

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07
Date: 8 February 2008

THE APPEALS CHAMBER

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

Registrar: Mr Bruno Cathala

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

Public

**Prosecution's Response to Defence Additional Details on the
"Defence Appeal Brief concerning Document in Support of Appeal
against the First Decision on Redaction of Witness Statements"**

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Introduction

1. The issue certified for this appeal relates to the scope of Rule 81(2), and whether the Single Judge misinterpreted and expanded the scope of that rule by holding that the identities of potential witnesses, who she considered as or analogous to sources, could be protected under its ambit at this stage in the proceedings. Consequently, this appeal is not about the individual determinations by the Single Judge that disclosure of the identity of these particular potential witnesses, on the facts of this case, may prejudice ongoing and further investigations, but only relates to the proper interpretation of the rule.
2. The Prosecution submits that potential witnesses are in a similar position to sources, who the Appeals Chamber has already ruled can be protected under Rule 81(2) at this stage, after a case-by-case determination; if revealing the identity of a potential witness may prejudice investigations, as it may in some cases, then Rule 81(2) must provide the authority to protect that identity. None of the arguments raised by the Appellant disclose any error on the part of the Single Judge.

Procedural background

3. On 3 December 2007, the Single Judge issued the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”.¹ In the Decision, the Single Judge provided “a full explanation of her decision with respect to each category of redaction”; and following the procedure set out by the Appeals Chamber, the Single Judge also set out in an *ex parte* annex which redactions fell under which category, statement by statement, and “in those instances in which the specific nature of the redactions requested by the Prosecution so requires ... an additional explanation of her decision concerning specific redactions.”²
4. On 13 December 2007, the Appellant sought leave to appeal two issues arising out of the Decision,³ including the scope of Rule 81(2), and specifically that “the Pre-Trial

¹ ICC-01/04-01/07-84-US-Exp (“the Decision”). A redacted version of the Decision, which was confidential but available to the Defence, was issued on 6 December 2007 (ICC-01/04-01/07-88-Conf-Exp). A public redacted version was issued on 7 December 2007 (ICC-01/04-01/07-90).

² Decision, paras. 6-7; see also paras. 4-5.

³ ICC-01/04-01/07-99. The Prosecution filed a Response to the Defence Motion for Leave to Appeal the Decision on 17 December 2007 (ICC-01/04-01/07-110).

Judge incorrectly determined that potential Prosecution Witnesses who had been or were about to be interviewed by the Prosecution could be characterised as «Prosecution sources» and, hence, their identifying information be redacted pursuant to Rule 81(2) of the Rules”.⁴

5. On 19 December 2007, the Single Judge granted the Appellant leave to appeal the issue of “whether the Single Judge enlarged the scope of application of Rule 81(2) 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 purposes of the confirmation hearing, have been or are about to be interviewed by the Prosecution.”⁵
6. On 2 January 2008, the Appellant filed the “Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”.⁶ The Prosecution responded to that brief on 14 January 2008, pointing out that substantial portions of the Appellant’s arguments were based on a false premise.⁷
7. Pursuant to an application by the Appellant,⁸ on 24 January 2008 the Appeals Chamber granted the Appellant leave to file additional details and authorities in support of its appeal.⁹ The Appellant filed additional arguments in support of its appeal on 1 February 2008.¹⁰ Pursuant to the terms of the Appeals Chamber’s order, the Prosecution hereby files its response.

The Prosecution also sought leave to appeal the Decision in respect of two different issues on 10 December 2007 (ICC-01/04-01/07-92-Conf; public redacted version filed on 14 December 2007, ICC-01/04-01/07-107). The Single Judge granted the Prosecution leave to appeal for these different issues on 14 December 2007 (ICC-01/04-01/07-108), and on 2 January 2008 the Prosecution filed the “Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements” (ICC-01/04-01/07-131-Conf).

⁴ ICC-01/04-01/07-99, para. 8(ii).

⁵ ICC-01/04-01/07-116, p. 7.

⁶ ICC-01/04-01/07-132 OA2.

⁷ ICC-01/04-01/07-142 OA2, para. 8: “namely: that the Decision authorized non-disclosure of the identifying features of “potential prosecution witnesses” whose statements the Prosecution intended to use at the confirmation hearing.”

⁸ ICC-01/04-01/07-150 OA2. The Prosecution objected to leave to file additional details and authorities being granted - ICC-01/04-01/07-154 OA2.

⁹ ICC-01/04-01/07-164 OA2.

¹⁰ ICC-01/04-01/07-176 OA2 (“Additional Arguments”)

Scope of the Issue on Appeal and the Additional Arguments

8. As set out above, this appeal concerns the scope of Rule 81(2), and specifically whether the Single Judge improperly enlarged the scope of Rule 81(2) by considering as “sources” (who can be protected under Rule 81(2)) persons who the Prosecution has interviewed or will interview, but who the Prosecution does not intend to call as witnesses at the confirmation hearing (“potential witnesses”). The issue on this appeal is whether this category of persons can be protected under Rule 81(2): i.e. whether the Single Judge had the discretion to conduct a case-by-case analysis of the applications to protect the identity of these potential witnesses; not whether the Single Judge exercised that discretion correctly in each of the cases at hand.¹¹

9. The Prosecution submits that the Appeals Chamber’s invitation to provide additional details under Regulation 28 was not intended to expand the scope of the issue which was certified for appeal.¹² To the extent that any arguments raised by the Defence go beyond the issue, the Prosecution submits that they should be disregarded by the Appeals Chamber.¹³

Discussion

10. In this appeal, the Appellant seeks to have the Appeals Chamber rule that the identities of potential Prosecution witnesses cannot be protected under Rule 81(2) prior to the confirmation hearing. The Prosecution submits that this cannot be correct: as in the case of sources, the Prosecution submits that disclosure of the identities of potential

¹¹ The Prosecution notes that, provided that the relevant rule has been interpreted correctly, the particular determinations of the Single Judge whether or not to authorize specific redactions are discretionary decisions. Had the issue and alleged errors in this appeal related to those specific determinations, the Prosecution notes that the exercise of such discretion must be shown to have been unreasonable (see e.g. ICC-01/04-01/07-46-131-Conf, 2 January 2008, para. 30). In any event, the Prosecution submits that in this instance the Single Judge’s determinations on the facts were reasonable, and that none of the Appellant’s arguments in either the original brief or the Additional Arguments disclose any error on the part of the Single Judge.

¹² As previously held by the Appeals Chamber, the grant of leave is the “definitive element for the genesis of a right of appeal” (ICC-01/04-168, 13 July 2006, para. 20).

¹³ As set out above, arguments relating to the manner in which the Single Judge exercised her discretion in this case (including the availability of alternatives) are not relevant to the issue on appeal (Additional Arguments, paras. 15, 16, 19, 39-40). Similarly, the issue on appeal is not whether the identity of sources themselves can be redacted under Rule 81(2) prior to the confirmation hearing, a matter which has already been ruled on by the Appeals Chamber; rather the issue is whether the Single Judge erroneously expanded the scope of Rule 81(2) by considering that the identity of potential witnesses could be redacted under it, including by considering them as (or as analogous to) sources. Therefore submissions which go solely to the issue of whether sources can be redacted under Rule 81(2) also fall outside this appeal (Additional Arguments, paras. 25-32).

witnesses can, in some circumstances, prejudice further or ongoing investigations. Whether the protection of their identities is justified must therefore be considered on a case-by-case basis, as the Appeals Chamber has previously ruled that it must be for sources¹⁴ and as the Single Judge did in this case.

11. The Decision is quite limited as it relates to potential witnesses, the object of this appeal, both in its approach and in its practical result. Contrary to the impression presented by some of the Appellant's arguments, the Decision does not cover any person who has spoken with the Prosecution,¹⁵ but only potential witnesses who have been interviewed by the Prosecution or who the Prosecution intends to interview in the near future. In practical terms, the redactions authorized by the Decision in relation to this category are very confined, relating only to a couple of individuals, and a small number of redactions in a few of the statements disclosed.¹⁶
12. This Chamber has previously ruled that, in the lead-up to the confirmation hearing, the identity of a source may be redacted under Rule 81(2) after consideration on a case-by-case basis.¹⁷ It is similarly uncontroversial that, in appropriate circumstances, the Prosecution may redact the identity of a witness on whose evidence it will rely at the confirmation hearing,¹⁸ and it may even in appropriate circumstances rely on (and therefore only disclose) summary evidence for the purposes of that hearing.¹⁹ The Prosecution submits that the provisions governing the protection of individuals and investigations must be interpreted harmoniously and in their context, and not in such a way that they contradict or undermine each other.
13. The Prosecution submits that it would create an incoherent system if a person who had provided or was providing information to the Prosecution (i.e. a source) but was not being considered as a potential witness could be protected under the rubric of Rule 81(2), whereas an individual who had been or was to be interviewed and who the Prosecution was considering calling as a witness could not be protected. In this

¹⁴ ICC-01/04-01/06-774 OA6, 14 December 2006, paras. 62-63.

¹⁵ See e.g. Additional Arguments, para. 12.

¹⁶ The precise scope of the redactions which were authorized to protect the identities of the potential witnesses is set out in the ex parte annex to the Decision.

¹⁷ ICC-01/04-01/06-774 OA6, 14 December 2006, para. 63.

¹⁸ ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 1, 39; albeit under a different authority, namely Rule 81(4).

¹⁹ ICC-01/04-01/06-773 OA5, 14 December 2006, para. 40; again albeit under a different authority, namely Article 61(5). Such summaries may in some circumstances not even include the identity of the relevant witness, in particular in conjunction with Article 68(5) (ICC-01/04-01/06-773 OA5, 14 December 2006, paras 45-50).

context, a potential witness is effectively a source of information or evidence, with the additional characteristic that they are being considered to give evidence at a future stage of proceedings, and should not be afforded lesser protection because of this. Further, there may well be situations where an individual who is a source is later considered as a potential witness, and finally agrees to be a witness – the rules on protection of investigations and individuals should not be interpreted in such a way as to artificially create a lacuna in the ability to protect the identity of such a person.

14. Further, given that the identities of actual witnesses can be redacted at this stage, i.e. prior to and for the purposes of the confirm hearing, the Prosecution submits that the fact that the person has not yet agreed to be a witness (or the Prosecution has not yet finalized its determination) cannot mean that their identities cannot be protected. This would leave the ability to protect such persons entirely contingent on the timing of a final decision whether to call a person at a given stage, regardless of the impact that disclosure of his or her identity could have on the prospective witness and the ongoing interviews of that person and investigations. It would leave the Court unable to protect a prospective witness who is referred to in other statements during the period in which the Prosecution is determining whether to utilize that person as a witness or while the person is considering a request from the Prosecution to appear as a witness; and could render moot any subsequent application for the protection of their identity under Rule 81(4) if they become a witness as their identity would have already been disclosed.
15. The Prosecution submits that the Single Judge was correct in considering potential witnesses as, or as analogous to, sources;²⁰ that disclosure of their identities at this stage could prejudice further or ongoing investigations; and that their identities therefore could be protected under Rule 81(2).²¹ The proper course was to assess each of the applications for redactions on its merits, which the Single Judge proceeded to do. Nothing in the Appellant's original Brief or the Additional Arguments demonstrates any appellable error by the Single Judge.

²⁰ Decision, paras. 39, 41 ("Any other individual who has already been interviewed by the Prosecution, or whom the Prosecution intends to interview in the near future, in relation to the case at hand is more appropriately characterised as a "Prosecution source" rather than as a "Prosecution witness". Hence, any redaction relating to their identities must be justified by the need to ensure the confidentiality of information pursuant to rule 81(4) of the Rules or to avoid any prejudice to further or ongoing investigations pursuant to rule 81(2) of the Rules.")

²¹ Decision, paras. 42-43. See further para. 13, above.

Response to the Specific Additional Arguments Raised by the Appellant²²

(a) - the Decision did not hold that disclosure to the Defence of information or statements from potential witnesses²³ ipso facto prejudices investigations

16. Contrary to the submissions of the Appellant, the Decision does not “result[] in a risk determination per category rather than per individual”, grant “a blanket privilege for the Prosecution” or a “blanket assignment of protection to potential witnesses”, or “create an umbrella privilege by which categories of witnesses and non-witnesses can unjustly enjoy protection that they should not otherwise have.”²⁴ Such submissions misconstrue or misrepresent the Decision.

17. The Prosecution had requested the redaction of the identities of a small number of “individuals who have already been interviewed by the Prosecution or that the Prosecution intends to interview in the near future, and in relation to whom the Prosecution has not yet decided whether they will become Prosecution witnesses” for the confirmation hearing (“prospective witnesses”) initially under Rule 81(4), and also under Rule 81(2).²⁵ The discussion of “prospective witnesses” in the Decision ruled that such individuals did not fall within the ambit of “witnesses” in Rule 81(4). However the Single Judge considered that as these individuals had been interviewed, or were about to be interviewed, by the Prosecution, that they were more appropriately characterized as sources.²⁶ The Single Judge did not declare that every potential witness would be protected. Rather, she recognized that “the Prosecution’s further or ongoing investigations could be prejudiced if such individuals were to be threatened, intimidated or interfered with”, and stated that she would “discuss each of the redactions included under this specific category separately in Annex I to the present

²² The Prosecution has not responded to each and every submission made by the Appellant in his Additional Arguments, but rather has focused on the main submissions of the Appellant. The Prosecution does not concede the merit of any other submission to which it has not responded. The letters used in this section correspond to the respective portions of the Appellant’s Additional Arguments.

²³ The Prosecution recalls that the issue at hand does not relate to withholding the statements of potential witnesses, but only limited redaction their identifying information from the statements of actual witnesses - see ICC-01/04-01/07-142, 14 January 2008, para. 8.

²⁴ Additional Arguments, paras. 11-12; see also Additional Arguments, para. 19.

²⁵ Decision, para. 39.

²⁶ Decision, para. 41. This was a reasonable assessment in the Prosecution’s submission, as they are indeed individuals who have provided and are providing information to the Prosecution: see further para. 13, above.

decision insofar as the individuals concerned are currently located in different places and have been contacted by the Prosecution in relation to different incidents.”²⁷

18. Thus the Single Judge did not make a blanket finding that every potential witness would necessarily require redaction (or that the disclosure of their identities would *ipso facto* prejudice the Prosecution’s investigation), nor did she create a privilege for this category or allow persons to dictate the terms of their cooperation with the Court.²⁸ Rather, the Single Judge considered the need for protection for each potential witness, including in relation to their current location and the nature of the incidents on which they are providing or have provided information to the Prosecution, performing precisely the type of “case-by-case” analysis that the Appeals Chamber stated is required and appropriate for granting the redaction of the identity of sources under Rule 81(2) prior to the confirmation hearing.²⁹ The Appellant’s submissions should be dismissed on this basis alone.

19. Finally, the Prosecution strongly objects to the submissions of the Appellant to the effect that the Prosecution would abuse the ability to seek the protection of the identity of potential witnesses or otherwise act in bad faith.³⁰ The Appellant has not presented any evidence to indicate that there has been any such activity by the Prosecution. It is respectfully submitted that parties and participants should refrain from bringing this type of unsubstantiated aspersions in submissions before this Court. Furthermore, any allegations that the Decision on this issue is open to abuse by the Prosecution are all the more speculative given that the redaction of the identities of potential witnesses is

²⁷ Decision, paras. 42-43 (emphasis added).

²⁸ Additional Arguments, paras. 12 and 14. The Appeals Chamber has previously held that even where a Pre-Trial Chamber took requests for non-disclosure by sources into account in authorizing the redaction of their identity under Rule 81(2), this was not per se impermissible; and that agreements or conditions on cooperation were only relevant for the purposes of an appeal relating to the alleged creation of a privilege if the Pre-Trial Chamber considered such agreements or conditions binding upon it (ICC-01/04-01/06-774 OA6, 14 December 2006, paras. 61-62). The Prosecution notes that there is no indication that the Single Judge considered any conditions or requests from the potential witnesses binding in this case. See further para. 25, below, on the more detailed Defence submissions relating to the alleged creation of a privilege in the Decision and the Appeals Chamber’s relevant jurisprudence.

²⁹ ICC-01/04-01/06-774 OA6, 14 December 2006, para. 63.

³⁰ See in particular Additional Arguments, para. 12 (“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”).

See also Additional Arguments, para. 30 (“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.”)

supervised by the Pre-Trial Chamber, which must consider and authorize each application.

(b) & (d) - Rule 81(2) may, in appropriate circumstances, cover information relevant to the preparation of the defence; and protecting the identity of potential witnesses prior to the confirmation hearing does not violate Rule 77 or the principle that there is no property in a witness

20. The Prosecution submits that many of these submissions, in particular those brought under issue (b), are either hypothetical, based on a false premise, or do not go to the issue on this appeal. In particular,

- None of the information which was redacted and is the object of this appeal was covered by Article 67(2).³¹ Regardless of whether Rule 81(2) could or could not be used, at this stage of the proceedings, to redact information which is potentially exculpatory, this argument does not fall within the scope of the issue certified for appeal. This argument does not support a submission that the scope of Rule 81(2) was erroneously enlarged when the Single Judge held that it could be used to redact the identities of potential witnesses.
- Most of the Appellant's submissions under issue (b) are based on arguments relating to the alleged need to know the identity of the witnesses whose statements were used in support of the warrant of arrest.³² These arguments are entirely speculative and, in the instant case, based on a false premise – none of the potential witnesses whose identities were redacted in the Decision were relied upon in any way in the application for a warrant of arrest against the Appellant. Such arguments consequently cannot sustain a claim of error by the Single Judge in permitting the redaction of the identities of these potential witnesses under Rule 81(2), and the Prosecution submits that they should be disregarded in their entirety.

³¹ Contrary to the allegation in the Additional Arguments (para. 24), the Prosecution did assess whether any of the identifying information of the potential witnesses was potentially exculpatory or relevant to the preparations of the defence, and this was considered in the Decision. If required, the Prosecution is ready to provide further written assurances or other substantiation in this regard.

³² Additional Arguments, paras. 20-24.

21. The Prosecution submits that redactions at the stage of the confirmation hearing may cover material or information which could be useful to the preparation of the defence.³³ For example, the identity of those witnesses who will be relied upon at the confirmation hearing would be just as, if not more, useful to the preparation of the defence; yet there is no dispute that this information can be withheld at this stage of the proceedings.³⁴ Similarly, at the confirmation hearing the Prosecution may rely on summary evidence,³⁵ which would not necessarily include the name of a potential witness which happened to be mentioned in passing. The Appeals Chamber has further ruled, in the context of upholding redactions to witness statements for the purposes of the confirmation hearing, that:

“The right to challenge the evidence [...] must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect. [...] As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested.”³⁶

Thus the fact that the identity of a potential witness, like that of an actual witness, may be material to the preparation of the defence does not preclude the redaction of this information prior to the confirmation hearing.

22. In contrast, the Prosecution submits that the degree of impact on the preparation of the defence is one of the factors that a Pre-Trial Chamber should consider and balance in deciding whether to authorize the redactions.³⁷ At this stage of the proceedings, there

³³ As the Appellant has noted, it is only that material or information which the Prosecution is obliged to disclose to the defence that it must seek authorization not to disclose – ICC-01/04-01/07-132 OA, 2 January 2008, para. 10.

³⁴ See e.g. ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 1, 39. The Appellant appears to have recognised this in their application for leave to appeal (ICC-01/04-01/07-99, 13 December 2007, para. 26). In this context, the Prosecution submits that the comments of the Trial Chamber in the context of redactions in preparation for the trial, as opposed to the confirmation hearing, are of no relevance to the present proceedings (Additional Arguments, para. 17).

³⁵ ICC-01/04-01/06-773 OA5, 14 December 2006, paras. 40, 45-50.

³⁶ ICC-01/04-01/06-774 OA6, 14 December 2006, para. 47. This was the same judgement in which the Appeals Chamber ruled that the identities of sources could be redacted under Rule 81(2) prior to the confirmation hearing on a case by case basis. Thus while the Appellant notes that the Pre-Trial Chamber did previously observe (while granting leave to appeal) that redaction of the identity of sources could affect the defence’s ability to challenge the Prosecution’s evidence at the confirmation hearing (Additional Arguments, para. 36), the Appeals Chamber went on in the judgement on that appeal to rule that this did not preclude such redactions being made.

³⁷ As set out above, this appeal is about the interpretation and scope of Rule 81(2), and whether its proper interpretation can include the redaction of the identities of potential witnesses. It does not cover whether the Single Judge exercised her discretion correctly in authorizing the redactions in this case (provided that Rule

is no absolute priority of one interest over another. Rather, Rule 81(2) recognizes that there may be a conflict between obligations of disclosure and protection of investigations, grants the Prosecution the ability to withhold disclosure, and places a judicial check on this discretion.³⁸ The fact that the Appellant claims to have an interest in information which the Prosecution was authorized to redact under Rule 81(2) does not demonstrate that the Single Judge erred in her interpretation of Rule 81(2) – rather this is a natural result of the operation of the Rule.

23. The Prosecution therefore submits that there is no merit in the Appellant's arguments: the fact that the identity of a potential witness may be material to the preparation of the Defence does not demonstrate that the Single Judge erred in holding that this identity could be redacted under Rule 81(2), prior to the confirmation hearing and where disclosure of that identity may prejudice further or ongoing investigations.

(c) - sources may be protected under Rule 81(2) at this stage in the proceedings, and this does not create any conflict with Article 54(3)(e)

24. At the outset, the Prosecution recalls that this Chamber has already ruled, at the stage of the confirmation hearing, that “[w]hether a source can be protected under these provisions [Rule 81(2)] has to be analysed on a case-by-case basis and cannot be decided in the abstract.”³⁹ Such case-by-case analysis of the applications to protect the potential witnesses, as sources, is exactly the exercise conducted by the Single Judge in this case, pursuant to the prior decisions of the Appeals Chamber. In contrast, the Appellant is asking the Appeals Chamber to declare in the abstract that no sources can be protected under Rule 81(2).

25. Contrary to the submissions of the Appellant, the Decision does not in any way “create[] a privilege, which is not foreseen by either the Statute or the Rules, for such a

81(2) can support cover the redaction of the identities of potential witnesses where disclosure would prejudice investigations), which would in any event require a showing that the Decision was unreasonable to warrant appellate intervention (see footnote 11, above). However, should the Appeals Chamber consider that it would benefit from submissions from the Prosecutor on whether and how the Single Judge did consider whether the identities of the potential witnesses were material to the preparation of the defence, and to what extent, in the *ex parte* annex to the Decision, then the Prosecution would be willing to provide such supplementary submissions.

³⁸ Brady, “Disclosure of Evidence” in Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 418-419.

³⁹ ICC-01/04-01/06-774 OA6, 14 December 2006, para. 63. The Appellant also appears to recognise, in passing, that sources can fall within the ambit of Rule 81(2) in his response to the Prosecution's appeal against the same Decision – ICC-01/04-01/07-140 14 January 2008, para. 18.

Prosecution source to *[sic]* his or her own conditions upon which he or she is willing to cooperate” or “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.”⁴⁰ There is no indication in the Decision that any agreement between the Prosecution and the source or potential witness was considered binding by the Single Judge.⁴¹ No privilege has been created or discretion abrogated. Indeed, the origin of the present proceeding before the Appeals Chamber is that the Prosecution was required to seek the Single Judge’s authorization to make the redactions in question and the Appellant has sought review of this authorization on appeal.

26. For the reasons set out above, there is no need to discuss the Appellant’s arguments in relation to sources and Article 54(3)(e) in detail. However, the Appellant appears to have misconceived the role of Article 54(3)(e), which is not (as the Appellant claims) “the principal provision concerning Prosecution sources”.⁴² Protection of information under Article 54(3)(e) is based on the particular circumstances and purpose of its collection,⁴³ and is given effect through Rule 82. Restriction on the disclosure of information under Rule 81(2), on the other hand, is based on whether disclosing that information may prejudice ongoing or further investigations – which may arise for a range of reasons, and regardless of the circumstances of its collection.⁴⁴ Given the differences between these two provisions, the argument of the Appellant that Article 54(3)(e) is not intended to cover potential witnesses is irrelevant to the question of whether the Single Judge erred in holding that potential witnesses could be covered by the provision in issue, namely Rule 81(2).

⁴⁰ Additional Arguments, para. 31.

⁴¹ See ICC-01/04-01/06-774 OA6, 14 December 2006, paras. 61-62.

⁴² Additional Arguments, para. 28.

⁴³ See e.g. Bergsmo and Krueger, “Article 54” in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 724, which refers to the significance of such information, especially in the context of investigating suspects in senior leadership positions or understanding the inner workings of organizations, and refers also to intelligence organisations. As the Appellant notes, this is aimed at information which is collected and not intended to be relied upon as evidence (Additional Arguments, para. 28).

⁴⁴ Brady, “Disclosure of Evidence” in Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 418-419. In addition to the identity of sources, this could include, for example, “certain locations and incidents, as well as the identity and identifying information of certain individuals who were directly or indirectly involved in such incidents” (Decision, para. 58), and is certainly is not limited to information which falls within the ambit of Article 54(3)(e).

(e) - the fact that, in some cases, the defence might not realise that a person is a potential witness does not exclude the identity of potential witnesses from the scope of Rule 81(2)

27. The Prosecution submits that the arguments of the Appellant do not demonstrate any error on the part of the Single Judge. The fact that in some circumstances the defence might not realize that a person is a potential witness does not show that the Single Judge erred in her interpretation of Rule 81(2), or that Rule 81(2) cannot be used to protect the identity of potential witnesses.

28. In many instances, the fact that an individual is a potential witness may be readily inferred from the context of the statement, or the risk of identification may (in all the circumstances) be considered too great. The risk to the ongoing investigations of the disclosure of information, including the identity of a person who the Prosecution has interviewed or is about to interview, must be assessed on a case-by-case basis.⁴⁵ In the Decision, the Single Judge set out the principles which were to be applied before authorizing any redaction, which includes considering whether there any “less intrusive alternative measure that can be taken to achieve the same goal at this stage.”⁴⁶ This issue was therefore addressed and incorporated by the Single Judge in this Decision. The potential availability of other measures to avoid some risks, in certain instances,⁴⁷ does not demonstrate any error on the part of the Single Judge and is irrelevant to this appeal.

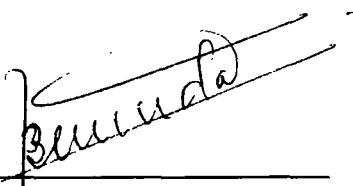
⁴⁵ See footnote 11, above.

⁴⁶ Decision, para. 4.

⁴⁷ The same arguments apply in response to para. 15 of the Appellant’s Additional Arguments: the fact that other means may in some instances suffice to avoid the relevant prejudice to the investigations does not mean that such other means will suffice in all instances, or that therefore the use of redactions in some instances is erroneous.

Conclusion

29. For the above referred reasons, the Prosecution respectfully requests the Appeals Chamber to dismiss the appeal, including the additional details, in its totality.



Luis Moreno-Ocampo
Prosecutor

Dated this 8th day of February 2008
At The Hague, The Netherlands