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THE APPEALS CHAMBER

Before :

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

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

Public

**Defence Appeal Brief concerning the First Decision on the Prosecution Request for
Authorisation to Redact Witness Statements**

The Office of the Prosecutor

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Introduction

1. On 19 December 2007, the Single Judge of Pre-Trial Chamber I granted the Defence leave to appeal the issue « whether the Single Judge enlarged the scope of application of rule 81(2) of the Rules by considering as Prosecution sources those individuals – whose identity and identifying information could be redacted pursuant to the said rule – who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution ».¹
2. Accordingly, the Defence for Mr. Germain Katanga (“the Defence”) files this Appeal Brief pursuant to Article 82(1)(d) of the Rome Statute. For the reasons set out in this Appeal Brief and in the *Defence Motion for Leave to Appeal the First Decision on the Prosecution Request for Authorisation to Witness Statements*,² the Defence submits that the Single Judge of Pre-Trial Chamber I made a reversible error in allowing redactions of the identities and identifying information of potential Prosecution witnesses pursuant to Rule 81(2) of the Rules of Procedure and Evidence (“Rules”).
3. In support of this issue of appeal, the Defence raises three arguments on appeal: (1) Statements of potential witnesses do not qualify as Prosecution sources; (2) Rule 81(2) requires disclosure of identities of sources; (3) Widening the scope of Rule 81(2) defeats the purpose of disclosure.

Procedural background

4. During an *ex parte* hearing held on 20 November 2007, the Prosecution requested, *inter alia*, redactions of the identities and identifying information of potential witnesses. The request was primarily based on Rule 81(4). The Prosecution argued that the term « witnesses » in Rule 81(4) also refers to « prospective witnesses », which covers « any individual contacted, or intended to be contacted by the Prosecution, and who may or may not become a Prosecution witness at a later stage ».³

¹ Public Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116 19-12-2007 7/7 SL PT [« Decision on Defence Motion for Leave to Appeal »].

² Public Defence Motion for Leave to Appeal the First Decision on the Prosecution Request for Authorisation to Witness Statements, ICC-01/04-01/07-99 13-12-2007 12/12 JT PT [“Defence Motion for Leave to Appeal”].

³ Urgent Public Redacted Version of First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-90 07-12-2007 2/25 EO PT [« impugned Decision »], para 39, with reference to: ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 7, lines 8-25 and p. 8, lines 1-11.

5. In the alternative, the Prosecution held that Rule 81(2) covers prospective or potential Prosecution witnesses. According to the Prosecution, those individuals could be considered as “Prosecution sources” and “ongoing and further investigations could be prejudiced if they were to be threatened, intimidated or interfered with”.⁴
6. In her *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« impugned Decision »), issued on 7 December 2007, the Single Judge of Pre-Trial Chamber I rejected the former argument, but accepted the latter argument. Thus, the impugned Decision, *inter alia*, authorised the requested redactions of the identities and identifying information of potential Prosecution witnesses who had been or were about to be interviewed by the Prosecution pursuant to Rule 81(2) of the Rules.⁵
7. On 13 December 2007, the Defence sought leave to appeal, *inter alia*, the issue of whether Rule 81(2) could provide a legal basis for authorising redactions of the identities and identifying information of potential Prosecution witnesses.⁶ On 19 December 2007, the Single Judge of Pre-Trial Chamber I granted appeal on this issue.⁷ On 21 December, the Appeals Chamber granted the Defence an extension of time until 2 January 2008.⁸ Accordingly, the Defence hereby submits the following arguments in support of its issue on appeal.

(1) Statements of potential witnesses do not qualify as Prosecution sources

8. Rule 81(2) of the Rules provides:

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

⁴ Impugned Decision, para 39, with reference to: ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 22, lines 4-20.

⁵ Impugned Decision, paras 40-42.

⁶ Defence Motion for Leave to Appeal (*supra* note 2).

⁷ Decision on Defence Motion for Leave to Appeal (*supra* note).

⁸ Public Urgent Decision on the « Defence Application for Extension of Time to File Document in Support of Appeal », ICC-01/04-01/07-121 21-12-2007 2/4 CB PT OA2.

9. The Defence submits that Rule 81(2) does not provide a proper basis to withhold from the Defence the identities and identifying information of potential Prosecution witnesses. The materials or information this Rule refers to do not include statements of potential witnesses. Statements of actual witnesses are covered by Rule 81(4). Statements of potential witnesses are not covered by any rule on disclosure. The reason is that, unless these statements include exculpatory evidence, the Prosecution is not under any obligation to disclose these statements. Hence, such statements do not qualify as material or information « in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute » [emphasis added].
10. The Prosecution is only required to disclose to the Defence exculpatory materials or materials on which it intends to rely. Potential or actual witnesses who exculpate the Accused do not need protection and would, therefore, not fall under the regime of Rule 81. Materials the Prosecution intends to rely on cannot include statements of potential witnesses. The Prosecution can only rely on statements of actual witnesses whose redactions it may seek under Rule 81(4). It is unheard of in any judicial system that any party can rely on statements of potential witnesses. A person who has been or is about to be interviewed by a party either agrees to be a witness and that his or her statement can be used in the investigations, or he or she does not. Only if he or she agrees or is obligated by a judicial order to cooperate can his or her information be relied upon.
11. If the Prosecution is not yet sure whether to use those potential witnesses as actual witnesses, or if those potential witnesses are not yet sure whether they are willing to become actual witnesses, the Prosecution is clearly not ready to confirm the charges against Mr. Katanga during a confirmation hearing. If this is indeed the dilemma, the Defence proposes to postpone the confirmation hearing rather than granting the Prosecution permission to rely on statements of potential witnesses, thereby creating poor precedent. If no such dilemma exists, there is no justification for the Prosecution to rely on potential witnesses rather than actual witnesses.
12. The Defence fails to understand the purpose of using statements of persons who are not actual witnesses. If such statements contain allegations which will at no point during the proceedings be confirmed by actual witnesses, then these statements have

no probative value. On the other hand, such unconfirmed allegations are highly prejudicial to the Accused. Unconfirmed allegations create an air of suspicion against which the Accused cannot properly defend himself because they are not actual allegations.

13. In the *ad hoc* Tribunals, evidence whose prejudicial effect substantially outweighs its probative value is not admissible.⁹ Likewise, such evidence should not be admitted in proceedings before the International Criminal Court. Pursuant to Article 69(4) of the Rome Statute, prejudice is a factor to be considered in determining the admissibility of evidence. The Defence accepts that the confirmation hearing is not a « mini-trial »,¹⁰ or « a determination of the guilt or innocence of the suspect ».¹¹ The Defence is also aware that « the threshold for the confirmation of the charges is lower than for a conviction » and that this threshold may be reached « even if the reliability of the witnesses and other evidence was not fully tested ». That, however, in no way suggests that the Prosecution is entitled to produce hearsay evidence that cannot be tested in any direct or indirect manner. The purpose of a confirmation hearing would be wholly defeated if the Prosecution can rely on evidence of such poor quality in support of the charges.

14. Rule 81(2) was clearly not intended to serve as a basis to allow the Prosecution to rely on statements of persons who, for reasons unknown to the Defence, are not actual witnesses. Thus, it cannot be the case that statements of potential witnesses are Prosecution sources under Rule 81(2). Therefore, the Single Judge erred in perceiving statements of potential Prosecution witnesses as Prosecution sources under Rule 81(2). In doing so, the Single Judge erroneously enlarged the scope of application of Rule 81(2).

(2) Rule 81(2) requires disclosure of identities of sources

⁹ *Prosecutor v. Tadic*, IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para. 16 ; *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Prosecutor's Interlocutory Appeals regarding Exclusion of Evidence, 19 December 2003, para. 16.

¹⁰ As noted by the Single Judge of Pre-Trial Chamber I during a Status Conference on 14 December 2007.

¹¹ *Prosecutor v. Lubanga*, Public Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-774 14-12-2006 18/29 CB PT OA6, para. 47 ("Lubanga Appeal Judgment against Second Decision on Redactions").

15. In case the Appeals Chamber finds that the Prosecution can rely on statements of potential witnesses for the purpose of the confirmation hearing, then the Prosecution is under a clear obligation to adequately disclose those statements. Rule 81(2) explicitly states that « the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused ».
16. The Defence is cognisant of the Appeals Chamber's previous finding in *Lubanga* that this part of Rule 81(2) does not automatically mean that a statement or document within the ambit of Rule 81(2) « must either be disclosed in its entirety or not considered at the confirmation hearing at all ».¹²
17. As this issue has already been determined by the majority of the Appeals Chamber,¹³ the Defence will not take the absolute approach that this part of Rule 81(2) creates an automatic rule that statements or documents under this Rule can only be used at the confirmation hearing if disclosed in their entirety. However, this part of Rule 81(2) may, depending on the particular circumstances, prevent the use of statements or documents at the confirmation hearing if not adequately disclosed.
18. This argument is completely in line with the Appeals Chamber's reasoning that the extent to which redactions may be authorised or maintained if the Prosecutor seeks to introduce information that is only partly disclosed to the Defence depends on « the facts of the individual case, taking into account the interests of the defence and the need for a fair and impartial trial ».¹⁴
19. In this particular situation, disclosure of the statements of potential witnesses would not be adequate without disclosing their identities and identifying information.

¹² Lubanga Appeal Judgment against Second Decision on Redactions, para. 45.

¹³ The Defence nonetheless notes with approval the Separate Opinion by Judge Georgios M. Pikis, attached to the Lubanga Appeal Judgment against Second Decision on Redactions, that "rule 81(2) of the Rules of Procedure and Evidence does not authorize the disclosure of a witness' statement in a redacted statement or a summary thereof under any circumstances. Rule 81 (2) of the Rules of Procedure and Evidence envisages the disclosure or non-disclosure of a compact piece of evidence or information which is the subject-matter of the rule. A piece of evidence like a witness statement or information is a unified entity that cannot be pierced. It cannot be fragmented because it entails alteration of or detracting from its content. Rule 81 (2) of the RPE makes no provision for partial disclosure of a set piece of evidence or information. Unambiguously, it provides that where disclosure of evidence or information is likely to prejudice further or ongoing investigations, the court may authorize its non-disclosure. There is no halfway house allowing the disclosure of parts of the evidence or information through a process of redaction of its content. The price of non-disclosure is prohibition of the use of the evidence in court proceedings, a fetter that may subsequently be removed by adequate prior disclosure" (Separate Opinion, paras 15, 16).

¹⁴ Lubanga Appeal Judgment against Second Decision on Redactions, para. 46.

Pursuant to Article 61(3)(b) of the Rome Statute, the suspect has a right to be informed, prior to the hearing, of the evidence on which the Prosecutor intends to rely. The purpose of this right is to enable the suspect to challenge the evidence presented by the Prosecutor at the confirmation hearing (Article 61(6)(b) of the Statute).¹⁵

20. Challenging the evidence from anonymous sources is impossible. This is so, because the Defence would be deprived of an opportunity to challenge the credibility of the sources of the allegation, which can only be effectively done if the identities of the accusers are known. Not only are the sources of the allegations anonymous, the allegations are also entirely based on hearsay, given that the sources are not actual witnesses. Anonymous hearsay statements cannot be said to inform the suspect of the evidence on which the Prosecution intends to rely. The disclosure of statements of potential witnesses is therefore meaningless if the identities and identifying information of the makers of the statements are redacted.
21. The redactions of the identities and identifying information of potential witnesses also hamper the Defence in conducting effective investigations to challenge the charges in general. The starting point of any effective investigation is the identity of the accusers. Only with that information can the Defence make focused inquiries. There may be good cause for withholding from the Defence, on a temporary basis, the identities of the accusers. However, such good cause is absent in the present situation, given that they are not actual witnesses.
22. Because the persons in question are not actual witnesses, the Defence is entitled to contact them. Speaking to those persons may be crucial for the Defence pre-confirmation investigations. Given the extremely limited time for the Defence to prepare for the confirmation hearing, it is important to sharply focus on the evidence that will be presented by the Prosecution. In this process, it would be very helpful indeed to have the contact details of those potential witnesses. Even if those potential witnesses are not accusers *per se*, they may be able to provide the Defence with relevant information or to get the Defence in contact with other useful sources.

¹⁵ As confirmed by the Appeals Chamber in the Lubanga Appeal Judgment against Second Decision on Redactions, para. 47.

23. In granting the Defence's request for leave to appeal the impugned Decision, the Single Judge acknowledged the value of this argument:¹⁶

CONSIDERING that those individuals who have been interviewed or are about to be interviewed by the Prosecution, and who have not yet become Prosecution witnesses, may have valuable information concerning the case at hand; that as they have not yet become Prosecution witnesses, the Defence may have an interest in contacting them; and that the redaction of their identities and identifying information would prevent the Defence from contacting them for the purpose of the preparation of the confirmation hearing.

24. The Single Judge had nonetheless already authorised those same redactions. The Single Judge erred in authorising the redactions of the identities and identifying information of the potential witnesses pursuant to Rule 81(2), thereby widening its scope, if the Prosecution intends to rely on those statements at the confirmation hearing.

(3) Widening the scope of Rule 81(2) defeats the purpose of disclosure

25. The Defence appreciates the importance of witness protection, but also emphasises the importance of respecting the right to a fair trial. It is important that these, at times conflicting, objectives are carefully balanced. A Trial Chamber at the International Criminal Tribunal for the former Yugoslavia (« ICTY ») emphasised its duty « to strike a fair balance between the right of the Accused to a fair trial on the one side, and the protection of victims and witnesses and the right of the public to access of information on the other side, the right of the Accused encompassing, in particular, the right to be allowed adequate time for the preparation of a defence, and to cross-examine witnesses testifying against the Accused ».¹⁷

26. Thus, the need to protect witnesses cannot override the defendant's right to a fair trial. On that premise, the rule is to fully disclose the materials that support the charges. Redactions can only be made on an exceptional basis with leave of the Court. The Court will exceptionally authorise such redactions where less extreme measures are not available, in accordance with the principle of necessity. Pursuant to the principle of proportionality, the redactions must be strictly limited to the exigencies of the situation, and must not infringe the right of the Defence to a fair and impartial trial.

¹⁶ Decision on Defence Motion for Leave to Appeal (*supra* note 1).

¹⁷ *Prosecutor v. Haradinaj et al*, IT-04-84-T, Decision on Prosecution's Application for Pre-Trial Protective Measures for Witnesses, 20 May 2005, page 4.

Where a protective measure (temporarily) infringes the rights of the defence, the Chamber is obliged to implement appropriate counterbalancing measures.¹⁸

27. The Defence has not been privy to the justifications, if any, raised by the Prosecution in the various *ex parte* hearings on the issue of redactions. *Prima facie*, however, it appears that the principle of necessity has not been complied with. Moreover, the redactions severely infringe the right of the Defence to a fair and impartial trial. The Defence cannot think of any grounds that would justify the authorised redactions of the identities and identifying information of persons who are not actual witnesses.

28. The Defence is unaware of any specific request of any of those potential witnesses to remain anonymous from the Defence. The Defence is also unaware whether any of those potential witnesses has expressed any fear for their safety, and if so, on what ground. If they have, and their feelings of fear are genuine, it still has to be determined whether this subjective fear has an objective foundation.¹⁹ The Defence is completely left in the dark as to this type of specific information.

29. The Prosecution has the burden of demonstrating that the redactions are necessary.²⁰ The Single Judge had the obligation of explaining properly the reasons for authorising the requested redactions. Both have failed their obligations, which on its own, is a sufficient ground to reverse the Decision on appeal.²¹

30. On the information the Defence has, the authorised redactions seem rather excessive. This is particularly so, given that the Single Judge did not authorise the redactions with the aim to protect witnesses or even those individuals – not presently marked as witnesses – who have given or are about to give a statement to the Prosecution. The

¹⁸ *Prosecutor v. Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, ICC-01/04-01/06-108 – 19.05.2006; ICC-01/04-01/06-108-Corr; *Prosecutor v. Lubanga*, Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102 – 15.05.2006.

¹⁹ This is the approach taken by the ICTY, the International Criminal Tribunal for Rwanda (« ICTR ») and the Special Court for Sierra Leone (« SCSL »). See, *inter alia*, *Prosecutor v. Brima, Kamara, Kanu*, Case No. SCSL-2004-16-T, Decision on the Joint Defence Application for Protective Measures for Defence Witnesses, 9 May 2006; *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, First Decision on Motion by Prosecution for Protective Measures, 21 July 2000, para. 26; *Prosecutor v. Mpambara*, No. ICTR-2001-65-I, Decision on Protection of Defence Witnesses, 4 May 2005, para. 2.

²⁰ *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July, 2000, paras. 13, 16–18, and 22–28; *Prosecutor v. Bizimungu et al*, No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses, 2 February 2005, para. 13.

²¹ The Defence in Lubanga successfully raised as a ground of appeal the fact that the Single Judge's explanations for authorizing redactions were inadequate. See Lubanga Appeal Judgment against Second Decision on Redactions, paras. 28-34.

redactions were authorised to avoid hindrance to the Prosecution's ongoing or further investigations.

31. Completely deprived of any further details regarding specific fears of specific individuals, the Defence assumes that the threats of, intimidation of or interference with those potential witnesses are, at this stage, purely hypothetical and have not yet materialised. Hypothetical claims of witness interference cannot justify an infringement of the right of the defendant to have adequate preparation time.²² Therefore, such hypothetical claims cannot trigger the exceptional measure of non-disclosure to the Defence of the most important information, namely the identities and identifying information of the makers of the statements.

32. If the fears of threats, intimidation or interference are not purely hypothetical, then Rule 87 provides the appropriate procedure to the Prosecution. Rule 87(1) refers to persons who may be "at risk on account of testimony given by a witness pursuant to article 68 paragraphs 1 and 2". Rule 87, however, only allows for protective measures if requested on an *inter partes* basis,²³ and which are directed against disclosure of the person's identity to the public,²⁴ as opposed to the Defence. Allowing the Prosecution to bypass this Rule and rely on Rule 81(2) to avoid the need to make out a case for each individual application and to disclose the information to the defence would clearly contradict the intention of the drafters. By adopting Rule 87, which would be wholly applicable to a situation as the present, if the Prosecution's allegation is founded, the drafters have indicated that an order for confidentiality would suffice to protect persons who - since they are only potential witnesses, thus have no special status at present - are less likely (if at all) to face any threat to their safety or security as a result of disclosure to the Accused and his Defence team of professional lawyers.²⁵

33. There are, further, definitely less drastic options for the Prosecution to protect its ongoing or further investigations. Even without relying on Rule 87, it would be way more appropriate for the Prosecution to withhold the identities and identifying

²² *Prosecutor v. Bagosora et al*, No. ICTR-98-41-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, 18 July 2003, para. 21.

²³ Rule 87(2)(a) of the ICC Rules of Procedure and Evidence.

²⁴ Rule 87(3) of the ICC Rules of Procedure and Evidence.

²⁵ This was also the position of the ICTY Pre-Trial Chamber in *Brdanin and Talic*, where the Pre-Trial Judge found that the safety of persons who were not actual witnesses would not be jeopardised by disclosure of their identity to the Defence. The Prosecution was therefore ordered to disclose the statements in unredacted form. *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 32.

information of its potential witnesses from the public at large only while disclosing this information to the Defence. There is a clear difference between the dangers of disclosure to the public at large and to the Defence. Where the request for disclosure concerns the Defence only, not the public and media, the Prosecution must demonstrate that such disclosure exclusively to the Defence increases the threat to witnesses.²⁶

34. Members of Mr. Katanga's Defence team are bound by rules of ethics and take their obligations of confidentiality extremely seriously. Unless there is evidence to the contrary, it must be assumed that the Defence will abide by those obligations.

35. Mr. Katanga is currently imprisoned in The Hague, a place far remote from the region where the witnesses are residing. Being so isolated and removed from the crime-scene, Mr. Katanga's contact with the outside world and, more specifically, with persons in the Democratic Republic of the Congo, is limited. He has, thus far, not received any visitors and his phone calls are monitored. In these circumstances, even if he so wished, Mr. Katanga is in no position to threaten, intimidate or interfere with any person residing in his region. Neither is he in a position to order someone else to do so on his behalf. It is, therefore, clearly excessive and contrary to the principle of necessity to withhold from the Defence the identities and identifying information of persons who made incriminating statements against Mr. Katanga and who may or may not become Prosecution witnesses.

36. The Prosecution's fear that persons are reluctant to cooperate if there is a risk that their identities be disclosed to the Defence can be resolved in ways other than withholding this information from the Defence. The Prosecution should have a constructive dialogue with any person who is potentially willing to make a statement. The Prosecution should adequately explain the consequences of making such statement and what the statement may potentially be used for.²⁷ The Prosecution should also provide such a person with a realistic picture of any potential risks involved in making a statement and what protective measures are available. The Defence is fully convinced that a person who is well-informed of his or her position would be way

²⁶ *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on First Motion by Prosecution for Protective Measures, 21 July 2000, para. 26.

²⁷ In *Prosecutor v. Brdanin and Talic*, the Pre-Trial Judge criticised the Prosecution for not informing the witness that their statement and identity might be disclosed in other cases. However, the Prosecution's failure to do so did not result in non-disclosure to the Defence. *Prosecutor v. Brdanin and Talic*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 30.

more willing to cooperate than someone who is not. If such persons, being fully informed, still refuse to cooperate, then the Prosecution should find other persons who are willing to cooperate, because the Prosecution will not be able to rely on their information anyway.

37. Therefore, given that the authorised redactions are clearly contravening the essential principles of disclosure and that less drastic measures could have been taken instead, the Single Judge of Pre-Trial Chamber I erroneously expanded Rule 81(2) beyond its intended scope in allowing those redactions pursuant to Rule 81(2).

Conclusion

38. On these grounds, the Defence submits that no reasonable judge could have come to the conclusion that the identities and identifying information of potential witnesses may be withheld from the Defence pursuant to Rule 81(2) if the Prosecution intends to rely on their statements. The Single Judge, therefore, committed a reversible error. This Appeal Brief has clearly demonstrated that this error is seriously detrimental to the Defence. The authorised redactions, namely, deprive the Defence of any real opportunity to challenge the charges at the confirmation hearing, thereby effectively removing any function from the Defence at the confirmation hearing. This is not an issue falling within the exclusive discretion of the Single Judge. The issue of redactions is of significant importance in these proceedings, given the far-reaching consequences thereof. It is also important for future proceedings, as the issue is not yet settled in law. Therefore, the Appeals Chamber's intervention to correct the Single Judge's error is warranted.

39. Therefore, the Defence prays the Appeals Chamber to find that the Single Judge erroneously enlarged the scope of application of Rule 81(2) of the Rules; to reverse the impugned Decision; and to order the Prosecution to disclose the identities and identifying information of the potential witnesses whose statements the Prosecution intends to use at the confirmation hearing.

Respectfully submitted,



Mr David Hooper, Defence Counsel

The 2nd of January 2008

At The Hague, Netherlands