

**Cour
Pénale
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**International
Criminal
Court**

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Date: 28 April 2008

THE APPEALS CHAMBER

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

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

Public Document

**Prosecution Response to Defence Document in Support of Appeal against
Decision on Redaction of Statements of Witnesses 4 and 9**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Mathieu

Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Ms Maryse Alié

Counsel for the Defence of Germain

Katanga

Mr David Hooper

Mr Göran Sluiter

Legal Representatives of Victims

Mr Joseph Keta

Ms Carine Bapita Buyangandu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. This appeal concerns the Single Judge's determination that she had the power to authorise the redaction of three alleged victims of sexual offences who suffered harm in attacks other than the attack on Bogoro on 24 February 2003, which is the subject of this case. The Appellant challenges the power of the Single Judge to authorise these redactions as "victims" in Rule 81(4). Like other prior appeals regarding redactions in this case,¹ this appeal relates solely to the interpretation of Rule 81: whether Rule 81(4) can authorise the Court to redact, under the notion of "victims" and prior to the confirmation hearing, the identity of an alleged victim of sexual violence unrelated to the charges against an individual.
2. The Appellant argues that no such power exists for the Court. The Prosecution opposes this interpretation. Rule 81(4) permits the protection of victims of sexual offences unrelated to the charges, in appropriate circumstances, by permitting non-disclosure of identifying information when that information has been placed before the Chamber through the statement of a witness (or other piece of proposed evidence). The redactions should be considered on a case-by-case basis, as the Single Judge did in this case. To hold that no such power exists risks creating a lacuna in the Court's protective regime, could result in conflicting decisions on protection and would undermine the protective scheme and mandate of the Court.

Procedural Background

3. On 21 December 2007, the Single Judge of Pre-Trial Chamber I issued the "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9" in the case *The Prosecutor v. Germain Katanga*.² This Decision

¹ See e.g. ICC-01/04-01/07-189 OA2, 8 February 2008, paras. 1-2, 8, 10, 12; ICC-01/04-01/07-215-Anx OA, 21 February 2008, paras. 2, 9, 21-23.

² ICC-01/05-01/07-123-Conf-Exp (Prosecution only), 21 December 2007 ("the Decision" or "impugned Decision"). On the same day, a confidential redacted version of the Decision was issued (ICC-01/05-01/07-124-Conf, 21 December 2007). A public redacted version of the Decision was issued on 23 January 2008 (ICC-01/05-01/07-160, 23 January 2008).

held that “on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of ‘victim’ under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand”, and on this basis went on to consider, and ultimately authorise, redaction of the names and identifying information of three victims of sexual offences, referred to in the statement of Witness 9, which are unrelated to the Bogoro attack.³

4. On 10 March 2008, the Pre-Trial Chamber joined the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*.⁴ On the same day, the Single Judge issued a further decision setting a time limit for the Defence of Mathieu NGUDJULO CHUI (“the Appellant”) to seek leave to appeal any prior decisions from the case of *The Prosecutor v. Germain Katanga* that may have an impact on his defence.⁵
5. On 26 March 2008, the Appellant sought leave to appeal the following issue in the Decision:⁶ that the Single Judge incorrectly found that a systematic and teleological interpretation of rule 81(4) of the Rules leads to the conclusion that the notion of “victim” under rule 81(4) of the Rules also covers alleged victims of sexual offences which are unrelated to the charges in the case at hand.
6. The Prosecution did not object to the application for leave,⁷ and on 4 April 2008 the Single Judge granted leave to appeal a single issue in the Decision.⁸
7. On 17 April 2008, the Appellant filed his document in support of appeal,⁹ in which it raised the following four arguments in support of its ground of appeal:
 - The alleged victims of sexual offences unrelated to the charges against Mathieu Ngudjolo cannot be covered by Rule 81(4) (“First Argument on Appeal”);

³ Decision, paras. 19-20.

⁴ ICC-01/04-01/07-257.

⁵ ICC-01/04-01/07-259.

⁶ ICC-01/04-01/07-340.

⁷ ICC-01/04-01/07-346, 31 March 2008.

⁸ ICC-01/04-01/07-365 (“Decision Granting Leave to Appeal”).

⁹ ICC-01/04-01/07-403-tENG OA5 (“Appeal Brief”).

- The contested redactions do not meet the criteria of necessity required by Rule 81(4) (“Second Argument on Appeal”);
 - The contested redactions are inconsistent with the right to a fair trial of Mathieu Ngudjolo (“Third Argument on Appeal”); and
 - The duty of confidentiality is sufficient to protect the persons concerned by the redactions (“Fourth Argument on Appeal”).
8. The Prosecution hereby files its response pursuant to Regulation 65(5).

The Issue in this Appeal

9. The issue certified for this appeal by the Single Judge is “whether the Single Judge erred in law in finding that alleged victims of sexual offences not connected to the charges in the relevant case can be considered victims for the purpose of redactions pursuant to rule 81(4) of the Rules.”¹⁰ Thus, this appeal only concerns the question of whether a Chamber has the authority to protect victims of sexual offences that are not directly related to the charges under the term “victims” in Rule 81(4).¹¹
10. The Prosecution submits that a Chamber does have the power to consider the redactions at issue under Rule 81(4) on their merits, and opposes the ground of appeal raised by the Appellant and each of the arguments raised in support thereof.
11. The First Argument on Appeal raised by the Appellant is framed as an error of law.¹² The Prosecution submits that the Single Judge did not err in her interpretation of Rule 81(4): victims of sexual offences which are not related to the charges are not excluded from protection under Rule 81(4).

¹⁰ Decision Granting Leave to Appeal, p. 8.

¹¹ Accordingly, this appeal is not about whether the Single Judge exercised discretion correctly in granting the redactions in this instance; nor is it about the general considerations which apply to all redactions under Rule 81(4).

¹² Appeal Brief, paras. 13-19. The applicable standard of review requires the Appellant to identify the alleged error, to present arguments in support of its claim, and to explain how the error invalidates the decision (*Prosecutor v. Brdjanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, para. 9).

12. In relation to the Second, Third and Fourth Arguments on Appeal,¹³ the Prosecution submits that these do not relate to the issue for which leave to appeal was granted. As a result, these arguments are not properly before the Appeals Chamber and should not be considered. In any event, even if the Chamber considers that any of the arguments raised could be considered as within the scope of the issue on appeal, the Prosecution submits that none of these demonstrate any error warranting appellate intervention.
13. The Prosecution notes that at various points, the Appellant appears to raise the issue of whether innocent third parties can be protected under Rule 81(4).¹⁴ This issue is also not within the scope of the present appeal, and is already before the Appeals Chamber in a separate appeal against an earlier decision on redactions.¹⁵ Accordingly, the submissions relating to this issue do not form part of this appeal and should also be disregarded by the Appeals Chamber.
14. Finally, the Appellant requests that the Appeals Chamber grant suspensive effect to this appeal.¹⁶ The Prosecution also opposes this request: the Decision and the issue on appeal will not cause any substantial or irreparable prejudice to the Appellant, and there is thus no reason requiring a grant of suspensive effect.
15. The Prosecution will set out its response in relation to each of the arguments in more detail below.

The First Argument on Appeal – the Single Judge correctly interpreted Rule 81(4)

16. The Single Judge correctly found that a Chamber may, pursuant to Rule 81(4), protect victims of sexual offences who are not related to the charges by means of authorising redactions of a victim's name and identifying information in statements to be disclosed to the Defence.¹⁷ Contrary to the submissions of the Appellant, the interpretation of Rule 81(4) by the Single Judge is consistent with

¹³ Appeal Brief, paras. 20-28.

¹⁴ See e.g. Appeal Brief, paras. 22, 25, 30.

¹⁵ See ICC-01/04-01/07-215-Anx OA, 21 February 2008; see also footnote 11, above.

¹⁶ Appeal Brief, paras. 29-33.

¹⁷ Decision, para. 19.

the letter and the spirit of the legal framework of the Court,¹⁸ and the Single Judge acted within the ambit of her jurisdiction when authorising the above redactions.¹⁹

17. Rule 81(4) is one of the primary means by which a Chamber may fulfil its role in facilitating and regulating the protection of persons at risk on account of the Court's activity. The Appellant acknowledges that the purpose of Rule 81(4) is, among other things, to protect certain categories of vulnerable persons, including victims of sexual offences, and that Rule 81(4) must be interpreted in light of Article 68.²⁰ However, the protection afforded by Rule 81(4) is not limited to witnesses testifying before the Court, persons who are granted procedural status of victims pursuant to Article 68(3),²¹ or strictly limited to victims of the specific crimes set out in the charges.²²
18. Article 68(1) imposes upon the Court as a whole a broad obligation to "protect the safety, physical and psychological well-being, dignity and privacy of victims" throughout the proceedings. Further, the Statute and the Rules are underpinned by a general concern to ensure that the Court disposes of the necessary tools to prevent that persons are unduly endangered by the Court's activities. Hence, protection is not limited to witnesses and victims who are granted procedural status pursuant to Article 68(3), or victims who are related to the charges, but extends also to family members and other persons, including victims of crimes unrelated to the charges, who might be at risk on account of the Court

¹⁸ Contrast Appeal Brief, paras. 17-18.

¹⁹ Contrast Appeal Brief, para. 19. The Appellant also refers to the statement in the Decision that "Only in the few instances where the Single Judge has found compelling reasons to depart from the practice in case ICC-01/04-01/06 will the Single Judge authorise the requested redactions" (Appeal Brief, para. 13). The Prosecution notes that in that case, the question of whether victims of crimes not connected with the present charges could be considered as "victims" for the purposes of Rule 81(4) never arose, and the issue on this appeal is thus not a question of departing from any past practice.

²⁰ Appeal Brief, para. 18.

²¹ See Appeal Brief, paras. 14-15.

²² This has also been recognised by the Appeals Chamber. In particular, the Appeals Chamber expressly found that the protection under Rule 81(4) extends to the families of witness. *Prosecutor v. Lubanga*, Judgement on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, paras. 21 and 33.

proceedings.²³ The preparatory works to the Statute and the Rules confirm this interpretation.²⁴

19. The term “victims” in Rule 81(4) must be interpreted in this context. In fact, Rule 81(4) is a key means to implement Article 68 and cannot be read in such a way as to leave a lacuna in which individuals at risk cannot be protected.²⁵ The Prosecution submits that it is antithetical to the intent of Article 68 to conclude that victims who were entitled to protection, including through the redaction of their identities, during an investigation or in a particular case, lose the right to such protection after the formation of a case which does not, at that point in time,

²³ For instance, Rule 87(1) provides that “a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2” (emphasis added). In addition, Article 43(6) states that “the Victims and Witnesses Unit [...] shall provide, in consultation with the Office of the Prosecutor, protective measures [...] for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses” (emphasis added). To deny a Chamber the authority to respond to requests for the protection of victims of sexual offences who are not related to the charges, would diminish the utility of such advice as may be provided by the Victims and Witnesses Unit, pursuant to article 68(4), since the Prosecution would be unable to request that appropriate protective measures be taken. Moreover, Article 54(3)(f) provides that the Prosecutor may “[t]ake necessary measures, or request that necessary measures be taken, to ensure [...] the protection of any person [...]” (emphasis added).

²⁴ The drafting history of the Statute and the Rules also appears to further emphasise that States considered that protection mechanisms should extend not only to victims and witnesses and their family members, but also to others who might be at risk on account of the Court proceedings. For instance: In the August 1997 draft of the Preparatory Committee, Article 43(5) (current Article 68), read: “these measures may extend to family members and others at risk on account of testimony given by such witnesses” (See *Decision taken by the Preparatory Committee at its Session held from 4 to 15 August 1997: Document A/AC.249/1997/L.8/Rev.1*, p. 36). See also *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands (“Zutphen Report”): Document A/AC.249/1998/L.13*, p. 17. In April 1998, the Preparatory Committee included in Article 44 (4) (current Article 43 (6)) stated that “this unit shall provide counseling and other assistance to victims, {defence} witnesses, their family members and others at risk on account of testimony given by such witnesses.” (Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 (14 April 1998)). See also Report of the Working Group on Composition and Administration of the Court: Document A/AC.249/1998/L.14/Add.1, p.1. See also Regulations 79(2) and 96(1) of the Regulations of the Registry. See also, “The International Criminal Court: Ensuring an effective role for victims”, Memorandum for the Paris seminar, April 1999, A/Doc. 1999/40/06/99, 01 April 1999, p. 29; United Nations High Commissioner for Refugees, “Victims and witnesses in the rules of procedure and evidence of the ICC”, briefing note, unofficial document, 29 November 1999; REDRESS, Rules of Procedure and Evidence for the International Criminal Court, Recommendations to the Preparatory Commission regarding Reparation and other issues relating to Victims, unofficial document, March 2000. See further 2 January 2008 Appeal, para. 15.

²⁵ This is particularly so as not all persons at risk on account of the testimony of a witness may be admitted to the Court’s protection programme and therefore, other forms of protection must be available. Absent recourse to such redactions the Prosecution would often be unable to seek necessary measures to provide for the security of persons. This is not to say that every time that a person is endangered, the redaction of their identity under Rule 81(4) will be appropriate. There may be circumstances where alternatives might suffice. Moreover, any redaction of identities must be balanced against the rights of the accused to a fair trial (see also para. 28, below; see further *Prosecutor v. Katanga*, ICC-01/04-01/07-131-Conf, Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements, 2 January 2008, (“2 January 2008 Appeal”), para. 21.

relate to them.²⁶ It could include victims for whom protection has been ordered in other cases. Denying the Court the ability to protect victims of crimes not directly related to the charges as proposed by the Appellant could thus leave a Chamber unable to effectively implement protective measures ordered in another case.²⁷

20. The Appellant further argues that the Single Judge does not have jurisdiction *ratione personae* to authorise the redaction of names and identifying information of victims of sexual violence who are not related to the charges.²⁸ The Prosecution submits that seeking a strict limitation to victims who have suffered from the crimes charged is not appropriate when considering redactions to a statement of a witness in a case which is squarely placed before the relevant Chamber. In this context the Appellant's extensive reliance on the Prosecution's document in support of a prior appeal is misplaced.²⁹ Rule 81(4) authorises the Single Judge to order redactions of documents, statements or other materials that the Prosecution must disclose to the Defence pursuant to Articles 61(3) and 67(2) and Rules 76-77. The fact that the Prosecution has a duty to disclose these documents, statements or materials to the Defence demonstrates that they relate to the charges against an individual. It is this relevance to the charges that triggers the Single Judge's competency to authorise pursuant to Rule 81(4) any redactions to these documents, statements and materials that the Single Judge deems necessary with a view to protecting the safety of persons at risk, including victims of sexual offences, as a consequence of their disclosure to the Defence.

²⁶ Under the interpretation proposed by the Appellant, victims would be unable to be protected by the withholding of their identities in the cases where their identities are of least relevance to the suspect, regardless of the danger which disclosure might pose.

²⁷ According to Regulation 42(1), protective measures once ordered in any proceedings in respect of a victim or witness shall continue to have full force and effect in relation to any other proceedings before the Court. Pursuant to the theory proposed by the Appellant, in spite of the continuing effect of the protective measures, a Chamber in another case would not be able to effectively implement the protective measures by ordering the necessary redactions.

²⁸ Appeal Brief, para. 19.

²⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1219 OA9, Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008 Decision on Victims' Participation, 10 March 2008, paras. 15-17; cited in Appeal Brief, para. 19. That appeal concerned victims applying for independent procedural status in a case, who had no connection with a witness statement or other piece of evidence linking them with the case or the crimes charged. In its Appeal Brief, the Prosecution explicitly stated that "The Prosecution does not challenge the Trial Chamber's finding that Rule 85 *per se* does not limit the definition of victims to persons who suffered harm as a result of the crimes contained in the specific charges", but argued that during the trial phase, the proper application of the provisions of the Statute and the Rules, including Rule 85, the scope of the proceedings, and the authority of the Chamber, are defined and limited by the specific charges against an individual (para. 16).

21. Further, Rule 87(1) confirms that a Chamber does not exceed its jurisdiction by looking beyond the victims of the specific crimes set out in the charges.³⁰ The alleged victims of sexual offences other than those which are the subject of this case were thus properly considered by the Single Judge as “victims” under Rule 81(4) for the purposes of protection in the context of the statement of a witness in that case.
22. For the above reasons, the Prosecution opposes the First Argument in support of the appeal.

**The Second, Third and Fourth Arguments on Appeal do not relate to
the issue in this appeal**

23. The Prosecution recalls that the issue certified for appeal by the Single Judge is a legal question regarding the interpretation of the term “victims” in Rule 81(4), and in particular whether this can include “victims of sexual offences not connected to the charges in the relevant case”.³¹ As the Appeals Chamber has previously held, the grant of leave by the original Chamber “constitutes the definitive elements for the genesis of a right to appeal.”³² To the extent that grounds or arguments go beyond the scope of the issue certified for appeal, the Prosecution submits that they are not properly before the Appeals Chamber³³ and should therefore not be considered in the disposition of this appeal.
24. The Prosecution submits that the Second, Third and Fourth Arguments on Appeal do not relate to the issue which was certified for appeal:

³⁰ Rule 87(1) states that “[a] Chamber may order measures to protect a victim, a witness or *another person at risk on account of testimony given by a witness* pursuant to article 68, paragraphs 1 and 2” (emphasis added).

³¹ Decision, p. 8; see para. 9, above.

³² *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 20; going on to confirm that “In essence, the Pre-Trial or Trial Chamber is vested with the power to state, or more accurately still, to certify the existence of an appellable issue.”

³³ See e.g. *Prosecutor v. Tolimir*, IT-05-88/2-AR73.1, Decision on Interlocutory Appeal against Oral Decision of the Pre-Trial Judge of 11 December 2007, 28 March 2008, para. 9: “The Appeals Chamber notes that the Appellant raises a number of issues that go beyond the scope of the certified issue ... The Appeals Chamber finds that these issues are not properly before it and accordingly declines to consider these submissions.”

- The Second Argument on Appeal raised by the Appellant is that the contested redactions do not meet the criterion of necessity as required by Rule 81(4). The requirement of necessity does not relate to the interpretation of Rule 81(4), rather, it is part of the fact-specific determination of whether particular redactions should be granted, in application of a given provision.
- The Third Argument on Appeal is that the contested redactions are inconsistent with the right of the Appellant to a fair trial. Again, this does not relate to the issue of the interpretation of victim in Rule 81(4). The Appellant raises general arguments relating to the impact of redactions on the Defence's ability to prepare for the confirmation hearing,³⁴ and seeks to impugn the findings of the Single Judge supporting these particular redactions,³⁵ rather than addressing the interpretation of the Rule 81(4) which granted the Single Judge the power to consider those redactions.
- Finally, the Fourth Argument on Appeal argues that the Defence's obligation of confidentiality is sufficient to protect the individuals concerned by the redactions. This is a generic consideration relating to any redaction, and a consideration to be taken into account in determining whether particular redactions are to be authorised. It has no relevance to the interpretation of Rule 81(4) which is at issue in this appeal.

25. The Prosecution thus submits that the Appeals Chamber should disregard the submissions. In the alternative, even if the Appeals Chamber considers that any of these arguments raised by the Appellant do properly fall within the scope of this appeal, the Prosecution submits that none of the arguments demonstrate any error in the Decision.

³⁴ Appeal Brief, para. 26.

³⁵ See e.g. Appeal Brief, para. 26: "In the present case, neither the Prosecution nor the impugned decision have shown why the protection of witnesses extraneous to Mr Mathieu Ngudjolo's case should prevail over the rights of the Defence, which in any event have priority".

The Second Argument on Appeal

26. The fact that the victims in question will not be confronted or have their credibility challenged by the defence does not demonstrate the lack of necessity or prove any error in the Decision:³⁶ if anything, the fact that Prosecution is not relying on these victims, and that they do not have any other material link with this case, reduces any prejudice which the defence may suffer from having their identities withheld. The Decision also does not contravene the presumption of innocence or suggest that the Appellant is guilty of these, or any other, charges.³⁷ Finally, the authorities on which the Appellant purports to rely do not support his arguments or demonstrate any error in the Decision.³⁸

The Third Argument on Appeal

27. While the Single Judge recognised “that the Defence may have an interest in contacting such individuals”,³⁹ none of the victims in question provided information of a potentially exculpatory character and that thus required disclosure under Article 67(2).⁴⁰ The prospect of a victim, who has not suffered from any crimes with which the accused is charged, being material to the preparation of the defence is one factor to consider in the case-by-case analysis of

³⁶ Contrast Appeal Brief, para. 20. The necessity of the redaction must be determined on a case-by-case basis, as the Single Judge did in this case (see Decision, para. 20).

³⁷ Contrast Appeal Brief, para. 21.

³⁸ Contrary to the submission of the Appellant, the ICTY decision in *Stanisic* does not demonstrate that the identity of victims related to another case cannot be withheld from the defence (Appeal Brief, para. 24). That decision dealt with the identity of witnesses who had already testified regarding the events with which the accused were charged (*Stanisic* decision, paras. 2-3). The prejudice to the accused in that case was additionally based on the close proximity of the two cases in question, which alleged common membership of a joint criminal enterprise and many identical events (paras. 7 and 10). Even in these circumstances, the non-disclosure of the identities of witnesses who had testified (albeit in another case) to events regarding the present charges against the accused was initially authorised unless they consented to such disclosure. Thus this case in no way suggests that victims, who have not testified at any stage and who are victims of crimes and events unrelated to the present case against the suspect, cannot be withheld.

Furthermore, the proposition which the Appellant cites from the ICTY decision in *Oric* (Appeal Brief, para. 23) does not relate to the issue on this appeal. That decision concerns the case-by-case determination of whether a particular redaction is warranted. It does not relate to whether a Rule, properly interpreted, contains the authority to grant certain redactions (which then allows a judge to perform the case-by-case determination) – which is the nature of the issue in this appeal.

³⁹ Decision Granting Leave to Appeal, p. 7; cited in Appeal Brief, para. 25 (emphasis added).

⁴⁰ If the Prosecution believed that the identity of the victim did fall within Article 67(2), but that disclosure would pose risks to the safety of the victim, then it would be obliged to seek a ruling from the Court under Article 67(2) and Rule 83.

whether to authorise particular redactions⁴¹ – the possibility that some such victims may be material does not show that there must be a general prohibition of these redactions or that they fall outside the scope of Rule 81(4), and therefore does not demonstrate any error.

28. The arguments raised by the Appellant regarding the general rights of the defence⁴² also fail to demonstrate any error in the Decision. It has repeatedly been confirmed that the identities of certain individuals, even witnesses whose testimony will be relied upon at the confirmation hearing, can be withheld from the defence at this stage in appropriate circumstances.⁴³ A degree of balancing of interests is thus required under the Statute, in which the nature of any prejudice to the defence must be considered, alongside the other interests protected by the Statute, including the protection of victims (and in particular victims of sexual violence).⁴⁴ The conduct of such an exercise, in which the Single Judge expressly considered the impact of the redactions on the rights of the defence,⁴⁵ would not constitute any error even if it was within the scope of this appeal.

The Fourth Argument on Appeal

29. These arguments also do not demonstrate that the Single Judge erred in her interpretation of Rule 81(4). The general consideration that defence counsel are bound by obligations of confidentiality is one factor which may be relevant in any

⁴¹ In particular, this would be a consideration affecting the degree to which the redactions would impact on the rights of the defence. This is one of the criteria prescribed by the Appeals Chamber in its 14 December 2006 Decisions, which the Single Judge considered and applied to the redactions in question – see Decision, para. 20.

⁴² Appeal Brief, para. 26.

⁴³ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-568 OA3, 13 October 2006; *Prosecutor v Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006; *Prosecutor v Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006. The Single Judge has made similar determinations in a series of redaction decisions in this case, many of which have not been challenged by the Appellant.

⁴⁴ See e.g. Article 68(1) and (5), Rules 81(4), 87 and 88. As the Prosecution has previously submitted in the context of protecting potential witnesses under Rule 81(2), “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. ... 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. 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 authorise the redactions. At this stage of the proceedings, there is no absolute priority of one interest over another” (ICC-01/04-01/07-189 OA2, 8 February 2008, paras. 21-22 – footnotes omitted). The Prosecution submits that the same principles apply, even more forcefully, here; and that reference to a decision by the ICTY regarding the protection of the identities of witnesses at trial (Appeal Brief, para. 26) is not of assistance in the present context.

⁴⁵ See footnote 41, above.

decision to authorise redactions; and will likely be more relevant where the redactions concern individuals more closely related to the case.⁴⁶ Such arguments are incapable of demonstrating that the Single Judge did not have the power to redact the identity of alleged victims of sexual crimes unrelated to the present case as “victims” under Rule 81(4), after consideration of the circumstances on a case-by-case basis.

The Appellant’s Request for Suspensive Effect

30. The Prosecution also opposes the Appellant’s request for suspension of proceedings pursuant to Article 82(3).⁴⁷ The redactions at issue in this appeal will not have irreparable consequences,⁴⁸ warranting suspension of the proceedings.⁴⁹ This appeal affects only the identifying information of three victims who are not related to the present case. Any impact of the redactions on the ability of the Appellant to prepare for the confirmation hearing has already been taken into consideration by the Single Judge.⁵⁰

31. Under the Statute, the rule is a grant of suspensive effect is the exception. It cannot be that every decision which authorised redactions, even redactions as limited as the identifying information of three alleged victims unrelated to the case, will warrant a suspension of the proceedings. Nor, contrary to the

⁴⁶ For example witnesses or victims of the crimes set out in the charges. The Prosecution notes that there is no dispute that the identities of such persons can be redacted under Rule 81(4) in appropriate circumstances. This further underscores that the alleged sufficiency of the confidentiality obligations of the defence, in some circumstances, cannot demonstrate that the Single Judge erred in holding that she had the authority to redact the identity of victims of unrelated crimes, after consideration on a case-by-case basis.

⁴⁷ Appeal Brief, para. 29.

⁴⁸ Appeal Brief, para. 30.

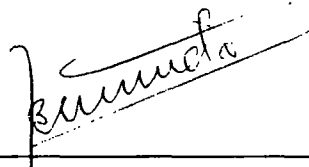
⁴⁹ The continuation of the proceedings under the terms of the impugned Decision will not render the object of the appeal moot. Further, rather than suspending proceedings based on the hypothetical prejudice that might arise if the Appeals Chamber grants the appeal, the Prosecution submits that there are other remedies available to the Defence at a later stage of the proceedings that may be more appropriate, if the charges would be confirmed in the meantime. Indeed, if the Appeals Chamber does allow the appeal and order disclosure of the identities of the three victims, then if the Appellant is able to demonstrate that the withholding of those identities caused identifiable prejudice he could seek leave to appeal against the decision confirming the charges.

⁵⁰ See footnote 41, above.

implication of the Appellant, does the fact that a decision has an impact on the proceedings, as recognised by the grant of leave to appeal, justify suspension.⁵¹

Relief Sought

32. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber denies this appeal in its entirety.



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

Dated this 28th day of April, 2008

At The Hague, The Netherlands

⁵¹ Contrast Appeal Brief, para. 30. In a recent decision, the Appeals Chamber ruled that “when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances.” In that case, where the issues under appeal related to the disclosure to the Defence of evidence and other material prior to the commencement of the trial, the Appeals Chamber considered “whether the implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant” (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1290 OA11, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, 22 April 2008, paras. 7-8).