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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 Application to Request Leave to Provide Additional Details and
Authorities on the « Public Defence Appeal Brief concerning the First Decision on
the Prosecution Request for Authorisation to Redact Witness Statements »**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia, Senior Appeals Counsel
Mr Eric MacDonald, Trial Lawyer

Defence for Mr. Katanga

Mr David Hooper
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Introduction

1. The Defence for Mr. Germain Katanga (« the Defence ») requests that the Appeals Chamber order, in the interests of justice and pursuant to Regulation 28 of the Regulations of the Court (« Regulations »), the Defence to provide additional details and authorities on the *Public Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« Defence Appeal Brief »).¹
2. The reason for this Defence Application is that the *Public Prosecution's Response to the Defence Appeal Brief concerning Document in Support of Appeal against the First Decision on Redaction of Witness Statements* (« Prosecution's Response to the Defence Appeal Brief »)² has brought to the attention of the Defence that the issue of appeal addressed in the Defence Appeal Brief has been argued to a large extent on a misreading of the Single Judge's *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« impugned Decision »).³ Indeed, the Prosecution is correct in its contention that many of the arguments laid out in the Defence Appeal Brief are based on the erroneous premise that the Single Judge had authorised the Prosecution to redact the identities of makers of statements – the makers being potential Prosecution witnesses rather than actual Prosecution witnesses. The Prosecution's contention that the Defence assumed that these statements would necessarily be used at the confirmation hearing is, however, not correct.⁴ Moreover, the arguments under ground 3 still stand. The Defence does not agree that the first cluster of arguments under ground 3 address issues that were not certified for appeal.⁵ They clearly concern the scope of Rule 81(2) for reasons the Defence is willing to clarify if permitted to provide additional details.
3. It is submitted that additional details from the Defence are, further, warranted in light of the Prosecution's explanation that⁶

the Decision authorized under Rule 81 (2) the redaction of discreet 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

¹ ICC-01/04-01/07-132 02-01-2008 1/13 JT PT OA2, filed on 2 January 2008.

² ICC-01/04-01/07-142 14-01-2008 2/8 CB PT OA2, filed on 14 January 2008.

³ ICC-01/04-01/07-90 07-12-2007 2/25 EO PT, issued on 7 December 2007.

⁴ The second argument in the Defence Appeal Brief is nonetheless based on the assumption that such statements might be used for the confirmation hearing.

⁵ Prosecution's Response to Defence Appeal Brief, para. 18.

⁶ Prosecution's Response to the Defence Appeal Brief, para. 8.

other persons who the Prosecution had contacted or intended to contact in the future ("sources").

4. A significantly different landscape arises from the Prosecution's explanation of what the impugned Decision actually authorised. Although the rationale behind the arguments in the Defence Appeal Brief remains similar, the analysis would have been different had the Defence properly understood the Decision, as now explained by the Prosecution. The Defence regrets its erroneous reading of the Decision.
5. Although the authorised redactions, as it has now come to light, do not concern the identities of actual makers of statements but potential Prosecution witnesses mentioned in actual Prosecution witness statements, the Defence still maintains that the Single Judge erroneously enlarged the scope of application of Rule 81(2) of the Rules of Procedure and Evidence ("Rules") by considering potential Prosecution witnesses as Prosecution sources under this Rule. This is precisely the issue for which appeal was sought and granted. It is squarely within the ambit of this issue that the Defence intends to provide additional details, if so authorised by the Appeals Chamber.
6. Allowing the Defence to provide additional details pursuant to Regulation 28 of the Regulations would enable the Defence to clarify the arguments raised in the Defence Appeal Brief, which are coloured by the erroneous premise, and to sharpen the Defence's focus on the correct premise. Therefore, the Defence requests that the Appeals Chamber invoke Regulation 28 in the interests of justice on the grounds that (1) the error was reasonable in the circumstances; and (2) the suspect would be unfairly prejudiced failing an opportunity to clarify; or (3) additional details would assist the Appeals Chamber in rendering its Decision on this important legal issue.
7. In addition, and in the alternative, the Defence requests the Appeals Chamber to be allowed to provide additional authorities of cases in other international criminal tribunals and the European Court of Human Rights ("ECHR"), all of which are directly on point. There is precedent in support of this request to provide additional

authorities. In *Lubanga*, a request from the Prosecution to provide the Court with additional authorities was granted.⁷

Legal Basis

8. The Defence notes the *Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'"*,⁸ where the Appeals Chamber held that no applications for Replies may be filed pursuant to Regulation 24(5) of the Regulations to Responses to documents in support of an appeal brought under Rule 155 of the Rules.⁹ However, the Appeals Chamber left open the possibility for further filings after a Response pursuant to Regulation 28:¹⁰

should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings.

9. It is respectfully submitted that the arguments that were raised in the Prosecution's Response to the Defence Appeal Brief, bringing to light that the Defence Appeal Brief had been based on an erroneous premise, necessitate further submissions by the Defence pursuant to Regulation 28 that are necessary for the proper disposal of the appeal.

(1) Error was reasonable

10. The Defence now understands that the impugned Decision was premised on redacting the identities and identifying information of potential Prosecution witnesses only where their names appear in actual Prosecution witness statements. Although this may have been clear upon first reading of the impugned Decision to the Prosecution, the Single Judge, the Appeals Chamber and anyone else who is familiar with the ICC disclosure system, it was not at all clear to the Katanga Defence team. The confidential redacted version of the impugned Decision was issued on 6 December 2007, the same day that Lead Counsel for Mr. Katanga was sworn in; and one day

⁷ *Prosecutor v. Lubanga*, Public Transcripts of 20 November 2007, pages 66-69. The Prosecution submitted those additional authorities on 23 November 2007 in *Prosecution's Submission of Authorities supporting the withdrawal of a fact or element underpinning a charge*, ICC-01/04-01/06-1041.

⁸ ICC-01/04-01/06-424 12-09-2006 1/10 SL PT OA3, issued on 12 September 2006.

⁹ *Ibid*, para. 6.

¹⁰ *Ibid*, para. 7.

prior to the Legal Assistant's appointment.¹¹ Although both Lead Counsel and Legal Assistant have significant experience in international criminal proceedings, the ICC is new to both of them.¹²

11. For the Katanga Defence team the impugned Decision was ambiguous and confusing. Given the emphasis on the statements that had been given or were about to be given by potential Prosecution witnesses as the main distinction between potential Prosecution witnesses and "innocent third parties",¹³ the Defence was of the understanding that the Prosecution intended to disclose the statements of those potential Prosecution witnesses but without disclosing their identities.
12. In this context, it has to be emphasised that the Defence had not been privy to any of the Prosecution's applications and could, therefore, not tell from the request what types of redactions were sought. All hearings and filings that preceded the Single Judge's Decision were *ex parte* prior to the appointment of Mr. Katanga's defence team. Members of the Defence team, who have worked in several other international criminal tribunals, have never experienced this excessive use of *ex parte* proceedings. There are several ways in which to reduce the use thereof without disclosing any person's identity to the Defence.¹⁴ There is clearly no reason to exclude the Defence from legal submissions on the interpretation of the disclosure rules.
13. In the instant case, the Defence never had the opportunity to hear and respond to legal submissions regarding the scope of Rule 81(2). The first time the Defence was even aware that such issues had been addressed was upon receipt of the impugned Decision. The question of whether or not the Defence's lack of opportunity to be heard invalidates the impugned Decision is, very unfortunately, not an issue of appeal

¹¹ Lead Counsel was appointed on 23 November 2007 but this was his first visit to The Hague since he was appointed. At the time of writing the Defence Appeal Brief, the Katanga Defence consisted of two members only. Since then, two more members joined the Katanga defence team. The case-manager was officially appointed on 12 December 2007, but did not actually begin her work activities until January 2008. Recently, a fourth person joined the team, be it on a *pro bono* basis.

¹² At the time of writing the appeal, both were still very much in the process of familiarising themselves with the facts of the case, as well as the procedure of the International Criminal Court ("ICC"). Both have spent lengthy periods in prison to take instructions from the client. The initial work program involved a lot of shuttling back and forth from prison to the ICC building to the Defence Support Section located next to the The Hague central station, trying to get the office and the team up and running and to demonstrate to the Accused that he finally has a team working on his defence.

¹³ Impugned Decision, para. 42.

¹⁴ One could, for example, think of using pseudonyms instead of the names and addresses of the persons whose protection is sought during *inter partes* hearings. When submissions cannot be made without disclosing the identity of such persons, the Defence can be requested to leave for a brief *ex parte* session.

because leave was not given.¹⁵ Had the Defence, however, been invited in these *ex parte* hearings, the misunderstanding as to the exact redactions requested and sought could easily have been avoided without disclosing any person's identity or identifying information.

14. Moreover, when the impugned Decision was issued, the Defence had not yet received any disclosure material and was therefore not in a position to verify the scope and the type of redactions that were sought and the prejudice thereof to the Defence. Contrary to what the Prosecution contends, the 13 December 2007 disclosure batch which included seven redacted statements of makers whose identities were disclosed did not clarify the situation to the Defence. In relation to these seven statements, the Prosecution specified that the "Documents contain redactions approved by the Single Judge, and some provisionally maintained by the Prosecution, as authorized by Single Judge in her 11 December 2007 Decision (ICC-01/04-01/07-94)". The Prosecution did, however, not specify under which category these redactions were approved. To the Defence, it was therefore not clear that this disclosure batch included the authorised redactions of the identities and identifying information of potential Prosecution witnesses.

15. It would be fair to say that the Defence was put on notice by the Single Judge's *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*,¹⁶ describing potential witnesses as "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".

16. Regrettably, the Defence has not interpreted this phrase in the sense explained by the Prosecution in its Response to the Defence Appeal Brief. As indicated in the Defence

¹⁵ Public Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116 19-12-2007 1/7 SL PT, issued on 19 December 2007. One of the Single Judge's considerations in dismissing the Defence's request for leave to appeal on the right to be heard was "that the Defence has nevertheless been notified of such requests and of the legal basis on which such requests have been made (that is, rules 81(2) and (4) of the Rules); and that, as set out in the 19 May 2006 Decision, Duty Counsel for the Defence could have filed written submissions about the legal scope of rules 81(2) and (4) of the Rules". The Defence finds this regrettable. First, Duty Counsel had not been privy to the Prosecution's submissions. Deprived of any knowledge as to the types of redactions sought and based on what legal arguments, Duty Counsel could not have been in a position to file written submissions about the legal scope of rules 81(2) and (4). Moreover, the Chambers, be it the Pre-Trial, Trial or Appeals Chamber, should at any time be in a position to rectify the prejudice to the Defence whenever caused, because it is ongoing prejudice.

¹⁶ ICC-01/04-01/07, issued on 19 December 2007.

Appeal Brief, the term ‘potential witnesses’ is very ambiguous. This term implies that these persons are to be distinguished from any other person because *potentially*, they will be witnesses. The Defence submits that at this stage of the proceedings, that is, the pre-confirmation hearing, it would only be fair to refer to persons who will *potentially* be witnesses for the purposes of the confirmation hearing, as ‘potential witnesses’. The confirmation hearing is potentially the end of the proceedings against Mr. Katanga. This stage is, therefore, clearly distinguishable from the post confirmation stage.

17. The Defence submits, therefore, asserted that these ‘potential witnesses’ can not at this point be described as ‘Prosecution witnesses for the purpose of the confirmation hearing’ either because the Prosecution has not yet formalised its witness list or because the ‘potential witnesses’ have not yet been interviewed. The Defence did not understand that the final status of these ‘potential witnesses’ was already determined, their status being that they would, for sure, not be witnesses for the purpose of the confirmation hearing. Why call them ‘potential witnesses’ if they are, in fact, not ‘potential witnesses’ at this stage. Therefore, even after reading the Single Judge’s *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, the Defence was still under the impression that the redactions concerned the statements of these ‘potential witnesses’.
18. Given the very thin layer of information the Defence had which clearly lacked any significant detail on the actual redactions sought and granted and allowed the Defence to argue on a very abstract level only, it was reasonable for the Defence to make the erroneous assertion that the Prosecution had been authorised to redact the identities and identifying information of makers of statements.
19. On these grounds, the Defence hopes to have persuaded the Appeals Chamber that, despite its serious efforts to conduct a diligent defence, the error underlying its Defence Appeal Brief was understandable in the overall circumstances of the situation.

(2) Prejudice to the suspect

20. It is clear that the suspect would suffer prejudice if no opportunity is given to his Defence team to provide additional details on the scope of Rule 81(2). As adequately

explained in the Defence Appeal Brief, if the impugned Decision is wrong, the Defence would unfairly be deprived of information important to the Defence investigations.

21. Moreover, it would be unfair to the suspect if he suffers severe prejudice due to an error of his legal team. At the *ad hoc* Tribunals, the judges have acknowledged their ‘inherent discretionary power’ to reconsider their own decisions ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice’.¹⁷ Likewise, the parties should be given an opportunity to rectify their mistakes in a timely manner. For the Prosecution, it would, for example, be important to be able to rectify a mistake in a timely manner which impacts on the safety of witnesses, for example, the disclosure of identifying information in violation of a witness protection order. For a Defence team, it would be important to rectify a mistake in a timely manner in order to avoid undue prejudice to the rights of their client.
22. The prejudice Mr. Katanga would suffer as a result of an erroneous ruling on the scope of Rule 81(2) is real, not merely hypothetical or academic. The Decision will set a precedent for Rule 81(2) redactions as regards all potential Prosecution witnesses in the case against Mr. Katanga. Since redactions issued under Rule 81(2) are not expressly time limited, these redactions could impact on the final resolution of the case itself. In light of this significant impact of the Single Judge’s ruling on the whole case against Mr. Katanga and the far reaching consequences for him, it would severely impede the fairness of the proceedings if the issue were to be decided without the benefit of informed Defence submissions.
23. By granting leave to appeal, the Single Judge has recognised that the issue in question impacts on the fairness and expeditiousness of the proceedings. Therefore, in order to avoid undue prejudice, the Defence requests that the Appeals Chamber allows it to provide additional details on the scope of Rule 81(2).

¹⁷ *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Decision of 7 July 2005, para. 20; *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203.

(3) Additional Details and Authorities would assist the Appeals Chamber

24. The Court may order that additional information be provided pursuant to Regulation 28 if in the interests of justice. The interests of justice would be served if the additional information is necessary for the Court to make a fair determination. Thus, as appears from previous rulings, the principal test of Regulation 28 seems to be whether additional information can assist the Court.
25. In the *Public Decision on the Appellant's Application for an Extension of the Time Limit for the Filing of the Document in Support of the Appeal and Order Pursuant to Regulation 28 of the Regulations of the Court*,¹⁸ the Appeals Chamber decided to act under Regulation 28 in seeking additional details from the Lubanga Defence on the reasons supporting the grounds of appeal. The Appeals Chamber stressed that the Defence had done little by way of articulating the reasons in support of its grounds for appeal.¹⁹ The Defence failed to respond appropriately to this order and requested to discontinue its Appeal on certain conditions. This request was not granted. Instead, the Appeals Chamber considered it "to be in the interests of justice to give the Appellant a further short period of time to comply with its previous order" to provide additional details.²⁰
26. In the present situation, even if the Appeals Chamber finds that the Defence has had an opportunity to present all relevant submissions, the failure of which is entirely caused by the Defence, and that the Accused is not unfairly prejudiced, the Appeals Chamber may still order the Defence to provide additional information in the interests of justice. The interests of justice would be served if such additional information would assist the Appeals Chamber in making a fair determination on the scope of Rule 81(2). The Defence submits that the additional information it proposes to provide would greatly assist the Appeals Chamber in its determination of the appeal. Without the additional information, the Appeals Chamber is not in the possession of all relevant information necessary to determine the scope of Rule 81(2).
27. We are still very much in the initial stages of ICC institution building. Mr. Katanga's case is only the second case to come before the ICC, and thus jurisprudence on

¹⁸ ICC-01/04-01/06-129 31-05-2006 1/9 SL PT OA2, issued on 30 May 2006.

¹⁹ *Ibid*, para. 10.

²⁰ Public Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal, 3 July 2006, 3 July 2006, ICC-01/04-01/06-176 03-07-2006 1/5 SL PT OA2 14.

fundamental issues is still being created. This comes with a real responsibility for all of us to create a proper set of principles whose application is fair to everyone. It is, therefore, in everybody's interest to avoid creating poor jurisprudence that sets poor precedents. The Defence respectfully submits that a flexible application of the procedural rules is warranted to achieve these objectives.

28. The central issue of this application is the scope of the application of Rule 81(2). This is an important issue, not only for the continuance of the proceedings in the case against Mr. Katanga, but also for future ICC cases. The Single Judge's Decision on the scope of Rule 81(2) may well create a legal principle that will be relied on in future cases. Given the importance of the issue, it is essential that both parties have been properly heard.

Conclusion

29. On the grounds stated in this Application, the Defence requests that the Appeals Chamber order, as a reply to the Prosecution's Response to the Defence Appeal Brief in the interests of justice and pursuant to Regulation 28, the Defence to provide additional details on the Defence Appeal Brief filed on 2 January 2008. In order not to delay the proceedings, the Defence requests for an urgent Decision on this Application and would be prepared to meet a tight deadline to provide those details. In accordance with the principle of equality of arms, the Defence further requests that the Prosecution be given an opportunity to respond.
30. If leave is given, the Defence will be in a position to submit arguments and case law to the effect that:
- disclosure to the defence of information or statements from potential Prosecution witnesses does not *ipso facto* prejudice Prosecution investigations, and as such, does not in itself, trigger the protection of Rule 81(2);
 - Rule 81(2) should not apply to information which is relevant to the preparation of the defence, or potentially exculpatory;
 - extending the protection of Rule 81(2) to prosecution sources would render the strict requirements of Article 54(3)(e) nugatory;
 - extending the protections of Rule 81(2) to potential OTP witnesses contravenes the principle that there is no property in a witness (particularly a potential witness), and that utilising the materials provided by the Prosecution pursuant

to Rule 77 or Article 67(2) is a legitimate method for the defence to conduct its investigations – particular in circumstances in which it is difficult for the defence to conduct lengthy or comprehensive investigations on the ground due to the limited time before the confirmation hearing, and the security situation in the DRC – however to interview these persons the Defence needs their identities;

- the fact that a person is a potential witness would not prejudice ongoing if the defence is not aware of the fact that the person is a potential witness. (i.e. the mere fact that a person is referred to in a statement does not in itself put the defence on notice that this person is a potential OTP or actual OTP witnesses).

31. In addition or in the alternative, the Defence requests that the Appeals Chamber would that the Appeals Chamber order, in the interests of justice and pursuant to Regulation 28, the Defence to provide authorities of similar applications for redactions at other international criminal tribunals. Given that they are all directly on point, these authorities would be of great assistance to the Appeals Chamber in determining the issue of appeal.

Respectfully submitted,



Mr David Hooper, Defence Counsel

The 18th of January 2008

At Arusha, Tanzania