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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 Response to Confidential Prosecution's Document in support of Appeal
 against the First Decision on the Prosecution Request for Authorisation to Redact
 Witness Statements**

The Office of the Prosecutor

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Introduction

1. The Defence for Mr. Germain Katanga (« the Defence ») hereby files a response to the *Confidential Prosecution's Document in Support of Appeal against the First Decision on Redaction of Witness Statements* (« Prosecution's Appeal »).¹ The Defence requests that the Appeals Chamber dismiss the Prosecution's arguments and, save for the pending issue of appeal addressed by the Defence,² confirm the Single Judge's *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« impugned Decision »)³ pursuant to Rule 158(1) of the Rules of Procedure and Evidence (« Rules »). The Defence offers the following arguments in support of this request.

(1) First Prosecution Issue on Appeal : Innocent Third Parties

2. The Prosecution's submission that the Single Judge erred as a matter of law in finding that Rule 81(4) of the Rules "does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families ("innocent third parties")",⁴ is without merit. Indeed, the Single Judge's conclusion on this issue was the only proper conclusion to be drawn from Rule 81(4) in conjunction with Article 54(3)(f) of the Rome Statute.

Interpretation of Rule 81(4) in conjunction with Article 54(3)(f)

3. The Prosecution correctly points out that « [t]he rule governing the interpretation of a section of law is its wording read in context and light of its object and purpose ».⁵ The

¹ ICC-01/04-01/07-46-131-Conf 02-01-2008 3/20 CB PT OA, filed on 2 January 2008. The Defence notes that the Prosecution filed its Document confidentially. The Defence Response is nonetheless legitimately filed publicly given that no confidential information is provided.

² Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness, ICC-01/04-01/07-132 02-01-2008 2/13 JT PT OA2, filed on 2 January 2008 ("Defence Appeal Brief").

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, issued on 7 December 2007.

⁴ Prosecution's Appeal, para. 9; Impugned Decision, para. 54.

⁵ Prosecution's Appeal, para. 13, footnote 24 with reference to: *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 OA3, 13 July 2006, para. 33. See further: *Prosecutor v. Kony et al*, ICC-02/04-01/05-147, Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005, 8 March 2006 ("Kony Decision relating to Registrar's Submission"), para. 25, where the Pre-Trial Chamber held that "[i]t is a general principle of international law that the provisions of a treaty must be interpreted not only in "good faith in accordance with the ordinary meaning" to be given to the relevant terms, but also "in their context" and "in light of its object and purpose" (article 31, paragraph 1, of the 1969 Vienna Convention on the Law of the Treaties), i.e., in such a way as not to defeat that

Defence would add to that, the obligation to apply and interpret the Rome Statute and Rules « consistent with internationally recognized human rights » pursuant to Article 21(3) of the Rome Statute.⁶

4. Rule 81(4) and Article 54(3)(f) must be interpreted in light of those principles. Unlike the Prosecution suggests, these provisions do not leave room for ambiguity. Whether a literal or theological interpretation be given to Rule 81(4) read together with Article 54(3)(f), the combination of these provisions does not authorise redactions of the identities of “innocent third parties”.

5. Rule 81(4) provides:

The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

6. The Single Judge correctly found that⁷

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."

7. In the present application, the Prosecution indicated that the redactions of the identities of « innocent third parties » are not being sought under 81(2) of the Rules to protect the Prosecution’s further or ongoing investigations, nor under Rule 81(4) read together with Article 68 of the Rome Statute for the purpose of protecting the identities of Prosecution witnesses, victims or members of their families.⁸ The question here is

object and purpose. The method of interpretation aimed at achieving this result is usually referred to as “functional” or “theological” interpretation. Equally inferred from article 31 of the 1969 Vienna Convention, and equally generally accepted, is the principle (commonly referred to as “effet utile”, “useful effect” or “principle of effectiveness”) that a treaty as a whole, as well as its individual provisions, must be read in such a way so as not to devoid either the treaty as such or one or more of its provisions of any meaningful content” [footnotes omitted].

⁶ See Public 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, 13 July 2006, para. 38.

⁷ Impugned Decision, para. 53.

⁸ Impugned Decision, paras. 45-46.

whether the requested redactions of the identities of “innocent third parties” may be authorised under the first part of Rule 81(4) read together with Article 54(3)(f) allowing the Prosecution to “[t]ake necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.”

8. Article 54 of the Rome Statute regulates the duties and powers of the Prosecutor with respect to investigations. Article 54(3)(f) does not impose any obligations on the Chamber, nor does it create any additional powers for the Chamber to grant redactions other than those which are expressly provided for in the Statute and Rules.
9. In this context, Pre-Trial Chamber II has ruled in the situation of Uganda that “[t]his provision does not grant the Prosecutor an absolute right to confidentiality, especially towards the judges or the Chambers, but simply an entitlement “to ensure the confidentiality of information””.⁹
10. In addition, Article 54(3)(f) is expressly subject to the Prosecution’s disclosure obligations to the Defence.¹⁰ Article 61(3)(b) of the Rome Statute is the leading Article in this respect, stipulating that the suspect has a right to be informed, prior to the confirmation hearing, of the evidence on which the Prosecutor intends to rely. Also, pursuant to Rule 76(1), the Prosecution must disclose to the Defence copies of any prior statements made by witnesses it intends to rely on.¹¹ The Prosecution may only disclose this information to the Defence in redacted format with leave of the Court and within the parameters of Rules 81 and 82.
11. Article 54(3)(f) does not create an independent exception to those general disclosure obligations. This also follows from Article 54 itself. Whereas the Prosecutor ‘may’ take measures to ensure confidentiality under article 54(3)(f), Article 54(1)(c) dictates

⁹ Kony Decision relating to Registrar’s Submission, para. 58.

¹⁰ As concluded by Pre-Trial Chamber II in the Kony Decision relating to the Registrar’s Submission, “Contrary to what is asserted in paragraph 39 of the Prosecutor’s submission, it is understood by the commentators cited by the Prosecutor that article 54, paragraph 3(f) of the Statute is “subject to disclosure orders by the Court pursuant to the Statute and the Rules of Procedure and Evidence” (para. 58 footnote 82, with reference to: Mr. Bergsmo and P. Kruger, Article 54 in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, Nomos Verlagsgesellschaft.

¹¹ The Appeals Chamber has confirmed that Rule 76 is applicable to the confirmation hearing as well. See *Prosecutor v. Lubanga*, Public Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06, 13 October 2006 (“Lubanga Appeals Chamber Judgment on General Disclosure Principles”), para. 34.

that the Prosecutor “shall [...] fully respect the rights of persons arising under this Statute”, such as the right of the suspect to be informed of the evidence on which the Prosecution intends to rely at the confirmation hearing pursuant to Article 61(3)(b).

12. The International Criminal Tribunal for Rwanda (« ICTR ») has also ruled that the Prosecutor cannot rely on a similarly worded provision as a basis for creating an independent exception to the Prosecution’s disclosure obligation.¹²

13. The Defence further submits that the powers of the Prosecution under Article 54(3)(f) are subject to the functions of the Prosecutor, as set out in Article 54(1)(a), as an impartial minister of justice, who is vested with independence and wide-reaching powers in order to ensure fairness in circumstances in which the Defence might not be able to access certain materials themselves.

14. In this regard, the drafters of the Rome Statute were aware that the Defence “would not be able to wield similar authority [as the Prosecutor] to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of recourses between parties.”¹³ The Prosecutor was therefore vested with strong investigative powers subject to a “clear and binding mandate for the Prosecutor to investigate both sides of the case equally”.¹⁴ The rationale for vesting the Prosecution with such powers would be completely vitiated if the Prosecution chose to construe its disclosure obligations in the narrowest manner possible. The result can only be a manifest inequality of arms, with little, if any prospects for fair proceedings. In this regard,

¹² The Prosecution asserted that it is empowered to withhold the identity of a person, who was a witness in another case, on the basis of Rule 39 (ii) of the Rules of the ICTR Rules of Procedure and Evidence, which authorizes the Prosecution to “take all measures necessary for the purpose of the investigation and to support the prosecution at trial, including the taking of special measures to provide for the safety of potential witnesses and informants”. The Chamber observed that “The Appeals Chamber has referred to the obligation to disclose exculpatory material as “fundamental to the fairness of proceedings before the Tribunal”.¹ Exceptions to that obligation must be subject to the specific, judicially-controlled provisions of Rule 68 (D). An independent power of the Prosecution to withhold information on unenumerated grounds could undermine the scope of Rule 68 (A).” See *Prosecutor v. Bagasora*, ICTR-98-41-T, Decision On Disclosure Of Identity Of Prosecution Informant, 24 May 2006, para. 8.

¹³ M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, Nomos Verlagsgesellschaft, at page 716, para. 2.

¹⁴ M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, Nomos Verlagsgesellschaft, at page 716, para 2.

there cannot be a really *fair* trial, if this fairness has not been practised and guaranteed appropriately in the phases before the trial.”¹⁵

15. In discussing the scope of the Prosecution’s obligations under Article 54, Bergsmo and Krueger have opined that “[m]aterial collected during the investigative phase should be collected with a view to their ultimate utilisation in Court proceedings”.¹⁶ A key consideration in construing the extent of the Prosecutor’s disclosure obligations should be the fact that “by seizing material, the Prosecution denies such accused persons access to that material. Experience has demonstrated that the results can be seriously deleterious to the rights of the accused.”¹⁷ Thus, the Prosecution does not fulfil its obligation to establish the truth by merely collecting evidence. In order to preserve the fairness of adversarial proceedings, the Prosecution must actually put the Defence in a position to use that information in court.¹⁸

16. It follows from this analysis that the Prosecution’s proposed interpretation of Rule 81(4) in conjunction with Article 54(3)(f) to allow redactions of the identities of « innocent third parties » would wholly defeat the object and purpose of Article 54 and devoid the disclosure scheme, balanced on the rights of the victims and witnesses and the defendant’s fair trial, of any « meaningful content ». ¹⁹ Given that the right of the defendant to a fair trial is seriously affected by non-disclosure, such wide interpretation would also be inconsistent with internationally recognized human rights.

Redactions under Rule 81(4) may only be authorised exceptionally

17. The Appeals Chamber has emphasised that « [t]he Statute and the Rules of Procedure and Evidence place much importance on disclosure to the defence ». ²⁰ The Appeals Chamber further confirmed that non-disclosure to the person in respect of whom a

¹⁵ Marchesiello, ‘Proceedings before the Pre-Trial Chamber’ in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court*, 2002, at page 1232. See also Public Appeals Chamber 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 13-07-2006 2/17 UM PT OA3 [DRC situation], para. 11.

¹⁶ M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, Nomos Verlagsgesellschaft, at page 719, para 29.

¹⁷ Decision of Duty Judge on Search and Seizure Warrant, Case IT-02-55-Misc4, cited in G. McIntyre, ‘Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY’, 25 August 2003, Outreach Seminar: Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps < <http://www.isrcl.org/Papers/McIntyre.pdf> >.

¹⁸ *Prosecutor v. Blaskic*, IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 41.

¹⁹ Kony Decision relating to Registrar’s Submission, para. 25.

²⁰ Lubanga Appeals Chamber Judgment on General Disclosure Principles, para. 37.

confirmation hearing is held of portions of prior statements made by witnesses on whom the Prosecution intends to rely at the confirmation hearing « is an exception to the general rule that the identity of such witnesses and their prior statements are to be disclosed ».²¹ The Prosecution may seek to depart from its general disclosure obligations but only with leave of the Court. Such leave may only be given if the Prosecution successfully demonstrates the need for the invocation of the exceptional measure of withholding information from the Defence. Redactions may be needed to protect the Prosecution's ongoing investigations, or to protect the safety of witnesses and victims and members of their families.

18. Since « innocent third parties » are neither Prosecution sources pursuant to Rule 81(2), nor witnesses, victims or members of their families pursuant to Rule 81(4), the Statute and Rules do not provide a basis for authorising redactions of their identities. In addition, the Prosecution clearly failed to demonstrate that there is a need to protect those « innocent third parties ».

19. The Prosecution concedes that « innocent third parties are generally not related to the case »²² and « the information concerning innocent third parties is not relevant to the charges ».²³ If that is the case, the Defence fails to see how their safety would be at risk if their identities be disclosed to the Defence. The defendant has been removed from the area where the innocent third parties are residing and therefore cut off from any possibility to intimidate them. Thus, there is no real danger to their safety. But even if the defendant had the possibility to intimidate them, what interest could he possibly have in intimidating persons who the Prosecution does not intend to meet, let alone use as witnesses?²⁴

20. The situation in the eastern part of the Democratic Republic of the Congo (« DRC ») may be precarious which is not surprising given the length and seriousness of the conflict that occurred there. As a direct result of the conflict, the environment of the eastern DRC may be « highly sensitive, and often dangerous », ²⁵ not only for actual witnesses and victims or any other person who accidentally got in contact with a witness or who has had some other involvement with the International Criminal Court

²¹ Lubanga Appeals Chamber Judgment on General Disclosure Principles, para. 1.

²² Prosecution's Appeal, para. 11. The Prosecution claims that, therefore, « the redaction of their identities does not have any material bearing on the right of an accused to a fair trial ».

²³ Prosecution's Appeal, para. 22.

²⁴ Prosecution's Appeal, para. 12.

²⁵ As suggested by the Prosecution in the Prosecution's Appeal, para. 18.

(« ICC ») proceedings, but also for persons who never had any dealings with the ICC. This is unfortunate but does in no way justify redactions of the identities of any person living in those precarious conditions. Sweeping statements not supported by any evidence about potential intimidations or reprisals of « innocent third parties » by this particular defendant do not demonstrate that disclosure of their identities to the Defence would cause a genuine risk to their safety. The fact that other Accused in other Tribunals have in the past allegedly leaked confidential information to the public²⁶ does, of course, not provide evidence that Mr. Katanga may do the same and has, therefore, no bearing on his case.

21. Allowing redactions of the identities of « innocent third parties » would wholly undermine the exceptional nature of non-disclosure. The examples of « innocent third parties » given by the Prosecution clearly indicate how broad the term « innocent third parties » is and that absolutely any person can be covered by it.

22. Thus, the Prosecution failed to convincingly demonstrate that its request for redactions of the identities of « innocent third parties » is justified. There is, therefore, no need to assess the impact of the request on the defendant's right to a fair trial. As a Trial Chamber at the International Criminal Tribunal for the former Yugoslavia (« ICTY ») held, "it is not a question of whether the accused can show that they would be prejudiced by the denial of their rights to have the identity of those persons disclosed. The question is whether the prosecution has established that the interests of justice require that denial of those rights of the accused."²⁷

23. However, in case the Appeals Chamber finds that the Prosecution did demonstrate a need for the requested redactions, authorisation thereof should still not be given because that would completely undermine the defendant's right to a fair trial.

The requested redactions undermine the right to a fair trial

24. The defence submits that the term « innocent third parties », is a misnomer, since it implies that such persons have no bearing on the case and the rights of the Defence. In fact, any persons referred to in a Prosecution witness statement are potential defence witnesses, since they may be in a position to discredit certain aspects of the

²⁶ Prosecution's Appeal, para. 21, footnote 32.

²⁷ *Prosecutor v. Brdjanin and Talic*, IT-99-36-T, Decision On Second Motion By Prosecution For Protective Measures, 27 October 2000, para. 31.

Prosecution witness statement or the credibility of the Prosecution witness. The Defence, therefore, has a real interest in contacting those « innocent third parties », not to threaten or intimidate them but to seek their cooperation in the preparations of the defence case and to challenge the credibility of the actual witnesses and the reliability of their statements. For the preparation of a full and vigorous defence, it is important that the Defence gets the investigative ball rolling as soon as possible. Contacting « innocent third parties » would be an excellent beginning.

25. In this context, it is worth noting the finding of the House of Lords in the United Kingdom on a similar issue:²⁸

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

26. In conclusion, a literal or theological interpretation of Rule 81(4) read together with Article 54(3)(f) does not allow for the requested redactions. Given that a proper contextual reading of Article 54(3)(f) does not create an independent exception to the Prosecution's general disclosure obligations; and given that the Prosecution failed to demonstrate that disclosure of the identities of « innocent third parties » would genuinely put them at risk and the serious implications such far-fetched interpretation of the disclosure scheme set out in the Rome Statute and the Rules would have for the defendant's right to a fair trial, there is certainly no justification to depart from the general rules and allow for the requested redactions.

(2) Second Prosecution Issue on Appeal : Locations of Interview and Identities of Current OTP and VWU Staff Members Present During Interview

27. The Single Judge did not authorise redactions of the locations where interviews took place and the identities of staff members of the Office of the Prosecutor (« OTP ») and Victim and Witness Unit (« VWU ») present at such interviews pursuant to Rule 81(2) of the Rules. The Single Judge accepted that disclosure of the interview locations and identities of OTP and VWU staff members « could, in a few instances, prejudice to a certain extent the Prosecution's investigations ».²⁹ In particular, the Single Judge

²⁸ *R v H and C* [2004] 2 AC 134, at 147.

²⁹ Impugned Decision, para. 59.

mentioned interviews that are conducted in small villages and staff members repeatedly travelling to small areas for lengthy periods of time.³⁰ In certain circumstances, the Single Judge reasoned, «the redactions requested by the Prosecution might [...] contribute to minimizing the abovementioned risk».³¹ Nonetheless, the Single Judge refused to authorise these redactions given that less intrusive measures were available to protect the OTP and VWU staff members and the Prosecution's ongoing and further investigations, such as « (i) avoiding to take statements in small villages or cities; (ii) making sure that such persons do not easily stand out from the local population; or (iii) rotating such persons once there are indications that their identification with the Court may endanger their security as well as the Prosecution investigation ».³²

28. The Prosecution submits that the Decision failed to consider a number of relevant factors, which rendered it unreasonable. In support of this submission, the Prosecution principally relies on the argument that the information it sought to redact « is of little, if any, relevance to the case and to the preparation of the Defence at this stage in the proceedings ».³³ Second, the Prosecution maintains that the failure to authorize redactions may well exacerbate « the serious risks to individuals and the ongoing investigations »³⁴ which cannot be rectified by less intrusive measures as suggested by the Single Judge, because they « either do not practicably exist, or would actually increase the risks to the safety of witnesses or the conduct of the investigations ».³⁵

29. As an additional ground of appeal, the Prosecution submits that the Single Judge made a procedural error by denying the Prosecution « any meaningful opportunity to make submissions on the viability or effectiveness of the alternative measures which were the basis of the decision to deny the redactions in question ».³⁶

30. It is submitted that none of those arguments have any merit and should, therefore, be dismissed. The Single Judge's Decision on this issue was entirely reasonable.

³⁰ Impugned Decision, para. 59.

³¹ Impugned Decision, para. 60.

³² Impugned Decision, para. 60.

³³ Prosecution's Appeal, para. 25. See also paras. 27; 34.

³⁴ Prosecution's Appeal, para. 27.

³⁵ Prosecution's Appeal, para. 34.

Relevance of the Information to the Defence

31. The Defence notes that the Prosecution presents the alleged lack of relevance to the Defence, thus an alleged lack of prejudice, as the first consideration. However, as aforementioned, prejudice to the Defence will only be considered upon the Prosecution establishing that the interests of justice require that the Defence be denied the right to full disclosure.³⁷ In this particular situation, the Prosecution must first demonstrate that disclosure of the interview locations and the identities of OTP and VWU staff members present during witness interviews would prejudice Prosecution's further and ongoing investigations and that no alternative, less intrusive measures are available to the Prosecution to achieve the same result. Where the Prosecution fails to establish that such prejudice exists, the redactions will not be authorised. Where the Prosecution successfully establishes that such prejudice exists, the redactions may be authorised only if consistent with internationally recognised human rights principles including a right to a fair and independent trial.³⁸

32. Furthermore, contrary to the Prosecution's allegation, at least some of the information whose redaction is sought is relevant to the Defence. The Defence concedes that, at this early stage of the proceedings, redactions of the locations of the witness interviews do not seriously hamper the ability of the Defence to conduct meaningful investigations. The Defence can also see some justification for such redactions. This should, however, not be read as a blanket invitation to redact such information in all circumstances. There could be situations where the Defence would have a real interest in knowing the location of witness interviews. For example, the Prosecution would have a positive obligation to inform the Defence as to whether the interview took place in policy custody or detention – since detention/custody can in itself constitute a coercive factor which impacts on the question as to whether the interview was voluntary.³⁹

³⁷ *Prosecutor v. Brdjanin and Talic*, IT-99-36-T, Decision On Second Motion By Prosecution For Protective Measures, 27 October 2000, para. 31.

³⁸ *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.

³⁹ *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision On The Prosecutor's Motion For The Admission Of Certain Materials Under Rule 89 (C), 14 October 2004, where the OTP sought to admit the transcripts of an accused, who had been interviewed whilst in detention, without the presence of a lawyer, as evidence against the accused in this case.

33. The Defence further submits that the redactions of the interview locations violate the Prosecution's disclosure obligations. The Defence, therefore, agrees with the Single Judge that, where possible, the Prosecution should explore less intrusive measures.

34. As for the identification of OTP and VWU staff members, this is clearly relevant information to the Defence. The relevance of disclosure thereof to the Defence was acknowledged by the Single Judge:⁴⁰

Moreover, the Single Judge considers that the identification of, at least, the staff members of the Office of the Prosecutor and the VWU present when the witness statements were taken is a key guarantee of procedural propriety in the taking of the statements, as well as a formal requirement for their admissibility, and redacting this information would be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.

35. The fundamental importance of this information for the Defence to verify the procedural propriety in the taking of the statements of the accusers as a credibility test is universally recognised. First, it is recognised by the ICC itself. Pursuant to Rule 111 of the Rules, records of formal statements « shall note the date, time and place of, and all persons present during the questioning ».

36. Further, the ICTR has held that the Prosecution is prohibited from redacting information concerning the identity of the persons involved in taking witness statements. In one case, the Chamber ordered the Prosecution "(1) To disclose to the Defence of Accused Nyiramasuhuko and the other Accused the information contained in the fact sheets of the statements of the witnesses the Prosecutor intends to call at trial; notably, (1) the name of the investigators and interpreters having conducted the interview, (2) the place and (3) the date of the interview, and (4) the language or languages used to conduct the interview".⁴¹

37. The same ICTR Trial Chamber subsequently rejected a Prosecution application for the redaction of the identities of OTP personnel from the witness statements, *inter alia*, on the ground "that such information was necessary for the Defence to prepare for cross-examination. Indeed, it could notably attest to the accuracy and to the modalities of collection of statements given by witnesses."⁴²

⁴⁰ Impugned Decision, para. 62.

⁴¹ *Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-97-21-T, Décision relative à la Requête de la Défense en extrême urgence tenant au respect, par le Procureur, de la « Décision relative à la Requête de la Défense en Communication de preuves » rendue le 1er novembre 2000, dated 8 June 2001.

⁴² *Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-97-21-T, Decision On the Prosecutor's Motion For, Inter Alia, Modification Of The Decision Of 8 June 2001, 25 September 2001, para. 21.

38. In another ICTR decision, a Trial Chamber held that the names of the Prosecution Investigator(s) who collected the prior statements of a particular witness « qualify as exculpatory material within the meaning of Rule 68 [the equivalent of Article 67(2) of the Rome Statute], in the sense that this information may affect the credibility of Prosecution evidence ».⁴³
39. All Human Rights Courts and Committees have emphasised the importance of disclosure of the identity of persons present during witness interviews. The Defence particularly refers to the United Nations Human Rights Committee which has issued observations, criticising the Colombian practice of suppressing the names of judges, prosecutors and witnesses in regional courts dealing with certain drug, terrorism, rebellion and weapons crimes.⁴⁴
40. Also, practically all national legal systems, including the DRC, have incorporated legislation imposing an obligation on the Prosecution to disclose the identities of all persons present during witness interviews.⁴⁵
41. Therefore, particularly disclosure of the identities of the OTP and VWU staff members present during witness interviews is clearly relevant to the Defence even at the pre-confirmation stage. One may argue that, in some ways, the disclosure of those identities is particularly important prior confirmation. The Defence expects that, for the purpose of the confirmation of the charges, the Prosecution may almost exclusively rely on witness statements rather than *viva voce* witness testimony. The dangers of relying on written statements without having the opportunity to question the makers of the statements in person and to evaluate their demeanour are well-

⁴³ *Prosecutor v. Nzirorera et al*, ICTR-98-38-T, Decision On The Defence Motion For Disclosure Of Exculpatory Evidence, Rule 68 of the Rules of Procedure and Evidence, 7 October 2003, para. 20.

⁴⁴ Human Rights Committee's Concluding Observations on Colombia, UN Doc. CCPR/c/79/Add. 76 1 April 1997, paras. 21, 40. See also African Commission on Human Rights: ACHPR /Res.61(XXXII)02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002), http://www.achpr.org/english/resolutions/resolution66_en.html. Pursuant to Article 28 of this Resolution, States should ensure that comprehensive written records of all interrogations are kept, including the identity of all persons present during the interrogation and consider the feasibility of the use of video and/or audio taped recordings of interrogations.

⁴⁵ As for the Democratic Republic of Congo, see the *Ordonnance 78-289 du 3 Juillet 1978, relative à l'exercice des attributions d'officiers et agents de police judiciaire près les juridictions de droit commun* (J.O.Z, n°15, 1^{er} août 1978, p ; 7), Articles 126, 129; *Décret du 6 août 1959, portant Code de procédure pénale* (B.O., 1959, p. 1934), Article 53. As for France, see Article 66 of the Code of Criminal Procedure. For commentary, see: Roger Merle, André Vitu, *traité de droit criminel, procédure pénale*, ed.cujas, 5^{ème} édition, §182. p.229). As for Belgium, see Article 40 of the *loi du 5 aout 1992 sur ma fonction de police* and Article 29 C.i.cr). For commentary, see: Henry D Bosly et Damien Vandermeersch, *Droit de la procédure pénale*, 3^e édition, 2003. As for the United Kingdom, see Crown Court (Special Measures Directions and Directions Prohibiting Cross-Examination) Rules 2002 (SI 2002 No. 1688), Rule 8.

known. At the very least, the Defence should not be deprived of information to verify the procedural regularity of the taking of the statements. Given this real need for the Defence to receive the identities of the OTP and VWU staff members and the absence of any serious ground to justify their redactions, the Defence submits that they should be disclosed as soon as possible.

The redactions sought are excessive

42. It is submitted that the Prosecution failed to demonstrate that the redactions sought are needed to protect the ongoing and further investigations pursuant to Rule 81(2). The Prosecution further misrepresented the Single Judge's findings that disclosure of the interview locations and identities of OTP and VWU staff members « could, in a few instances, prejudice to a certain extent the Prosecution's investigations », ⁴⁶ and that « in certain circumstances, the redactions requested by the Prosecution might [...] contribute to minimizing the abovementioned risk ». ⁴⁷
43. At paragraph 49 of its Appeal, the Prosecution incorrectly interpreted this finding to be « that disclosure of the information would increase the risks to the investigations and to staff members ; that redaction would contribute to minimizing those risks; and that where the alternatives were not adequate then redaction should be ordered » [emphasis added].
44. The Prosecution erroneously replaced “could, in a few instances, to a certain extent” for “would”, “might in certain circumstances” for “would” and spontaneously added a novel finding, namely that “where the alternatives were not adequate then redaction should be ordered”. Thus, the Prosecution's version of the Single Judge's findings on those issues completely misstates the Single Judge's actual findings. The Single Judge did not make a conclusive determination that non-disclosure of the information in question would be justified if no alternative measures were available to the Prosecution. On the contrary, the Single Judge's strong language in favour of disclosure to the Defence at least of the identities of the OTP and VWU staff members present during witness interviews ⁴⁸ suggests that she was reluctant to make such a conclusive ruling.

⁴⁶ Impugned Decision, para. 59.

⁴⁷ Impugned Decision, para. 60.

⁴⁸ Impugned Decision, para. 62.

45. Given the world-wide recognition of the importance of disclosure of the information sought, as described above, the Defence submits that redactions of at least the identities of the OTP and VWU staff members present during witness interviews would not be justifiable irrespective of the availability of alternative measures.
46. Indeed, it is not appropriate to protect OTP and VWU staff members by keeping them anonymous to the Accused. In this context, it is noteworthy that Pre-Trial Chamber I rejected a request by a legal representative of victim applicants for protective measures concerning his identity. The Chamber held that such anonymity was incompatible with the functions of the legal representative, in particular the fact that he may be called upon to represent the applicants during public hearings.⁴⁹
47. Pre-Trial Chamber I also rejected arguments that the name of intermediaries involved in the application process be redacted from the applications provided to the Prosecution and the Office of Public Counsel for the Defence (“OPCD”): “The Chamber also recognises that a distinction can be made between the Chamber's obligation to protect victims and witnesses in the proceedings under the Statute, Rules and Regulations, and a further obligation to protect staff members of nongovernmental organisations who choose to act as intermediaries.”⁵⁰
48. Moreover, an ICTR Trial Chamber rejected a Prosecution’s application in which it referred to the ongoing conflict in certain areas of Rwanda, and therefore requested that the identity of OTP personnel be redacted from the witness statements disclosed to the Defence. The Trial Chamber held firstly, that the “mere reference to “a risk of harm” in view of an ongoing precarious security situation in certain areas of Rwanda is not sufficient to warrant non-disclosure of information which the Chamber holds to be an integral part of the witnesses’ statements, attesting to the modalities of collection of the said statements”;⁵¹ secondly, that the request was not warranted as “the names of the said Prosecution personnel would exclusively be disclosed to the Defence in the instant cases, as opposed to the public at large”;⁵² and thirdly, “that such information was necessary for the Defence to prepare for cross-examination. Indeed, it could

⁴⁹ ‘Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation’, which was issued in the DRC situation, ICC-01/04-374, 17 August 2007, para. 48.

⁵⁰ *Ibid*, para. 31.

⁵¹ *Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-97-21-T, Decision On the Prosecutor's Motion For, Inter Alia, Modification Of The Decision Of 8 June 2001, 25 September 2001, para. 19.

⁵² *Ibid*, para. 20.

notably attest to the accuracy and to the modalities of collection of statements given by witnesses.”⁵³

49. The cited jurisprudence together with the universally recognised obligation on the Prosecution to disclose at least the identities of those present during witness interviews without exception suggests that there is still ample room for the Appeals Chamber to find that the redactions sought are not authorised regardless whether less intrusive measures are available to the Prosecution.

50. If, however, the Appeals Chamber finds that the redactions sought are justifiable, the Defence submits that alternative measures are available to the Prosecution.

Availability of alternative measures

51. It is respectfully submitted that the Prosecution’s submissions on the difficulties and dangers for witnesses to travel to other locations within the DRC are somewhat exaggerated. The Defence fails to see how the travelling of witnesses would necessarily increase the risk that they be identified. It is presumably quite common for people in the eastern part of the DRC to travel from one location to another. Thus, the travelling itself would not rise to any suspicion that the witness in question is travelling to meet the ICC Prosecution for an interview.

52. The Prosecution further refers to multiple check-points which would increase the chances that someone would be identified. However, the check-points are operated by local authorities under auspices of the Government. The Government is clearly not on the side of Mr. Katanga but rather cooperates with the ICC. Thus, these check-ups would not increase the risk for a witness to be identified by someone who wants to harm him or her because of his or her cooperation with the ICC.

53. Likewise, provided there is good cooperation with the local authorities, the Defence fails to see how interested parties, whomever they may be, would be alerted to the arrival of ICC staff members into a certain region. On the contrary, the Prosecution could seek the cooperation of the local authorities to carry out the alternative measures suggested by the Single Judge.

⁵³ *Ibid*, para. 21.

54. Clearly, the witnesses concerned cannot afford to pay the air fare if they are made to fly to the interview site. It is clearly the task of the ICC to reimburse those witnesses for their travel costs.
55. The Single Judge does not exclusively sum up all alternative measures available to the Prosecution. The three measures mentioned in the impugned Decision are merely suggestions. From their own limited experience in conducting investigations in hostile and unstable environments, the Defence knows that there are many different manners in which to ensure that witness interviews do not attract the attention of bystanders. Travelling to larger cities is not the only way to avoid attention. Such interviews can also be conducted in isolated locations. Even if the Prosecution is not in a position to rotate staff members, it is clearly a possibility for Congolese investigators to be sent out to collect the witnesses to be interviewed by the ICC OTP and bring them to a more anonymous location.
56. These are mere examples. The Defence is confident that the, undoubtedly, highly qualified and experienced Prosecution investigators can think of many more ways in which to avoid attracting attention when conducting witness interviews.
57. Whilst failing to see how the suggested alternative measures would increase the risk of identification of witnesses to be interviewed by the Prosecution, the Defence nonetheless acknowledges that putting such measures in place would inconvenience the Prosecution in conducting its investigations. It will demand quite an operation to properly carry out such alternative measures and avoid increased risks of identification. However, inconvenience itself cannot justify the serious infringements of the defendant's fair trial rights which would be caused by non-disclosure of the information concerned.
58. Moreover, most of the concerns raised by the Prosecution some of which have some merit, cannot be resolved by withholding the identities of OTP and VWU staff members from the Defence. The Prosecution's concerns are the unfortunate and inavoidable side effects of conducting investigations in what may still be a volatile environment and where anyone working for the ICC is recognisable from afar. These concerns cannot be resolved by redacting the witness statements disclosed to Mr. Katanga and his Defence team. Mr. Katanga is in The Hague, far remote from these locations and incapable of harming those witnesses or their families. Disclosure of the

said identities to the Defence will, therefore, not increase any risk for those witnesses. In those circumstances, redacting this information is excessive.

Denial of any meaningful opportunity to make submissions

59. The Prosecution complains that it was not given any meaningful opportunity to be heard on the issue of alternative measures. The specific measures suggested by the Single Judge were not raised during the *ex parte* hearings with the Prosecution and the VWU, and “no meaningful notice was given to the Prosecution that these alternative measures were being considered or would ultimately be imposed”.⁵⁴ The Prosecution submits that this denial of its right to be meaningfully heard “on the determinative issue of the proposed alternatives constitutes an independent procedural error meriting appellate relief”.⁵⁵

60. The Defence invites the Appeals Chamber to dismiss this ground of appeal given that the Prosecution failed to request leave to appeal on this issue or even mention it as an alleged sub-ground undermining this part of the Decision. The Prosecution cannot now, for the first time, introduce this alleged procedural error as an independent ground of appeal.

61. Had the Prosecution sought leave to appeal the Decision on the ground that it was not given a meaningful opportunity to make submissions on alternative measures, such application would most probably be rejected. The Defence has been completely deprived of any opportunity to be heard on any of the issues in the impugned Decision prior to the issuing of the Decision given that all those issues were discussed in *ex parte* hearings and *ex parte* filings which, for the largest part, took place and were filed prior to the appointment of Mr. Katanga’s Defence team. Nonetheless, the Defence’s request for leave to appeal the impugned Decision on the basis that the Defence had been denied any opportunity to be heard on any of the redactions authorised by the Single Judge,⁵⁶ was denied.⁵⁷ It is, therefore, difficult to imagine that the Prosecution would have been granted leave to appeal. This is particularly so given that the extent to which the Prosecution was allegedly deprived of any meaningful

⁵⁴ Prosecution’s Appeal, para. 44.

⁵⁵ Prosecution’s Appeal, para. 47.

⁵⁶ Public Defence Motion for Leave to Appeal the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-99 13-12-2007 12/12 JT PT, paras. 10-22.

⁵⁷ Public Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116 19-12-2007 6/7 SL PT.

opportunity to be heard on this issue is incomparable to the Defence's deprivation thereof, given its total exclusion from those meetings and filings.

62. Also on the merits, the Prosecution's submission is unfounded. The Prosecution had a very meaningful opportunity to present submissions as to why redacting was the only measure available to the Prosecution. During the *ex parte* hearings the Prosecution had ample opportunity to address the Pre-Trial Chamber I on any issues it deemed relevant. The law on disclosure is very clear. The Prosecution must demonstrate that redactions are justified and that no alternative, less intrusive, measures are available.⁵⁸ Thus, it cannot have come as a surprise to the Prosecution that the Single Judge would assess whether alternative measures were available to the Prosecution to achieve the same result.

63. The burden to demonstrate that no alternative measure could be found to achieve the same result clearly rests upon the Prosecution. The Prosecution's failure to do so cannot be blamed on the Single Judge. It is not the Single Judge's duty to remind the Prosecution of what it has to demonstrate in order to persuade the Single Judge to authorise the requested redactions. This additional ground of appeal is, therefore, wholly unfounded and should be dismissed.

Conclusion

64. On the grounds stated in this Response, the Defence requests that the Appeals Chamber dismiss the Prosecution's grounds of appeal and confirm the Single Judge's impugned Decision on the issues set out in the Prosecution's Appeal.

Respectfully submitted,



Mr David Hooper, Defence Counsel

The 14th of January 2008

At Arusha, Tanzania

⁵⁸ *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.