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**THE APPEALS CHAMBER**

**Before:** Judge Erkki Kourula, Presiding Judge  
Judge Philippe Kirsch  
Judge Georgios M. Pikis  
Judge Navi Pillay  
Judge Sang-Hyun Song

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

**Public Document**

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

**Source: Defence Team of Mathieu Ngudjolo**

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## 1. PROCEDURAL HISTORY

1. On 6 July 2007, Pre-Trial Chamber I of the International Criminal Court issued a warrant of arrest for Mr Mathieu Ngudjolo.<sup>1</sup>
2. On 7 February 2008, Pre-Trial Chamber I rendered a decision to unseal the warrant of arrest issued against Mr Mathieu Ngudjolo.<sup>2</sup>
3. On that same day, the Pre-Trial Chamber scheduled Mr Mathieu Ngudjolo's first appearance for 11 February 2008.<sup>3</sup>
4. On 12 February 2008, the Defence of Mr Mathieu Ngudjolo filed a *Requête en vue d'obtenir la prorogation des délais permettant à la Défense de déposer l'ensemble du dossier pouvant justifier l'exception d'irrecevabilité de la procédure*, in accordance with its submission at the pre-trial hearing of 11 February 2008.<sup>4</sup>
5. On 18 February 2008, the Defence of Mr Mathieu Ngudjolo submitted to Pre-Trial Chamber I its observations on the joinder of the cases against Mathieu Ngudjolo and GERMAIN Katanga pursuant to the oral request of Pre-Trial Chamber I at the hearing of 12 February 2008.<sup>5</sup>

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

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

<sup>3</sup> *Decision Scheduling the First Appearance of Mathieu Ngudjolo Chui and Authorising Photographs at the Hearing of 11 February 2008*, Pre-Trial Chamber I, 7 February 2008, ICC-01/04-02/07-20.

<sup>4</sup> *'Requête en vue d'obtenir la prorogation des délais permettant à la Défense de déposer l'ensemble du dossier pouvant justifier l'exception d'irrecevabilité de la procédure*, Pre-Trial Chamber I, 12 February 2008, ICC-01/04-02/07-20.

<sup>5</sup> *Observations de la Défense concernant la question de la jonction de procédures entre l'affaire Mathieu Ngudjolo et l'affaire Germain Katanga, en application de la requête orale présentée par la Chambre Préliminaire I lors de l'audience du 12 février 2008*, Pre-Trial Chamber I, 18 February 2008, ICC-01/04-02/07-29.

6. On 25 February 2008, the appointment of Mr Jean-Pierre Kilenda Kakengi Basila as Permanent Counsel was registered.<sup>6</sup>
7. On 10 March 2008, the Pre-Trial Chamber decided to join the cases of Katanga and Ngudjolo on the ground of their alleged joint criminal participation in the acts described in their respective warrants of arrest.<sup>7</sup>
8. On that same day, the Pre-Trial Chamber rendered a decision establishing a calendar in the new joint case. The Defence of Mr Mathieu Ngudjolo had until 28 March 2008 to submit any applications for reconsideration or leave to appeal the decisions rendered in the case of *The Prosecutor v. Germain Katanga*.<sup>8</sup>
9. On 26 March 2008, the Defence of Mr Mathieu Ngudjolo applied for leave to appeal against the decision rendered by the Single Judge on 23 January 2008 on the Prosecutor's request for authorisation to redact statements of Witnesses 4 and 9.<sup>9</sup>
10. On 31 March 2008, the Prosecution stated in reply to the Defence application for leave to appeal that, while it did not support all the arguments advanced, it did not oppose the application for leave to appeal.<sup>10</sup>

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<sup>6</sup> *Enregistrement de la désignation de maître Jean Pierre Kilenda Kakengi Basila par M. Mathieu Ngudjolo Chui comme conseil et de la déclaration d'acceptation du mandat par le conseil*, Pre-Trial Chamber I, 25 February 2008, ICC-01/04-02/07-42.

<sup>7</sup> *Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-257.

<sup>8</sup> *Decision Establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-259.

<sup>9</sup> *Demande d'autorisation d'interjeter appel de la décision relative à la requête de l'accusation sollicitant l'autorisation d'expurger les déclarations des témoins 4 et 9*, Pre-Trial Chamber I, 26 March 2008, ICC-01/04-01/07-340, para. 17. See also the *Decision on the Prosecution Request for authorisation to Redact Statements of witnesses 4 and 9*, Pre-Trial Chamber, 23 January 2008, ICC-01/04-01/07-160, para. 14.

<sup>10</sup> "Prosecution's Response to Ngudjolo's Application for Leave to Appeal the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9", ICC-01/04-01/07-346.

11. In a decision of 4 April 2008, the Single Judge granted the Defence of Mr Mathieu Ngudjolo leave to appeal against her decision of 23 January 2008.<sup>11</sup>

12. The Defence sets out herein the arguments on which it seeks to rely in order to challenge the redactions authorised in respect of the statements of Witnesses 4 and 9 and of the notes taken during their interviews.

## **II. AS TO THE LAW: SINGLE GROUND BASED ON THE VIOLATION OF RULE 81(4) OF THE RULES OF PROCEDURE AND EVIDENCE (RPE)**

**A. The alleged victims of sexual acts are extraneous to the acts imputed to Mr Mathieu Ngudjolo and accordingly cannot fall within the purview of rule 81(4) of the RPE.**

13. In her decision of 23 January 2008, the Single Judge, citing the precedent of the Lubanga case, stated that she would only authorise redactions in the few instances where she had found compelling reasons to depart from the practice established in case ICC-01/04/01-06. Such redactions would be authorised after ensuring that the requirements set out by the Appeals Chamber in its two decisions of 14 December 2006 had been met.<sup>12</sup> For the purposes of her analysis, the Single Judge grouped the requested redactions under seven heads.<sup>13</sup>

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<sup>11</sup> *Decision on the Defence Application for Leave to Appeal the "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9"*, Pre-Trial Chamber I, 4 April 2008, ICC-01/04-01/07-365

<sup>12</sup> *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, 23 January 2008, ICC-01/04-01/07-160, para. 6.

<sup>13</sup> "(a) names and identifying information of Victims; (b) current whereabouts of Victims; (c) names and identifying information of family members of prosecution witnesses; (d) current whereabouts of family members of Prosecution witnesses; (e) potential Prosecution witnesses; (f) innocent third parties; and (g) further and ongoing investigations pursuant to rule 81(2) of the Rules". cf *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, 23 January 2008, ICC-01/04-01/07-160, para. 7.

14. The Defence recalls that rule 85(a) of the RPE provides that “[v]ictims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. Pursuant to this rule, four criteria must be fulfilled in order for an alleged victim to participate in proceedings before the Court:

- the victim must be a natural person;
- the victim must have suffered harm;
- the crime or the harm must be within the jurisdiction of the Court;
- there must be a causal link between the crime and the harm.<sup>14</sup>

15. In her decision of 23 January 2008, the Single Judge stated in this respect that “the procedural status of victim in case proceedings held before the Pre-Trial Chamber can be granted only to those for whom there are reasonable grounds to believe that they have suffered physical or moral harm as a result of a crime within jurisdiction of the Court expressly included in the warrant of arrest or summons to appear – and, subsequently, in the charging document.”<sup>15</sup> The Defence would emphasise that, since the alleged victims are extraneous to the acts imputed to Mr Ngudjolo, verification of the criteria laid down in rule 85 of RPE is impossible.

16. In her decision, the Single Judge adopts a broad, systemic, teleological interpretation of article 81(4) of the RPE. Thus, while acknowledging that the alleged victims of sexual crimes not connected with the charges or facts of the case pertaining to Mr Mathieu Ngudjolo cannot in principle be considered to

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<sup>14</sup> The Defence is relying on the Court’s jurisprudence on this point. See, in particular, *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo*, pp. 6-8, 29 June 2006, ICC-01/04-01/06-172-tEN; *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo*, pp. 8-9, 28 July 2006, ICC-01/04-01/06-228; *The Prosecutor v. Thomas Lubanga Dyilo, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo*, p. 9, 20 October 2006, ICC-01/04-01/06-601-tEN.

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

be victims within the meaning of rule 81(4) of the RPE,<sup>16</sup> the Single Judge does ultimately take account of them. She accordingly authorised the redaction of the identities and other identifying information in respect of those persons pursuant to rule 81(4) of RPE.

17. Mr Mathieu Ngudjolo's Defence maintains, as it did in its application for leave to appeal, that "[TRANSLATION] [n]othing justifies such an interpretation, even on an exceptional basis, whether in light of the statutory framework of the Court or of the fundamental legal principles of criminal proceedings, such as the principles of exception, proportionality, necessity, legality and respect for the rights of the accused."<sup>17</sup> It should further be recalled that, in the view of the Defence, "[TRANSLATION] the Single Judge relies on the provisions of the Statute governing the protection of alleged victims of sexual offences in order to avoid applying rule 81(4) of the RPE and to establish an exception to the principle laid down therein."<sup>18</sup> To extrapolate in this way is thus to contradict the letter and spirit of the Court's statutory framework, as well as the jurisprudence of the Chambers on redactions.<sup>19</sup>

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<sup>16</sup> *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, Pre-Trial Chamber I, 23 January 2008, ICC-01/04-01/07-160, para. 15.

<sup>17</sup> *Demande d'autorisation d'interjeter appel de la décision relative à la requête de l'accusation sollicitant l'autorisation d'expurger les déclarations des témoins 4 et 9*, Pre-Trial Chamber I, 26 March 2008, ICC-01/04-01/07-340, para. 17.

<sup>18</sup> *Demande d'autorisation d'interjeter appel de la décision relative à la requête de l'accusation sollicitant l'autorisation d'expurger les déclarations des témoins 4 et 9*, Pre-Trial Chamber I, 26 March 2008, ICC-01/04-01/07-340, para. 20.

<sup>19</sup> See the jurisprudence cited by the Defence in *Demande d'autorisation d'interjeter appel de la décision relative à la requête de l'accusation sollicitant l'autorisation d'expurger les déclarations des témoins 4 et 9* of 26 March 2008, paras. 22 *et seq.*, ICC-01/04-01/07-340. See also the decision in *The Prosecutor v. Bagosora, Decision on Interlocutory Appeals on Decision on Witness Protection Orders*, 6 October 2005, case ICTR-96-7, paras. 17-18: " (17) The Appeals Chamber notes that following general principles of interpretation, the first step in the proper interpretation of a protective measure must always be an examination of its provisions. The terms used are construed according to their plain and ordinary meaning in their context and in the light of the instrument's object and purpose; (18) The Trial Chamber considered the text of the witness protection orders at issue and determined that it prohibits "disclosure of information that would, directly or indirectly, reveal that the person is a witness" but that it does not "prevent use of the witness's name [by the Prosecution] to make reasonable inquiries". The Appeals Chamber agrees and finds that the Trial Chamber's interpretation of Clause 7 is consistent with the text and the principles for adopting witness protection measures."

18. The *ratio legis* of rule 81(4) of the RPE is to protect certain categories of persons because of their particular vulnerability, including alleged victims of sexual crimes. There can be no doubt that this rule must be read in conjunction with article 68 of the Statute. It follows that the judge's power to order measures for the non-disclosure of certain information relates to the matter of witness protection. Thus, as emphasised by Rafaëlle Maison in a comparative study of legislative texts applicable to the *ad hoc* international criminal tribunals: "[TRANSLATION:] Under article 69 of the RPE of the International Criminal Tribunals, before the start of the trial, in exceptional circumstances, the Prosecutor may apply to the Trial Chamber to order the non-disclosure of the identity of a victim or witness 'who may be in danger or at risk'. Such a non-disclosure order is effective until the witness is brought under the protection of the Tribunal. It seems that article 68 of the ICC Statute is intended to fulfil a similar purpose, the Prosecutor having the power, *proprio motu*, to withhold a certain amount of information on the witness prior to trial."<sup>20</sup> R.S. Lee states: "Rule 81 draws together various grounds for restricting disclosure, many of which derive from articles scattered throughout the Statute. The rule, based on ICTY and ICTR precedents, gave rise to relatively little debate. It will apply to disclosure whenever it occurs – prior to confirmation or prior to the trial."<sup>21</sup> In the same vein, Sylvia Pieslak explains that "[t]he first draft, of what later became rule 81 in the final draft of the ICC Rules, stipulated that the court would 'in accordance with Article 68, ... protect the safety of witnesses and victims and member of their families, by authorizing the non-disclosure of their identity'".<sup>22</sup> From these analyses, it is clear that the witnesses and victims to be protected, and hence those persons whose identities may need to be concealed, are those persons who are to come and testify and not,

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<sup>20</sup> R. MAISON, 'La place de la victime', in *Droit International Pénal*, H. ASCENCIO, E. DECAUX, and A. PELLET, Ed. A. Pedone, Paris, 2000, pp. 779-780.

<sup>21</sup> R. S. LEE (Ed. by), *The International Criminal Court: elements of crimes and rules of procedure and evidence*, Transnational Publishers, 2001, p.418.

<sup>22</sup> S. PIESLAK, 'Comment: The International Criminal Court's Quest to Protect Rape Victims of Armed Conflict: Anonymity as The Solution', *Santa Clara J. Int'l L.*, 2003, Vol. 2, p.164.



therefore, alleged victims who are extraneous to the acts imputed to Mr Mathieu Ngudjolo. Accordingly, the teleological approach taken by the Single Judge to 81(4) and 85 of the RPE is unacceptable, being contrary to certain provisions of the Statute and the RPE, in particular the measures for the protection of witnesses and victims – for example, Article 43(6) of the Statute, or indeed rule 87(1) of the RPE.

19. Finally, it must be observed that, in the Lubanga case, the Prosecution itself stated that, in order to be recognised as a victim within the meaning of rule 85 of the RPE, it was necessary for the person concerned to have been a victim of an act contained in the charges. It follows that the Pre-Trial Chamber's jurisdiction *ratione personae* with respect to redactions is necessarily limited. Thus the Prosecution stated: "[...] the Decision potentially expands the scope of Chamber's intervention beyond the facts and circumstances of the case, as included in the charges. The Prosecution submits that, like any other matter to be ruled on by a Chamber, victims' participation must be determined through the lens of the competency afforded to the decision maker. This applies in particular to the relevant personal interest, which must be linked to the subject matter of the instant proceedings in which victims seek to participate. The parameters set out in the charges set the limits to the Chamber's authority, to the issues that can be discussed during trial and to the actors that may intervene in the specific proceedings".<sup>23</sup> On the subject of determination of victim status, the Prosecution added: "The Prosecution does not challenge the Trial Chamber's finding that Rule 85 per se does not limit the definition of victims to persons who suffered harm as a result of the crimes contained in the specific charges. However, the Prosecution contends that, during the trial phase, the proper application of the provisions of the Statute and the Rules, including Rule 85, the scope of the proceedings, and the authority of the

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<sup>23</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, "Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation", Appeals Chamber, 10 March 2008, ICC-01/04-01/06-1219, para. 15.

Chamber, are defined and limited by the specific charges against an individual. The Trial Chamber is not vested with the authority or the competence to make any assessment, including those regarding victim participation, which steps outside the strict boundaries of the charges against an individual. Any such determination would be made in a legal and factual vacuum. As stated by Judge Blattmann in his dissenting opinion, "the Majority envisages that victims must have interests which are affected by the issue or evidence arising in the case, but does not believe that victims' participation should be encased by the charges confirmed by the Pre-Trial Chamber."<sup>24</sup> With respect to the causal link which must exist between a victim and a given crime contained in the warrant of arrest or in the charges against a suspect, the Prosecutor further stated: "The Prosecution also notes that Pre-Trial Chamber I has consistently ruled that for the purposes of victim participation during the prosecution of a case, it is required proof of a causal link between the victim applicant and a crime included in an arrest warrant or the charges. This approach was also followed by Pre-Trial Chamber II. There is no reason for the Trial Chamber to depart from this jurisprudence, much less in light of its self-imposed standard pertaining to the status of decisions of the Pre-Trial Chamber in trial proceedings".<sup>25</sup> It therefore follows that the persons referred to in the documents pertaining to Witnesses 4 and 9 cannot in any event be regarded as alleged victims of the acts which Mr Mathieu Ngudjolo is suspected of having committed. The Court accordingly cannot find that there is a legal basis for the redactions.

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<sup>24</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, "Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation", Appeals Chamber, 10 March 2008, ICC-01/04-01/06-1219, para. 16.

<sup>25</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, "Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation", Appeals Chamber, 10 March 2008, ICC-01/04-01/06-1219, para. 17.

**B. The redactions at issue do not meet the criterion of necessity required by rule 81(4) of the RPE**

20. The Defence disputes the need for the measures taken in relation to redactions in respect of those alleged victims of sexual abuse who are extraneous to the proceedings against Mr Mathieu Ngudjolo. Since the alleged victims are not witnesses on whom the Prosecution intends to rely in order to confirm the charges against Mr Mathieu Ngudjolo, they will not in principle have to confront him in future proceedings before the Court, nor will their credibility be challenged by the Defence. Accordingly, the redactions pertaining to them are unnecessary and have no legal basis.

21. It is thus apparent that the Single Judge wrongly sought to diminish the rights of the Defence by effectively balancing them against those of the Prosecution. However, to adopt such an approach at this stage of the proceedings is to suggest not only that Mr Mathieu Ngudjolo is guilty of the crimes imputed to him (*quod non*), but also that he is guilty of crimes not included in the charges – a form of speculation which violates the principle of the presumption of innocence as enshrined in article 66 of the *Rome Statute*.

22. Furthermore, with respect to innocent third parties, the Defence endorses the submissions put forward by Mr Germain Katanga's Defence as set out in his response to the Prosecution appeal on this issue, and relies on the findings of the Single Judge, who, in her first decision on the redactions, stated: "the literal interpretation of rule 81 (4) of the Rules empowers the competent Chamber to authorise only two types of redactions. The first part of rule 81(4) of the Rules is limited to redactions which aim to 'ensure the confidentiality of information, in accordance with articles 54, 72 and 93 of the Statute. The second part of rule 81 (4) of the Rules refers to redactions 'in accordance with

article 68, to protect the safety of witnesses and victims and members of their families'.<sup>26</sup>

23. Under rule 81(4) of the RPE, the redaction of identifying information must be confined to persons whose security is at risk as a result of their testimony or their victim status. In this respect, the Defence refers to the ICTY decision in *Oric*, where Trial Chamber II clearly recalled that: "for any protective measures to be granted, the applicant must show that, should it become publicly known that he testified, there is a real risk to his security or that of his family, thus, the Trial Chamber must be satisfied that the fear expressed has an objective foundation".<sup>27</sup>

24. Accordingly, to authorise such redactions is inconsistent with rule 81(4) and with the rights of the Defence. The Defence relies, further, on the recent decision of ICTY Trial Chamber III in *Stanisic*<sup>28</sup>. The Defence concludes from that decision that the fact that a person is a victim in another case does not justify a refusal to disclose details enabling that person to be identified.

### **C. The impugned redactions are inconsistent with Mr Mathieu Ngudjolo's right to a fair trial.**

25. The alleged victims cited in the statements and notes relating to witnesses 4 and 9 could fall to be regarded, depending on the circumstances, either as

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<sup>26</sup> *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements*, Pre-Trial Chamber I, 7 December 2007, ICC-01/04-01/07-90, para.53.

<sup>27</sup> *Prosecutor v. Oric*, Decision on Urgent Defence Request for Certification for Appeal of the Trial Chamber's Confidential Decision on Second Defence Motion for Protective Measures for Witness D002, Trial Chamber, 28 September 2005, case IT-03-68, See <http://www.un.org/icty/oric/trialc/decision-e/050928.htm#1>. See also *Prosecutor v. Bagosora*, Decision on Interlocutory Appeals on Decision on Witness Protection Orders, 6 October 2005, case ICTR-96-7, para. 45-46; *Prosecutor v. Milosevic*, Decision on Trial Related Protective Measures for Witnesses, 30 July 2002, case IT-02-54-T, para. 11, see <http://www.un.org/icty/milosevic/trialc/decision-e/020730-2.pdf>: "[...] for the protective measures sought to be granted the applicant must show that, should it become publicly known that he testified, there is a real risk to his security or that of his family. Furthermore, something more than a general expression of fear by the witness for his safety must be shown. Some specific reason must be established and the Trial Chamber must be satisfied that the fear expressed has an objective foundation."

<sup>28</sup> *Prosecutor v. Stanisic and Simatovic*, 'Decision Reconsidering the Conditions for the Defence Access to Confidential Testimony and Documents from the Milosevic case', Trial Chamber, 4 February 2008, case IT-03-69, see <http://www.un.org/icty/simatovic/trialc/decision-e/080204.pdf>.

innocent third parties or as potential defence witnesses. Thus, in her decision granting leave to appeal, the Single Judge considers that, “as a result of the interpretation of the Single Judge of rule 81 (4) of the Rules, the Defence will not have access to the names of the relevant victims of sexual offences; that the Defence may have an interest in contacting such individuals for the purpose of preparing for the confirmation hearing, and that the redaction of their identities and identifying information would prevent the Defence from doing so [...] therefore that the issue raised by the Defence for Mathieu Ngudjolo Chui would significantly affect the fair conduct of the proceedings.”<sup>29</sup> Mr Mathieu Ngudjolo’s Defence accordingly submits that information on persons extraneous to the acts imputed to him is governed by article 67(2) of the Statute and rule 77 of the RPE.

26. Furthermore, pursuant to article 67(1)(e), the Defence has the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under the Statute. Hence, in order not to infringe the right to a fair trial, alleged victims extraneous to the acts imputed to Mr Mathieu Ngudjolo must remain identifiable, so that the Defence can obtain the information needed to cross-check temporal, material and geographical details, including possible exculpatory statements. This is a legitimate aim, and also correct in law. In this regard, the Defence recalls that the Trial Chamber in the Milosevic case stated in a decision rendered on 30 July 2002 that “the determination of protective measures requires the Chamber to consider several interests. On the one hand, the right of the accused to a fair and public trial, and to cross-examine witnesses against him; and, on the other hand, the right of victims to

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<sup>29</sup> “Decision on the Defense Application for Leave to Appeal the ‘Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9’” Pre-Trial Chamber I, 4 April 2008, ICC-01/04-01/07-365, p. 7.

protection and privacy. The hierarchy between these interests is clearly reflected in Article 20 of the Statute, which provides expressly that the rights of the accused take precedence over the protection of victims, as they are to be given “full respect”, while the protection of the victims is to be given “due regard”. This priority is further confirmed by the wording of Rule 75 (A) of the Rules, which allows the Chamber to order protective measures, “provided that [they] are consistent with the rights of the accused.”<sup>30</sup> Article 68(1) of the Statute states that protective measures for victims and witnesses shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In the present case, neither the Prosecution nor the impugned decision have shown why the protection of witnesses extraneous to Mr Mathieu Ngudjolo’s case should prevail over the rights of the Defence, which in any event have priority

**D. The obligation of confidentiality is sufficient to protect the persons concerned by the redactions.**

27. It is important to recall that the Defence is subject to the obligation of confidentiality. Thus, in *Haradinaj*, the Trial Chamber, in response to Defence requests for access to confidential documents in the Milosevic file, decided that “the protective measures put in place in the Milosevic case, and the fact that the Applicants recognize their obligation to abide by them, [were] sufficient to maintain the confidentiality of documents and it [was] not necessary therefore to redact the documents or ask for additional protective measures”.<sup>31</sup>

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<sup>30</sup> *Prosecutor v. Milosevic, Decision on Trial Related Protective Measures for Witnesses*, Pre-Trial Chamber, 30 July 2002, Case No. IT-02-54-T, para. 4, see <http://www.un.org/icty/milosevic/trialc/decision-e/020730-2.pdf>.

<sup>31</sup> *Prosecutor v. R. Haradinaj, I. Balaj and L. Brahimaj, ‘Order relating to applications for access to confidential documents’*, Trial Chamber I, 27 September 2006, Case No. IT-04-84, p. 5, see <http://www.un.org/icty/haradinaj/trialc/decision-e/070208.pdf>

28. Moreover, the Defence would emphasise that, if, through its investigator, it were to establish contact with any of the alleged victims, the investigator could then be given specific training by the appropriate department of the Court. Furthermore, if the Defence decided to call any of the alleged victims to testify, it could request the Court to take appropriate protective measures on their behalf pursuant to rule 81(4) of the RPE. However, at the present stage there is no need whatsoever for the identifying information in respect of such persons to be withheld.

### **III. SUSPENSION OF PROCEEDINGS PURSUANT TO ARTICLE 82(3) OF THE STATUTE AND RULE 156(5) OF THE RPE**

29. Concurrently with this appeal, the Defence for Mr Ngudjolo requests the Appeals Chamber to apply article 82(3) of the Statute and rule 156(5) of the RPE on the suspensive effect of appeals. Such suspension is required because the examination and admissibility of the redactions challenged by the Defence raise major issues affecting not only the rights of the Defence, but also the Prosecution's obligations, and the future course of the present ongoing criminal proceedings.

30. The Defence submits various arguments that provide a sound basis for its request for suspension of the proceedings. Admissibility of the redactions in the documents related to Witnesses 4 and 9 will have irreparable consequences. The decision of your Court is certain to have an impact on the future proceedings, since it raises a question of principle with regard in particular to the interpretation of rules 81(4) and 85 of the RPE concerning the concepts of victims, innocent third parties and witnesses. This impact is indeed clearly reflected in the decision of the Single Judge granting the Defence leave to lodge the present appeal.<sup>32</sup> In any event, refusal or

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<sup>32</sup> *Decision on the Defence Application for Leave to Appeal the 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9', Pre-Trial Chamber I, 4 April 2008, ICC-01/04-01/07-365, p. 7.*

acceptance of the redactions pertaining to Witnesses 4 and 9 will require a whole series of measures to be taken by both Prosecution and Defence. Thus, other documents related to Witnesses 4 and 9, and indeed to other documents that the Prosecution may wish to produce for the confirmation hearing, may be affected by your Judgment.

31. The appeal was filed on 17 April 2008 and the statutory time limit for the Prosecution to submit its observations is 10 days. That time limit thus expires on 28 April 2008, which is less than 30 days before the confirmation hearing, currently scheduled for 21 May 2008. Consequently, it will be impossible for your Honourable Court to render its judgment not less than 30 days prior to the confirmation hearing.

32. It should be recalled, however, that pursuant to rule 121(3) of the RPE, the Prosecutor shall provide “to the Pre-Trial Chamber and the person, no later than 30 days before the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing”. Such an obligation cannot be fulfilled unless your Court grants suspensive effect to this appeal, applying article 83(2) of the Statute and rule 156 (5) of the RPE.

33. The Defence would further emphasise that the impact of your decision on whether to accord suspensive effect to the appeal will also be crucial in light of rules 76 and 77 of the RPE. Thus, under those provisions the Prosecutor is required, in particular at the pre-trial phase, to disclose to the Defence as soon as possible a whole series of items of prosecution evidence. These provisions make it clear that their purpose is to enable the Defence to prepare for the confirmation hearing. Accordingly, in order for the Prosecution to fulfil its obligations and for the Defence to be in a position to be effective in accordance with the standards of fairness in criminal proceedings, it is



essential that your Court accord suspensive effect to the current appeal proceedings.

**FOR THESE REASONS,**

34. The Defence respectfully requests the Appeals Chamber to:

- declare that the present appeal shall have suspensive effect on the ongoing proceedings;
- reverse the impugned decision and order the unredacted disclosure of the documents pertaining to Witnesses 4 and 9.

And justice shall be done.

[Signed]

**Mr Jean-Pierre Kilenda Kakengi Basila**

**Permanent Defence Counsel of Mr Mathieu Ngudjolo Chui**

Dated this 17 April 2008

At Brussels (Belgium).