

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : English

No.: ICC-01/04-01/07  
Date: 14 January 2008

**THE APPEALS CHAMBER**

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

**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 Appeal Brief concerning Document in Support of  
Appeal against the  
First Decision on Redaction of Witness Statements**

**The Office of the Prosecutor**

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## Introduction

1. The Prosecution herewith responds to the document entitled “Defence Appeal brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”,<sup>1</sup> filed on behalf of Germain KATANGA (“the Appellant”) on 2 January 2008. The Prosecution respectfully submits that the Appellant’s main contention that the Single Judge erred by allowing redactions of the identities and identifying information of potential Prosecution witnesses pursuant to Rule 81 (2) is premised on a misreading of the terms of the Decision, which affects all three arguments raised by the Appellant in his brief. As a result of this error, the grievances expressed by the Appellant do not arise from the impugned Decision, and must consequently be dismissed in their entirety.

## Procedural background

2. On 3 December 2007, the Single Judge issued the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (“the Decision”).<sup>2</sup>
3. On 13 December 2007, the Appellant filed a Motion for Leave to Appeal the Decision, in which the Defence identified the following two issues:<sup>3</sup> (a) The Decision was issued without hearing the Defence (“first issue”); and (b) 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 (“second issue”).

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<sup>1</sup> ICC-01/04-01/07-132 OA.

<sup>2</sup> ICC-01/04-01/07-84-US-Exp. This version of the Decision was available to the Prosecution only. A redacted version of the Decision, which was confidential but available to the Defence, was issued on 6 December 2007 (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. A further public redacted version was issued on 7 December 2007 (ICC-01/04-01/07-90).

<sup>3</sup> ICC-01/04-01/07-99. The Prosecution sought leave to appeal the Decision in respect of two different issues on 10 December 2007 (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 Single Judge granted the Prosecution’s leave to appeal for these different issues on 14 December 2007 (ICC-01/04-01/07-108) and on 2 January 2008, the Prosecution filed the “Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements” (ICC-01/04-01/07-131-Conf).

4. On 17 December 2007, the Prosecution filed a Response to the Defence Motion for Leave to Appeal the Decision.<sup>4</sup> On 19 December 2007, the Single Judge issued the Decision on the Defence Motion for Leave to Appeal, rejecting the Defence motion in relation to the first issue and granting the Defence motion in relation to the second issue.<sup>5</sup>
5. On 2 January 2008, the Appellant filed the “Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (“Appellant’s Brief”).<sup>6</sup>
6. Pursuant to Regulation 65(5), the Prosecution hereby responds to the Appellant’s Brief.

### **Discussion**

7. The Appellant raises three “arguments on appeal”:<sup>7</sup> (1) statements of potential witnesses do not qualify as Prosecution sources; (2) Rule 81 (2) requires disclosure of identities of sources; and (3) Widening the scope of Rule 81 (2) defeats the purpose of disclosure. The Prosecution will deal with each of these arguments separately.
8. Prior to that, however, the Prosecution must stress that all grounds of appeal advanced by the Appellant are based on a false premise, namely: that the Decision authorized non-disclosure of the identifying features of “potential prosecution witnesses” whose statements the Prosecution intended to use at the confirmation hearing.<sup>8</sup> This position is misplaced; as will be discussed in more detail below, at no point did the Decision authorize the Prosecution to withhold the identity and identifying features of “potential witnesses” on whose statements the Prosecution intended to rely at the confirmation hearing. Rather, the Decision authorized under Rule 81 (2) the redaction of discreet

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<sup>4</sup> ICC-01/04-01/07-110.

<sup>5</sup> ICC-01/04-01/07-116.

<sup>6</sup> ICC-01/04-01/07-132 OA.

<sup>7</sup> The Prosecution notes that under Regulation 64 (2) there are specific requirements for the preparation of appeal briefs, including the duty to spell out each ground of appeal, and separately the legal and factual reasons in support of each ground of appeal. The Appellant’s brief does not appear to follow the prescribed structure. The Prosecution will nonetheless treat each “argument of appeal” as a ground of appeal for the purposes of discharging its duties as a respondent under Regulations 65 and 64 (4).

<sup>8</sup> See *inter alia* Appellant’s Brief, para. 39.

portions of the statements of *actual* witnesses - i.e. witnesses who had been interviewed by the Prosecution and whose evidence would be relied upon at the confirmation hearing - which mentioned *other* persons who the Prosecution had contacted or intended to contact in the future ("sources"). The identity of all seven witnesses in question, i.e. the makers of the statements, *has been* disclosed to the Defence as of 13 December 2007.

9. This misconception invalidates the totality of the Appellant's arguments, to the extent that they all refer to an alleged prejudice that has actually never materialized. Further, the Prosecution stresses that the burden is on the Appellant to demonstrate before the Appeals Chamber that the Single Judge abused her discretion by authorizing the redactions in question under Rule 81 (2). Absent such a showing, the Single Judge's exercise of discretion should be left undisturbed.<sup>9</sup>

*The argument that "potential witnesses do not qualify as Prosecution sources"*

10. The Appellant firstly submits that "statements of potential witnesses are not covered by any rule on disclosure".<sup>10</sup> Under this reasoning, the Prosecution cannot rely on statements of potential witnesses, but "only on statements of actual witnesses whose redactions it may seek under Rule 81 (4)".<sup>11</sup> Thus, the Single Judge allegedly erred by expanding the scope of application of Rule 81 (2) in such a manner that "statements of potential witnesses" were treated as "Prosecution sources under Rule 81 (2)".<sup>12</sup>

11. The Appellant's conclusions are misplaced: the Single Judge, after clarifying that the Decision related to seven *witnesses* who had already been accepted in the protection

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<sup>9</sup> As the ICTY Appeals Chamber has noted, "an interlocutory appeal challenging the exercise of discretion by a Trial Chamber is not a hearing *de novo*. In reviewing the exercise of a Trial Chamber's discretion, the issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber but whether the Trial Chamber has abused its discretion in reaching that decision. For the Appeals Chamber to intervene in a Trial Chamber's exercise of discretion, the Appellant must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly" (*Prosecutor v Milosevic*, Case No: IT-00-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, at paras. 9-10).

<sup>10</sup> Appellant's Brief, para. 9

<sup>11</sup> *Ibid.*, para. 10.

<sup>12</sup> *Ibid.* para. 14.

program of the Victim and Witness Unit,<sup>13</sup> only allowed the Prosecution to make within the *same statements* specific redactions of identifying details of persons other than the makers of the statements, which the Single Judge characterized as “Prosecution sources” as opposite to “Prosecution witnesses”.<sup>14</sup>

12. The Single Judge had previously ruled that the term “witnesses” under Rule 81 (4) only referred to actual witnesses, i.e. makers of statements on which the Prosecution intended to rely on at the confirmation hearing, and not to potential or prospective witnesses (“sources”).<sup>15</sup> Redactions pertaining to this latter category could only be allowed under Rule 81 (2) (protection of further or ongoing investigations) or under the other protective functions of Rule 81 (4) (protection of information under Articles 54, 72 or 93).<sup>16</sup> Thus, it should have been clear to the Appellant that at all times the Single Judge was dealing with statements of actual witnesses, and authorizing specific redactions within those statements aimed at the protection of other, specific persons, namely: Prosecution sources. Any doubts as to this should have disappeared once the Appellant received the statements in question.<sup>17</sup>

13. Thus, at no time did the Single Judge treat “statements of potential witnesses” as “Prosecution sources”. Rather, the Single Judge considered that specific information related to persons whom the Prosecution had contacted or intended to contact – called “sources” in the Decision – ought to be temporarily protected under the “further or ongoing investigations” exception under Rule 81 (2). The Appellant has not demonstrated why and how this exercise of discretion should be seen as erroneous or abusive.

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<sup>13</sup> Decision, para. 10.

<sup>14</sup> Decision, paras. 40-41.

<sup>15</sup> Decision, paras. 40-41.

<sup>16</sup> Decision, para. 41.

<sup>17</sup> The seven statements were disclosed on 13 December 2007 including the identity of all witness. See Confidential Annexes I and II.

*The argument that Rule 81 (2) requires disclosure of identities of sources*

14. The Appellant contends that in the event that the Appeals Chamber concludes that the Prosecution “can rely on statements of potential witnesses for the purposes of the confirmation hearing, then the Prosecution is under a clear obligation to adequately disclose those statements”, under the terms of Rule 81 (2).<sup>18</sup> Further, it is alleged that “disclosure of the statements of potential witnesses would not be adequate without disclosing their identities and identifying information”.<sup>19</sup>
  
15. As already explained, the Appellant’s perception of the process of redactions and subsequent disclosure is wrong. The Prosecution has disclosed to the Appellant the statements of witnesses it intends to rely on at the confirmation hearing together with their identities and identifying features. Those statements contain a limited number of redactions related to the identifying features of other persons, in relation to which the Single Judge properly concluded that the Prosecution’s further or ongoing investigations could be prejudiced if they were to be threatened, intimidated or interfered with.<sup>20</sup> Not only does Rule 81 (2) provide for a solid basis for such redactions; reliance at the confirmation hearing on disclosed statements which contain redactions is also supported by the Appeals Chamber’s jurisprudence, as the same Appellant concedes at paragraph 17 of his brief.<sup>21</sup>
  
16. The remaining arguments advanced by the Appellant refer to an alleged impossibility to challenge the evidence from “anonymous witnesses” and to conduct proper inquiries without knowing “the identity of the accusers”. As already demonstrated, the instant facts do not involve any “anonymous witnesses” or “accusers”, but merely specific redactions in the statements of witnesses whose identities have been disclosed to the Defence.

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<sup>18</sup> Appellant’s Brief, para. 15.

<sup>19</sup> Ibid., para. 19.

<sup>20</sup> Decision, para. 42.

<sup>21</sup> See *Prosecutor v. Lubanga*, Judgment on Appeal Against Second Redaction Decision, ICC-01/04-01/06-774 OA6, 14 December 2006, paras. 45-46.

*The argument that widening the scope of Rule 81 (2) defeats the purpose of disclosure*

17. The Appellant's final ground of appeal appears to contain two sets of arguments: the first cluster relates to the necessity of the measures in question, the degree to which the Prosecution satisfied its burden of demonstrating such necessity and the sufficiency of the Single Judge's reasoning in authorizing the redactions.<sup>22</sup> The second set of arguments relates to an alleged error by the Single Judge in allowing the Prosecution to bypass Rule 87 (1) and its *inter partes* procedure, and to rely on Rule 81 (2) instead.
18. The Prosecution need not deal with the first cluster of arguments, since they address issues that *were not certified for appeal*.<sup>23</sup> At no point did the Appellant seek leave to appeal any issues pertaining to the necessity of the redactions in question, their extension or the sufficiency of the reasons advanced by the Single Judge in her ruling, nor were any of these issues otherwise certified for appeal. Consequently, none of the issues raised in this particular part of the Appellant's brief are properly before the Appeals Chamber.<sup>24</sup>
19. The second set of arguments can be seen as included, albeit in an indirect manner, in the issue certified for appeal, to the extent that they refer to an allegedly expansive use of Rule 81 (2). The arguments advanced, however, fall on their merits, once more due to the Appellant's misapprehension of the Decision and now also of the governing legal regime. Since none of the redactions in question relate to actual witnesses, as determined by the Decision, but to Prosecution sources, and only affect confined

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<sup>22</sup> Appellant's Brief, paras. 27-30. The Appellant relies on a prior defence appeal in the *Lubanga* case where the appellant successfully raised as a ground of appeal "the fact that the Single Judge's explanations for authorizing redactions were inadequate" (see footnote 21).

<sup>23</sup> The Appellant applied for leave to appeal only in relation to two discreet issues: "(a) whether the Decision was issued without hearing the Defence, and (b) 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 same rule – who, despite not being Prosecution witnesses for the purposes of the confirmation hearing, have been or about to be interviewed by the Prosecution". Leave to appeal was granted only in relation to the second issue. See also 19 December 2007 Decision on Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-1116, p. 7.

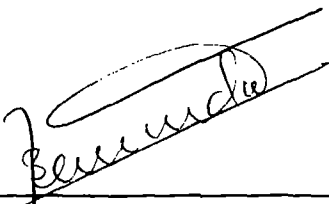
<sup>24</sup> Issues related to the necessity of the redactions or the sufficiency of the Single Judge's reasoning cannot be seen as somehow included or implied in the confined issue that was certified for appeal, which only relates to the proper scope of Rule 81 (2) – and the Prosecution notes that the Appellant has made no efforts to demonstrate that they are.

portions of written statements disclosed by the Prosecution, then Rule 87 (1) is not applicable.<sup>25</sup>

20. The Prosecution stresses that the specific provisions governing restrictions to disclosure of materials in the possession of the Prosecution are Rules 81 and 82, and not Rule 87. The protection of further and ongoing investigations under Rule 81 (2), in addition, is a specific matter completely divorced from the protective functions of Rule 87, and consequently the former is *lex specialis* vis-à-vis the latter. The arguments advanced by the Appellant consequently fail to demonstrate any error in the Decision requiring corrective action by the Appeals Chamber.

### Conclusion

21. For the above referred reasons, the Prosecution respectfully requests the Appeals Chamber to dismiss the appeal in its totality.

  
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 Luis Moreno-Ocampo  
 Prosecutor

Dated this 14th day of January 2008  
 At The Hague, The Netherlands

<sup>25</sup> Rule 87 falls under a separate section of the Rules, entitled “Victims and Witnesses”, and allows for protective measures for persons “at risk on account of testimony given by a witness. . . .”. This, as well as the examples of protective measures outlined in the provision, such as holding *in camera* hearings or using technical means to alter pictures or voice, shows that it is primarily an available means to protect persons at risk as a result of the live testimony of a witness.