

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/07
Date: 17 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***

Public

**Prosecution's Response to the Defence Motion for Leave to Appeal
the First Decision on Redaction of Witness Statements**

The Office of the Prosecutor

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Procedural Background

1. The Prosecution submitted applications and amended applications for redactions to witness statements pursuant to Rules 81(2) and (4) on 10 September 2007,¹ 22 October 2007,² 24 October 2007³ and 21 November 2007.⁴
2. 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 2007.⁵
3. On 3 December 2007, the Single Judge issued the "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements",⁶ which was classified "Under Seal, Ex parte only available to Office of the Prosecutor". A redacted version of the Decision, which was confidential but available to the Defence, was issued on 6 December 2007.⁷ A further public redacted version was issued on 7 December 2007.⁸
4. The Prosecution sought leave to appeal the Decision in respect of two issues on 10 December 2007.⁹
5. On 13 December 2007, the Defence filed a Motion for Leave to Appeal the Decision.¹⁰

¹ ICC-01/04-01/07-18-US-Exp.

² ICC-01/04-01/07-42-Conf-Exp.

³ ICC-01/04-01/07-43-Conf-Exp.

⁴ ICC-01/04-01/07-83-Conf-Exp.

⁵ 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.

⁶ ICC-01/04-01/07-84-US-Exp ("the Decision").

⁷ ICC-01/04-01/07-88-Conf-Exp. While this Decision was issued on 6 December 2007, the Prosecution understands that it was not notified to the Defence until 7 December 2007.

⁸ ICC-01/04-01/07-90.

⁹ ICC-01/04-01/07-92-Conf. The Prosecution filed a public redacted version of this Application on 14 December 2007 (ICC-01/04-01/07-107). The issues raised by the Defence in the present Application for Leave to Appeal are distinct from those for which the Prosecution sought leave to appeal, namely: 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; and the refusal to authorize the redaction of the location of interviews of witnesses, and the identifying information of current and former staff members of the OTP and the VWU at this particular stage of the proceedings (ICC-01/04-01/07-107, para. 7).

¹⁰ ICC-01/04-01/07-99 ("Application for Leave to Appeal").

6. The Prosecution hereby responds to the Defence's Application for Leave to Appeal, pursuant to Regulation 65(3).

Whether the issues identified in the Application for Leave to Appeal meet the criteria in Article 82(1)(d)

7. The Defence seeks leave to appeal two issues:¹¹

- The Decision was issued without hearing the Defence ("the First Issue");
- The Pre-Trial Judge incorrectly determined that potential Prosecution Witnesses who had been or were about to be interviewed by the Prosecution could be characterised as "Prosecution sources" and, hence, their identifying information be redacted pursuant to Rule 81(2) of the Rules ("the Second Issue").

8. Under Article 82(1)(d), leave to appeal shall be granted if a decision "involves an issue which affects the fair and expeditious conduct of the proceedings ... and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

9. The Prosecution does not oppose granting leave in respect of the Second Issue. However the Prosecution submits that the First Issue as raised by the Defence is not an issue for which leave to appeal can be granted, within the terms of Article 82(1)(d) and the jurisprudence of the Appeals Chamber, and in any event immediate resolution of this issue will not materially advance the proceedings.

The First Issue: the Decision was issued without hearing the Defence

10. Under Article 82(1)(d), the Decision must involve the issue in question. The Appeals Chamber has stated that an issue:

¹¹ Application for Leave to Appeal, para. 8.

- “is an identifiable subject or topic requiring a decision for its resolution”,¹² and
- “is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.¹³

11. The Prosecution submits that the First Issue identified by the Defence in this Application, i.e. the fact that the Decision was issued without hearing the Defence, does not constitute an issue for the purposes of granting leave to appeal. This is not a topic requiring a decision for its resolution, or which is essential for the disposition of the matters under judicial examination, within the meaning of the Appeals Chamber’s jurisprudence. Rather, it is merely a procedural step which was taken towards the resolution of the issues in the Decision (which include the Second Issue for which the Defence has sought leave). This Decision on redactions does not itself “involve” the issue of the right to be heard.

12. The system of leave to appeal enshrined in the Statute, while not constituting a bar to interlocutory appeals, restricts such appeals to decisions which raise issues that have an impact on the proceedings. An error in the procedure leading up to the rendering of a decision may cause some unfairness to a party, but this does not mean that every procedural step taken by a Chamber in arriving at a decision will therefore constitute an issue for the purposes of Article 82(1)(d). A claim of denial of the right to be heard may, in the Prosecution’s submission, be more properly considered – and in appropriate circumstances, addressed – as an alleged procedural error made in relation to a given issue,¹⁴ where the underlying issue on which the party alleges that it was not heard itself qualifies for leave to appeal.

¹² *Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9.

¹³ *Ibid.*

¹⁴ The Prosecution’s opposition to granting leave to appeal the First Issue in its own right is without prejudice to any position that it may take should the Defence be granted leave to appeal the Second Issue and seek to raise before the Appeals Chamber any alleged error based on a denial of the right to be heard.

13. If the Single Judge disagrees with the submissions above, and considers that the First Issue may constitute an issue for the purposes of considering leave under Article 82(1)(d), then the Prosecution further submits that in the circumstances of this case, the First Issue still does not meet the criteria for granting leave to appeal, as immediate resolution of this issue by the Appeals Chamber will not materially advance the proceedings.¹⁵
14. The issue here is confined to denial of a procedural right in connection with one particular decision. The Defence had the right to seek leave to appeal any substantive issue arising out of the Decision which does impact on the fair and expeditious conduct of the proceedings, and has availed itself of this opportunity.¹⁶ Contrary to the implication of the Defence, there is nothing in the Decision which governs the right of the Defence to be heard on future applications for redactions, or to make subsequent submissions on the legal criteria or parameters for such redactions.¹⁷ In this context, the Prosecution submits that immediate resolution of the procedural issue that one decision was

¹⁵ The Prosecution does not agree with each of the arguments raised by the Defence, or its characterization of proceedings. Without entering into the merits of the case, the Prosecution notes that while the jurisprudence of the ICTY may provide helpful guidance on the use of *ex parte* procedures, the Appeals Chamber of this Court has ruled that even the fact of an *ex parte* filing may, if strictly necessary, be withheld from the other party (*Prosecutor v Lubanga*, ICC-01/04-01/06-568, 13 October 2006, paras. 65-67; see also the recent decision of Trial Chamber I, *Prosecutor v Lubanga*, ICC-01/04-01/06-1058, 6 December 2007). Contrast e.g. Application for Leave to Appeal, para. 14). Rule 81(2) also specifically provides that applications under it “shall be heard on an *ex parte* basis”. Nonetheless, the Prosecution also acknowledges that an issue of the right of a party to be heard may affect the fair conduct of proceedings, as the Appeals Chamber has held that proceedings for the purposes of Article 82(1)(d) can encompass past, as well as present and ongoing, proceedings (*Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 12). Furthermore, the right of the Defence to be heard may be seen as having affected the expeditious conduct of the proceedings. In this context, the Prosecution notes that the Decision was issued on 3 December 2007, prior to the formal appointment of Defence counsel (Application for Leave to Appeal, para. 10). It was public knowledge that there was an ongoing redaction process: public notes were filed to that effect (See e.g. ICC-01/04-01/07-65; ICC-01/04-01/07-67; ICC-01/04-01/07-71; ICC-01/04-01/07-72), and the Prosecution has since made further public filings indicating that redactions to statements were being requested. The “confidential *ex parte*, prosecutor only” annexes only contained the proposed redactions themselves.

¹⁶ The Prosecution, as will be explained below, does not oppose the grant of leave in respect of the issue for which the Defence has sought leave. The Prosecution recalls that the first issue for which they have sought leave is not the underlying issues on which the Defence was not heard (Application for Leave to Appeal, para. 22), but the issue that “The Decision was issued without hearing the Defence” (Application for Leave to Appeal, para. 8).

¹⁷ Application for Leave to Appeal, para. 22. Indeed, nothing in the Decision prevents the Defence from making a filing requesting right to be heard for next batch of redactions.

rendered without hearing the Defence would not in itself materially advance the proceedings.

15. Quite to the contrary, granting leave to appeal this issue may significantly delay proceedings. Unlike the Prosecution's Application for Leave to Appeal¹⁸ and the Second Issue for which the Defence is seeking leave, this issue does not ask the Appeals Chamber to review a particular finding or category of redactions. Rather, it seeks to overturn and presumably remand to the Chamber the entire Decision governing redactions prior to the confirmation hearing.

The Second Issue: whether Rule 81(2) can cover protection of the identity of potential witnesses for the Prosecution

16. The Prosecution does not oppose granting leave to appeal the Second Issue. The Prosecution notes that this issue may affect the fair and expeditious conduct of the proceedings, and warrants immediate resolution by the Appeals Chamber.¹⁹ While the Prosecution disagrees with many of the arguments raised by the Defence in the Application for Leave in respect of this issue, it recognizes that the majority of these disagreements go to the merits of any future appeal and are not appropriate for further discussion in the context of an application for leave.

¹⁸ ICC-01/04-01/07-107.

¹⁹ The Prosecution has previously not opposed leave to appeal an issue relating to the interpretation of Rule 81(2) during preparation for the confirmation hearing – *Prosecutor v Lubanga*, ICC-01/04-01/06-497, 3 October 2006, para. 30.

Conclusion

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

- grant leave to appeal the Second Issue pursuant to Article 82(1)(d); and
- deny leave to appeal the First Issue.


Luis Moreno-Ocampo
Prosecutor

Dated this 17th day of December 2007
At The Hague, The Netherlands