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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Defence Motion for Leave to Appeal the Fourth Decision on the Prosecution
Request for Authorisation to Redact Documents related to Witnesses 166 and 233**

Source: Defence for Mr Germain Katanga

Mr David Hooper

Ms Caroline Buisman

Mr Göran Sluiter

Ms Sophie Menegon

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo

Counsel for the Defence
Mr Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims
[1 name per team maximum]

Legal Representatives of Applicants
[1 name per team maximum]

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
[2 names maximum]

**The Office of Public Counsel for the
Defence**
[2 names maximum]

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Introduction

1. The Defence for Mr. Germain Katanga (“Defence”) requests leave to appeal the Single Judge’s *Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233* (“impugned Decision”).¹ The Defence submits that this Decision contains an error warranting the Appeals Chamber’s consideration: the Single Judge incorrectly interpreted Rule 81(2) of the Rules of Procedure and Evidence (“Rules”) by allowing redactions of the names of “organisations [that] have been approached by the Prosecution for the specific purpose of obtaining information in relation to the ongoing investigations in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* or in relation to future Prosecution investigations”.²

Procedural background

2. On 3 April 2008, the Single Judge of Pre-Trial Chamber I rendered the impugned Decision. The Decision partially granted the Prosecution’s requests for authorisation to redact the investigators’ notes, statements and documents relating to Witnesses 166 and 233. In particular, the Single Judge held that “the Prosecution’s further or ongoing investigations could be prejudiced if the representatives of such organisations were to be threatened, intimidated or interfered with”.³

Threshold Criteria for Leave to Appeal

3. The Defence files this *Defence Motion for Leave to Appeal the Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233* (“Defence Motion”) pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
4. Pre-Trial Chambers I and II have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets 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

¹ ICC-01/04-01/07-360-Conf.

² ICC-01/04-01/07-360-Conf, para. 27.

³ ICC-01/04-01/07-360-Conf, para. 27.

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.⁴

Issue of Appeal

5. It is respectfully submitted that the Single Judge of Pre-trial Chamber I wrongfully widened the scope of Rule 81(2) of the Rules⁵ in holding that it also covers the names of organisations approached by the Prosecution for the specific purpose of obtaining information in relation to the ongoing investigations in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* or in relation to future Prosecution investigations.
6. The Defence is left in the dark as to which organisations are covered by the impugned Decision. The Defence cannot believe that representatives of any organisation approached by the Prosecution for the purpose of obtaining information in relation to Mr. Katanga or Mr. Ngudjolo need protection against threats, intimidation or interference. The term 'organisations' is sufficiently broad to cover, for example, the United Nations. Whilst the Defence may accept that some representatives of some organisations in some circumstances may have a legitimate need for protection, it would raise doubt as to the need to protect representatives of the United Nations. In allowing redactions of the names of organisations on the mere ground that they were approached by the Prosecution in its ongoing investigations against Mr. Katanga and Mr. Ngudjolo, the impugned Decision creates a form of privilege for the Prosecution sources in question which is not provided for in either the Statute or Rules.
7. The Defence fails to see the general need to protect such organisations and redact their names and reiterates that the onus is on the Prosecutor to demonstrate such need. The Prosecutor must seek and maintain cooperation with any organisation in a manner

⁴ *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, ICC-01/04-01/07-108 14-12-2007 3/7 EO PT, Public Document; *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, ICC-01/04-01/07-116 19-12-2007 4/7 SL PT, Public Document.

⁵ According to Rule 81 (2) of the Rules :

Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

consistent with its obligations under the Statute, including its disclosure obligations to the Defence.

8. The Defence further contends that the broad interpretation given to Rule 81(2) is not 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.⁶ A distinction should be made between disclosure to the Defence and to the public at large. Less extreme measures, such as withholding the names of the organisations from the public, are available. Withholding the names of the organisations from the Defence is, therefore, not necessary nor proportional, and infringes the right of the defendant to a fair and impartial trial.
9. The proposed redactions of the names of organisations prejudice the Defence. If the redactions form part of the content of the document, then such redactions would prevent the Defence from verifying the source of a particular assertion or conclusion. If the redactions pertain to the name of an organisation who has transmitted a document to the Prosecution or referred a witness or victim to Prosecution investigators, then their identity is crucial to the ability of the Defence to analyse and challenge the eventual links between the organisation and the Prosecution or the witness or victim, a possible collusion, the existence of prior statements, etc. Thus the Defence need to know the name of such organisations in order to be able to assess their neutrality and impartiality.
10. The Defence wishes to underline that in the *Lubanga* case, in its *Decision on Third Defence Motion for Leave to Appeal*, the Single Judge of Pre-trial Chamber I granted the Lubanga Defence Team's request for leave to appeal the following issue, similar to our present ground of appeal:

whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules and, in particular, under which conditions restrictions to the disclosure of Prosecution sources are permissible pursuant to rule 81 of the Rules⁷ [called the "Fourth Issue"]

11. The Defence submits that the Single Judge's interpretation of Rule 81(2) in the impugned Decision was erroneous, significantly affecting the fair trial and

⁶ 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.

⁷ ICC-01/04-01/06-514, dated 4 October 2006, page 14.

expeditious conduct of the proceedings for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Impact on Fairness

12. The Defence submits that an overly broad interpretation of Rule 81(2) significantly impacts on the fairness of the proceedings against Mr Katanga because it allows for redactions to become the rule rather than the exception. Redactions can only be authorised exceptionally because, as the Single Judge has acknowledged,⁸ such redactions may prejudice the Defence in its investigations and preparation of an adequate defence case.
13. Widening the scope of Rule 81(2) of the Rules so as to include all names of the organisations approached by the Prosecution in order to obtain information in relation to the ongoing investigations in the present case or in relation to future Prosecution investigations has far-reaching consequences. Such interpretation could potentially cover any organisation that has ever been in contact with the Prosecution in the context of the case against Mr. Katanga. 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, for instance in order to assess the impartiality of these organisations.
14. The Defence underlines that in the *Decision on Third Defence Motion for Leave to Appeal*, where the Lubanga Defence Team had raised an issue similar to our current ground of appeal,⁹ the Single Judge of Pre-trial Chamber I conceded that :

the 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 the Fourth Issue is directly related to the fairness of the proceedings;

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.¹⁰
15. For the grounds stipulated, such wide interpretation to Rule 81(2) clearly impacts on the fairness of the proceedings.

⁸ Decision on the Defence Motion for Leave to Appeal the First Decision on Redaction, issued on 19 December 2007, ICC-01/04-01/07-116 19-12-2007 2/7 SL PT, page 6.

⁹ See above, para. 11.

¹⁰ ICC-01/04-01/06-514, dated 4 October 2006, page 12.

Impact on the Expeditiousness

16. This issue is also directly related to the expeditious conduct of the proceedings given that the Prosecution may request authorisation to redact the names of those organisations in other documents it intends to disclose. To clarify the scope of Rule 81(2) in relation to these organisations would favour the expeditious conduct of the proceedings and avoid any further Defence submissions in relation to this issue.
17. Moreover, the Defence respectfully submits that the more materials are being disclosed to the Defence in unredacted format the easier it is to conduct investigations and prepare for confirmation and trial. Conducting full investigations in order to be adequately prepared for confirmation and trial to put on a vigorous and well-prepared defence undoubtedly expedites the proceedings.
18. Furthermore, the Defence underlines that in its *Decision on Third Defence Motion for Leave to Appeal* in the case of Lubanga, the Single Judge of Pre-trial Chamber I considered that the issue of whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules :

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.¹¹

An Immediate Resolution may materially advance the Proceedings

19. The interpretation of Rule 81(2) regarding the organisations which have been approached by the Prosecution, as set out in the impugned Decision, will most likely provide a guideline for future applications. It will not only affect future filings in the case of Mr. Katanga but also filings in other trials. It is of great importance for “institution-building” of the ICC, being still in the process of developing a body of jurisprudence, that the Rules are correctly interpreted. Therefore, an immediate resolution of the Appeals Chamber on this yet to be determined issue would be warranted.
20. 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

¹¹ ICC-01/04-01/06-514, dated 4 October 2006, page 12.

Appeals Chamber in relation to the procedure and criteria for protective measures would materially advance the proceedings.¹² 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.¹³

21. Moreover, in its *Decision on Third Defence Motion for Leave to Appeal* in the case of Lubanga, the Single Judge of Pre-trial Chamber I held:

CONSIDERING that given the potential implications of the Third Issue and the Fourth Issue, their immediate resolution by the Appeals Chamber may materially advance the proceedings in the case of The Prosecutor vs. Thomas Lubanga Dyilo;¹⁴

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

Conclusion

23. On these grounds, the Defence prays the Single Judge of Pre-Trial Chamber I to grant leave to appeal the *Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233* 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.



David HOOPER

Dated this 9th April 2008

At The Hague, The Netherlands

¹² Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13.

¹³ 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.

¹⁴ ICC-01/04-01/06-514, dated 4 October 2006, page 13.