge presented the following proposal in relation to the procedure for requests for leave to appeal decisions relating to the procedural issues to be dealt with prior to the start, as well as at the beginning of the confirmation hearing:

The third item I would like to consider before we come to the main agenda item is the procedure for leave to appeal relating to procedural issues to be dealt with from now on till the start of the confirmation hearing.

The Single Judge observes that there are a number of procedural issues pending before this Chamber, including the issues raised by the Defences concerning Article 54(3)(e) of the Statute, the application for participation of Witness 166, the requests for anonymity vis-à-vis both Defences of a number of victims, the requests for leave to appeal against the decision on the Prosecution's urgent application for the admission of the evidence of Witnesses 132 and 287, and the two urgent -- or, rather, three urgent motions filed yesterday and today by the Defences of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui. The Single Judge can foresee that a number of additional procedural issues, including those relating to admissibility and relevance of the evidence on which the Prosecution and the Defences intend to rely at the confirmation hearing, are likely to be raised in the coming days prior to the commencement of the confirmation hearing or will be included in the parties and participants lists of procedural issues to be filed by the 23rd of June 2008.

As a result and considering that the confirmation hearing is due to start in two weeks, the Single Judge would like to ask the parties and participants if the following procedure for leave to appeal is agreeable to them in order to avoid spending resources from their limited time on leave to appeal rather than the proper preparation for the evidentiary debate to be held at the confirmation hearing. And I will just list very quickly the proposal and would then like to ask the parties and participants whether they are agreeable, and they simply say yes or no.

The first is that the Single Judge will decide on all the procedural issues raised by the parties either prior to the confirmation hearing or immediately after the oral submissions on procedural matters which is scheduled for the morning session of 2nd July. The Chamber will then decide either in written decision or by way of an oral decision.

Then within the five-day deadline provided for in Rule 155 of the Rules, the issues for which a request for leave to appeal is intended to be sought shall be identified and enumerated in a short filing. The reasoning supporting the request for leave to appeal the issues previously identified shall be contained in an additional document to be filed within the five-day deadline to the request for leave to appeal the Chamber's decision on the confirmation or not of the charges at the end of the hearing.

Only upon the filing of the documents with the reasoning supporting the requests for leave to appeal will then -- will the deadline for the filing of responses to such requests then start running.

The Chamber then shall decide on the request for leave to appeal in the same decision in which it decides on any request for leave to appeal the decision on the confirmation or not of the charges.¹⁰

2. Following the presentation of the proposal, the Single Judge made the following clarification at the request of the Prosecution:

MR. MacDONALD: Well, I would maybe have a question of clarification, your Honour, just to make sure that we understand correctly, and then maybe we can proceed this way for now. Are we to understand that we have five days to file in -- make a filing indicating our intention to seek leave to appeal and then provide the actual reasons after or at the -- after the confirmation hearing? So basically we're entering a notice indicating that is we intend so that we can preserve our rights and then -- all right.

PRESIDING JUDGE KUENYEHIA: I think that's what we mean. So that you do not lose your right.¹¹

3. After the Hearing, the Prosecution, in the Prosecution's Submissions, stated as follows:

The Office of the Prosecutor (the "Prosecution") is amenable to the Single Judge's proposal, which it recognizes allow the parties to focus their resources on the preparation for the confirmation hearing to the greatest extent possible.

However, the Prosecution submits that there may be rare instances in which an issue would cause irreparable prejudice to a party if not remedied prior to the confirmation hearing or decision, and thus could not be meaningfully appealed after the decision on the confirmation of charges has been delivered. Should such an instance arise, then the Prosecution submits that this proposal should not prevent the party, in those limited circumstances, from immediately filing a full application for leave to appeal within the ordinary time limits.

In the present circumstances, such an application would necessarily require urgent consideration, and as such it would be incumbent upon the party to set out in the application the reasons warranting such urgent consideration by the Pre-Trial Chamber.¹²

4. At the Hearing, the Defence for Germain Katanga stated as follows:

MR. HOOPER: Madam President, there clearly is a logic here, but it's slightly eluding me as to the advantage this system has over the present one. It's not criticism at all it's just that I'm not absorbing it this afternoon. Now, I was wondering in those circumstances as the Court wants basically a yes or a no from us whether the yes or the no can be deferred later on this evening. I can send an e-mail after we've discussed it, but we still have the five-day Rule in terms of the period for submission, but one is -- the first document is merely an indication of a request of an intent, and then the second --

PRESIDING JUDGE KUENYEHIA: So as not to lose your right.

¹⁰ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, page 6, lines 7 to page 8, line 3

¹¹ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, page 8, lines 10-19

¹² ICC-01/04-01/07-580, p.3

MR. HOOPER: Yes. All right. Yes. Well, I'm sure once I've understood it it will be eminently workable

PRESIDING JUDGE KUENYEHIA: I think the Chamber is quite well disposed for you to give an answer later on in the evening --

MR. HOOPER: Thank you very much.¹³

5. After the hearing, the Defence for Germain Katanga - in an e-mail sent by the case manager of the Defence Team to the Legal Officer of the Presiding Judge which is attached as Annex I to the present Decision - stated the following:

Notre équipe accepte la procédure d'appel proposée par la Chambre lors de l'audience d'aujourd'hui. Pourriez-vous nous préciser si elle est donc applicable et, le cas échéant, à partir de quelle date?

6. At the Hearing, the Defence for Mathieu Ngudjolo Chui said as follows:

MR. KILENDA (interpretation): Thank you, Your Honour. I think the position taken by my learned colleague Mr. Hooper is logical. We would also like to be afforded reasonable time, perhaps up to this evening, so that we can tell you our position.¹⁴

7. After the hearing, the Defence for Mathieu Ngudjolo Chui - in an e-mail sent by the case manager of the Defence Team to the Legal Officer of the Presiding Judge which is attached as Annex II to the present Decision - stated the following:

De manière liminaire, la Défense est d'avis que toutes les questions pendantes/qui ont déjà été soulevées par une des parties devant la Chambre Préliminaire soient réglées avant le début de la confirmation des charges. Pour les questions potentielles à être soulevées entre aujourd'hui et le début de la confirmation des charges, la Défense souhaiterait souligner l'importance que ces questions soient réglées avant la confirmation ou au plus tard le 3 juillet 2008

Quant à la suggestion de l'Honorable Juge unique relative aux demandes d'autorisation d'interjeter appel (jusqu'à la fin de la confirmation des charges), la Défense de Mathieu Ngudjolo n'est pas favorable à une telle procédure. Les règles établies par le cadre statutaire de la Cour (plus particulièrement le Règlement de procédure et de Preuve) doivent s'appliquer. La Défense tient au respect des règles de procédure telles qu'elles existent aujourd'hui.

8. Finally, Mr Gillisen, the Legal Representative of Victim a/0333/07, who was present at the Hearing, indicated that he would also like to have the same opportunity as both Defences to reflect upon the Single Judge's Proposal. Nevertheless, to date, no answer has been received from Mr Gillisen.

¹³ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, page 8, line 20 to page 9, line 8

¹⁴ ICC-01/04-01/07-T-35-ENG ET WT 10-06-2008, page 9, lines 12-17

II. Procedure for Leave to Appeal pursuant to article 82 (1)(d) of the Statute, rule 155 of the Rules and regulation 65 of the Regulations

9. The Single Judge observes that only the Defence for Mathieu Ngudjolo Chui opposes the procedure proposed by the Single Judge insofar as it considers that it is not in accordance with the statutory framework provided for by the Statute and the Rules.

10. In this regard, the Single Judge observes that, according to rule 155 of the Rules:

When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

11. The Single Judge also notes that this provision is further developed by regulation 65(1) and (2) of the Regulations, which states as follows:

An application for leave to appeal under rule 155 shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof. If the facts relied upon in support are not apparent from the record of the proceedings, they shall as far as possible, be substantiated by a solemn affirmation by a person having knowledge of the facts stated therein.

An application for leave to appeal under article 82, paragraph 1(d), shall specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.

12. Furthermore, the Single Judge recalls the consistent case law of this Chamber, according to which:

[...] pursuant to regulation 1(1) of the Regulations, the regulations shall be read subject to the Statute and Rules and therefore no extension or reduction of time-limits can be granted in relation to time-limits established by the Statute or the Rules.¹⁵

13. As a result, after having carefully analysed the above-mentioned provisions and case law, the Single Judge is of the view that the procedure proposed at the Hearing would be consistent with article 82(1)(d) of the Statute, rule 155 of the Rules and regulation 65(1) and (2) of the Regulations as long as the relevant party files,

¹⁵ ICC-01/04-01/07-466 , ICC-01/04-01/07-478, p 5

within the five day time limit provided for in rule 155 of the Rules, a short (one or two pages) written application for leave to appeal in which:

- (i) the issues for which leave to appeal is requested are identified; and
- (ii) the legal and/or factual reasons supporting the request for each of the issues for which leave to appeal is requested are specified *via* their enumeration.

14. According to the Single Judge's Proposal, once an application has been filed, the party filing it shall have until five days after the receipt of the notification of the Chamber's decision confirming or not the charges to file an additional document in support of the application in which the reasons enumerated in the original application may be elaborated upon.

15. Due to the fact that the reasons will be subsequently developed in the additional document in support of the original application, the Single Judge considers that, whenever this procedure is resorted to, the three day time limit to file a response provided for in regulation 65(3) of the Regulations shall only start running (i) upon the notification of the filing of the additional document in support of the original application; or (ii) absent such filing, upon the expiration of the time limit provided for in the previous paragraph for the filing of such additional document.

16. The Single Judge agrees with the Prosecution that there may be certain instances in which "an issue would cause irreparable prejudice to a party if not remedied prior to the confirmation hearing or decision". As a result, the Single Judge considers that the procedure provided for in paragraphs 13 to 15 of this decision shall not prevent the relevant party from filing an application for leave to appeal within five days of being notified of the impugned decision, in which the reasons for the request for leave to appeal are fully elaborated on. In this scenario, responses

shall be filed, pursuant to regulation 65(3) of the Regulations, within three days of notification of the application.

17. As a result, it will be up to the party seeking leave to appeal the impugned decision to decide whether to file a short application and rely on the procedure provided for in paragraphs 13 to 15 of the present decision, or to file an application fully elaborating on the reasons supporting it. Hence, as both options will be available to the party seeking leave to appeal, the Single Judge considers that no prejudice can be claimed by either the Prosecution or any of the Defences as a result of the implementation of the procedure provided for in the present decision.

18. Moreover, the Single Judge recalls that no provision in the Statute, the Rules or the Regulations imposes any time limit on the Chamber to decide on any given request for leave to appeal. As a result, save in cases in which “an issue would cause irreparable prejudice to a party if not remedied prior to the confirmation hearing or decision”, nothing prevents the Chamber from deciding upon the various requests for leave to appeal after the confirmation hearing in one single decision along with any request for leave to appeal the decision confirming or not the charges.

19. As a result, the Single Judge considers that the party making an application fully elaborating on the reasons supporting it must set out in the application the reasons warranting the urgent consideration of the application by the Chamber, so that the Chamber’s decision cannot wait until the finalisation of the confirmation hearing. Only if the Chamber is convinced of the need for the urgent consideration of the application shall the Chamber issue the decision on the application prior to, or during the confirmation hearing.

20. In the view of the Single Judge, the procedure set out in the previous paragraphs, in addition to permitting the parties (as acknowledged by the Prosecution and the Defence for Germain Katanga) to focus their resources on the preparation for the confirmation hearing to the greatest extent possible, would not

be contrary to the statutory framework provided for in the Statute and the Rules as stated by the Defence for Mathieu Ngudjolo Chui.

21. Furthermore, this procedure will allow the Chamber to decide in one single decision after the confirmation hearing most, if not all, applications for leave to appeal those decisions issued by the Chamber from the date of issuance of the present decision to the end of the confirmation hearing. It will also permit the Appeals Chamber to deal simultaneously with (i) all such issues for which leave to appeal is granted; and (ii) all issues raised in the decision confirming or not the charges for which leave to appeal is also granted.

22. As a result, the Single Judge considers that this procedure will substantially facilitate the expeditious conduct of the proceedings. Moreover, due to its flexibility, it will not infringe on the fairness of the proceedings.

23. Finally, given the need for the confirmation hearing to be held within a reasonable period of time from the surrender of the suspects to the seat of the Court, the above-mentioned procedure will permit the Chamber not to have to dismiss applications for leave to appeal on the sole ground that an immediate decision of the Appeals Chamber may not materially advance the proceedings because the starting date of the confirmation hearing is close and the time taken on average by the Appeals Chamber to decide upon interlocutory appeals ranges between four and five months.

III. Applications for Leave to Appeal against the Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287

24. The Single Judge observes that there are two pending requests for leave to appeal against the Decision on Prosecution's Urgent Application for the Admission

of the Evidence of Witnesses 132 and 287,¹⁶ one filed by the Defence for Mathieu Ngudjolo Chui on 3 June 2008,¹⁷ the other one filed by the Defence for Germain Katanga on 3 June 2008.¹⁸

25. The Defence for Mathieu Ngudjolo Chui identifies three issues in its request for leave to appeal:

- (i) the readmission of the statements, interview notes and interview transcripts of Witnesses 132 and 287 is not the result of an independent analysis of the competent unit of the Court, but it results from the sole wish of the Prosecution;¹⁹
- (ii) the circumstances leading to the readmission of statements, interview notes and interview transcripts of Witnesses 132 and 287 cannot be considered as new facts;²⁰ and
- (iii) The Single Judge has decided on the readmission of the statements, interview notes and interview transcripts of Witnesses 132 and 287 upon the urgent motion of the Prosecution in violation of the Defence's right to be heard, as well as regulations 24(1) and 34(b) of the Regulations of the Court.²¹

26. The Defence for Germain Katanga identifies in its request for leave to appeal two issues which are similar to the second and third issues identified by the Defence of Mathieu Ngudjolo Chui, that is to say:

- (i) The Single Judge improperly reconsidered her earlier Decision to exclude evidence of witnesses 132 and 287 on purported new circumstances that did not justify such reconsideration;²²

¹⁶ ICC-01/04-01/07-523

¹⁷ ICC-01/04-01/07-544-Conf

¹⁸ ICC-01/04-01/07-545

¹⁹ ICC-01/04-01/07-544-Conf, para 16

²⁰ ICC-01/04-01/07-544-Conf, para 16

²¹ ICC-01/04-01/07-544-Conf, para 16

²² ICC-01/04-01/07-545, para 11 (a)

- (ii) The Single Judge's reconsideration had very prejudicial consequences for the Defence, without hearing any submissions from the Defence.²³

27. Moreover, the Single Judge also observes that at paragraphs 27 and 28 of the request for leave to appeal of the Defence for Germain Katanga, the following is stated:

In her Decision granting leave to appeal the Evidentiary Scope of the Confirmation Hearing, the Single Judge recognised that it was unlikely that the Appeals Chamber would issue its decision prior to the date scheduled for the confirmation hearing. The Single Judge nonetheless granted leave to appeal and in so doing held that the Decision of the Appeals Chamber would materially advance the proceedings. Having so held, it would be fundamentally unfair to deprive the Defence the opportunity of seeking an appellate resolution of this issue, simply because the Prosecutor has no[w] withdraw[n] their appeal on this issue.

Indeed, the Prosecution's 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 was granted on the issue concerning "the remedy for the unlawful preventive relocation by the Prosecution of Witnesses 132 and 287 was the exclusion of their evidence for the purpose of the confirmation hearing".

28. In this regard, the Single Judge notes that both Defences, as well as the Prosecution, seem to have assumed that the remedy against the unlawful Prosecution's preventive relocation of Witnesses 132 and 287 was the automatic inadmissibility of their evidence for the purpose of the confirmation hearing.

29. Nevertheless, the Single Judge highlights that this assumption was erroneous insofar as the Single Judge embraced a lesser remedy, that is to say, that as a result of the unlawful Prosecution's preventive relocation of Witnesses 132 and 287 they had to be considered as being unprotected at the time the Decision on the Evidentiary Scope of the Confirmation Hearing was issued. This lesser remedy was chosen in light of the fact that they had been moved to a new location just before the issuance of the decision, and immediately after the issuance of the decision the Registry was ordered to take full responsibility for their protection.

²³ ICC-01/04-01/07-545, para 11 (b)

30. As a result, the inadmissibility of the evidence of these two witnesses resulted solely from the fact that:

- (i) Witnesses 132 and 287 could not be accepted and relocated by the Registrar – as part of the Court's Witness Protection Programme - in the three days left between the issuance of the Decision on the Evidentiary Scope of the Confirmation Hearing and the 21 April 2008 deadline for the Prosecution's disclosure to both Defences of the evidence on which it intended to rely at the confirmation hearing (30 days before the then scheduled starting date for the confirmation hearing of 21 May 2008); and
- (ii) 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.

31. In the view of the Single Judge, the reading of paragraphs 39 and 40 of the Decision on the Evidentiary Scope of the Confirmation Hearing in light of the other parts of the Decision, including Section V.C., explains the nature and the reasons for the remedy adopted by the Single Judge against the unlawful Prosecution's preventive relocation of Witnesses 132 and 287.

32. Nevertheless, the Single Judge acknowledges that a further explicit explanation would have likely avoided the Prosecution and Defences' misunderstanding of the nature of the chosen remedy. It is for this reason that in the "Decision on the Requests for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67 (2) of the Statute and Rules 77 of the Rules", the Single Judge explicitly highlighted:

CONSIDERING 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.²⁴

33. As a result, unlike what the Defence for Germain Katanga states, the Single Judge, in the “Decision on Prosecution’s Urgent Application for the Admission of the Evidence of Witnesses 132 and 287”, did not reconsider the remedy previously adopted in the Decision on the Evidentiary Scope of the Confirmation Hearing. Quite the contrary, she simply acknowledged that as a result of the subsequent acceptance and relocation of Witnesses 132 and 287 as part of the Court’s Witness Protection Programme, the security concerns relating to these two witnesses had disappeared, and in light of the fact that the confirmation hearing had in the meanwhile been postponed to commence on 27 June 2008, there were no longer any security reasons that would prevent the Prosecution’s reliance at the confirmation hearing on the evidence of these two witnesses.

34. Whether, as claimed by the Defences for Mathieu Ngudjolo Chui and Germain Katanga, this constituted new facts, and whether the Single Judge erred in reaching her conclusion without having first obtained the observations of both Defences, are issues that will not be dealt with in the present decision.

35. In the view of the Single Judge, for the purpose of the present decision, it is important to highlight that the Defences’ misunderstanding as to the nature of the specific remedy adopted by the Single Judge - along with the fact that such a remedy (although not automatically) led to the exclusion of the evidence of Witnesses 132 and 287 for the purpose of the confirmation hearing due to security concerns – must have been an important factor in the Defences’ decision not to request leave to appeal within the five day time limit provided for in rule 155 of the Rules the specific remedy adopted by the Single Judge.

²⁴ ICC-01/04-01/07-484, p 10

36. Logically, by the time the specific nature of the remedy was specified in the "Decision on the Requests for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67 (2) of the Statute and Rules 77 of the Rules" it was too late for any of the Defences to request leave to appeal such a remedy.

37. Furthermore, the Single Judge agrees with the Defence for Germain Katanga, that - as a result of the "Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287" the Prosecution withdrew its appeal against the remedy adopted by the Single Judge for the unlawful Prosecution's preventive relocation of Witnesses 132 and 287 – the Defence has been left with no opportunity to seek an appellate resolution concerning the issue of the remedy.

38. In this regard, the Single Judge considers that, as pointed out by the Defence for Germain Katanga, the issue of the nature of the remedy adopted by the Single Judge for the unlawful Prosecution's preventive relocation of Witnesses 132 and 287 is inherently linked to some of the issues identified in the two pending Defences' requests for leave to appeal the Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287. As a result, in order to avoid any possible prejudice to any of the Defences, the Chamber, when deciding upon such pending requests, shall take into consideration the above-mentioned issue of the nature of the remedy.

39. In relation to the timing for the decision on the two pending Defences' requests for leave to appeal, the Single Judge considers that the reintroduction of the charges relating to alleged sexual violence on the basis of the evidence of Witnesses 132 and 287 is not an issue which "would cause irreparable prejudice to a party if not remedied prior to the confirmation hearing or decision".

40. Quite the contrary, the Single Judge observes that charges relating to alleged sexual violence were already included in the original arrest warrants issued for

Germain Katanga on 2 July 2007²⁵ and for Mathieu Ngudjolo Chui on 6 July 2007.²⁶ Moreover, such charges, as well as the evidence of Witnesses 132 and 287 on which they are based, were also included in the Prosecution's Charging Document and List of Evidence filed in the case of *The Prosecutor v. Germain Katanga* on 29 January 2008,²⁷ and to which Mathieu Ngudjolo Chui also had access once the cases were joint.

41. Indeed, the Single Judge observes that, not only were the Defences put on notice of those charges and the evidence supporting them several months ago, but, as explicitly stated by the Prosecution, such charges were not included in the Prosecution Charging Document and List of Evidence filed on 21 April 2008 due, exclusively, to the issuance three days before of the Decision on the Evidentiary Scope of the Confirmation Hearing.²⁸

42. Furthermore, in the 21 April 2008 Prosecution Charging Document it was explicitly stated that the charges relating to alleged sexual violence connected to the Bogoro attack would be reintroduced if the Prosecution was successful in seeking an appellate review of the remedy adopted by the Single Judge for the Prosecution's preventive relocation of Witnesses 132 and 287.²⁹

43. Subsequently, since the "Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287" filed on 28 May 2008, that is to say 30 days before the commencement of the confirmation hearing on 27 June 2008, both Defences were on notice that the Prosecution would very likely reintroduce the charges relating to alleged sexual violence on the basis of the evidence of Witnesses 132 and 287. Moreover, the Single Judge emphasises that this evidence has been disclosed to both Defences, as provided by rule 121(4) of the Rules, on 12 June 2008 (that is to say, 15 days prior to the commencement of the confirmation hearing).

²⁵ ICC-01/04-01/07-1, p. 6

²⁶ ICC-01/04-01/07-260, p. 6

²⁷ ICC-01/04-01/07-170 and Anx 1

²⁸ ICC-01/04-01/07-411-Conf-Exp, ICC-01/04-01/07-428, and ICC-01/04-01/07-428-Corr

²⁹ ICC-01/04-01/07-422, paras. 5 and 6

44. Under these circumstances, the Single Judge considers that there can be no prejudice to either Defence if, as a result of deciding the two pending Defences' requests for leave to appeal, the charges of sexual enslavement, rape and outrages upon personal dignity included in the Amended Prosecution Charging Document filed on 12 June 2008 are considered, along with the evidence of Witnesses 132 and 287 (included in the Prosecution's Additional List of Evidence also filed on 12 June 2008), at the confirmation hearing scheduled to start on 27 June 2008.

45. Moreover, if in the event the charges relating to alleged sexual violence are confirmed, the Chamber decides to grant leave to appeal for any of the issues identified by the Defence in their respective applications for leave to appeal, the Defences could still seek an appellate ruling from the Appeals Chamber overturning the part of the Chamber's decision on the confirmation of the charges relating to alleged sexual violence.

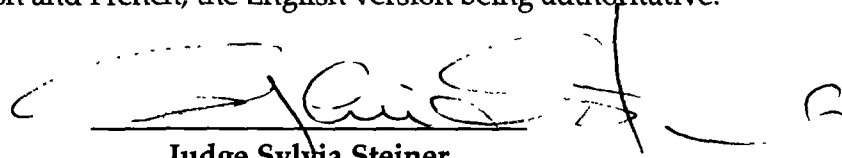
46. As a result, the Single Judge concludes that there is no reason warranting the urgent consideration of the two pending Defences' requests for leave to appeal the "Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287", as no irreparable prejudice would be caused to any of the Defences if the issues identified by the Defences are not remedied prior to the confirmation hearing or decision.

FOR THESE REASONS

DECIDE that in relation to any decision issued by this Chamber in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* after the issuance of the present decision, the procedure for leave to appeal set out in the section II of the present decision shall be applicable.

DECIDE that the two pending Defences' requests for leave to appeal the Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287 shall be dealt with after the confirmation hearing, along with any request for leave to appeal the Chamber's decision confirming or not the charges.

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



Judge Sylwia Steiner
Single Judge

Dated this Tuesday 17 June 2008

At The Hague, The Netherlands