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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 authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08”

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 authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08*, issued on 07 February 2008 ("impugned Decision").¹ It is submitted that, in this impugned Decision, the Single Judge erred in requiring that the Defence be provided with redacted versions of the applications for victim participation.
2. The Single Judge relied on articles 68(1) and 57(3)(c) of the Rome Statute and rule 86 of the Rules of Procedure and Evidence ("Rules") to conclude that "when the safety of an applicant so requires the Pre-Trial Chamber may order the Registrar to transmit to the Prosecutor and the Defence a redacted copy of the applications for participation expunged of any information which could lead to the applicants identification".
3. In this particular situation, "in light of the security situation in the DRC (and in particular in the Ituri district) referred to in the First Decision on Redactions", the Single Judge determined, *proprio motu*, that it was necessary to redact for the Defence any information in these applications which could lead to the applicants identification.
4. It is respectfully submitted that the Appeals Chamber's intervention in this matter is warranted on the grounds that:
 - (i) none of the legal provisions the Single Judge relied on authorises her to order redactions in applications for victim participation;
 - (ii) the Single Judge's order violates the principle that redactions may only be ordered as an exceptional measure where necessary and proportionate;
 - (iii) the impugned Decision does not sufficiently state the reasons upon which the Single Judge made the order to redact the applicants identities and identifying information.

Threshold Criteria for Leave to Appeal

5. 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*

¹ ICC-01/04-01/07-182.

(“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.

6. 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.²

Issues of Appeal

7. The Defence raises three appealable issues:
 - (i) The Single Judge’s order to redact for the Defence the identities and identifying information of the applicants for victim participation in the case against Mr. Katanga exceeds the Pre-Trial Chamber’s discretionary powers under the Rome Statute, Rules and Regulations of the Court (“Regulations”).
 - (ii) In relying on the general insecurity in the DRC, particularly the Ituri district, rather than the insecurity of the particular applicants to justify the need for redactions, the Single Judge failed to respect the exceptional nature of this protective measure.
 - (iii) In relying simply on the general insecurity in the DRC, particularly the Ituri district without providing further detailed reasoning as to why the redactions ordered are necessary, the Single Judge failed to sufficiently state the reasons for her order to redact.
8. It is respectfully submitted that each of these appealable issues meets the criteria for granting leave to appeal. Each of these three issues would significantly affect the fairness and expeditiousness of the proceedings and constitutes an issue for which an

² *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.

immediate resolution by the Appeals Chamber may materially advance the proceedings.

Issue 1

Impact on Fairness

9. Pursuant to rule 89, the Prosecutor and Defence shall receive the written applications of alleged victims who seek to participate in the proceedings and are entitled to reply within a time limit to be set by the Chamber. This rule makes reference to article 68(1), but does not stipulate that such applications may be redacted. Regulation 86 of the Regulations lists the details to be provided in such written applications. Regulation 86(2) specifically states that the identity of the victim be given. Regulation 86(2) is not subject to any exception. Pursuant to the rules and regulations, therefore, the Prosecutor and Defence are entitled to non-redacted copies of the written applications for victim participation. No exception is provided for.

10. In ordering the redactions for the Defence only of the identities and identifying information of the applicants for victim participation, the Single Judge relied on articles 68(1) and 57(3)(c) of the Rome Statute and rule 86 of the Rules. However, none of those provisions explicitly authorise the Pre-Trial Chamber to order the redactions concerned. Exercising its inherent powers to order, *proprio motu*, the redactions concerned is in violation of the spirit of the ICC articles, rules and regulations.

11. 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.

12. 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.

13. Article 21(3) of the Statute further mandates the Chamber to interpret all provisions of the Rome Statute and the Rules in a manner which is consistent with internationally recognised human rights.
14. In light of these provisions, withholding relevant information from the Defence should be allowed only if explicitly authorised within the framework of the ICC Statute and Rules, which it is not in the present situation.³
15. That the rights of the defendant are at stake here is obvious, given that it concerns information in applications to victim participation in the proceedings against Mr. Katanga. In light of the excessive number of applicants seeking to participate as victims in the proceedings against Mr. Lubanga, it is only fair to assume that the present applications in the Katanga case are only the beginning. Many more will follow. Given the extensive rights these applicants, once admitted as participants, have, clearly affecting the rights of the defendant, it is crucial that the Defence has an adequate and meaningful opportunity to reply to the applications. The submissions of the parties are important in order to ensure that only those applicants who truly deserve to be called victims in direct connection with the proceedings against Mr. Katanga will be admitted as such.
16. In order to meaningfully exercise its right to reply to victim applications, the Defence must be in the possession of at least the identifying details of the applicants. Otherwise, the Defence cannot provide meaningful submissions as to whether there is a sufficient nexus between the applicants and the case against Mr. Katanga in order for the applicants to be admitted as victim participants in the present proceedings.
17. Therefore, the first appealable issue clearly impacts on the fairness of the proceedings.

Impact on Expeditiousness

18. The erroneous interpretation of the ICC articles, rules and regulations, thereby granting an inherent discretion to the Single Judge to redact the identities and identifying information of victims-to-be also impacts on the expeditiousness of the proceedings. The Defence will make similar objections to future victim applications

³ It is interesting to note that the same Single Judge who ordered the redactions concerned previously held that there was no legal basis to authorise redactions of identities and identifying information of « innocent third parties ». See Document ICC-01/04-01/07- 90, Public Redacted Version (“First Decision on Redactions”), paras. 44-56.

and may challenge the victimhood of those applicants during the proceedings. But most importantly, the failure to provide the Defence with adequate information to be able it to advise on determinations of victim applications may result in an excessive number of victim participants in the Katanga trial, which would seriously delay the proceedings.

19. In order to avoid unnecessary delays, it is important to ensure that only the applicants whose claim to victimhood has merit and who have established a genuine link to the proceedings against Mr. Katanga are accepted as victims. Thus, both parties should respond and be provided with the necessary information to do so adequately and meaningfully.

20. Therefore, the first appealable issue clearly impacts on the expeditiousness of the proceedings.

Immediate Appeals Chamber's Resolution may materially advance the proceedings

21. The Defence observes that the Single Judge's order will have implications for all future victim applications, at all stages of the proceedings. In this connection, the Defence observes that the 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.⁴ The 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.⁵

22. As such, the Defence respectfully submits that an immediate resolution of these issues would ensure that all future victim applications are processed and adjudicated in accordance with the correct legal principles, and would eliminate the necessity of revising the status of victims, if they have been incorrectly accorded this status. In this connection, the Defence notes that the power of the Chamber to modify the status of victims pursuant to rule 91 would not constitute an effective remedy if victims, who

⁴Decision on Second Defence Motion for Leave to Appeal, 28 September 2006, ICC-01/04-01/06-489 at page 13. See also 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.

⁵ 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.

had been wrongly granted this status, had in the interim been granted access to confidential materials, or if their views had been taken into consideration by the Chamber as the basis for a judicial finding.

23. Therefore, an immediate resolution of the Appeals Chamber in relation to the first appealable issue may materially advance the proceedings.

Issue 2

Impact on Fairness

24. The Single Judge justifies her order to redact on the security situation in the Ituri district and makes reference to the *First Decision on the Prosecution Request for Authorisation to Redact Witness Statements* (“First Decision on Redactions”)⁶. The First Decision on Redactions only makes general and broad references to the “volatile situation in Ituri and Kinshasa areas” and “the influence of Germain KATANGA in the Ituri and Kinshasa areas today”⁷. Such general concerns cannot justify the invocation of the exceptional measure of redacting the identity and identifying information of the victim applicants.

25. The necessity of redactions must be determined on a case-to-case basis. Redacting the identities and identifying information of any victim applicant from the Ituri district (which is necessarily so, given the need to establish a link to Mr. Katanga’s trial) would result in an automatic right of any such applicant to have his or her identity and identifying information redacted for the Defence.

26. This 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.⁸ Less extreme measures, such as withholding the identities and identifying information of the applicants from the public, are available. Withholding those identities and identifying information from

⁶ ICC-01/04-01/07-88-Conf-Exp 06-12-2007 2/25 EO PT.

⁷ First Decision on Redactions, para. 22.

⁸ 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.

the Defence is, therefore, not necessary nor proportional, and infringes the right of the defendant to a fair and impartial trial.

27. The Defence submits that this should be no different for victim applicants who have not yet been accepted as participants. As aforementioned, in order for the Defence to reply to the victim applications in any meaningful way, full disclosure of the applications is essential.

28. Thus, the Single Judge's reliance on general security concerns rather than individual subjective and objective fears to justify the redactions of the identity and identifying information of victim applicants wholly undermines the exceptional nature of the measure of redactions.

29. Therefore, the second appealable issue clearly impacts on the fairness of the proceedings.

Impact on Expeditiousness

30. The second appealable issue clearly impacts on the expeditiousness of the proceedings on the same grounds as stated in relation to the first issue.

Immediate Appeals Chamber's Resolution may materially advance the proceedings

31. An immediate resolution of the Appeals Chamber in relation to the second appealable issue may materially advance the proceedings for the same reasons as set out in relation to the first issue.

Issue 3

Impact on Fairness and Expeditiousness warranting an Appeals Chamber's Resolution

32. As usual, the Defence has been excluded from any discussion that preceded the impugned Decision. The impugned Decision does not provide any details explaining why the Single Judge found it necessary to order the redactions of the identities and identifying information of the victim applicants.

33. The right to be fully informed of the reasons which form the basis of such a Decision or any Decision, particularly when the Decision negatively impacts on the rights of the defendant, has already been acknowledged by the Appeals Chamber in Lubanga. The Appeals Chamber held that the Pre-Trial Chamber erred “in not providing sufficient reasoning for its finding that the identities of the witnesses covered by the Impugned Decision should not be divulged to the appellant unless the relevant witnesses consented freely to the immediate disclosure of their identities”.⁹

34. For the same reason that the Lubanga Defence was granted leave to appeal the issue of lack of information, enforced by the subsequent finding of the Appeals Chamber that the lack of factual reasoning constituted an error, the Defence requests to be granted leave to appeal the third issue. For reasons stated in relation to the first and second issue as well as indicated by the Appeals Chamber in Lubanga, the third issue impacts the fairness, expeditiousness and warrants an immediate resolution of the Appeals Chamber.

Conclusion

35. The Defence is aware that the Single Judge rejected a similar Application for Leave to Appeal from the Lubanga Defence. The Single Judge held that “only the arrangements for participation and the protection measures granted to persons whose status as victim authorised to participate in the proceedings has been recognised may raise, if applicable, an issue which might significantly affect the fair and expeditious conduct of the proceedings”.¹⁰

36. The Defence urges the Single Judge not to apply the same reasoning to the present Application. In rejecting the Lubanga Defence Application for Leave to Appeal, the Single Judge took into consideration the fact that “no further applicants for participation would be entertained in the case of The Prosecutor v. Thomas Lubanga Dyilo prior to the confirmation of charges hearing”.¹¹

37. The circumstances in the present situation are different. The confirmation hearing has been postponed until a date yet to be determined. These are the first victim applications received by the Katanga Defence.

⁹ n° ICC-01/04-01/06 (O A 5), para. 18.

¹⁰ N° ICC-01/04-01/06-672.

¹¹ N° ICC-01/04-01/06-672.

38. This Decision can further not be held to have created a firm principle that no defence team can seek leave to appeal decisions ordering redactions of the identities and identifying information of victim applicants. A ruling can only have such a far-going effect, depriving the Defence of a right to appeal a fundamental issue, if it has been tested by the Appeals Chamber.

39. Therefore, the Defence prays the Single Judge of Pre-Trial Chamber I to grant the Defence leave to appeal the “Decision authorising the filing of observations on the applications for participation in the proceedings a/0327/07 to a/0337/07 and a/0001/08” 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 13th February 2008

At The Hague, The Netherlands