

**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**

**Corrigendum to the "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**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

Mr Simo Väätäinen

**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”<sup>1</sup> (“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*”<sup>2</sup> (“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”<sup>3</sup> (“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*”<sup>4</sup> (“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 regulations 64 and 65 of the Regulations of the Court;

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<sup>1</sup> ICC-01/04-01/07-474

<sup>2</sup> ICC-01/04-01/07-481

<sup>3</sup> ICC-01/04-01/07-499

<sup>4</sup> ICC-01/04-01/07-503

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

<sup>5</sup> 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 I'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

<sup>6</sup> ICC-01/04-168

<sup>7</sup> Appeals Chamber Judgment, para 9

<sup>8</sup> Appeals Chamber Judgment, para 9

<sup>9</sup> Appeals Chamber Judgment, para 9

<sup>10</sup> Appeals Chamber Judgment, para 10

- (iv) "[i]dentification 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'";<sup>11</sup>

**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");<sup>12</sup>
- (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");<sup>13</sup> 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;<sup>14</sup>

**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

<sup>11</sup> Appeals Chamber Judgment, para 14

<sup>12</sup> The Defence Request, para 11

<sup>13</sup> The Defence Request, para 26

<sup>14</sup> 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 non-anonymous victims have the right to:

- (i) lead at trial the evidence proposed by such non-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) make at trial challenges to the admissibility or relevance of evidence.<sup>15</sup>

**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 and 65 of the Regulations for the filing of documents in support of interlocutory appeals and responses, the issuance of a decision on an interlocutory appeal takes an average of four to five months since 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

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<sup>15</sup> This, in the view of the Single Judge, continues to be a purely hypothetical issue insofar as the only individuals currently granted the procedural status of victim in the case of the *Prosecution v Thomas Lubanga Dyilo* remain anonymous

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,<sup>16</sup> none of the other criteria provided for in article 82(1)(d) of the Statute is met;<sup>17</sup>

**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, becoming subsequently 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 arises, it will be up to the competent Trial Chamber to decide on it;<sup>18</sup> and that, therefore, in the view of the Single Judge the Third Issue does not arise out of the Decision;

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<sup>16</sup> This, 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


<sup>17</sup> The Single Judge observes that the Defence of 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

<sup>18</sup> 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