



Original : English

N° : ICC-01/04-01/07
Date : 29 January 2008

PRE-TRIAL CHAMBER I

Before : Judge Sylvia Steiner, Single Judge

Registrar : Mr Bruno Cathala

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

PUBLIC

**Defence Application for Leave to Appeal the “Decision on the Prosecution Request
for Authorisation to Redact Statements of Witnesses 4 and 9”**

The Office of the Prosecutor

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Introduction

1. The Defence for Mr. Germain Katanga (« the Defence ») requests leave to appeal the Single Judge's *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9*, issued on 23 January 2008 ("impugned Decision").¹ It is submitted that this Decision contains two errors warranting the Appeals Chamber's consideration: (1) the Single Judge incorrectly interpreted rule 81(4) of the Rules of Procedure and Evidence ("Rules") to allow redactions of identities and identifying information of alleged victims of sexual offences which are completely unrelated to the charges against Mr. Germain Katanga set out in the arrest warrant against him; (2) the Single Judge abused her discretion in placing the need for protection of Witness 4 on a higher scale than the prejudice to the Defence as a result of this protection.

Procedural background

2. On 23 January 2008, the Single Judge of Pre-Trial Chamber I rendered the impugned Decision. The Decision partially granted the Prosecution's requests for authorisation to redact the interview notes and statements of Witnesses 4 and 9. In particular, the Single Judge of Pre-Trial Chamber I held:
 - (a) that a systematic and teleological interpretation of rule 81(4) of the Rules leads to the conclusion that, on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of "victim" under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the case at hand; therefore the Single Judge authorised redactions of the names and identifying information of three alleged victims of sexual offences referred to in the statement of Witness 9, which are unrelated to the Bogoro attack, under the regime of this rule;²
 - (b) that the need for protection of Witness 4 through the redaction of his name and identifying information overrides any prejudice that might be caused to the Defence; therefore the Single Judge authorised redactions of Witness 4's name and identifying information in his statement pursuant to rule 81(4).³

¹ ICC-01/04-01/07-160.

² Impugned Decision, paras. 19-20.

³ Impugned Decision, paras. 30, 32.

Threshold Criteria for Leave to Appeal

3. The Defence files this *Application for Leave to Appeal the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9* ("Defence Application") pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules, and regulation 65 of the Regulations of the Court.
4. Pre-Trial Chambers I and II have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets the following two cumulative criteria:
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁴
5. It is respectfully submitted that these criteria are met in the present situation for the reasons discussed in this Application.

Issues of Appeal

6. The Defence raises two appealable issues:
 - (i) the Pre-Trial Single Judge incorrectly found that a systematic and teleological interpretation of rule 81(4) of the Rules leads to the conclusion that the notion of "victim" under rule 81(4) of the Rules also covers alleged victims of sexual offences which are unrelated to the charges in the case at hand.
 - (ii) the Pre-Trial Single Judge incorrectly found that the need for protection of Witness 4, through the redaction of his name and identifying information, overrides any prejudice that might be caused to the Defence.

⁴ *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, ICC-01/04-01/07-108 14-12-2007 3/7 EO PT, Public Document; *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, ICC-01/04-01/07-116 19-12-2007 4/7 SL PT, Public Document.

Redactions of the identities and identifying information of alleged victims of sexual offences which are not related to the case at hand – scope of rule 81(4)

7. It is respectfully submitted that the Single Judge of Pre-Trial Chamber I wrongfully widened the scope of rule 81(4)⁵ in considering that a systematic and teleological interpretation of this rule leads to the conclusion that, on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of "victim" under rule 81(4) of the Rules also covers alleged victims of sexual offences which are unrelated to the case at hand. Neither rule 81(4) nor any other rule or article in the Rome Statute allows for such a broad interpretation. Such broad interpretation further contravenes the principles of exceptionality, necessity, and proportionality and infringes the right of the defendant to a fair and impartial trial.
8. The Single Judge herself acknowledged that alleged victims of events unrelated to the case at hand do not qualify as victims under rule 81(4) and reiterated that "the status of victim in situation and case proceedings is linked to the object of such proceedings".⁶ More specifically, the Single Judge considered that "the procedure status of victim in case proceedings held before the Pre-Trial Chamber can be granted only to those for whom there are reasonable grounds to believe that they have suffered physical or moral harm as a result of a crime within jurisdiction of the Court expressly included in the warrant of arrest or summons to appear - and, subsequently, in the charging document."⁷ On those grounds, the Single Judge held that the alleged victims whose redactions are being sought "cannot, in principle, be considered as victims for the purpose of rule 81(4) of the Rules".⁸
9. Nonetheless, the Single Judge made a stretch to allow for an exception to this unambiguous and clear finding, despite it being wholly consistent with the literal text

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 Impugned Decision, para. 14; with reference to: ICC-01/04-101 -tEN, in particular paras.97-100; ICC-01/04-01/06-172-tEN; ICC-01/04-177-tEN; ICC-01/04-417.

⁷ Impugned Decision, para. 14 [emphasis added]; with reference to: ICC-01/04-01/06-172-tEN, pp. 6-8; and ICC-01/04-01/06-228-tEN.

⁸ Impugned Decision, para. 15.

and spirit of the Rules.⁹ The justification for creating such an exception was founded on “the particular emphasis placed by the drafters of the Statute and Rules on the protection of alleged victims of sexual offences resulting from crimes within the jurisdiction of the Court”.¹⁰

10. There is no denying of the particular emphasis in the Statute and Rules on the protection of alleged victims of sexual offences.¹¹ None of the articles and rules quoted by the Single Judge do, however, explicitly foresee in the type of protection that has been sought and granted in the present proceedings. Withholding relevant information from the Defence is the most intrusive protective measure that can possibly be imposed. This protective measure should, therefore, be granted only if explicitly authorised within the framework of the ICC Statute and Rules.

11. The Defence fully appreciates the concerns for the safety of victims and witnesses. However, it seems that these particular redactions were not sought and granted to protect the safety of the alleged victims. Mr. Katanga has absolutely no incentive to harm persons who have made no allegations against him. Rather, it seems that the redactions were sought and granted to protect their dignity.¹² Whilst accepting that this is a noble purpose, there are other ways to achieve it which affect the fairness to the defendant to a lesser extent. Given that Mr. Katanga had nothing to do with the victims’ alleged suffering, there is no need to protect their dignity from him. On the other hand, the Defence fully respects their wish to remain anonymous to the public at large.¹³

⁹ In relation to a previous Prosecution application seeking redactions of identities and identifying information of « innocent third parties » on the basis of article 54(3)(f) read together with rule 81(4), the Single Judge was not prepared to make such a stretch. See Document ICC-01/04-01/07- 90, Public Redacted Version (“First Decision on Redactions”), paras. 44-56. The Defence fails to see the difference between that situation and the current situation.

¹⁰ Impugned Decision, para. 19.

¹¹ See article 68(1) of the Statute ; article 54(1)(b) of the Statute ; rule 86 of the Rules ; rule 88 of the Rules ; rule 70 of the Rules. As emphasised in the impugned Decision, para. 17.

¹² The Defence assumes that this is the case on the basis of the little information it has. As usual, the Defence was excluded from any hearing that was held to discuss those matters prior to the rendering of the impugned Decision.

¹³ That there is a clear difference between withholding information from the public and the Defence is apparent from case law at the *ad hoc* International Criminal Tribunals. See, *inter alia*, *Prosecutor v. Blaskic*, IT-95-14-T, Décision sur la requête du Procureur en date du 17 octobre 1996 aux fins de mesures de protection des victimes et des témoins, 5 novembre 1995, para. 24 : « c’est le droit de l’accusé à un procès équitable qui doit prendre préséance et exigera que soit levé en sa faveur le voile de l’anonymat, même si ce voile doit continuer d’obstruer la vue du public et des médias. »

12. Indeed, the need to protect alleged victims of sexual crimes from public disclosure was clearly acknowledged by Judge Stephen in the context of the former Yugoslavia:¹⁴

What is special about such witnesses [victims of rape or sexual assault] is not, of course, that by giving evidence they or their family, more than other victims who give evidence, have reason to fear retaliation. What does make their case special is the combination of possible social consequences of it becoming generally known in communities in the former Yugoslavia that a woman has been a rape victim and also the often acute trauma of facing one's attacker in court and being made to relive the experience of the rape. The customary protection measures to guard against these two possible consequences are in camera proceedings, devices to avoid confrontation with the accused in court and careful control of cross-examination.

13. However, the same Judge held that the need to protect this particularly vulnerable category of victims did not justify redactions of their identity and identifying information to the Defence:¹⁵

That being so, it leads me to the conclusion that it is measures such as those, and not any wholesale anonymity of witnesses, that Article 22 primarily contemplates. [...] [I]t seems clear that the according of anonymity to prosecution witnesses in the way proposed in the present application, which is likely substantially to disadvantage the defendant, is not a measure contemplated by the terms of the Statute. [...] My conclusion therefore is that the Statute does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused specified in Article 21 and in particular the "minimum guarantee" in (4). Of course, the Statute clearly mandates the protection of victims and witnesses, including protection of their identity. But this is not to say that it mandates unqualified anonymity of witnesses. Simple protection of identity is something that in appropriate cases, as with offences involving minors, in certain matrimonial cases and where gross indecency and rape are involved, has been habitually accorded by Courts in many jurisdictions for very many years but by recourse to in camera proceedings or restrictions on media reporting without involving the ultimate step of concealing the identity of a witness from the accused and his counsel.

14. In the same esprit, the broad interpretation given to rule 81(4) is not in line with the conditions set for authorised redactions. Protective measures will only be granted on an exceptional basis, after exhausting the possibility of employing less extreme measures (principle of necessity), must be strictly limited to the exigencies of the situation (principle of proportionality), and must not infringe the right of the defendant to a fair and impartial trial.¹⁶ Less extreme measures, such as withholding the identities and identifying information of the alleged victims of sexual offences from the public, are available to the Prosecution. Withholding those identities and identifying information from the Defence is, therefore, not necessary nor proportional, and infringes the right of the defendant to a fair and impartial trial.

¹⁴ See *Prosecutor v. Dusko TADIC A/K/A "DULE"*, Separate opinion of Judge Stephen on The prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, <http://www.un.org/icty/tadic/trialc2/decision-e/50810pmn.htm>

¹⁵ *Ibid.*

¹⁶ 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, ICC-01/04-01/06-108-Corr – Original 19.05.2006; Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006.

15. Thus, the Single Judge's interpretation of rule 81(4) was erroneous, significantly affecting the fair and expeditious conduct of the proceedings for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Impact on Fairness

16. The Defence submits that the redactions sought and granted pursuant to rule 81(4) very clearly impact on the fairness of the proceedings against Mr. Katanga. An overly broad interpretation of rule 81(4) has the effect that redactions become the rule rather than the exception. Redactions can only be authorised exceptionally because, as the Single Judge has acknowledged,¹⁷ such redactions may prejudice the Defence in its investigations and preparation of an adequate defence case.
17. The specific redactions sought and granted will hamper the Defence's ability to adequately prepare the defence case of Mr. Katanga. Mr. Katanga is charged with the offence of sexual slavery as both a crime against humanity and a war crime. Therefore, even though the three alleged victims of sexual offences are unrelated to the Bogoro attack, all data about them would be very useful given that the Prosecution could use these alleged examples to show that sexual slavery was widespread in the FRPI/FNI camps, as mentioned in the warrant of arrest. Thus, those redactions would affect the ability of the Defence to fully challenge the Prosecution evidence.
18. Moreover, widening the scope of rule 81(4) of the Rules so as to include all alleged victims of sexual offences, even those not related to the case at hand, has far-reaching consequences. The precise nature of those consequences depends on the extent to which the Prosecution will seek to rely on this ruling in future applications and whether the Trial Chamber will be guided by this ruling in its interpretation of rule 81(4). But it is clear that this ruling potentially has wide implications both in the continuation of the proceedings against Mr. Katanga and future proceedings. This is all the more so, given that the articles and rules the Single Judge relied on in giving her broad interpretation of the term "victim" under rule 81(4), are not limited to alleged victims of sexual offences. They all use terminology such as "in particular, but not limited to" (article 68(1) of the Statute), or simply "in particular" (article 54(1)(b)

¹⁷ Decision on the Defence Motion for Leave to Appeal the First Decision on Redaction, issued on 19 December 2007, ICC-01/04-01/07-116 19-12-2007 2/7 SL PT, page 6.

of the Statute; rules 68, 70, 86, 88 of the Rules). Thus, potentially, the Single Judge's broad interpretation of rule 81(4) opens the door wide open for future applications which are not limited to alleged victims of sexual offences, wherever and by whomever committed in the DRC, but may include any alleged victim in the DRC. Once a person is qualified as a victim under rule 81(4), their family members may also be entitled to protection under rule 81(4). Such wide application of the open-ended interpretation of rule 81(4) would clearly unfairly prejudice the Defence and render the exceptional nature of non-disclosure nugatory.

19. Furthermore, if the Single Judge's interpretation is followed, it could incite any alleged victims in the DRC to condition their cooperation with the Court on the requirement that their name not be disclosed to the Defence. This would render all future proceedings fundamentally unfair.

20. The need to redact information to protect witnesses and victims and the need of the Defence to receive that information must be carefully balanced. That this protection measure can only be imposed if consistent with the defendant's right to a fair trial follows from all ICC articles and rules dealing with witness and victim protection. Authorising redactions of identities and identifying information of every single victim in the DRC as well as their family members would result in heavily redacted and therefore meaningless disclosure to the Defence, which significantly impacts on the fairness of the proceedings.

Impact of the Expeditiousness

21. This Issue is also directly related to the expeditious conduct of the proceedings given that the Prosecution may request authorisation to redact the name of alleged victims of sexual offences not related to the case at hand in other witnesses statements. To clarify the scope of Rule 81(4) in relation to these alleged victims would favour the expeditious conduct of the proceedings by avoiding any further Defence's motions in relation to this issue.

22. Moreover, the Defence respectfully submits that full disclosure with the least redactions necessary would assist the Defence in its preparation for the confirmation hearing. The sooner efficient investigations can be conducted, the better for the expeditiousness of the proceedings. The more materials are being disclosed to the

Defence the easier it is to conduct investigations and prepare for the confirmation hearing.

23. An adequate preparation for the confirmation hearing is necessary to challenge prosecution evidence in order to ensure that the time and resources of the international community are not wasted on unsubstantiated charges. This will assist the Prosecution to focus the Prosecution case on what is really relevant rather than on unfounded claims. A clear focus will undoubtedly expedite the proceedings.

An Immediate resolution may materially advance the Proceedings

24. The legal principles set out in the Decision will most likely provide a guideline for future applications. It will not only affect future filings in the case against Mr. Katanga but also filings in other trials. The ICC is in the process of developing a body of jurisprudence to be used in future filings and by jurists in international criminal law. Principles on disclosure and exceptions thereof are yet to be defined. It is therefore of great importance for « jurisprudence-building » that the Rules are correctly interpreted.
25. The Honourable Single Judge has previously held that in light of the fact that several applications for protective measures were pending, an immediate decision by the Appeals Chamber in relation to the procedure and criteria for protective measures would materially advance the proceedings.¹⁸ The International Criminal Tribunal for Rwanda (« ICTR ») has also held that the enumeration of a legal principle, which is likely to be applied through the proceedings, constitutes an issue the resolution of which would materially advance the proceedings.¹⁹
26. Thus, an immediate resolution of the Appeals Chamber regarding the issue would clearly materially advance the proceedings.

¹⁸ Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13.

¹⁹ Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, Prosecutor v. Nzirorera, 9 October 2007.

Disclosure of the identity and identifying information of Witness 4 – Scope of rule 81(4)

27. Witness 4 allegedly witnessed the events in Bogoro which are described in the warrant of arrest against Mr. Katanga. He gave details on those events in a statement to the Prosecution, which was used as supporting material on which the arrest warrant relied. Witness 4 subsequently discontinued his cooperation with the Prosecution and requested that his identity and identifying information not be disclosed to the Defence.
28. The Single Judge acknowledged that authorising the redaction of Witness 4's name and identifying information may cause prejudice to the Defence, which may have an interest in contacting him to verify his version of events.²⁰
29. Nonetheless, the Single Judge held that, "in balancing this possible prejudice against the need to protect Witness 4 in a context as serious as the one referred to in Section II of the First Decision on Redactions, the Single Judge considers that the need for protection [REDACTED] which can be properly granted through the redaction of his name and identifying information overrides any prejudice that might be caused to the Defence at this stage."²¹
30. It is respectfully submitted that this balancing exercise of the potential prejudice to the Defence and the potential need for protection of Witness 4 should have resulted in prioritising the Defence's need to receive the redacted information in order to effectively prepare a defence case. The Single Judge's failure to place more significance on the potential prejudice to the Defence than on the potential need to protect Witness 4 in the particular circumstances resulted in an error, which significantly affects the fair and expeditious conduct of the proceedings and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Impact on Fairness

31. The Rules are secondary to the Rome Statute and must be interpreted in light of the articles set out in the Rome Statute and with full respect of the spirit thereof. In

²⁰ Impugned Decision, para. 29.

²¹ Impugned Decision, para. 30.

authorising the redactions of the identity and identifying information of Witness 4 whose statement has been used in support of the arrest warrant against Mr. Katanga, the Single Judge failed to do so. In particular, the Single Judge failed to consider article 68(1) of the Rome Statute.

32. Article 68 (1) of the Statute provides:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

33. This article clearly mandates that witness protection shall not prejudice the Defence. Accordingly, the mandate of the Court under article 68(1) must be interpreted in a restrictive manner in order to ensure that the defendant's rights are well respected. It is, therefore, respectfully submitted that the Chamber's finding that the need for protection of Witness 4 outweighed the prejudice to the Defence contradicts the clear wording of article 68(1).

34. In this particular case, the Single Judge acknowledged that the Defence may be prejudiced and have an interest in contacting this alleged victim to verify his story. The Single Judge, however, held that "even if any prejudice is caused, this will not be inconsistent with the rights of the Defence and a fair and impartial trial because the redactions are only granted for the purpose of the proceedings leading up to the confirmation hearing - which is an early stage of the proceedings in the case of The Prosecutor v. Germain Katanga characterised by the limited scope of the confirmation hearing. Furthermore, Witness 4 has made it clear that he no longer wants to cooperate with the Prosecution and does not wish his statement to be used by the Prosecution as evidence for the purpose of the confirmation hearing in the case of The Prosecutor v. Germain Katanga."²²

35. In doing so, the Single Judge has underestimated the prejudice to the Defence at this stage, and exaggerated the need for protection of Witness 4.

²² Impugned Decision, para. 31.

36. Already at this stage of the proceeding, the Defence has a genuine interest in knowing the identity of witnesses whose statements have led to the arrest warrant. The Defence may wish to challenge the arrest warrant and Mr. Katanga's detention and apply for interim release pending trial pursuant to article 60(2). In order to effectively challenge the arrest warrant and Mr. Katanga and apply for interim release pending trial, the Defence must be in a position to review the supporting materials and assess whether there (still) are reasonable grounds to believe that Mr. Katanga has committed a crime within the jurisdiction of the Court.

37. In that light, the Single Judge considered that Witness 4's statement, having been included as supporting material in the Prosecution's Application for the issuance of a warrant of arrest for Mr. Katanga and relied upon by the Chamber when it issued the relevant warrant of arrest, "is material for the Defence's preparation for the confirmation hearing within the meaning of rule 77 ».²³ It is, however, submitted that the Defence's ability to properly test the evidence underlying the arrest warrant and subsequent provisional detention would be impeded if the identities of the makers of the allegations which led to the warrant of arrest are redacted.

38. Indeed, the importance of disclosure of the identities of makers of statements which were used to issue a warrant of arrest in order to verify their stories is acknowledged not only by the Single Judge herself,²⁴ but also by the European Court of Human Rights ("ECHR")²⁵ as well as the International Criminal Tribunal for the former Yugoslavia ("ICTY")²⁶ and the International Criminal Tribunal for Rwanda ("ICTR").

39. At the same time, given that Witness 4 is no longer a Witness, the need for his protection is significantly reduced. In the ICTY case of *Brdjanin and Talic* a similar situation occurred. Five persons had given incriminating statements to the Prosecution but subsequently refused to continue their cooperation and demanded that their identities not be disclosed to the Accused. The Trial Chamber refused the application for non-disclosure, holding that "once the prosecution says that it will not call them, and concedes that it used their statements prepared for other purposes in this case

²³ Impugned Decision, para. 4.

²⁴ Impugned Decision, para. 29.

²⁵ *Al-Nashif v. Bulgaria* (Application no. 50963/99) Judgment 20 June 2002 at paras. 94-98. <http://www.bghelsinki.org/upload/resources/al-nashif-eng.doc>.

²⁶ *Prosecutor v. Brdjanin and Talic*, Decision On Fifth Motion By Prosecution For Protective Measures, 15 November 2000, paras. 5-6. <http://www.un.org/icty/brdjanin/trialc/decision-e/01115PM213937.htm>.

without their authority, the suggested justification for their continuing fear of retaliation disappears.”²⁷

40. In this light, redacting the name and identifying information of Witness 4 is hardly fair given the fact that the witness has clearly stated that he does not wish to testify for the Prosecution or even continue any kind of cooperation as an informant – as such, by redacting his statement they are in effect hoarding him by preventing the Defence from accessing him.

41. Moreover, the exceptional nature and necessity of the redactions sought has not been demonstrated. In the present case, the Single Judge did not specify in which way disclosing the identity of Witness 4 could pose an additional risk to his safety; she only made a reference to the “current circumstances in Ituri”²⁸ and to Section II of the *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (“First Decision on Redactions”)²⁹, which, in the Confidential Redacted Version available to the Defense, does not mention specifically Witness 4. Such a general and broad reference to the “volatile situation in Ituri and Kinshasa areas” and “the influence of Germain KATANGA in the Ituri and Kinshasa areas today”³⁰ cannot justify the invocation of the exceptional measure of redacting the identity and identifying information of Witness 4; otherwise the redaction of the identity and identifying information of any witness coming from these areas could be justified in a totally unfair and arbitrary way.

42. Therefore, given the importance of the disclosure of the identity and identifying information of Witness 4 to the Defence and the lack of demonstrated need for protection of Witness 4, the Single Judge did not properly weigh those conflicting interests and erred in authorising the redactions sought.

43. This error clearly impacts on the fairness of the proceedings. This is confirmed by the Single Judge’s own admission that the redactions sought may cause prejudice to the Defence, possibly having an interest in contacting Witness 4 to verify his version of

²⁷ Decision on Second Motion by the Prosecution for Protective Measures, 27 October 2000, para. 31. <http://www.un.org/icty/brdjanin/trialc/decision-e/01027PM213940.htm>

²⁸ Impugned Decision, para. 26.

²⁹ ICC-01/04-01/07-88-Conf-Exp 06-12-2007 2/25 EO PT.

³⁰ First Decision on Redactions, para. 22.

events,³¹ as well as her previous ruling in respect of potential prosecution witnesses, *inter alia*, that individuals who had been interviewed by the Prosecution but are not Prosecution witnesses “may have valuable information concerning the case at hand; that as they have not yet become Prosecution witnesses, the Defence may have an interest in contacting them; and that the redaction of their identities and identifying information would prevent the Defence from contacting them for the purpose of the preparation of the confirmation hearing.”³² In the present situation, the individual is no longer willing to cooperate with the Prosecution in whatever capacity. On no basis, therefore, can the Prosecution keep him away from the Defence, which has a real interest in contacting him to verify his statement, which led to the arrest of Mr. Katanga.

Impact of the Expeditiousness

44. This Issue is also directly related to the expeditious conduct of the proceedings given that the Prosecution may request authorisation to redact the name of alleged victims of sexual offences not related to the case at hand in other witnesses statements. To clarify the scope of Rule 81(4) in relation to these alleged victims would favour the expeditious conduct of the proceedings by avoiding any further Defence’s motions in relation to this issue.
45. Moreover, the Defence respectfully submits that full disclosure with the least redactions necessary would assist the Defence in its preparation for the confirmation hearing. The sooner efficient investigations can be conducted, the better for the expeditiousness of the proceedings. The more materials are being disclosed to the Defence the easier it is to conduct investigations and prepare for the confirmation hearing.
46. An adequate preparation for the confirmation hearing is necessary to challenge prosecution evidence in order to ensure that the time and resources of the international community are not wasted on unsubstantiated charges. This will assist the Prosecution to focus the Prosecution case on what is really relevant rather than on unfounded claims. A clear focus will undoubtedly expedite the proceedings.

³¹ Impugned Decision, para. 29.

³² Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116 19-12-2007 2/7 SL PT.

47. Disclosure of the identity and identifying information of Witness 4 may also focus the Defence's investigations. In respect of a previous very similar Defence application requesting leave to appeal the issue of the scope of rule 82(1), the Single Judge considered that this issue would significantly affect the expeditious conduct of the proceedings, *inter alia*, because the authorised redactions "may delay certain investigative steps by the Defence".³³

An Immediate resolution may materially advance the Proceedings

48. The legal principles set out in the Decision will most likely provide a guideline for future applications. It will not only affect future filings in the case against Mr. Katanga but also filings in other trials. The ICC is in the process of developing a body of jurisprudence to be used in future filings and by jurists in international criminal law. Principles on disclosure and exceptions thereof are yet to be defined. It is therefore of great importance for « jurisprudence-building » that the Rules are correctly interpreted.

49. The Honourable Single Judge has previously held that in light of the fact that several applications for protective measures were pending, an immediate decision by the Appeals Chamber in relation to the procedure and criteria for protective measures would materially advance the proceedings.³⁴ The International Criminal Tribunal for Rwanda (« ICTR ») has also held that the enumeration of a legal principle, which is likely to be applied through the proceedings, constitutes an issue the resolution of which would materially advance the proceedings.³⁵

50. The Single Judge further referred to the deadline of 28 January 2008 (prior to 29 January 2008) for the Judge to rule on all redactions applications in light of the confirmation hearing scheduled for 28 February 2008 as a factor materially advancing the proceedings. Even if, presently, this deadline has passed, many issues in relation to witness redactions are still pending. Moreover, as the Prosecution is yet to disclose to the Defence the final charges in relation to which it will seek confirmation, the Defence is unsure whether the confirmation hearing will actually take place on 28

³³ Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116 19-12-2007 2/7 SL PT

³⁴ Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13.

³⁵ Decision on Joseph Nzirorera's Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, Prosecutor v. Nzirorera, 9 October 2007.

February 2008. Clarification on those matters is, therefore, still relevant to the proceedings against Mr. Katanga and, given the time pressure, an urgent ruling by the Appeals Chamber on this issue would materially advance the proceedings.

Conclusion

1. On these grounds, the Defence prays the Single Judge of Pre-Trial Chamber I to grant leave to appeal the *Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9* pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules of Procedure and Evidence, and regulation 65 of the Regulations of the Court.

Respectfully submitted,



Mr David Hooper, Defence Counsel

The 29th January 2008

At Arusha, Tanzania