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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 Document Providing Additional Details on the "Defence Appeal Brief
concerning the First Decision on the Prosecution Request for Authorisation to
Redact Witness Statements"**

The Office of the Prosecutor

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Introduction

1. Pursuant to the Appeals Chamber's *Public Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities* issued on 24 January 2008 ("Appeals Chamber's Order"),¹ the Defence for Mr. Germain Katanga (« the Defence ») hereby files additional details on the *Public Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« Defence Appeal Brief »).² The Defence has attached to this Document a bundle of authorities as Annex A.

2. In accordance with the *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 »* ("Defence Application"),³ the Defence will provide the Appeals Chamber with additional details and authorities in support of the following submissions:
 - a. 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);
 - b. Rule 81(2) should not apply to information which is relevant to the preparation of the defence, or potentially exculpatory;
 - c. extending the protection of Rule 81(2) to prosecution sources would render the strict requirements of Article 54(3)(e) nugatory;
 - d. 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 – particularly 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;
 - e. the fact that a person is a potential witness would not prejudice ongoing investigations if the defence is not aware of the fact that the person is a

¹ ICC-01/04-01/07-164 24-01-2008 2/3 EO PT OA2

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

³ ICC-01/04-01/07-150 21-01-2008 1/11 CB PT OA2, dated and submitted for filing late on 18 January 2008, processed on 21 January 2008.

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 witness).

Procedural Background

3. On 7 December 2007, the Single Judge of Pre-Trial Chamber I issued the public version of the *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« impugned Decision »).⁴ The impugned Decision, *inter alia*, authorised redactions of the identities and identifying information of potential Prosecution witnesses who had been or were about to be interviewed by the Prosecution pursuant to Rule 81(2) of the Rules of Procedure and Evidence (“Rules”).
4. On 13 December 2007, the Defence sought leave to appeal, *inter alia*, the issue of whether Rule 81(2) could provide a legal basis for authorising redactions of the identities and identifying information of potential Prosecution witnesses.⁵
5. On 19 December 2007, the Single Judge of Pre-Trial Chamber I granted the Defence leave to appeal the issue « whether the Single Judge enlarged the scope of application of rule 81(2) of the Rules by considering as Prosecution sources those individuals –whose identity and identifying information could be redacted pursuant to the said rule– who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution ». ⁶
6. Accordingly, the Defence for Mr. Germain Katanga (“the Defence”) filed its *Public Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (« Defence Appeal Brief »)⁷ pursuant to Article 82(1)(d) of the Rome Statute. The Defence Appeal Brief alleged that the Single Judge made a reversible error in allowing redactions of the identities and identifying information of potential Prosecution witnesses pursuant to Rule 81(2) of the Rules. In support of this allegation the Defence reiterated the submissions set out in the Defence Motion for Leave to Appeal, and raised three grounds of appeal: (1) Statements of

⁴ Urgent Public Redacted Version of First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-90 07-12-2007 2/25 EO PT [« impugned Decision »].

⁵ 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 [“Defence Motion for Leave to Appeal”].

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

⁷ ICC-01/04-01/07-132 02-01-2008 1/13 JT PT OA2, filed on 2 January 2008.

potential witnesses do not qualify as Prosecution sources; (2) Rule 81(2) requires disclosure of identities of sources; (3) Widening the scope of Rule 81(2) defeats the purpose of disclosure.

7. On 14 January 2008, the Prosecution filed a Response to the Defence Appeal Brief⁸ in which it pointed out that the Defence's submissions in support of its issue of appeal were largely 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.
8. On 21 January 2008, having been made aware of its misunderstanding of the impugned Decision, the Defence filed a Defence Application requesting leave to provide additional details and authorities.⁹ That same day, the Appeals Chamber issued a Public Urgent Order stating that the Prosecutor may respond to the Defence Application by 12 o'clock noon on 24 January 2008.¹⁰
9. On 22 January 2008, the Prosecution filed a Response to the Defence Application re Additional Details¹¹ submitting that the relief sought by the Defence goes beyond the proper scope of regulation 28 of the Regulations of the Court;¹² and that "the proper course of action would be to discontinue his appeal, in whole or in part, following the prescriptions of Rule 157 of the Rules of Procedure and Evidence."¹³
10. On 24 January 2008, the Appeals Chamber granted the Defence Application and ordered the Defence to provide additional details on the Defence Appeal Brief and any additional authorities upon which it wishes to rely by 4 p.m. on 1 February 2007.¹⁴ Accordingly, the Defence hereby files a *Defence Document Providing Additional Details on the "Defence Appeal Brief concerning the First Decision on the Prosecution Request for*

⁸ Public Prosecution's Response to the Defence Appeal Brief concerning Document in Support of Appeal against the First Decision on Redaction of Witness Statements, ICC-01/04-01/07-142 14-01-2008 2/8 CB PT OA2 ["Prosecution's Response to the Defence Appeal Brief"].

⁹ Public Defence Application to Request Leave to Provide Additional Details and Authorities on the "Public Defence Appeal concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-150 21-01-2008 2/11 CB PT OA2 ["Defence Application re Additional Details"]

¹⁰ Public Urgent Order concerning the filing of a response by the Prosecutor to the Defence Application to Request Leave to Provide Additional Details and Authorities, ICC-01/04-01/07-153 21-01-2008 1/2 SL PT OA2.

¹¹ Public Prosecution's Response to the 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 Authorization to Redact Witness Statements" ICC-01/04-01/07-154 22-01-2008 1/4 EO PT OA2 ["Prosecution's Response to Defence Application re Additional Details"].

¹² Prosecution's Response to Defence Application re Additional Details, para. 1.

¹³ Prosecution's Response to Defence Application re Additional Details, para. 11.

¹⁴ Public Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities, ICC-01/04-01/07-164 24-01-2008 2/3 EO PT OA2.

Authorisation to Redact Witness Statements, providing additional details in relation to the submissions indicated in the Defence Application re Additional Details.

a. 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)

11. As clearly outlined under ground 3 of the Defence Appeal Brief,¹⁵ persons who have given a statement or are about to give a statement to the Prosecution do not necessarily feel a subjective fear that is objectively justified for their safety as a direct result of the statement they have given or will give to the Prosecution. This must remain a case-to-case determination and the perceived threat must come from the Defence.¹⁶ Authorising redactions of potential witnesses without any further qualification results in a risk determination per category rather than per individual and creates a blanket privilege for the Prosecution.

12. It is, further, hard to determine what the parameters, if any, of this unmerited privilege are. Any person who is in contact with the Prosecution is a potential witness. The blanket assignment of protection to potential witnesses can create an umbrella privilege by which categories of witnesses and non-witnesses can unjustly enjoy protection that they should not otherwise have. For example, the Prosecution can brand any person who may never even have had any intention to testify against Mr. Katanga as a potential witness, and thus create the potential for a scenario in which an informant could operate for a significant period of time without disclosing his or her identity under the guise of being a potential witness. Or, the protection could unjustifiably extend to actual witnesses who are inappropriately characterised as only potential witnesses and thus do not have their statements disclosed to the Defence as long as they remain qualified as a potential witness (unless the statement contains evidence which would assist the Defence).¹⁷ Consequently, by taking a backdoor

¹⁵ Paras. 25-37.

¹⁶ *Prosecutor v. Milosevic*, Decision On Prosecution Motion For Provisional Protective Measures Pursuant To Rule 69, 19 February 2002, para. 29, <http://www.un.org/icty/milosevic/trialc/decision-e/20219PM517175.htm>

¹⁷ Such statements should in any event be disclosed to the Defence, even if the potential witnesses will never testify. See *Prosecutor v. Kordic*: Order on Motion to Compel Compliance by the Prosecutor with Rules 66 (A) And 68, 26 February 1999.

approach to Rule 81(2), many more persons would enjoy protection than was intended by the drafters of the ICC legislation.

13. The phrase “disclosure may prejudice further or ongoing investigations” should be construed strictly. It is not sufficient to withhold information simply to make it easier for the Prosecution to conduct further investigations.¹⁸ In general, the Defence fails to understand on what grounds potential Prosecution witnesses need protection, as in this view supported by Trial Chambers in other international criminal tribunals.¹⁹ The Defence is particularly troubled by the fact that persons who have not yet given statements to the Prosecution may enjoy protection if the Single Judge’s Decision is not overturned. The fear that motivates the granting of protection to such persons out of an overabundance of caution is completely hypothetical and therefore not objectively justified. Indeed, in light of the fact that they are not identified as Prosecution witnesses and have not given a statement to the Prosecution, there is no factual basis to conclude that the disclosure of their identity to the Defence could create a real risk or threat to their security.²⁰

14. The Defence is also concerned that persons qualified as potential Prosecution witnesses condition their cooperation with the Prosecution upon advanced promises of protective measures. Witnesses or potential witnesses should never be given the liberty to dictate to the Prosecution on which terms they are willing to cooperate. Unless the requirements of article 54(3)(e) are met, informants cannot demand that certain information remains confidential (see ground b).

15. Even if those potential witnesses have good grounds for want of protection, the Prosecution’s investigations are not *ipso facto* prejudiced if the identities and identifying information of those potential witnesses are not withheld from the Defence. Other means are available to the Prosecution to safeguard its investigations.²¹ First, it can redact the identities and identifying information of potential witnesses in

<http://www.un.org/icty/kordic/trialc/ordere/90226EV55547.htm>

¹⁸ *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 29. <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm>

¹⁹ *Prosecutor v. Brdjanin and Talic*, Decision On Prosecution’s Request For Variation Of Third Protective Measures Decision, 29 November 2000, para. 14. <http://www.un.org/icty/brdjanin/trialc/decision-e/01129PM214121.htm>

²⁰ 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>

²¹ See also Defence Appeal Brief, paras. 33-36.

any publicly available document and only provide the Defence with this information.²² Second, it can have a constructive dialogue with these potential witnesses and explain what options the ICC can offer them in terms of protection if they elect to testify. If they decide not to testify, there appears to be no need for protection. Third, the Prosecution can search for other sources.

16. Given that the Prosecution failed to demonstrate in what manner disclosure to the Defence of the identities and identifying information of potential Prosecution witnesses would frustrate the Prosecution's investigations, potential Prosecution witnesses do not trigger the protection of Rule 81(2).

b. Rule 81(2) should not apply to information which is relevant to the preparation of the defence, or potentially exculpatory

17. During a hearing held on 18 January 2008 in the case of *Lubanga*, Trial Chamber I ruled that "the Prosecution will not be permitted to withhold material of potential assistance to the accused because it relates to other inquiries."²³ Indeed, the Trial Chamber I reiterated the Prosecution's obligation to disclose "all information that is potentially exonerating pursuant to Rule 67(2) of the Rules of Procedure and Evidence or any material that falls for inspection under Rule 77".²⁴

18. The same logic should apply to the Katanga case: if material is of potential assistance to the Defence, the Prosecution has an obligation to make this material available to the Defence irrespective whether this material would otherwise fall under the protection of rule 82(1). This also corresponds with the jurisprudence of other international tribunals where the entitlement to confidentiality of Prosecution sources "does not relieve the Prosecution of the obligation, pursuant to Rule 68, to disclose to the Defence, "the existence of material known to the Prosecutor which in any way tends to suggest the

²² If filed confidentially, the Defence obligation to withhold that information from anyone outside the Defence team is triggered. This was done in *Prosecutor v. Brdjanin and Talic* Decision On Fifth Motion By Prosecution For Protective Measures, 15 November 2000, para. 6; <http://www.un.org/icty/brdjanin/trialc/decision-e/01115PM213937.htm>

²³ ICC-01/04-01/06-T-71-ENG ET WT 18-01-2008 4/12 NB T, page 10, lines 4-6.

²⁴ ICC-01/04-01/06-T-71-ENG ET WT 18-01-2008 4/12 NB T, pages 4 line 25 – 5 line 3.

innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence”.²⁵

19. In evaluating the Prosecution’s request for a blanket protection of potential Prosecution witnesses without any further qualification, there has been no assessment as to whether the information is potentially exculpatory for the Defence or would assist the Defence to prepare its case.
20. It is submitted that many of the redactions sought will assist the Defence in its investigations and preparations. Not only does the Defence have a real interest in contacting persons who may be called to testify (see ground c), it also has an interest in contacting persons who will not testify but who have made statements to the Prosecution which have been used for purposes other than serving as evidence in support of the charges against Mr. Katanga. For instance, such statements may have been used in support of the warrant of arrest issued against Mr. Katanga.
21. 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. For the purpose of doing so, the Defence will seek to contact the persons upon whom the Prosecution relied in its application for issuing a warrant of arrest against Mr. Katanga and verify their allegations. Hence, the Defence genuinely needs their identities and identifying information.²⁶
22. In this case, the Single Judge of Pre-Trial Chamber I acknowledged that the identity and identifying information of a person who has given a statement to the Prosecution for the purpose of the arrest warrant against Mr. Katanga but who will not be called as a witness

²⁵ *Prosecutor v. Brdjanin and Talic*, ‘Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002’ 23 May 2002, paragraphs 18-19.

²⁶ The Defence also raised this argument in: Public Defence Application for Leave to Appeal the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”, ICC-01/04-01/07-169 29-01-2008 1/16 CB PT, paras. 36-37.

in the case against him is valuable information to the Defence who may have an interest in contacting him or her to verify his or her story of events.²⁷

23. Domestic courts, other international criminal courts and human rights courts have made rulings to the effect that a defendant is entitled to know the identities of the informants relied upon in support of an arrest warrant or detention order. The European Court of Human Rights (“ECHR”) has made findings to the effect that a State cannot rely on confidentiality concerns based inter alia on national security to justify depriving a person of procedural justice which is necessary to contest the lawfulness of their detention.²⁸ A United States Court rejected an INS detention order against a suspected terrorist sympathizer, which was based on *ex parte* and hearsay evidence.²⁹ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) also made several orders to the Prosecution to disclose to the Defence the identities of persons whose statements formed part of the supporting materials accompanying the indictment even if those statements were not used as evidence during trial.³⁰

24. The Defence is completely in the dark as to whether the information of at least some of the potential Prosecution witnesses has been used in support of the Prosecution’s application for issuance of an arrest warrant against Mr. Katanga or for other purposes of interest to the Defence. It is submitted that the Prosecution should not be authorised to withhold from the Defence the identities and identifying information of potential Prosecution witnesses without first assessing whether these identities and identifying information are relevant to the Defence preparations or are potentially exculpatory.

²⁷ Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-160, para. 29.

²⁸ *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>. See also UN Report of the Special Rapporteur on the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment (Columbia), paras 70 and 71, which implicitly criticises the use of anonymous witnesses for detention orders. E/CN.4/1998/39/Add.2 30 March 1998. <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/e1b44569379d86b080256659005262b3?Opendocument>

²⁹ *Al-Najjar v. Reno*, 97 F. Supp. 2d 1329, 1352-61 (S.D. Fla. 2000) , 273 F.3d 1330 (11th Cir. 2001).

³⁰ See *inter alia* *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>. In this case, the Chamber rejected a Prosecution’s application for leave to withhold from the accused and their defence teams the identity of a person whose statement was part of the supporting material which accompanied the indictment when confirmation was sought, on the basis that the prosecution does not intend to call this witness at the trial.

c. extending the protection of Rule 81(2) to prosecution sources would render the strict requirements of Article 54(3)(e) nugatory

25. Pursuant to article 54(3)(e) of the Rome Statute, the Prosecution may “[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents”.
26. The Prosecution may agree with a source not to disclose information that was obtained on the condition of confidentiality only on the basis of article 54(3)(e). Article 54(3)(e) should be used in exceptional circumstances only. The right to confidentiality it grants to Prosecution sources should be “strictly delineated”,³¹ and implemented only when “strictly necessary”.³²
27. It is submitted that the Single Judge’s expansion of the scope of rule 81(2) so as to include prosecution sources would allow the Prosecution to circumvent the strict conditions of Article 54(3)(e). It is well possible that the Prosecution’s request for redactions of identities and identifying information of Prosecution witnesses is based on their refusal to cooperate in other circumstances. If that is the case, in line with the jurisprudence of other international criminal tribunals,³³ the Prosecution may only use their information if, pursuant to article 54(3)(e), it was obtained on the condition of confidentiality and solely for the purpose of generating new evidence.
28. The entitlement to confidentiality under article 54(3)(e) applies only to information upon which the Prosecution does not intend to rely as evidence in the case. It does not apply to information upon which the Prosecution may rely as evidence, as is the case in respect of potential Prosecution witnesses. Potential Prosecution witnesses, therefore, do not enjoy protection under article 54(3)(e). The Prosecution should not be allowed to bypass article 54(3)(e), which is the principal provision concerning Prosecution sources, and grant

³¹ *Prosecutor v. Blaskic* ‘Decision of Trial Chamber I on the Prosecutor’s Motion for Video Deposition and Protective Measures’ 11 November 1997 at para 10. < <http://www.un.org/icty/blaskic/trialc1/decisions-e/71113PM113320.htm> >

³² *Prosecutor v. Brdjanin and Talic*, ‘Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002’ 23 May 2002, paras 18-19.

³³ *Prosecutor v. Milosevic*, Decision on Prosecution Motion to utilised redacted statement and order for non-disclosure, dated 29 May 2002 <http://www.un.org/icty/milosevic/trialc/decision-e/020529.pdf> the prosecution sought to disclose a redacted version of a statement in order to “protect the safety and security of the sources of information” provided to the witness (page 2); the Court concluded that the requirements of rule 70(b) were not met because the Prosecution had not established that the statement has been provided on a confidential basis; and that it has been used solely for the purpose of generating new evidence (at page 3) As such, Chamber dismissed the application

protection to Prosecution sources, not meeting the criteria of article 54(3)(e), under rule 81(2).

29. If information under article 54(3)(e) is used as evidence, it must be disclosed to the Defence. The information provider may agree or not agree to the use of the information as evidence. Once the provider consents to the use of the information as evidence, he or she cannot impose conditions as to the timing of disclosure to the Defence, or the right of the Defence to be informed of the source of the information, once the provider has consented to the use of that information in evidence.³⁴
30. Under rule 81(2), on the other hand, any potential Prosecution witness may enjoy protection as long as their status of “neither being a witness, nor being a non-witness” is not amended. Because the agreement between the potential Prosecution witness and the Prosecution regarding the former’s status is not subject to the control of the Pre-Trial Chamber, allowing the protection of Prosecution sources under rule 81(2) may create a temptation for Prosecution sources to keep their status as “potential Prosecution witness” as long as possible in order to avoid that their identities be disclosed to the Defence.
31. The Defence further submits that the expansion of the scope of rule 81(2) so as to include prosecution sources has the effect to implicitly abrogate the powers of the Court in that it removes from the Pre-Trial Chamber the discretion to determine whether a Prosecution source must disclose his or her identity to the Defence and vests this discretion with the Prosecution source him or herself. Hence, it creates a privilege, which is not foreseen by either the Statute or the Rules, for such a Prosecution source to his or her own conditions upon which he or she is willing to cooperate.

³⁴ See for example, the following ICTY decisions concerning the mirror provision of article 54(3)(3): *Prosecutor v. Blaskic*, Decision on Prosecutor’s request for Authorization to Delay Disclosure of Rule 70 Information, “According to the Trial Chamber, once its consent has been given, the humanitarian organisation cannot determine if, and if necessary, when it is appropriate to the disclose the prior statements.” Decision of 6 May 1998, < <http://www.un.org/icty/blaskic/trialc1/decisions-e/80506DE113452.htm> > *Prosecutor v. Blaskic*, ‘Decision of Trial Chamber 1 on Prosecutor’s Requests of 5 and 11 July 1997 on the Protection of Witnesses’, Decision of 10 July 1997. < <http://www.un.org/icty/blaskic/trialc1/decisions-e/70710PM113304.htm> > See also Decision on Prosecution Motion to Utilize Redacted Statement and Order of Non-Disclosure’ issued in *Prosecutor v. Milosevic*, in which the Prosecution sought leave to rely on a redacted statement of a witness protected by Rule 70. The Trial Chamber concluded that whilst Rule 70 (the equivalent of article 54(3)(e)) provides an exception to the general rule mandating disclosure to the Defence of evidence, once consent to utilise the evidence as testimony has been given, in order to obtain further protection measures such as redactions, it is necessary to satisfy the requirements of exceptional measures under Rule 69, or the imposition of protective measures under Rule 75 of the ICTY Rules of Procedure and Evidence. 29 May 2002, <http://www.un.org/icty/milosevic/trialc/decision-e/020529.pdf>

32. If the Single Judge's interpretation of rule 81(2) is followed, any person may condition his or her cooperation with the Court on the non-disclosure of his or her identity to the Defence. This may have profound consequences because many Prosecution sources would take advantage of such a privilege without the need to meet the requirements under article 54(3)(e). Allowing Prosecution sources to subject their cooperation with the ICC to conditions which go beyond the scope of article 54(3)(e) should, therefore, in no way be permissible.³⁵

d. 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 – particularly 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

33. In withholding the identities of potential witnesses from the Defence, the Prosecution has effectively deprived the Defence of the right to contact those persons. In the context of its investigations and preparation of an effective and rigorous defence, the Defence has a real interest in contacting any person falling in the category "potential Prosecution witness" irrespective of whether such a person has already given a statement or is about to give a statement to the Prosecution. Potential Prosecution witnesses clearly have useful information for the Defence because they must have a connection to the case against Mr. Katanga. Since they are not, at this stage, actual witnesses, the Defence should be entitled to contact them.

34. As such, the identities and identifying information fall under materials which would assist the Defence in its investigations and should, as such, be disclosed to the Defence

³⁵ In this connection, in the case of the Prosecutor v. Juvénal Kajelijeli, the ICTR Trial Chamber rejected an application from the Prosecutor not to disclose to the defence a video tape which might identify persons from the Rwandan government who were assisting the Prosecution, on the grounds that disclosure would prejudice further investigations. The Chamber referred to the fact that the Rwandan government was obliged to cooperate with the Court, and as such, the question of their possible future non-cooperation was better addressed through the cooperation mechanisms of the Court rather than non-disclosure to the Defence. 'Decision On The Motions Of The Parties Concerning The Inspection And Disclosure Of A Videotape' 28 April 2003, <http://69.94.11.53/default.htm>

pursuant to rule 77 or article 67(2). The Defence's request to contact the potential Prosecution witnesses is totally legitimate. The Defence does not have an obligation to make independent efforts to obtain the requested materials before relying on the Prosecution to disclose materials pursuant to rule 77 or article 67(2).³⁶

35. This is so, particularly in light of the urgency of the need for these materials, given that there is limited preparation time for the confirmation hearing and the investigations of both parties are hampered by security concerns in the Democratic Republic of Congo ("DRC"). It cannot be right if one party is authorised to safeguard its investigations by means which frustrate the investigations of the other party.

36. As was noted by the Single Judge in the Lubanga case, "redaction of the names of Prosecution sources could affect the ability of the Defence to fully challenge the Prosecution evidence at the confirmation hearing, and in particular may affect the Defence ability to raise issues concerning the authenticity of the Prosecution evidence"³⁷

37. The Defence reminds the Prosecution that there is no property in a witness, particularly not a potential witness. The Defence has a right to contact such a person regardless whether he or she has already given a statement to the Prosecution, because the giving of a statement "does not preclude the other party from seeking to interview him or her at this stage of pre-trial proceedings".³⁸ If such a person is not willing to speak to the Defence, it is for him or her to say so, not for the Prosecution. At least, the Defence must be given "the opportunity of attempting to determine whether those individuals can assist them".³⁹

38. These are all the more reasons to limit the scope of rule 81(2) to what it was intended for and not allow the expansion of its scope, as proposed by the Single Judge.

³⁶ *Prosecutor v. Bagosora*, 98-41-T, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/250906.htm#_ftn32#_ftn32

³⁷ Decision on Third Defence Motion for Leave to Appeal, ICC-01/04-01/06-514, 4 October 2006, at pages 12-13; also quoted in Defence Motion for Leave to Appeal, para. 30.

³⁸ *Prosecutor v. Mrksic*, Decision of 7 May 2003.

³⁹ *Prosecutor v. Brdjanin and Talic*, Decision On Prosecution's Request For Variation Of Third Protective Measures Decision, 29 November 2000, para. 14. <http://www.un.org/icty/brdjanin/trialc/decision-e/01129PM214121.htm>

- e. The fact that a person is a potential witness would not prejudice ongoing investigations 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 witness).**

39. It is submitted that the mere fact that a name appears in a statement does not immediately put that person at risk. It is not in the defendant's interest to threaten someone simply because he or she is mentioned by someone else. If the Prosecution does not indicate that a person who is mentioned in a witness statement is a potential or actual Prosecution witness, there is no way of knowing his or her status. This argument, in itself, deprives the Prosecution's request for redactions of every merit. Namely, the Prosecution's assertion that it is in need of withholding from the Defence the identities and identifying information of potential Prosecution witnesses in order to safeguard its investigations does not justify the redacting of those identities from documents which do not indicate their status.

40. If the Appeals Chamber finds that the Prosecution demonstrated the need to protect potential Prosecution witnesses and that Rule 81(2) can legitimately be utilised for that purpose, the Defence proposes as compromise that their identities be disclosed without disclosing their status in the Katanga trial. The Defence would then be able to contact those persons who can decide to inform or not to inform the Defence of their prior contacts with the Prosecution and are fully entitled not to speak with the Defence at all; but at least the opportunity to seek their cooperation would be offered to the Defence. In that way, neither the Prosecution's investigations nor the Defence's investigations would be hampered.

Conclusion

41. On the basis of the arguments enhanced in this *Defence Document Providing Additional Details on the "Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements*, as well as in the Defence Motion for Leave to Appeal and the Defence Appeal Brief, the Defence prays that the Appeals Chamber to:

- (i) find that the impugned Decision was erroneous on the issue of redactions of the identities and identifying information of potential Prosecution witnesses;
- (ii) reverse the impugned Decision; and
- (iii) order that the identities and identifying information of the potential Prosecution witnesses be disclosed to the Defence without delay.

Respectfully submitted,



Mr David Hooper, Defence Counsel

This 1st February 2008

At Arusha, Tanzania