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**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Response to Defence Motion for Leave to Appeal the Fourth
Decision on Request to Redact Documents related to Witnesses 166 and 233**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Defence of Germain KATANGA ("the Defence") has requested leave to appeal a single issue in a recent decision on redactions. The issue – the redaction of the identity of organisations which the Prosecution had approached in relation to its further and ongoing investigations, under Rule 81(2), in order to protect those investigations – does not relate to a broad matter of principle or interpretation regarding the scheme applicable to redactions before this Court. Rather, the issue raised in this request relates to the application of that scheme in this particular instance, affecting only a very small number of documents.
2. While the Prosecution has regularly recognised that issues affecting the interpretation of the disclosure regime or the disclosure of significant categories of information will often meet the criteria for leave to appeal, not every decision on disclosure will necessarily meet that standard. In this case, the Prosecution submits that the issue which actually arises out of the Decision at hand does not significantly affect the fair and expeditious conduct of the proceedings, nor would its immediate resolution in these circumstances materially advance the proceedings. The Prosecution thus opposes leave to appeal.

Procedural background

3. On 13 March 2008, the Prosecution applied for redactions to a number of documents related to witnesses 166 and 233.¹
4. On 2 April 2008, the Single Judge issued her "Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233" ("the Decision").²
5. On 9 April 2008, the Defence for Germain KATANGA sought leave to appeal against the Decision pursuant to Article 82(1)(d) in respect of a single issue.³

¹ ICC-01/04-01/07-321-Conf-Exp.

² ICC-01/04-01/07-358-Conf-Exp. The decision was issued on 2 April 2008, but registered and notified on 3 April 2008. Confidential, *inter partes* (ICC-01/04-01/07-360-Conf) and public redacted (ICC-01/04-01/07-361) versions of the Decision were also issued on 3 April 2008.

³ ICC-01/04-01/07-380 ("Application for Leave to Appeal").

6. The Prosecution hereby files its response to the Application for Leave to Appeal, pursuant to Regulation 65(3).

The Decision and whether the issue for which leave is sought arises

7. The Defence argues that the Decision “wrongfully widened the scope of Rule 81(2)”, in that the Single Judge allowed the redaction of the names of organisations to protect Prosecution sources and avoid prejudicing further and ongoing investigations.⁴ The Defence further argues that by “allowing redactions of the names of organisations on the mere ground that they were approached by the Prosecution in its ongoing investigations ... the impugned Decision creates a form of privilege for the Prosecution sources”.⁵
8. The Prosecution submits that, at least in part, the Defence has misinterpreted or misrepresented the Decision. As a result, the issue as presented does not arise in its entirety.
9. Contrary to the assertion of the Defence, the Decision does not create any blanket assumption that any organisation will have its identity redacted merely because it has been approached by the Prosecution in the course of its investigations.⁶ The Decision holds that the identity of organisations can be withheld in order to protect further or ongoing investigations, under Rule 81(2). It does not rule that this will always be the case, but specifically states that it will go on to discuss each of the redactions separately in the Annex.⁷ This is consistent with the approach mandated by the Appeals Chamber.⁸
10. Thus, contrary to the Defence’s characterisation, the Decision cannot be characterised as creating a “privilege” for sources or organisations outside of the

⁴ Application for Leave to Appeal, para. 5.

⁵ Application for Leave to Appeal, para. 6.

⁶ Application for Leave to Appeal, para. 6.

⁷ Decision, paras. 6, 28.

⁸ Decision, paras. 8-10; *Prosecutor v Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 22; see further *Prosecutor v Katanga*, ICC-01/04-01/07-90, 7 December 2007, paras. 6-7.

Statute and the Rules.⁹ This aspect of the issue asserted by the Defence does not arise.

11. Rather, the Decision recognises that in order to protect ongoing investigations, and sources in particular, after consideration on a case-by-case basis the Single Judge may authorise the redaction of the names of organisations. This case-by-case evaluation incorporates many of the elements which the Defence claims are required, in particular whether there is no less intrusive means of achieving the required goal, and whether the redactions are prejudicial to or inconsistent with the rights of the defence and a fair and impartial trial.¹⁰
12. The Prosecution submits that it is uncontroversial that sources can be protected under Rule 81(2) prior to the confirmation hearing, in appropriate circumstances and after consideration on a case-by-case basis.¹¹ The Defence recognised that it “may accept that some representatives of some organisations in some circumstances may have a legitimate need for protection”.¹² The Prosecution also recalls that the Decision linked the redaction of the identities of the organisation to the protection of their representatives from threats or intimidation.¹³

⁹ Application for Leave to Appeal, para. 6. The Appeals Chamber considered that the issue of creating a “privilege” for sources required that “the Pre-Trial Chamber considered them [agreements that the Prosecutor might have concluded with information sources] as binding for the purposes of authorisation of disclosure with redactions.” As with the previous case, in this instance “There is no indication that the Pre-Trial Chamber considered itself bound by any agreements between the Prosecutor and his sources or a request by such sources for nondisclosure” (*Prosecutor v Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, paras. 61-62). Any issue regarding a purported privilege therefore does not arise.

¹⁰ Application for Leave to Appeal, para. 8; Decision, para. 6.

¹¹ As the Appeals Chamber has confirmed, “Whether 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” - *Prosecutor v Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 63.

¹² Application for Leave to Appeal, para. 6. The Defence went on to state that it “would raise doubt as to the need to protect representatives of the United Nations.” The Prosecution submits that this underscores the fact that this is a debate about the application of the principle in question, not the principle itself. As will be demonstrated below, in circumstances such as these, an issue which is confined to the application of a principle to the facts at hand does not meet the criteria for leave to appeal under Article 82(1)(d).

¹³ Decision, para. 27: “The Single Judge is therefore of the view that the Prosecution's further or ongoing investigations could be prejudiced if the representatives of such organisations were to be threatened, intimidated or interfered with.”

13. The issue arising out of this Decision, therefore, is not one of the interpretation of Rule 81(2), but of its application to a limited number of documents and redactions in this instance.¹⁴

**To the extent that the issue arises, it does not “significantly affect
the fair and expeditious conduct of the proceedings”**

14. The Prosecution firstly submits that the issue, to the extent that it arises from the Decision, does not significantly affect the fair conduct of the proceedings. Contrary to the submissions of the Defence, the Decision does not “allow[] for redactions to become the rule rather than the exception”.¹⁵ Redactions under the Decision will still only be authorised, consistent with the existing jurisprudence, after consideration on a case-by-case basis including consideration of whether and to what extent such redactions impact on the rights of the Defence.¹⁶
15. The argument that the Decision “could potentially cover any organisation that has ever been in contact with the Prosecution in the context of [this] case”¹⁷ also does not demonstrate impact on the fairness of the proceeding, in light of the fact that no redactions can be authorised without a case-by-case determination that they are required in order to avoid prejudicing further or ongoing investigations and are not prejudicial to the rights of the defence.¹⁸

¹⁴ The documents as disclosed to the Defence distinguish those redactions which were authorised under Rule 81(4) from those authorised under Rule 81(1) or (2) by virtue of the colour of the redactions (the few redactions authorised under Rule 81(1) are further distinguished from those under Rule 81(2) by a separate notation specifying the Rule under which the redaction was authorised). The *inter partes* text of the Decision sets out the authority under which each category of redaction was authorised, and only two categories were authorised under Rule 81(2): Prosecution sources (category (d), in issue here), and the places where interviews were conducted and the names, initials and signatures of the persons present (category (i)). The Defence was thus in a position at least to identify that redactions authorised under 81(2) constituted a small portion of those redactions authorised in the Decision, and those which related to Prosecution sources were in turn only one subset of these.

¹⁵ Application for Leave to Appeal, para. 12.

¹⁶ Contrast Application for Leave to Appeal, para. 12. The degree to which the redaction of the name of an organisation may prejudice the rights of the defence is a matter that can only be assessed on such a case-by-case basis, and may include consideration of factors such as, *inter alia*, whether the organisation is the source or author of the document in question; whether the organisation is a source in relation to the investigation against the suspect or in relation to unrelated investigations; and the stage of the proceedings.

¹⁷ Application for Leave to Appeal, para. 13 (emphasis added).

¹⁸ Indeed, in these circumstances, such a hypothetical impact in potential future instances simply does not arise in this Decision.

16. The issue in this Decision concerns the application of Rule 81(2) to the protection of sources in the context of these particular documents. Especially in light of the small number of documents and redactions which are affected by the relevant category, i.e. sources,¹⁹ the Prosecution submits that this does not significantly affect the fair conduct of the proceedings for the purposes of Article 82(1)(d).²⁰
17. The Prosecution further submits that the Defence has failed to demonstrate that the issue significantly affects the expeditious conduct of the proceedings. As the Prosecution has argued above, the issue in this Decision does not relate to the interpretation of the scope of Rule 81(2), but rather to its application in this instance.²¹ A general assertion that “the more materials are being disclosed to the Defence in unredacted format the easier it is to conduct investigations and prepare for confirmation and trial” does not establish that the issue arising out of this Decision affects the expeditious conduct of the proceedings.²²
18. Finally, while the Defence points out the Single Judge has previously granted leave to appeal “the issue of whether the impugned decision creates a form of privilege for Prosecution sources which is not provided for in the Statute or Rules”,²³ the Prosecution submits that this is not relevant here as:
- a. nothing in the Decision at hand indicates that it creates “a form of privilege for Prosecution sources”, and this aspect of the purported issue does not arise from the Decision;²⁴ and

¹⁹ Category (d); Decision, paras. 26-28.

²⁰ Even if the issue could be seen as having any impact at all on the fairness of the proceedings, such an impact is minimal and does not rise to the level of “significantly affect the fair ... conduct of the proceedings” for the purposes of Article 82(1)(d). The Prosecution has previously recognised that decisions which govern the principles for redactions, the interpretation of the disclosure framework or entire categories or redactions will often fulfil the requirements for granting leave to appeal (see para. 21, below), and has argued against an overly restrictive interpretation of Article 82(1)(d). However a balance must be struck, and the requirements of Article 82(1)(d) should also not be interpreted in such an overly permissive manner than every decision regarding the application of redaction principles necessarily qualifies for interlocutory appeal.

²¹ Contrast with Application for Leave to Appeal, para. 16.

²² Application for Leave to Appeal, para. 17. While the Prosecution considers that an issue which significantly impacts on a party’s ability to effectively investigate certainly could affect the expeditious conduct of the proceedings, it is not the case that every decision which to any extent makes investigations easier or more difficult rises to the threshold of leave to appeal under Article 82(1)(d).

²³ Application for Leave to Appeal, para. 18; quoting *Prosecutor v. Lubanga*, ICC-01/04-01/06-514, 4 October 2006, page 12.

²⁴ See paras. 9-10, above.

- b. leave was granted in that other case “in view of the number of Prosecution sources for which redactions have been authorised in the Decision”,²⁵ whereas in the present instance the redactions only affect the identity of a very small number of sources in a small portion of the documents which were the subject of the Decision.

19. The Prosecution thus submits that the issue for which leave is sought, to the extent that it arises from the Decision, significantly affects neither the fair nor the expeditious conduct of the proceedings, and that leave to appeal must therefore be denied.²⁶

Immediate resolution of the issue by the Appeals Chamber also would not, in these circumstances, materially advance the proceedings

20. While failure to satisfy the first limb of Article 82(1)(d) disposes of the matter, the Prosecution considers that the issue also does not fulfil the second limb. The Prosecution submits that, in the circumstances of this case, immediate resolution of the issue arising out of this Decision by the Appeals Chamber will not materially advance the proceedings.

21. The Prosecution has previously recognised the importance of the Appeals Chamber having an early opportunity to review decisions which prescribe the framework within which redactions may be sought and granted, or provide general interpretations or principles regarding redactions.²⁷ However as set out above, the issue arising out of this Decision does not relate to the interpretation of Rule 81(2), but rather to its application in this instance. Thus, contrary to the

²⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-514, 4 October 2006, page 12, as quoted in Application for Leave to Appeal, para. 18.

²⁶ The Prosecution notes that the Defence has made no arguments to the effect that the issue could affect the outcome of the trial.

²⁷ See e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06-125, 24 May 2006; *Prosecutor v. Katanga*, ICC-01/04-01/07-107, 14 December 2007 (para. 8); *Prosecutor v. Katanga*, ICC-01/04-01/07-110, 17 December 2007 (para. 16); *Prosecutor v. Lubanga*, ICC-01/04-01/06-1261, 4 April 2008. Leave to appeal under Article 82(1)(d) might also be appropriate in cases where the issue at hand affects entire categories of redactions or the disclosure of classes of material.

submission of the Defence, the resolution of this issue by the Appeals Chamber is not likely to provide significant guidance.²⁸

22. In addition, even if the Single Judge considers that the issue at hand could have some impact on the fair and expeditious conduct of the proceedings, the Prosecution submits that the circumstances – including (a) the nature of the information in question; (b) the very small number of documents involved; (c) the stage of the proceedings; and (d) the fact that the Single Judge has already conducted a case-by-case analysis of those documents, in which she considered the effect that any redactions would have on the rights of the defence – mean that any immediate resolution of this issue by the Appeals Chamber would only have a minimal impact on advancing the proceedings.

23. Against the lack of need for the Appeals Chamber to address the issue at this stage, the Prosecution submits that the possible delays that would be caused by granting leave should also be considered.²⁹ The confirmation hearing in this case is scheduled to commence on 21 May 2008. Even if leave was granted very promptly by the Single Judge, it is extremely unlikely that the appellate pleadings could be completed and the Appeals Chamber could render a judgement prior to the commencement of the hearing.³⁰ Given that a number of the Defence's arguments relate to its ability to conduct investigations and prepare for the

²⁸ Application for Leave to Appeal, para. 19. The Prosecution recalls that the Appeals Chamber has already confirmed that "Whether a source can be protected under these provisions has to be analysed on a case-by-case basis", and that referral to the Appeals Chamber is thus even less likely to provide additional guidance – *Prosecutor v Lubanga*, ICC-01/04-01/06-744 OA6, 14 December 2006, para. 63.

²⁹ As the Prosecution has regularly submitted, the extent of any likely delay is one factor to consider in whether immediate resolution of the issue would materially advance the proceedings, although it is certainly not decisive in its own right – see e.g. *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 37, and authorities cited therein (in particular at footnote 22).

In the Prosecution's prior submissions on this element of Article 82(1)(d), it has also emphasised that the purpose of this article is to regulate when, not whether, a party may raise an issue on appeal (see e.g. *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 37; *Situation in the DRC*, ICC-01/04-168 OA3, 24 April 2006, para. 42). In this case, denying the application for leave to appeal will not leave the Defence without any opportunity to have this issue reviewed. If, after the confirmation hearing has been completed and the decision rendered, the redactions in issue have actually caused any meaningful prejudice to the Defence, then this matter could be raised by the Defence in seeking to appeal against the confirmation decision.

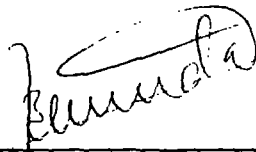
³⁰ If leave to appeal was granted at the end of this week, on Friday 18 April 2008, the Response to the Document in Support of Appeal would not be due until 14 May 2008, just one week before the scheduled commencement of the confirmation hearing.

confirmation hearing, it is thus likely that granting leave could thus delay the hearing.

24. Considering these various factors, the Prosecution submits that, on balance, immediate resolution of the issue would not materially advance the proceedings.

Relief sought

25. For the reasons set out above, the Prosecution requests that the Single Judge deny the Application for Leave to Appeal.



Fatou Bensouda, Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 14th day of April, 2008

At The Hague, The Netherlands