Cour Pénale Internationale

International Criminal Court

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N° : **ICC-01/04-01/07**
Date : **13 December 2007**

PRE-TRIAL CHAMBER I

Before : **Judge Sylvia Steiner, Single Judge**

Registrar : **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA

PUBLIC
Defence Motion for Leave to Appeal the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Eric MacDonald, Trial Lawyer
Mrs Florence Darques-Lane, Legal Adviser

Defence Counsel
Mr David Hooper
Ms Caroline Buisman

Procedural Background

1. On 7 December 2007, the Single Judge of Pre-Trial Chamber I rendered her *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« impugned Decision »). The Decision partially grants the Prosecution's requests for autorisation for redactions to the statements and interview notes of Witnesses 1, 3, 7, 8, 12, 13 and 14 and orders the Prosecution to disclose the statements and interview notes of Witnesses 1, 3, 7, 8, 13, 14 with the redactions authorised by the Single Judge, as well as an electronic version thereof (providing all details required by the Draft Protocol on the Presentation of Evidence followed in the case ICC-01/04-01/06) and make available to the Defence the statement of Witness 12 through the system of pre-inspection and inspection with the redactions authorised by the Single Judge, no later than Wednesday 12 December 2007.

2. The Single Judge authorised five categories of redactions. The first category of redactions was authorised pursuant to Rule 81(4) of the Rules of Procedure and Evidence (« Rules »). These redactions related to the current whereabouts of Prosecution Witnesses who have been accepted in VWU's protection program. The second category of redactions was authorised pursuant to Rule 81(4) of the Rules. These redactions related to the names and identifying information of the family members of two Witnesses. The third category of redactions was authorised pursuant to Rule 81(4) of the Rules. These redactions related to the current whereabouts of the family members of the witnesses 1, 3, 7, 8, 12, 13 and 14. The fourth category of redactions was authorised pursuant to Rule 81(2) of the Rules. These redactions related to identifying information concerning potential Prosecution Witnesses who had been or were about to be interviewed by the Prosecution. The fifth category of redactions was partly authorised pursuant to Rule 81(2) of the Rules. These redactions related to the names, initials, signatures and any other identifying information of certain, to the Defence unidentified, persons present at interviews conducted by the Prosecution for the purpose of assisting in the process of interviewing witnesses and taking their statements.

3. The Prosecution had requested authorisation to redact two more categories of information. One category related to all identifying information concerning « innocent third parties ». The other category related to the identities of the OTP and VWU

personnel present during the interviews of the relevant Witnesses and the locations where such interviews took place. The Single Judge did not authorise any redaction under these categories. On 10 December 2007, the Prosecution filed an *Application for Leave to Appeal and Urgent Application for Confined Variation of the First Decision on Redaction of Witness Statements* seeking leave to appeal the non-authorisation of the redactions of those categories.

4. On 11 December 2007, the Single Judge of Pre-Trial Chamber I rendered a *Decision on Urgent Application for Confined Variation of the First Decision on Redactions* in which she authorised the Prosecution to provisionally maintain the requested redactions pending a Decision on the Prosecution Application for Leave to Appeal. Moreover, the Single Judge granted the Prosecution an extension of 24 hours for the disclosure to the Defence of the disclosure material listed in paragraph 1 of the present Motion. Thus, the Defence is yet to receive any of the disclosure materials relevant to this Motion.

Threshold Criteria for Leave to Appeal

5. The Defence for Mr. Germain Katanga (« the Defence ») files this *Motion for Leave to Appeal the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements dated 7 December 2007* pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court.

6. Pursuant to Article 82(1)(d), leave for appeal will be granted if the party submitting the application has identified at least one issue of appeal that has been dealt with in the impugned Decision and which « 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 ».[1]

7. It is respectfully submitted that these criteria are met in the present situation on the grounds enhanced in this Motion.

[1] As confirmed in various Decisions. See, *inter alia*, *Prosecutor v. Lubanga*, No. ICC-02/04-01/05-US-EXP, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Application for Warrants of Arrest under Article 58', 19 August 2005, para 26; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Second Defence Motion for Leave to Appeal, 28 September 2006.

Issues of Appeal

8. The Defence raises two appealable issues:
   (i) The Decision was issued without hearing the Defence;
   (ii) The Pre-Trial Judge incorrectly determined that potential Prosecution Witnesses who had been or were about to be interviewed by the Prosecution could be characterised as « Prosecution sources » and, hence, their identifying information be redacted pursuant to Rule 81(2) of the Rules.

9. Both these issues would significantly affect the fair and expeditious conduct of the proceedings for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

The right of the Defence to be heard

10. Defence Counsel for Mr. Katanga was sworn in on 6 December 2007. Only since that day does the Defence have access to an office and confidential materials. Until today, the Defence has not received any disclosure material. The Defence is to receive the first batch of Prosecution disclosure material by the end of today. Prior to the swearing in of Defence Counsel, there have been various filings and *ex parte* hearings on disclosure issues all of which are listed in the impugned Decision. None of those filings give any information regarding the Prosecution's motives for requesting redactions of disclosure material.

11. The Prosecution's *Application Pursuant to Rule 81(2) and Rule 81(4) to Statement of Witness 2* filed on 26 November 2007 and the Prosecution's *Amended Application Pursuant to Rule 81(2) and Rule 81(4) to Statements of Witnesses 1, 7, 9, 11, 13 and 14, and Interview Notes of Witnesses 9 and 12* filed on 27 November 2007 are most relevant to the impugned Decision. Both these Applications simply notified Pre-Trial Chamber I and the Defence that *ex parte* Applications were made. All the Prosecution's substantive arguments regarding redactions were elaborated in *ex parte* Annexes and during *ex parte* hearings. Thus, there was nothing Defence Counsel could have responded to. The Defence cannot respond in the abstract without having received the legal and, or factual arguments made in support of the Applications.

12. The very first time that the Defence was in an opportunity to even have a remote idea of the Prosecution's foundation underlying the Applications for redactions was on 7 December 2007 when the impugned Decision was issued. This Decision discusses the various categories of requested redactions and explains on what basis they were authorised or not.

13. It is remarkable that the Prosecution found it necessary to file the totality of both these Applications in *ex parte* format. Surely, there would have been a way to give a global idea of the reasons why the Prosecution is requesting redactions in order to give the Defence an adequate opportunity to respond. The Decision was issued publicly and discusses all those grounds without disclosing any details that could identify the persons concerned.

14. In cases before the International Criminal Tribunal for the former Yugoslavia (« ICTY ») and the International Criminal Court (« ICC »), it has been held, not only that exceptional circumstances must justify the use of *ex parte* hearings or filings,[2] but also that the party using *ex parte* hearings or filings must explain in some detail why unfair prejudice would be caused by revealing the contents of the application.[3] Most importantly, the basis for the application must be given in sufficient detail in order that the opposing party can make an informed decision as to whether to oppose the relief sought.[4] The Trial Chamber of the ICC has also upheld the important of utilising *ex parte* proceedings in a reserved and proportionate manner, which nonetheless respects the right of the defence to be heard where possible.[5] In the present situation, the Prosecution failed to do any of the above.

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[2] *Prosecutor v. Simic*, Decision on (1) Application by Todorovic to re-open the decision of July 27, 1999, (2) Motion by ICRC to re-open scheduling order of November 18, 1999, and (3) Conditions for access to material, 28 February, 2000, para. 40; See 13.10.2006 **-** Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"**,** ICC-01/04-01/06-568.

[3] *Prosecutor v. Brdjanin*, Decision on second motion by Prosecution for protective measures, 27 October 2000, para. 11; *Prosecutor v. Kordic and Cerkez*, Order to Prosecution to Refile its ex parte Filing in Response to Motion by Kordic for Disclosure in Relation to Witness "AT", 31 March 2003, para. 4.

[4] *Prosecutor v. Brdanin*, Decision on third motion by Prosecution for protective measures, 8 November 2000, paras 6-11; See 22.05.2006 **-** Decision on the Defence Motion concerning the Ex parte hearing of 2 may 2006, ICC-01/04-01/06-119 and19.05.2006 **-** Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute ICC-01/04-01/06-108 - ICC-01/04-01/06-108-Corr -

[5] *Prosecutor v. Thomas Lubuanga Dyilo,* Decision on the procedures to be adopted for ex parte proceedings, ICC-01/04-01/06-1058 6 December 2007.

15. Given that the nomination of Defence Counsel took excessively long and he was only recently sworn in and given that, until the Decision was issued, he had no information on which basis he could have made any reasoned argument, the Defence should not be prejudiced for not raising these issues before.

16. Most importantly, the Defence has never had an opportunity to be heard. The entirety of the impugned Decision was issued without hearing the Defence. The Defence cannot exercise its right to be heard if not provided with adequate information. The fact that the Decision is based on applications which were made in *ex parte* annexes and during *ex parte* hearings impacts on the right of the defence to be heard in relation to the legal basis of the application. It should be noted that Pre-Trial Chamber I has reversed Decisions where they were issued without the benefit of submissions from a concerned party or participant.[6] This is, therefore, an issue of appeal affecting both the fairness and the expeditiousness of the proceedings for which an immediate resolution of the Appeals Chamber may materially advance the proceedings.

Impact on Fairness

17. The scope of the right to be heard has been explored both before the *Ad Hoc* International Criminal Tribunals and the International Criminal Court. In a Decision of 31 March 2006, the DRC Pre-Trial Chamber held that the fairness of proceedings was predicated on *inter alia* the principle of adversarial proceedings.[7]

18. The Chamber cited with approval the decision of the European Court of Human Rights (« ECHR ») to the effect that the right to adversarial proceedings "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision".[8]

[6] See: Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", 12 September 2006, ICC-01/04-01/06-424 ; Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17 August 2007, ICC-01/04-374, which reversed the Chamber's earlier decision to grant the OTP and OPCD access to the Report of the Registry: Decision authorising the filing of observations on applications for participation in the proceedings, 17 July 2007 **,** ICC-01/04-358.

[7] Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2,VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 31 March 2006, ICC-01/04-135

[8] *Ibid*, Morel v. France (fn 52 page 13).

19. In this connection, the ICTY Appeals Chamber has held that "the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the Prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the Prosecution and from its argument on the applicable law."[9]

20. Thus, clearly, the denial of the right to be heard has an immediate impact on the fairness of the proceedings. The failure to provide relevant information to the Defence effectively deprived it of the right to be heard. The Honourable Single Judge further explicitly acknowledged in the Thomas Lubanga Dyilo case that the issue of the right of the defence to receive relevant information which may assist it to challenge Prosecution evidence, impacts on the fairness of the proceedings, and thus meets this criterion of article 82(1)(d) of the Statute.[10]

Impact on the Expeditiousness

[9] Prosecutor v. Jelisic Appeals judgement of 5 July 2001 at para 27: http://www.un.org/icty/jelisic/appeal/judgement/index.htm
See also the opinion of ad hoc Judge Barwick in the Nuclear Tests (Australia v. France), ICJ Reports 1974, p. 442 "It is of course for the Court to resolve al1 questions which come before it: the Court is not bound by the views of one of the parties. But is this a sufficient or any reason for not notifying the parties of an additional question which the Court proposes to consider and for not affording the parties an opportunity to put before the Court their views as to how the Court should decide the question, whether it be one of fact or one of law? The Court's procedure is built on the basis that the parties will be heard in connection with matters that are before it for decision and that the Court will follow what is commonly called the "adversary procedure" in its consideration of such matters. See, e.g., Articles 42, 43, 46, 48 and 54 of the Statute of the Court. The Rules of Court *passim* are redolent of that fact. Whilst it is true that it is for the Court to determine what the fact is and what the law is, there is to my mind, to say the least, a degree of judicial novelty in the proposition that, in deciding matters of fact, the Court can properly spurn the participation of the parties. Even as to matters of law, a claim to judicial omniscience which can derive no assistance from the submissions of learned counsel would be to my mind an unfamiliar, indeed, a quaint but unconvincing affectation."
[10] Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489, 28 September 2006, at page 12; and Decision on the Prosecution motion for reconsideration and, in the alternative, leave to appeal, 23 June 2006, ICC-01/04-01/06-166 at para. 32.

21. The denial of the right to be heard also impacts on the expeditiousness of the proceedings. Hearing both parties and providing them with the information necessary to adequately respond facilitates and thus also expedites the proceedings. In this context, the Honourable Single Judge in the Thomas Lubanga Dyilo case has held that an issue related to the regime under which the Defence "can get notice and participate as far as possible in the decision-making process" concerning Prosecution applications for protective measures, is "directly related to the expeditious conduct of the proceedings".[11]

An Immediate Resolution may materially advance the Proceedings

22. The issue at stake in relation to which the Defence was not heard is fundamental. It is incredibly important that the material disclosed to the Defence is the least redacted necessary. This is important to conduct efficient investigations and to prepare for the confirmation hearing. Moreover, this Decision will potentially set the parameters of authorised redactions in future filings. Thus, its scope is potentially wider than the pre-confirmation stage. Given the importance of the Decision, it is incredibly important to allow the Defence to be heard. A speedy rectification of the manner in which the impugned Decision was issued may materially advance the proceedings because it would advance the investigations and preparations for the confirmation hearing.

The scope of Rule 81(2) of the Rules

23. It is respectfully submitted that the Trial Chamber wrongfully widened the scope of Rule 81(2) of the Rules in holding that it also covers identifying materials of potential witnesses. The Rules are very clear. Rule 81(4) allows redactions to affect the safety of witnesses, victims or members of their families. This Rule does not cover potential witnesses, only real witnesses. The Defence fails to comprehend how Rule 81(4) can be extended by use of Rule 81(2) without re-interpretating the meaning given to those Rules by the drafters. The Decision does not properly explain how protection of potential witnesses fits in the definition under Rule 81(2) of prejudicing further or ongoing investigations by the Prosecution.

Impact on Fairness

[11] Decision of 23 June 2006 at para 56.

24. The Defence submits that an overly broad interpretation of Rule 81(2) significantly impacts on the fairness of the proceedings because it allows for redactions to become the rule rather than the exception.

25. The interpretation of Rule 81(2) should however be in line with the conditions set for authorised redactions. Protective measures will only be granted on an exceptional basis, after exhausting the possibility of employing less extreme measures (principle of necessity), must be strictly limited to the exigencies of the situation (principle of proportionality), and must not infringe the right of the defence to a fair and impartial trial. In view of the latter element, protective measures cannot be employed against the Defence at the trial stage. In the event that a protective measure (temporarily) infringes the rights of the defence, the Chamber is obliged to implement appropriate counterbalancing measures.[12]

26. In the ICTY case of *Brdjanin and Talic*, it was held that fear for retaliation as a consequence of willingness expressed by witnesses to testify against the Accused is not a sufficient ground to allow redactions where the witnesses did not testify and after the Prosecution had indicated that they would not be called and that any use of their statement was without their authority.[13] It may be concluded from this Decision that the exceptional measures of non-disclosure do not extend to potential witnesses. The term potential witnesses is too vague. If they will be called as witnesses, their status will change and, if their case meets the criteria of Rule 81(4), would enjoy protection. However, at present, that is a mere hypothetical situation which should not justify the infringement of the right of the Defence to have full disclosure in accordance with the Rules.

27. A distinction should be made between disclosure to the Defence and to the public at large. It is submitted that the Decision does not clarify how disclosure to the Defence, as opposed to the general public, of the identities of persons who are merely potential witnesses, could create any risk at all for these persons.

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[12] Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, ICC-01/04-01/06-108, ICC-01/04-01/06-108-Corr – Original 19.05.2006;
Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006.

[13] Second decision, para. 31.

28. Widening the scope of Rule 81(2) of the Rules so as to include all identifying materials of potential witnesses has far-reaching consequences. Such interpretation could potentially cover any person who has ever spoken to the Prosecution in the context of the case against Mr. Katanga. There would hardly be any material left that would be disclosed to the Defence. Such great leeway for the Prosecution to redact identifying materials is in clear violation of the exceptional nature of the measure sought. It would also seriously hamper the Defence's ability to conduct meaningful investigations. Failing to know the identity even of those who may never appear as witnesses against Mr. Katanga makes the work of an investigator, who seeks information from all sources to rebut the Prosecution allegations, incredibly difficult.

29. For the grounds stipulated, such wide interpretation to Rule 81(2) clearly impacts on the fairness of the proceedings. Given the potentially wide scope of the Decision, not only is the fairness of these proceedings at stake, but also the fairness of future proceedings.

30. The Defence further notes that in the Thomas Lubanga Dyilo case, the Honourable Single Judge expressly recognised that "redaction of the names of Prosecution sources could affect the ability of the Defence to fully challenge the Prosecution evidence at the confirmation hearing, and in particular may affect the Defence ability to raise issues concerning the authenticity of the Prosecution evidence; and that therefore [that this] Issue is directly related to the fairness of the proceedings; [and that this] Issue is also directly related to the expeditious conduct of the proceedings in view of the number of Prosecution sources for which redactions have been authorised in the Decision; CONSIDERING therefore that the Fourth Issue is an issue which would significantly affect the fair and expeditious conduct of the proceedings in the case of The Prosecutor vs. Thomas Lubanga Dyilo."[14]

Impact on the Expeditiousness

31. The Defence respectfully submits that lesser rather than more redactions would assist the Defence in its preparation for the confirmation hearing. The sooner efficient investigations can be conducted, the better for the expeditiousness of the proceedings.

[14] Decision on Third Defence Motion for Leave to Appeal**,** ICC-01/04-01/06-514, 4 October 2006, at pages 12-13.

The more materials are being disclosed to the Defence the easier it is to conduct investigations and prepare for the confirmation hearing.

32. An adequate preparation for the confirmation hearing is necessary to challenge prosecution evidence in order to ensure that the time and resources of the international community are not wasted on unsubstantiated charges. This will assist the Prosecution to focus the Prosecution case on what is really relevant rather than on unfounded claims. A clear focus will undoubtedly expedite the proceedings.

An Immediate Resolution may materially advance the Proceedings

33. The importance of this Decision and its potentially wide scope has already been noted. The legal principles set out in the Decision will most likely provide a guideline for future applications. It will not only affect future filings in the case against Mr. Katanga but also filings in other trials. The ICC is still very much in the process of developing a body of jurisprudence to be used in future filings and by jurists in international criminal law. Real principles on disclosure and exceptions thereof are yet to be defined. It is therefore of great importance for « jurisprudence-building » that the Rules are correctly interpreted.

34. The Honourable Single Judge has previously held that in light of the fact that several applications for protective measures were pending, an immediate decision by the Appeals Chamber in relation to the procedure and criteria for protective measures would materially advance the proceedings.[15] The International Criminal Tribunal for Rwanda (« ICTR ») has also held that the enumeration of a legal principle, which is likely to be applied through the proceedings, constitutes an issue the resolution of which would materially advance the proceedings.[16]

35. Thus, an immediate resolution of the Appeals Chamber regarding the issue would clearly materially advance the proceedings.

Conclusion

[15]Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13.
[16] Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, Prosecutor v. Nzirorera, 9 October 2007.

36. On these grounds, the Defence prays the Single Judge of Pre-Trial Chamber I to grant leave to appeal the *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court.

Mr David Hooper, Defence Counsel

The 13th day of December 2007

At Arusha, Tanzania