

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

*Original : English*

No.: ICC-01/04-01/07  
Date: 14 December 2007

**PRE-TRIAL CHAMBER I**

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

**Registrar:** Mr Bruno Cathala

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

**URGENT**  
**Public redacted version**

**Prosecution's Application for Leave to Appeal and Urgent Application for  
Confined Variation of the First Decision on Redaction of Witness Statements**

**The Office of the Prosecutor**

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## Introduction

1. The Single Judge recently issued the first decision on redactions to witness statements that are required to be disclosed prior to the confirmation hearing. In that Decision, the Single Judge extensively noted the precarious security situation in the eastern DRC, including explicit threats to witnesses and indications that elements in the region are actively trying to identify individuals who are cooperating, or may cooperate, with the Prosecution.<sup>1</sup> The Single Judge also noted that the disclosure of certain categories of information which the Prosecution had sought to redact would, in this context, increase the risks involved in investigations.<sup>2</sup> Nevertheless, the Single Judge denied the redaction of entire categories of information, in part on the basis of alternative investigative techniques that the Single Judge proposed that the Prosecution use instead. These blanket denials place the Prosecution in the position of having to choose between its obligations to conduct a thorough, effective and independent investigation, and avoiding endangering witnesses, victims and other persons. The conflicts or practical impediments created by these issues have a significant effect on the fair and expeditious conduct of the proceedings, and may even in some cases bring investigations to a standstill. The Prosecution therefore seeks leave to appeal. The Prosecution also seeks a confined variation of the Decision so as not to render this application moot.

## Procedural Background

2. The Prosecution submitted applications and amended applications for redactions to witness statements pursuant to Rules 81(2) and (4) on 10 September 2007,<sup>3</sup> 22 October 2007,<sup>4</sup> 24 October 2007<sup>5</sup> and 21 November 2007.<sup>6</sup>

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<sup>1</sup> Decision, paras. 13-22.

<sup>2</sup> Decision, para. 59.

<sup>3</sup> ICC-01/04-01/07-18-US-Exp

<sup>4</sup> ICC-01/04-01/07-42-Conf-Exp

<sup>5</sup> ICC-01/04-01/07-43-Conf-Exp

3. In relation to the applications and amended applications, the Single Judge convened a series of closed session, *ex parte* hearings with the Prosecution and the VWU, including on 30 and 31 October 2007 and on 20 November 2007.<sup>7</sup>
4. On 3 December 2007, the Single Judge issued the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”.<sup>8</sup> In that Decision, the Single Judge held *inter alia* that:
  - Rule 81(4), read in conjunction with Article 54(3)(f), does not empower the Chamber to authorise redactions for “innocent third parties”, unless the redaction is required in order to protect the confidentiality of information under Rule 81(4) or to protect sources in the context of ongoing investigations under Rule 81(2);<sup>9</sup> and
  - Redactions of the locations of interviews and identifying information of OTP and VWU staff members would not be authorised, except for identifying information of [REDACTED].<sup>10</sup>
5. The Prosecution hereby seeks leave to appeal these aspects of the Decision pursuant to Article 82(1)(d).

### **Request for Confidentiality**

6. The Prosecution submits this application on a confidential basis because it is seeking leave to appeal a Decision which has been classified with the same level of confidentiality.<sup>11</sup> Although the full Decision was classified as “Under Seal, *Ex*

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<sup>6</sup> ICC-01/04-01/07-83-Conf-Exp

<sup>7</sup> ICC-01/04-01/07-T-7-Conf-Exp-Eng; ICC-01/04-01/07-T-8-Conf-Exp-Eng; ICC-01/04-01/07-T-9-Conf-Exp-Eng.

<sup>8</sup> ICC-01/04-01/07-84-US-Exp (“the Decision”). A redaction version classified “Confidential, *Ex parte* only available to Office of the Prosecutor and the Defence” was issued on 6 December 2007 (ICC-01/04-01/07-88-Conf-Exp). A public redacted version was issued on 7 December 2007 (ICC-01/04-01/07-90).

<sup>9</sup> Decision, paras. 44-56; see in particular paras. 54-55.

<sup>10</sup> Decision, paras. 59-64.

<sup>11</sup> While the confidential version of the Decision was formally classified as “Confidential, *Ex parte* only available to Office of the Prosecutor and the Defence”, the Prosecution understands that as there are no participants other than the Prosecution and the Defence at this stage, then the classification of the filing as “Confidential” will produce the same effect and limit its distribution to the parties. Further, as a public redacted

*parte* only available to Office of the Prosecutor”, the confidential redacted version which is available to the Defence substantively addresses the issues which are the subject of this application for leave to appeal. The Prosecution has provided as much information on the effects of these issues on the fair and expeditious conduct of the proceedings as it is able to in an *inter partes* filing. If the Single Judge considers that further information, in particular on the operational consequences of these issues, would assist in the determination of whether to grant leave to appeal, then the Prosecution would be willing to provide additional details in an *ex parte* filing.

### **The issues involved**

7. The Prosecution seeks leave to appeal two issues in the Decision.

- i) The first issue is whether Article 54(3)(f) authorises the Prosecution to seek, and Rule 81(4) read in conjunction with that article empower the Chamber to authorise, redactions for the protection of “innocent third parties”, i.e. persons who are not victims, current or prospective Prosecution witnesses or sources, or members of their families. The Decision held that there was no such power in the Rules, unless the application was based on the need to protect Prosecution sources or confidentiality of information as construed by the Single Judge,<sup>12</sup> and denied the Prosecution’s applications for redactions which fell into this category without considering the merits of those applications. The issue which the Prosecution seeks leave to appeal is whether the Statute and the Rules empower the Chamber to authorise such redactions, not whether each was justified in the particular circumstances of this case.

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version of the Decision has also been issued, the Prosecution will file a public redacted version of this Application for Leave to Appeal as soon as practicable.

<sup>12</sup> Decision, para. 55.

ii) The second issue is the Single Judge's blanket refusal to authorize the redaction of the location of interviews of witnesses,<sup>13</sup> and the identifying information of current and former staff members of the OTP and the VWU at this particular stage of the proceedings. The Single Judge recognized that in the context of this case, the disclosure of such information would increase the risks involved.<sup>14</sup> However the Single Judge identified countervailing interests of the Defence in knowing the identity of persons present during the interviews;<sup>15</sup> and considered that less intrusive measures could be taken to avoid most of the risks.<sup>16</sup> Therefore the Single Judge denied authorization of that entire class of redactions, except for "identifying information of [REDACTED]".<sup>17</sup>

The Prosecution submits that these two issues clearly arise out of the Decision.

8. As has been repeatedly recognized and emphasized, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue involved in the Decision meets the criteria set out in that article. In this case, the Prosecution submits that the issues of whether or not a Chamber has the power to authorize redactions in order to protect an entire class of persons who may be at risk as a result of the Court's activities, namely innocent third parties, and the protection of the location of interviews and identity of current OTP staff members at this stage in the proceedings should be considered by the Appeals Chamber. The Prosecution submits that – as has previously been recognized by the Single Judge, albeit in a different context – issues relating to the availability of categories of redactions (or the criteria for granting such redactions) affect the fair and expeditious conduct of the

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<sup>13</sup> Including some operational questions put to the witnesses related to this topic, which reveal the manner in which the Prosecution conducts its investigations – see e.g. ICC-01/04-01/07-84-US-Exp-Anx1, p. 68, first point.

<sup>14</sup> Decision, para. 59.

<sup>15</sup> Decision, para. 62.

<sup>16</sup> Decision, paras. 60-61.

<sup>17</sup> Decision, paras. 64, 61.

proceedings<sup>18</sup> and should be granted leave to be resolved by the Appeals Chamber.<sup>19</sup>

### **The issues affect the fair conduct of the proceedings**

9. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants be respected,<sup>20</sup> and in this context has been held to include fairness to the Prosecution,<sup>21</sup> which “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54.”<sup>22</sup> Fairness has also been linked to the ability of a party to present its case.<sup>23</sup>

#### *The first issue affects the fair conduct of the proceedings*

10. The Prosecution submits that, if it is correct and Rule 81(4) read together with Article 54(3)(f) does empower the Prosecution to apply for and the Chamber to grant redactions to protect innocent third parties,<sup>24</sup> then the Single Judge’s blanket

<sup>18</sup> The Prosecution is not arguing, in this application, that the issue affects the outcome of the trial.

<sup>19</sup> The Single Judge has previously granted leave to appeal the issue of whether Rule 81 could sustain redactions in order to protect Prosecution sources (ICC-01/04-01/06-514, p. 12). The Single Judge has also considered that issues relating to the criteria for granting certain categories of redactions fulfills the requirements of Article 82(1)(d) (ICC-01/04-01/06-166, paras. 31-34; ICC-01/04-01/06-489, p. 12-14)

<sup>20</sup> See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11. This has been held to include respect for the norms of a fair trial (*Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38)

<sup>21</sup> *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

<sup>22</sup> *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 39.

<sup>23</sup> *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

<sup>24</sup> A grant of leave does not in any way imply that the Single Judge agrees with the party’s position on the underlying issues, merely that it recognises that the issue itself is of importance. The Single Judge has previously recognized as much, see e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-166, 23 June 2006, at paras. 31, 37-42, 54. When considering the impact of an issue on the proceedings, the Prosecution submits that the Single Judge should grant leave where, if the issue was wrongly decided, it would affect the fair and expeditious conduct of the proceedings. Even if the Chamber considers the chance of the decision being in error to be small, if the implications of such an error would still significantly affect the fair and expeditious conduct of the proceedings, then leave shall be granted: see e.g. *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecutor’s Application for Certification under Rule 73(B) Concerning the Evidence of an Investigator, 20 June 2002; *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para 9; *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decision on Protection of Defence Witnesses, 28 September 2005, para. 5; see further *Situation in the DRC*, ICC-01/04-141, 24 April 2006, paras. 56 and 58 and authorities cited therein.

denial of any opportunity for the Prosecution to request such redactions, and the Single Judge's refusal to consider the merits of any such requests for redactions, affects the fairness of the proceedings. The Decision denies the Prosecution a procedural right, namely the right to apply for this category of redactions, directly affecting the fairness of the proceedings for the Prosecution. The Decision also denies the Prosecution the right to effectively present its case on why such redactions should be authorized on a case-by-case basis, as the Single Judge ruled in the relevant section of the Decision that it was not empowered to authorize the relevant redactions and thus declined to consider the merits of the Prosecution's submissions in respect of each of the requested redactions that fell into this category.<sup>25</sup>

11. Furthermore, in many cases the only way in which innocent third parties, with whom the Prosecution may not have any contact or know the whereabouts of, can be protected is by redacting their identity. Thus the denial of any ability to seek, and have considered on the merits, such redactions denies the Prosecution the only viable manner of carrying out its mandate to "[t]ake necessary measures, or request that necessary measures be taken, to ensure ... the protection of any person". The Prosecution submits that removing the ability of an organ to even seek the measures it has determined to be necessary, as authorised under the Statute, further affects the fairness of the proceedings, at the very least *vis-à-vis* that party.
12. This issue will thus require the Prosecution to choose between two interests: those of effectively investigating and not placing persons in danger. The inability of the Prosecution to reconcile these interests by seeking redactions of the identity of innocent third parties who could be in danger as a result of the disclosure of their

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<sup>25</sup> The Prosecution recalls that the Appeals Chamber has previously ruled that the Pre-Trial Chamber does not have "the competence to pre-determine the merits of future applications for authorisation of non-disclosure pursuant to rule 81 (4) of the Rules of Procedure and Evidence. It is fundamental to the exercise of judicial power that applications are adjudicated on a case-by-case basis." (*Prosecutor v Lubanga*, ICC-01/04-01/06-568 OA3, 13 October 2006, para. 39).

identity in connection with a witness statement will force it to compromise one of those interests. This might even, in particularly serious cases, leave the Prosecution with no option but to withdraw the use of a statement rather than to gravely endanger the safety of the person.<sup>26</sup> The Prosecution submits that an issue which may deny it the use of certain evidence in the future, especially where there is no process to be heard on and have a determination on the merits, affects the fairness of the proceedings, and in particular will impact on the ability of the Prosecution ultimately to effectively present its case.<sup>27</sup>

13. Finally, if the Prosecution places innocent third parties, [REDACTED] communities in which it conducts investigations, in danger, then this will affect the ability of the Prosecution to build trust with those communities and to effectively approach people to cooperate with its ongoing and further investigations. This will thus additionally impact on the fairness of the proceedings as it will impair the Prosecution's ability to fulfill its statutory obligation to conduct its investigations and to effectively present its case.

*The second issue affects the fair conduct of the proceedings*

14. The Prosecution submits that the issue of the disclosure of the location of interviews and the identities of current staff members at this stage<sup>28</sup> affects the fair conduct of the proceedings: by impacting on the Prosecution's ability to conduct its ongoing investigations, pursuant to its statutorily defined role, and to effectively present its case; and by affecting its ability to protect its witnesses and ensure that its investigations do not place victims and witnesses in danger. Indeed, it appears that the Single Judge recognized that this issue would impact

<sup>26</sup> While the Prosecution does not consider any of the statements dealt with in the Decision to pose a level of risk to a third party that would lead it to withdraw a statement, the Decision holds that the Chamber does not have the power to authorize redactions under Rule 81(4) for innocent third parties under any circumstances, regardless of the level of risk posed.

<sup>27</sup> See *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

<sup>28</sup> The Prosecution recognizes that Rules 111 and 112 require the recording of the names of those present during the questioning, and the interests protected by this. The issue which the Prosecution seeks leave to appeal is not whether such names must be disclosed at all, but whether they can be redacted on a temporary basis at this stage in the proceedings, prior to the confirmation hearing and while ongoing investigations are still active.



on the proceedings by increasing the risks involved,<sup>29</sup> however decided on the merits not to authorize the categories of redactions in question due to potential other steps that might be taken and countervailing interests.<sup>30</sup>

15. Article 54 grants to the Prosecution the power to conduct the investigation, and imposes certain obligations on the Prosecution in the conduct of such investigations. In the Decision, the Single Judge recognized the impact that disclosure of locations of interviews and identity of OTP personnel may have on the investigation, but effectively determined that a series of alternative ways of conducting the investigation will be sufficient to address these concerns, without seeking or considering the views of the Prosecution regarding the viability of these proposals or their impact on investigations. The Prosecution submits that this infringes on the independence of the Prosecutor and affects the fairness of the proceedings *vis-à-vis* the Prosecution, in that the Single Judge has impacted on the ability of "the Prosecutor ... to exercise the powers and fulfil the duties listed in article 54."<sup>31</sup> In this context, the Prosecution respectfully submits that it is not for the Judges of this Court to prescribe how it allocates its investigative resources.

16. This issue not only directly impacts on the manner in which the Prosecutor may conduct the investigation: its impact also extends to the security of witnesses, since it identifies the people they have met with or are likely to meet with, and the locations they have been (or future witnesses will be) interviewed in, thereby increasing the identifiability of the witnesses. Thus the Decision, again without the Single Judge having elicited the Prosecution's views on the viability of the alternatives proposed,<sup>32</sup> impacted on the fairness to the Prosecution by impairing the Prosecution's ability to organise its contacts with witnesses, and to carry out

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<sup>29</sup> Decision, para. 59.

<sup>30</sup> Decision, paras. 60-62.

<sup>31</sup> *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 39.

<sup>32</sup> As discussed below, there is a risk that some of the alternative measures proposed by the Single Judge may even increase the risks to prospective witnesses, to the extent that the suggestion to avoid taking statements in small villages or cities [REDACTED]. Further, while the rotation of Prosecution personnel may be an option in appropriate circumstances, [REDACTED].

its statutory mandate to protect victims and witnesses, the obligation to do so being imposed squarely on the Prosecutor during the investigation of crimes.<sup>33</sup>

17. The Prosecution submits that the practical realities of conducting investigations in the DRC, and the status and circumstances of the current investigation, demonstrate the significant impact that this issue has.<sup>34</sup> [REDACTED]. Forcing the Prosecution to identify these locations will deny the Prosecution, and other organs of the Court, [REDACTED] for the conduct of interviews in the region. In relation to staff members,<sup>35</sup> many of those in question [REDACTED] in the context of the ongoing investigations of the crimes committed by Germain KATANGA.<sup>36</sup>
18. Furthermore, the Prosecution has advised the Single Judge that it has information that elements within Ituri are actively seeking to track and identify individuals who are cooperating with the Court in relation to the investigation of crimes committed by the FNI and/or FRPI. The Prosecution submits that the combined effect of disclosing the identities of staff members who participate in interviews of witnesses, and the locations of interviews, will significantly increase the risk that persons cooperating with the Court can be identified in the field, which affects the fairness of the proceedings as described below. The risk of identification is further increased since effectively forcing the Prosecution not to conduct interviews in small villages or cities, or in the existing locations, [REDACTED]. [REDACTED], and other practical realities of travel in the region, will provide

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<sup>33</sup> Article 54(1)(b) expressly requires the Prosecutor, in ensuring the effective investigation and prosecution of crimes within the jurisdiction of the Court, to “respect the interests and personal circumstances of victims and witnesses”. In addition, Article 68(1) outlines the general obligation on the Court to take appropriate measures to protect the safety, well-being and privacy of victims and witnesses, and imposes such measures in particular on the Prosecutor during the investigation and prosecution of crimes. These obligations extend to protecting the psychological well-being of victims and witnesses, and the Prosecution therefore [REDACTED]. Thus the Decision may, to the extent that it effectively forces the Prosecution to continually rotate personnel, impact on its ability to fulfill this obligation.

<sup>34</sup> The impact of this issue is not limited to these proceedings, as the Prosecution has recently sought the redaction of the location of interviews in other cases.

<sup>35</sup> As the Prosecution advised the Single Judge, it has only sought the redaction of the identities of those persons present during interviews who are currently employed by the ICC.

<sup>36</sup> The ongoing investigations are more active at this time than they were at the time that redactions were being sought in the case against Thomas LUBANGA DYILO. In addition, the Prosecution has not in this case indicated that it is suspending further investigations against Germain KATANGA, as it did in the case against Thomas LUBANGA DYILO (*Prosecutor v Lubanga*, ICC-01/04-01/06-170).

further opportunities for the identification of those cooperating with the investigation.<sup>37</sup>

19. These consequences and realities are not presented here to challenge the correctness of the Decision, but to illustrate the significant effects that this issue has on the fairness of the proceedings. Providing this information, prior to the confirmation of charges and while investigations are still active, may directly impact on the Prosecution's ability to carry out its obligations and statutory tasks, and may in the present circumstances actively endanger both investigators and witnesses. To the extent that witnesses may be identified as a result of the refusal to redact the relevant information, they may be subject to threats and intimidation and may refuse to testify. [REDACTED] may also make potential witnesses less likely to cooperate with the investigation. Each of these will impact on the fairness to the Prosecution, both in terms of its ability to fulfill its obligation under Article 54(1)(a) to establish the truth, and in its ability to effectively prepare and present its case.

20. As noted above, the Single Judge herself appeared to recognize that the issue of disclosure of identities of Prosecution personnel and interview locations would have an adverse effect, at least on the conduct of investigations,<sup>38</sup> however considered this to be balanced by the interests of the Defence<sup>39</sup> and the alternatives proposed. The Prosecution recalls that the question at hand in this application is not whether the Single Judge was correct in her determination and in the balance that she struck; that would be a question for the Appeals Chamber if leave is granted. The fact that the Single Judge may have been correct in her

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<sup>37</sup> [REDACTED]

<sup>38</sup> Decision, para. 59.

<sup>39</sup> Decision, para. 62. The Prosecution notes that the interests of the Defence identified by the Single Judge only appear to refer to the identities of the personnel present when the statement was taken, and do not appear to relate to the issue of the location of the interviews. The Prosecution acknowledges that the identities of those present during the taking of a statement must be disclosed to the Defence at some stage – the question is whether that disclosure should take place at this stage in the proceedings (i.e. well prior to the confirmation hearing) and in these circumstances (i.e. while the investigations of the case against this particular individual are ongoing in the field.)

assessment does not affect the question at hand here,<sup>40</sup> namely whether the underlying issue – the disclosure of the identity of OTP and VWU personnel and the locations used by the Prosecution for interviews of witnesses – affects the fair conduct of the proceedings.

### **The issues affect the expeditious conduct of the proceedings**

21. The Prosecution notes that it has, in previous filings, expressed its view that once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).<sup>41</sup> Nonetheless, the Prosecution submits that these issues do affect the expeditious conduct of the proceedings.

#### *The first issue affects the expeditious conduct of the proceedings*

22. The Prosecution submits that if it can never seek the redaction of the identities of innocent third parties when they are endangered, then it will be required to devote additional time and resources to assessing and managing the security implications of the disclosure of the identities of such persons. For example, this could involve, in appropriate cases, requiring contact with these persons in order

<sup>40</sup> As noted above, a grant of leave does not in any way imply that the Single Judge agrees with the party's position on the underlying issues, merely that it recognises that the issue itself is of importance – see footnote 24, above.

<sup>41</sup> Similarly, if a party had demonstrated that the issue does affect the expeditious conduct of the proceedings, then any showing that it also affected the fair conduct of the proceedings would likewise be superfluous. See in particular *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see further *Situation in the DRC*, ICC-01/04-103, footnote 5; *Prosecutor v Lubanga*, ICC-01/04-01/06-125, footnote 30.

The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition. In both tribunals, Chambers have often granted leave to appeal solely on the basis that the issue affects the fair conduct of the proceedings - see authorities set out in *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see subsequently *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005.

The Prosecution submits that the current issue highlights this – it cannot be the case that a decision which denies protection to an entire class of persons and endangers innocent individual, and is recognized as affecting the fair conduct of the proceedings, still cannot be reviewed merely because it does not also delay those proceedings.

to inform them of the fact that they are mentioned in a statement which is about to be disclosed in proceedings and which could lead to them being endangered. In certain cases, this might extend to providing them with an opportunity to make arrangements to manage the security risks involved, or even receiving protective assistance from the Court.<sup>42</sup>

23. In most cases, the Prosecution is not in contact with these persons and does not know their current locations. Given the nature of the situations under investigation and the context in which statements are taken, such persons will often be working in remote communities, where communications may be difficult or non-existent. Further, those innocent third parties who may be at risk if their identity is disclosed in statements taken by the Prosecution are likely to be working in areas of conflict or instability, where the Prosecution may be unable to travel to communicate with the individual, or where even being contacted by the ICC could itself put them in danger. Thus any process of contacting a person who may be endangered is likely to be a time consuming process, which will affect the expeditious conduct of the proceedings.

24. Furthermore, to the extent that situations of significant danger to an innocent third party may in exceptional cases lead the Prosecution to determine that it cannot use the testimony of a given witness, as it was unable to disclose their statement,<sup>43</sup> then this would additionally affect the expeditious conduct of the proceedings as it would require the Prosecution to seek out additional evidence to use in substitution for the relevant underlying facts. Even once such additional evidence is acquired, the inability to use the original statement may affect the expeditious conduct of the proceedings on an ongoing basis as it may deny the Court the most relevant and probative evidence on a given point, and thus the

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<sup>42</sup> The Prosecution notes that Article 43(6) could be interpreted as covering this category of persons, as it extends the mandate of VWU to "others who are at risk on account of testimony given by such witnesses."

<sup>43</sup> While the Prosecution is not arguing in this application that leave to appeal is warranted on the basis that the issue affects the outcome of the trial, it notes that in particularly serious cases, the withdrawal of a statement may impact on the determination of guilt or innocence in respect of one or more charges.

most efficient manner of addressing that point, and instead require the Court to consider a larger volume of less relevant evidence.

*The second issue affects the expeditious conduct of the proceedings*

25. The disclosure of the names of OTP personnel who are active in investigations in the field, and the locations of interviews, will also impact on the expeditious conduct of the proceedings.
26. As submitted above, the disclosure of the location of the interviews will, in the present circumstances,<sup>44</sup> force the Prosecution to continually seek out and identify new locations for interviews. This in itself will complicate and delay proceedings, affecting their expeditious conduct.
27. The suggestion that the Prosecution avoids taking statements in small cities and villages merely underscores the difficulties posed and the effects on the ability to efficiently and effectively investigate. The locations presently identified by the Prosecution are [REDACTED].
28. Not only will these [REDACTED] which are suggested, and effectively imposed, by the Decision complicate and delay attempts to contact and interview witnesses. [REDACTED] may well increase the chances that witnesses and potential witnesses are identified as such, which in the current circumstances puts them at risk of threats and intimidation. Further, as noted above, [REDACTED], with the associated increase in risks,<sup>45</sup> merely to be interviewed may also affect their willingness to cooperate with the Court. To the extent that this combination of increased risk of identification and intimidation, and the other barriers to the cooperation of witnesses with the investigation and prosecution of crimes, identified above leads to witnesses being unwilling to testify,<sup>46</sup> then this will affect the expeditiousness of proceedings as well as their fairness. The Prosecution will

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<sup>44</sup> These circumstances include the ongoing investigations and indications that elements in Ituri are attempting to track and identify individuals who are cooperating with the Court in relation to the investigation of crimes committed by the FNI and/or FRPI – see paras. 16 - 19, above.

<sup>45</sup> See para. 18, and in particular footnote 37, above.

<sup>46</sup> See paras. 16 - 19, above.

have to seek out additional evidence to use in substitution and the Court may be denied the evidence which would allow it to dispose of an issue in the most efficient and expeditious manner.<sup>47</sup>

29. The manner in which the Single Judge proposed that the Prosecution address the relevant concerns relating to personnel – namely considering that personnel will be properly protected if the Prosecution ensures the staff do not easily stand out from the local population and rotates staff when required – will also have an inevitable effect on the expeditious and efficient conduct of proceedings during the investigation and the early stages of a case. Limiting the personnel that the Prosecution can send into the field because their identity has been disclosed, and the frequency with which they can travel to the field to meet with witnesses, will affect expeditious conduct of the proceedings. Experience has shown that even [REDACTED]. The risks, at the same time, are increasing as the work of the Court progresses: the profile of the Court is increasing, and the additional cases increase the base of potential threats. Such limits may, for example, lead the Prosecution to not send those personnel with the most experience and [REDACTED], impacting negatively on the efficiency and continuity in the preparation of the case.<sup>48</sup>

30. Such consequences on the expeditious conduct of the proceedings are not limited to the early stages of investigations, but also affect the expeditious conduct of pre-trial proceedings in that they will have consequences for the follow-up contacts with witnesses which are required as the case moves towards a confirmation hearing and eventually trial, for example maintaining information on the security environment of a witness; obtaining consents relating to disclosure, use of statements or protective measures; or arranging for testimony.

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<sup>47</sup> See para. 24, above.

<sup>48</sup> As noted above, in order to minimize the psychological impact of the investigation on witnesses, the Prosecution [REDACTED].

31. Again, the question is not whether these impacts on the expeditiousness of the proceedings are justified on balance, that being a question for the Appeals Chamber if certified, but whether the impacts exist, which the Prosecution submits they clearly do.

**Immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings**

32. The Prosecution submits that immediate resolution of these issues will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”<sup>49</sup> The Appeals Chamber has also confirmed that proceedings are “not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto.”<sup>50</sup>

33. Immediate resolution of these issues by the Appeals Chamber will advance these proceedings primarily by ensuring that entire categories of redactions, or applications for redactions, are dealt with correctly on an ongoing basis throughout this case. It will ensure that the proper levels of, and options for, protection of individuals and information are available.

34. Immediate resolution of the first issue by the Appeals Chamber will also ensure that a party is not denied any right, namely to apply for and have considered on the merits certain categories of redactions, which they should have been afforded in their preparation for trial, and that the upcoming trial is not therefore tainted by any such improper denial.

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<sup>49</sup> *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

<sup>50</sup> *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 12, see also para. 17.



35. The Prosecution further recalls that the purpose of article 82(1)(d) is to regulate whether an issue should be appealed at this stage of proceedings, or whether it should be left to be raised (if necessary) as part of a final appeal against judgement.<sup>51</sup> The issues at hand here are not matters which could properly be remedied as part of an appeal against final judgement: once the identity of a person or location has been disclosed, any danger to the person or to others will have eventuated and cannot be reversed after the conclusion of the trial. Similarly, if the Prosecution is forced to abandon a statement – in an extreme case under the first issue due to the danger that its use would cause a third party; or in relation to the second issue because disclosure of the location of interviews or of investigators lead to the identification of a witness, who was threatened or harmed as a result – then the later identification of any error after the conclusion of the trial will not be able to effectively remedy this.
36. The Prosecution further submits that none of the considerations which commonly militate against immediate resolution by the Appeals Chamber apply to the present case. The issues involved here are of a systemic, abstract nature, dealing with the permissibility or admissibility of redactions to cover entire categories of information. These issues affect the ongoing proceedings, and a range of potential evidence, rather than merely one specific incident or item before the Chamber.<sup>52</sup>
37. Furthermore, the authoritative determination of these issues by the Appeals Chamber will have the additional benefit of ensuring that the permissibility of applications for redactions in order to protect these categories of information, and therefore to safeguard the welfare of third parties and the safety and efficacy of

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<sup>51</sup> See e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6. See further submissions in *Situation in the DRC*, ICC-01/04-103, 23 January 2006, paras. 37-38 and authorities cited therein.

<sup>52</sup> In this regard, the Prosecution notes that the issues are not embedded in the ongoing factual matrix of a trial, in the way that the application of the general principles in any particular instance may be, and thus can be properly and readily assessed by the Appeals Chamber in an interlocutory appeal.

investigations, is clear in all situations and cases.<sup>53</sup> It will also ensure that similarly situated individuals are not afforded different levels of protection depending on the situation or case in which their identity arises.

38. Finally, the Prosecution submits that granting leave to appeal will not cause any delay to the proceedings. Subject to the request for a confined variation to the order below, the Prosecution will still disclose the statements on 12 December 2007. Given the limited nature of the redactions which are affected by the issues in this application, if leave to appeal is granted then this will not materially affect the ability of the Defence to be able to continue its preparation for the confirmation hearing while the appeal proceeds.

#### **Urgent request to vary the order on the disclosure and inspection of the statements**

39. The Prosecution is seeking leave to appeal the Decision only in respect of the findings regarding redactions addressed under categories E and G of the Decision. The Prosecution submits that the order for disclosure, as currently set out, would render the issues which are the subject of this application for leave to appeal moot. Therefore, without prejudice to the correctness of the Decision, the Single Judge's decision on this application, or any future order of the Appeals Chamber if leave to appeal is granted, the Prosecution separately requests a confined variation of the Single Judge's order for disclosure in the Decision.

40. The Prosecution requests that the Single Judge, in order not to render this application moot, urgently suspend in part the effect of the Decision so as to

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<sup>53</sup> As the Prosecution has noted above, it has recently sought the redaction of the location of interviews in other cases. While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave - see *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be "invoked as an additional argument in support of the alleged significant impact on the current proceedings" (*Prosecutor v Kony et al*, ICC-01/05-20-US-Exp (reclassified pursuant to ICC-02/04-01/05-52), 19 August 2005, para. 54).

authorise the Prosecution to maintain, on a strictly limited and conditional basis, those redactions requested for the protection of innocent third parties, identities of OTP and VWU personnel present during the interview, and the location of the interview, pending the decision of the Single Judge on this application.

41. If leave is denied, then the Prosecution will be able to disclose further copies of the statements without the redactions which were not authorised under categories E and G within 3 days of the denial of leave. Alternatively, if the Single Judge grants leave to appeal, then the Prosecution respectfully requests that the Single Judge continue to exceptionally authorize the Prosecution to maintain the relevant redactions pending a decision of the Appeals Chamber.<sup>54</sup>
42. These redactions are not extensive in nature. Those relating to innocent third parties only affect approximately 26 paragraphs<sup>55</sup> in the seven statements addressed in the Decision. Further, those relating to the identities of OTP and VWU personnel present during the interview and the location of the interview do not affect the substance of the statements. The Prosecution therefore submits that exceptionally authorizing the maintenance of those redactions on a limited basis will still allow for meaningful disclosure to take place and thus will not compromise the substance of the Decision.
43. Given that the Single Judge has ordered the Prosecution to disclose the statements without the redactions which are the object of this application for leave to appeal by 12 December 2007, the Prosecution respectfully requests that the Single Judge urgently rule on this aspect of the application, independent of a determination of the request for leave to appeal.

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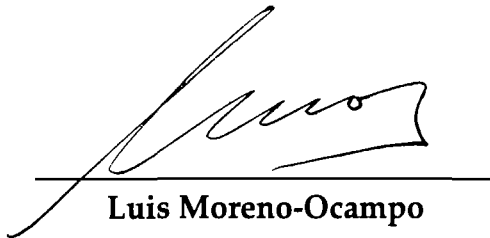
<sup>54</sup> In so doing, the Single Judge could set out the terms of any further extension in the decision on the application for leave to appeal, including any requirement that the Prosecution seek suspensive effect from the Appeals Chamber under Article 83(3).

<sup>55</sup> In addition, affects a small number of details from page 3 of one of the statements.

## Conclusion

44. For the above referred reasons, the Prosecution respectfully requests the Single Judge to:

- grant leave to appeal the issues pursuant to Article 82(1)(d); and
- urgently authorize the Prosecution to provisionally maintain those redactions which it had requested to protect innocent third parties, the identities of OTP and VWU personnel present during the interview, and the location of the interview in any disclosure, pending the Single Judge's decision on leave to appeal and, if granted, any decision of the Appeals Chamber.



**Luis Moreno-Ocampo**  
**Prosecutor**

Dated this 14<sup>th</sup> day of December 2007  
At The Hague, The Netherlands