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**International
Criminal
Court**

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No.: ICC-01/04-01/07 (OA)

Date: 13 May 2008

THE APPEALS CHAMBER

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

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

Public Document

**Judgment
on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled
“First Decision on the Prosecution Request for Authorisation to Redact Witness
Statements”**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr David Hooper
Ms Caroline Buisman

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court (hereinafter “the Court”).

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 December 2007 entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (ICC-01/04-01/07-84-US-Exp),

After deliberation,

By majority, Judge Pikis dissenting,

Delivers the following

JUDGMENT

(i) The decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” is reversed to the extent that the Pre-Trial Chamber decided not to authorise redactions:

- a) for the protection of individuals other than “victims, current or prospective Prosecution witnesses or sources, or members of their families”; and
- b) relating to the locations of interviews of witnesses and identifying information of staff members of the Office of the Prosecutor and of the Victims and Witnesses Unit present at those interviews.

(ii) The requests of the Prosecutor for:

- a) non-disclosure of identifying information of individuals other than “victims, current or prospective Prosecution witnesses or sources, or members of their families”; and
- b) non-disclosure of the locations of interviews of witnesses and identifying information of staff members of the Office of the Prosecutor and of the Victims and Witnesses Unit present at those interviews,

are remitted to the Pre-Trial Chamber, to be determined on their individual merits.



REASONS

I. KEY FINDINGS

1. Rule 81(4) of the Rules of Procedure and Evidence should be read to include the words “persons at risk on account of the activities of the Court” so as to reflect the intention of the States that adopted the Rome Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect that category of persons.

2. While the non-disclosure of information for the protection of persons at risk on account of the activities of the Court is permissible in principle, pursuant to rule 81(4) of the Rules of Procedure and Evidence, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

3. Non-disclosure of information that is required to be recorded pursuant to rule 111(1) of the Rules of Procedure and Evidence may be authorised by a Pre-Trial Chamber. Requests for non-disclosure of such information require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

II. PROCEDURAL HISTORY

4. On 3 December 2007, Judge Sylvia Steiner, acting as the Single Judge of Pre-Trial Chamber I, rendered the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (hereinafter “Impugned Decision”).¹ That decision was issued under seal *ex parte*, only available to the Office of the Prosecutor (hereinafter “OTP”). A confidential, *ex parte* only available to the Office of the Prosecutor and the Defence, redacted version of the Impugned Decision was issued on 6 December 2007.² A public redacted version of the Impugned Decision was issued on 7 December 2007.³ Revised confidential and public versions of the Impugned Decision were issued on 22

¹ ICC-01/04-01/07-84-US-Exp.

² ICC-01/04-01/07-88-Conf-Exp.

³ ICC-01/04-01/07-90.

February 2008.⁴ The page and paragraph numbers of the Impugned Decision cited in this judgment are the same in the under seal *ex parte*, confidential and public versions.

5. The Impugned Decision was triggered by applications filed by the Prosecutor on an under seal *ex parte*, Prosecutor only basis between 10 September and 21 November 2007, seeking to disclose to Mr Germain Katanga, prior to the hearing to confirm the charges, redacted versions of statements and interview notes of seven witnesses.⁵ The applications were heard in five *ex parte* closed session hearings with the Prosecutor and the Victims and Witnesses Unit (hereinafter "VWU") between 17 October and 20 November 2007.⁶ The specific redactions to each witness statement in question were addressed in Annex I to the Impugned Decision which was issued under seal *ex parte*, Prosecutor only.⁷

6. In the Impugned Decision, the Pre-Trial Chamber, *inter alia*, declined the request of the Prosecutor to authorise two categories of redactions from witness statements, namely: (i) all identifying information concerning 'innocent third parties'⁸ and (ii) information relating to the locations of interviews and the names, initials and signatures of staff of the OTP and the VWU present when witness statements were taken.⁹

7. On 10 December 2007, the Prosecutor sought,¹⁰ and, on 14 December 2007, the Pre-Trial Chamber granted, leave to appeal in respect of two issues, namely:

- (i) "whether 'Article 54(3)(f) authorises the Prosecution to seek, and Rule 81(4) read in conjunction with that article empower the Chamber to authorise, redactions for the protection of 'innocent third parties', i.e. persons who are not victims, current or prospective Prosecution witnesses or sources or members of their families'"; and
- (ii) "whether the Single Judge erred in the application of the test prescribed by the Appeals Chamber in its 14 December 2006 Decisions by refusing to authorise the redaction of the location of interviews of witnesses, and the identifying

⁴ Decision on the filing of a revised confidential redacted version of the First Decision on Redactions, ICC-01/04-01/07-223 and Annex, ICC-01/04-01/07-223-Conf-Anx. Decision on the filing of a revised public redacted version of the First Decision on Redactions, ICC-01/04-01/07-224, and Annex, ICC-01/04-01/07-224-Anx.

⁵ Impugned Decision, pages 3-5 and paragraph 1.

⁶ Impugned Decision, pages 4-5.

⁷ ICC-01/04-01/07-84-US-Exp-Anx 1. See Impugned Decision, paragraphs 6 and 7.

⁸ Impugned Decision, paragraphs 44-56.

⁹ Impugned Decision, paragraphs 59-64.

¹⁰ Prosecution's Application for Leave to Appeal and Urgent Application for Confined Variation of the First Decision on Redaction of Witness Statements, ICC-01/04-01/07-92-Conf; this version was issued confidentially and a public redacted version of the application was filed on 14 December 2007, ICC-01/04-01/07-107

information of current and former staff members of the OTP and the VWU at this particular stage of the proceedings".¹¹

8. On 2 January 2008, the Prosecutor filed a document in support of the appeal (hereinafter "Document in Support of the Appeal") with a confidential classification on the ground that the Impugned Decision against which he was appealing had also been classified as confidential.¹²

9. On 14 January 2008, Counsel for Mr Katanga filed a response thereto (hereinafter "Response to the Document in Support of the Appeal") requesting the Appeals Chamber to dismiss the appeal in its entirety.¹³ That document was filed publicly on the basis that it did not contain any confidential information.¹⁴

Preliminary Issue: The filings in the appeal

10. On 19 February 2008, the Appeals Chamber ordered the Prosecutor to indicate, and to provide reasons for, what information, if any, contained within his Document in Support of the Appeal should be kept confidential.¹⁵ In response to that order, on 20 February 2008, the Prosecutor submitted that the Document in Support of the Appeal contained four categories of information that should be kept confidential that was substantively the same information that had been kept confidential in the process of applying for leave to appeal from the Pre-Trial Chamber, namely: (i) information that had been redacted by the Pre-Trial Chamber in the public redacted version of the Impugned Decision; (ii) "information relating to the content or focus of the Prosecution's investigative activities"; (iii) "[i]nformation which could lead to the identification of persons who have assisted the Prosecution in its investigations, and which could compromise the safety or privacy of individuals or ongoing investigations if disclosed to the public"; and (iv) "[i]nformation which concerns details of the investigative activities and procedures of the Prosecution, and which could compromise future investigative

¹¹ Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-108, pages 6-7 (hereinafter "Decision Granting Leave to Appeal").

¹² Prosecution's Document in Support of Appeal against the First Decision on Redaction of Witness Statements, ICC-01/04-01/07-131-Conf, paragraph 7.

¹³ Defence Response to Confidential Prosecution's Document in support of Appeal against the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-140. Counsel for Mr Katanga is also appealing a separate issue arising out of the Impugned Decision (Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-132). Judgment in relation to that appeal is also being delivered today.

¹⁴ Response to the Document in Support of the Appeal, page 2, footnote 1.

¹⁵ Order in relation to the "Prosecution's Document in Support of Appeal against the First Decision on Redaction of Witness Statements", ICC-01/04-01/07-208.

activities if disclosed publicly". A public redacted version of the Document in Support of the Appeal was annexed to the submissions of the Prosecutor.¹⁶ The paragraph numbers of the Document in Support of the Appeal cited in this judgment are the same in the confidential and public versions.

11. The Appeals Chamber did not deem it necessary to make any order in relation to the classification of the confidential version of the Document in Support of the Appeal, noting: (i) that the document had been received, without redactions, by Mr Katanga; (ii) the reasons given for maintaining certain information as confidential, as set out above; and (iii) in particular, the fact that each of the issues under consideration in the present appeal, and the reasoning of the Appeals Chamber in relation to each issue, is fully available to the public in this judgment.

12. However, in light of the filings received in this appeal, the Appeals Chamber deems it necessary to remind the parties of their obligations pursuant to regulation 23 *bis* of the Regulations of the Court (hereinafter "the Regulations"), which provides, in relevant part:

"1. Any document filed by the Registrar or a participant and marked "*ex parte*", "under seal" or "confidential", shall state the factual and legal basis for the chosen classification and, unless otherwise ordered by a Chamber, shall be treated according to that classification throughout the proceedings.

2. Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked "*ex parte*", "under seal" or "confidential" shall be filed with the same classification. ... "

13. In the Document in Support of the Appeal, the Prosecutor stated that the reason for filing the document with a confidential classification was that "the [Impugned] Decision which it is appealing against has also been classified as confidential".¹⁷ However, as set out at paragraph 10 above, the reasons provided by the Prosecutor in response to the order of the Appeals Chamber of 19 February 2008, and the material to which those reasons related, went beyond material that had been redacted from the public version of the Impugned Decision. In the present appeal, the basis for the chosen classification should have been made expressly in the original document itself, pursuant to regulation 23 *bis* (1). This would have put the Appeals Chamber on notice that there was material within the Document in Support of the Appeal that the Prosecutor wished to be treated as

¹⁶ Prosecution's Response to Appeals Chamber's Order of 19 February 2008, ICC-01/04-01/07-215, paragraphs 7 and 9 and Annex, ICC-01/04-01/07-215-Anx.

¹⁷ Document in Support of the Appeal, paragraph 7.

confidential that went beyond material that had been redacted out of the public version of the Impugned Decision by the Pre-Trial Chamber.

14. The Response to the Document in Support of the Appeal was filed publicly, notwithstanding the confidential classification that had been chosen by the Prosecutor, contrary to the provisions of regulation 23 *bis* (2) of the Regulations, which is set out above. One of the purposes of regulation 23 *bis* (2) is to ensure that a participant does not make public information that another participant believes should be treated as confidential prior to a Chamber having ordered otherwise.

15. Notwithstanding the above, the Appeals Chamber did not deem it necessary to issue any order in relation to the Response to the Document in Support of the Appeal, there not having been any application from the Prosecutor submitting that the Appeals Chamber should do so, and recognising that Counsel for Mr Katanga had not, in fact, referred to any material that the Pre-Trial Chamber had redacted from the public version of the Impugned Decision. However, the Appeals Chamber emphasises that regulation 23 *bis* must be fully complied with, so as to avoid a situation arising in the future in which confidential information is inadvertently made public.

III. MERITS OF THE APPEAL

A. The First Issue: Redaction of Information Concerning ‘Innocent Third Parties’

16. Hereafter, all references to articles in this judgment are to articles of the Rome Statute (“the Statute”). All references to rules are to rules contained within the Rules of Procedure and Evidence (“the Rules”).

17. As his first ground of appeal, the Prosecutor submits that the Pre-Trial Chamber erred in law in finding that rule 81(4) of the Rules does not permit a Chamber to authorise redactions whose sole purpose is to protect the identity of individuals whom the Prosecutor termed ‘innocent third parties’. The latter were defined by the Pre-Trial Chamber as “individuals (i) who are referred to by the Prosecution witnesses in their statements; and (ii) who are not victims, current or prospective Prosecution witnesses or

sources, or members of their families”.¹⁸ The Pre-Trial Chamber made clear that such persons were not part of the investigation of the Prosecutor.¹⁹

1. Relevant part of the decision of the Pre-Trial Chamber

18. The first ground of appeal arises from the following finding of the Pre-Trial Chamber, subsequent to consideration of the argument of the Prosecutor that rule 81(4) read together with article 54(3)(f) of the Statute permits redactions to ensure the protection of any person:

“... rule 81(4) of the Rules does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families.”²⁰

19. This was based upon the conclusion of the Pre-Trial Chamber that:

“... the literal interpretation of rule 81(4) of the Rules empowers the competent Chamber to authorise only two types of redactions. The first part of rule 81(4) of the Rules is limited to redactions which aim to ‘ensure the confidentiality of information, in accordance with articles 54, 72 and 93 of the Statute’. The second part of rule 81(4) of the Rules refers to redactions ‘in accordance with article 68, to protect the safety of witnesses and victims and members of their families’”.²¹

20. The Pre-Trial Chamber proceeded to state that:

“... redactions concerning individuals other than Prosecution witnesses, victims or members of their families may only be authorised (i) if they are needed to ensure the confidentiality of information pursuant to rule 81(4) of the Rules; or (ii) in order not to prejudice further or ongoing Prosecution investigations because such individuals are Prosecution sources pursuant to rule 81(2) of the Rules. Otherwise, the use of redactions is not a measure that is available to ensure the protection of these individuals”.²²

21. The Pre-Trial Chamber concluded:

“For these reasons, and given that the Prosecution explicitly states that none of the individuals referred to as ‘innocent third parties’ is a Prosecution source or is in any way involved in any ongoing or further Prosecution investigation, and that the relevant redactions are requested solely for their protection because they could erroneously be perceived as Prosecution sources or witnesses, the Single Judge



¹⁸ Decision Granting Leave to Appeal, page 4.

¹⁹ Decision Granting Leave to Appeal, page 5.

²⁰ Impugned Decision, paragraph 54.

²¹ Impugned Decision, paragraph 53.

²² Impugned Decision, paragraph 55.

decides not to authorise any redaction under the category of ‘innocent third parties’.”²³

22. In the Decision Granting Leave to Appeal, the Pre-Trial Chamber stated that the fact that the drafters of the Statute and the Rules did not provide for the exceptional measure of redactions to protect innocent third parties did not mean that they were left unprotected. This was because it could be made clear that they had not been contacted by the Prosecutor and were not part of the investigation of the Prosecutor and their names and identities could always remain confidential and not be made public. The Pre-Trial Chamber further considered that the Defence may have an interest in contacting such individuals for the preparation of the hearing to confirm the charges and the redaction of their identities would prevent the Defence from doing so.²⁴

2. *Arguments of the Prosecutor*

23. The Prosecutor offers further information on the category of persons referred to as ‘innocent third parties’, explaining that “[w]hen investigating crimes of this nature and scale, a wide range of individuals will often be identified, named, and included in statements, though they may have little or no connection with any particular case in which the accused is charged”.²⁵

24. The Prosecutor makes his submissions on appeal against the overall backdrop of ongoing investigations in the precarious security situation in the Democratic Republic of the Congo (hereinafter “DRC”), which the Pre-Trial Chamber acknowledged²⁶ and which, he argues, may place victims, witnesses, and innocent third parties in jeopardy absent any appropriate protective measures.²⁷ The Prosecutor highlights those parts of the Impugned Decision that, *inter alia*, refer to the influence of Mr Katanga in Ituri and Kinshasa; to the capability of his supporters to interfere with prosecution witnesses, victims and members of their families; and to precedents of interference with prosecution witnesses. He argues that the practical realities should inform the consideration of the use of redactions in the present case.²⁸ It is argued that, “in many instances, since the information concerning innocent third parties is not relevant to the charges, redactions do not infringe on the right to a fair trial, while they contribute significantly to the protection of persons who fall

²³ Impugned Decision, paragraph 56.

²⁴ Decision Granting Leave to Appeal, pages 4-5.

²⁵ Document in Support of the Appeal, paragraph 11.

²⁶ Impugned Decision, paragraphs 13 and 22.

²⁷ Document in Support of the Appeal, paragraph 8.

²⁸ Document in Support of the Appeal, paragraph 8.

within the Court's protective mandate".²⁹ Moreover, the contention is that "reference to the names of innocent third parties in documents otherwise filled with incriminatory information may arouse the interest of, and potentially result in intimidation or reprisal by, the accused, persons associated with him, or other persons who consider that they may be targets of investigation" by the Court or by national authorities.³⁰ The Prosecutor argues that the Court has a duty to protect persons who have been exposed to danger as a consequence of the activities of the Court through no fault of their own and who may not, in most instances, be aware that their security may be at risk.³¹

25. Furthermore, the Prosecutor argues that the decision of the Pre-Trial Chamber is at odds with a literal interpretation of rule 81(4) and the overarching spirit of the Statute and the Rules, which, according to the Prosecutor, "rightly underscore the importance of carrying out investigations and prosecutions in a manner protective of the security of any person who may be affected by the Court's activities".³² The Prosecutor submits that a "literal and teleological analysis of rule 81(4) and the context of the Statute and the Rules" authorises the Chamber to: (i) undertake redactions to protect innocent third parties and (ii) undertake any redaction required to protect confidential information, including with respect to innocent third parties.³³

26. The Prosecutor submits that "there is no legal basis to conclude that Rule 81(4) lists exhaustively all categories of persons that can be protected through redactions at the request of the Prosecution in accordance with Article 54(3)(f). The reference in Rule 81(4) to Article 54 pertains to the entire Article. Thus, Rule 81(4) should be read as concerning 'measures to be taken for the confidentiality of information, the protection of any person and the preservation of evidence'".³⁴ In supporting this argument, the Prosecutor draws upon what he deems a "broad concern" underpinning the Statute "to ensure that persons are not unduly endangered by the Court's activities", as well as the preparatory material of the Statute and the Rules which he maintains "suggest that the mechanism of protection extends 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".³⁵

²⁹ Document in Support of the Appeal, paragraph 22.

³⁰ Document in Support of the Appeal, paragraph 12.

³¹ Document in Support of the Appeal, paragraph 11.

³² Document in Support of the Appeal, paragraph 10.

³³ Document in Support of the Appeal, paragraphs 10 and 13.

³⁴ Document in Support of the Appeal, paragraphs 14-15.

³⁵ Document in Support of the Appeal, paragraph 15.

27. The Prosecutor further submits that the redactions should have been authorised by the Pre-Trial Chamber to ensure the ‘confidentiality of information’ as explicitly provided under rule 81(4). It is argued that “‘steps to ensure the confidentiality of information’ may themselves include redactions whose purpose is to protect innocent third parties. The identity and identifying information of innocent third parties constitute ‘information’ that may be classified as ‘confidential’ by the Prosecutor exercising his duty to protect persons who may be endangered as a result of the preparation and presentation of a case”. Thus, identifying information of innocent third parties who may be at risk should be considered confidential.³⁶

28. The Prosecutor, in support of his submissions that rule 81(4) is “one of the primary means by which a Chamber may fulfil its role in facilitating and regulating the protection of [innocent] third parties”, relies upon the practice of Trial Chamber I which, it is argued, has granted permanent redactions of the identifying information of innocent third parties.³⁷

29. It is submitted that “[t]o deny a Chamber the authority to respond to requests for the protection of innocent third parties through the redaction of their identities would render ineffective the Prosecutor’s ability to take necessary measures by way of authorisation from the Chamber to ensure the ‘confidentiality of information’ and ‘the protection of any person’ pursuant to article 54”. In addition, such denial would diminish the utility of advice provided to the Prosecutor by the VWU, pursuant to article 43(6), on protective measures for persons, including those at risk on account of testimony given by witnesses.³⁸

30. Absent any recourse to redactions, the Prosecutor argues that he “would often be unable to seek necessary measures to provide for the security of innocent third parties in the face of the dangers posed”.³⁹ In the instant case, it is argued that the alternatives suggested by the Pre-Trial Chamber in the Decision Granting Leave to Appeal (i.e. “making clear that innocent third parties have not been contacted by the Prosecution and are not part of the investigation, and withholding their identities from the public”) “would, in many instances ... put the security of such persons in the hands of an accused”.⁴⁰

³⁶ Document in Support of the Appeal, paragraphs 16-18.

³⁷ Document in Support of the Appeal, paragraph 19.

³⁸ Document in Support of the Appeal, paragraph 20.

³⁹ Document in Support of the Appeal, paragraph 21.

⁴⁰ Document in Support of the Appeal, paragraph 21.

Finally, it is submitted that article 54(3)(f) and rule 81(4) should be interpreted to “allow the [Prosecutor] to request, and the Chamber to consider, on a case-by-case basis whether redactions of identifying information of innocent third parties are permitted. In so doing, the Chamber would balance the right of the accused to a fair trial with the need to protect innocent third parties, and would have the discretion to determine the degree of protection required”.⁴¹ The Prosecutor requests the Appeals Chamber to remit the matter to the Pre-Trial Chamber to consider on the merits, if it finds that there is power to authorise redactions to protect innocent third parties.⁴²

3. *Arguments of Mr Katanga*

31. In response, Counsel for Mr Katanga argues that the submissions of the Prosecutor are without merit. It is argued that “whether a literal or theological [*sic*] interpretation be given to Rule 81(4) read together with Article 54(3)(f), the combination of these provisions does not authorise redactions of the identities of ‘innocent third parties’”.⁴³ It is submitted that article 54(3)(f) neither imposes any obligations on the Chamber nor creates any additional powers for the Chamber to grant redactions other than those which are expressly provided for in the Statute and the Rules. It is contended that article 54(3)(f) is expressly subject to, and does not create any independent exception to, the disclosure obligations of the Prosecutor to Mr Katanga, as set out in article 61(3)(b) and rule 76(1); the Prosecutor may only redact information with the leave of the Court within the parameters of rules 81 and 82.⁴⁴ Counsel for Mr Katanga states that not only must the wording of a rule be read in context and in light of its object and purpose, but there is also an obligation to apply and interpret the Statute and the Rules consistently with internationally recognised human rights, pursuant to article 21(3).⁴⁵

32. Counsel for Mr Katanga further submits that the powers of the Prosecutor under article 54(3)(f) are subject to his “wide-reaching” and impartial investigatory functions, as set out in article 54(1)(a), in order to ensure fairness in circumstances where the Defence might not be able to access certain materials themselves.⁴⁶ As such, it is argued that the Prosecutor cannot construe his disclosure obligations so narrowly as to result in a manifest



⁴¹ Document in Support of the Appeal, paragraph 23.

⁴² Document in Support of the Appeal, paragraph 48.

⁴³ Response to the Document in Support of the Appeal, paragraph 4.

⁴⁴ Response to the Document in Support of the Appeal, paragraphs 8, 10 and 11

⁴⁵ Response to the Document in Support of the Appeal, paragraph 3.

⁴⁶ Response to the Document in Support of the Appeal, paragraphs 13-15.

inequality of arms and thereby little, if any, prospects for fair proceedings.⁴⁷ Therefore, it is argued that the Prosecutor's proposed interpretation of rule 81(4) read in conjunction with article 54(3)(f) to allow redactions of the identities of innocent third parties would "wholly defeat the object and purpose of Article 54 and devoid the disclosure scheme, balanced on the rights of the victims and witnesses and the defendant's fair trial, of any 'meaningful content'". It is submitted that, "[g]iven that the right of the defendant to a fair trial is seriously affected by non-disclosure, such wide interpretation would also be inconsistent with internationally recognised human rights".⁴⁸

33. Counsel for Mr Katanga relies upon jurisprudence of the Appeals Chamber wherein it was held that redacting portions from statements made by witnesses upon whom the Prosecutor intends to rely at the hearing to confirm the charges is an exception to the general rule that the identity of witnesses and their statements must be disclosed to the Defence. It is submitted that the Prosecutor may only depart from his general disclosure obligations with leave of the Court and leave may only be given if the necessity of exceptionally withholding information from the Defence is demonstrated.⁴⁹ Furthermore, Counsel for Mr Katanga argues that the Statute and the Rules do not provide a basis for authorising redactions of the identities of innocent third parties, "[s]ince 'innocent third parties' are neither Prosecution sources pursuant to Rule 81(2), nor witnesses, victims or members of their families pursuant to Rule 81(4)".⁵⁰

34. Counsel for Mr Katanga further contends that the Prosecutor clearly failed to demonstrate a need to protect such 'innocent third parties'. It is disputed that Mr Katanga could have any possible interest in intimidating innocent third parties, were he even capable of doing so (given the fact that he has been removed to The Hague), since it is conceded by the Prosecutor that such persons are generally not related to the case and the information concerning them is not relevant to the charges.⁵¹ Moreover, Counsel for Mr Katanga argues that the Prosecutor has not provided evidence that disclosure of the identities of innocent third parties specifically to Mr Katanga would cause a genuine risk to their safety. It is submitted that "[s]weeping statements not supported by any evidence about potential intimidations or reprisals of 'innocent third parties' by this particular defendant do not demonstrate that disclosure of their identities to the Defence would



⁴⁷ Response to the Document in Support of the Appeal, paragraph 14.

⁴⁸ Response to the Document in Support of the Appeal, paragraph 16.

⁴⁹ Response to the Document in Support of the Appeal, paragraph 17.

⁵⁰ Response to the Document in Support of the Appeal, paragraph 18.

⁵¹ Response to the Document in Support of the Appeal, paragraphs 18-19.

cause a genuine risk to their safety”.⁵² Indeed, Counsel for Mr Katanga contends that allowing redactions of the identities of innocent third parties would “wholly undermine the exceptional nature of non-disclosure” since the definition of such persons given by the Prosecutor is so broad that “absolutely any person can be covered by it”.⁵³

35. In addition, Counsel for Mr Katanga argues that if the Appeals Chamber finds that the Prosecutor has in fact demonstrated a need for the requested redactions, authorisation thereof should be refused as it would “completely undermine the defendant’s right to a fair trial”.⁵⁴ It is submitted that the Defence has a “real interest” in contacting innocent third parties to seek their cooperation in the preparation of the case. Counsel for Mr Katanga asserts that, “any persons referred to in a Prosecution witness statement are potential defence witnesses, since they may be in a position to discredit certain aspects of the Prosecution witness statement or the credibility of the Prosecution witness”.⁵⁵ In this context, Counsel for Mr Katanga makes reference to a judgment of the House of Lords of the United Kingdom, in which it was stated that the golden rule was that full disclosure should be made of material which weakened the prosecution case or strengthened that of the defendant.⁵⁶

4. Determination by the Appeals Chamber

36. The first issue on appeal concerns the refusal by the Pre-Trial Chamber to authorise any redactions from the witness statements and interview notes of seven prosecution witnesses of information, referred to by those witnesses in those documents, that could reveal the identity of “innocent third parties”.⁵⁷ The issue before the Appeals Chamber was framed by the Pre-Trial Chamber as follows:

“[W]hether ‘Article 54(3)(f) authorises the Prosecution to seek, and Rule 81(4) read in conjunction with that article empower the Chamber to authorise, redactions for the protection of ‘innocent third parties’, i.e. persons who are not victims, current or prospective Prosecution witnesses or sources, or members of their families’”.⁵⁸

⁵² Response to the Document in Support of the Appeal, paragraph 20.

⁵³ Response to the Document in Support of the Appeal, paragraph 21.

⁵⁴ Response to the Document in Support of the Appeal, paragraph 23.

⁵⁵ Response to the Document in Support of the Appeal, paragraph 24.

⁵⁶ Response to the Document in Support of the Appeal, paragraph 25, referring to *R v H and C* [2004] 2 AC 134 at 147.

⁵⁷ Impugned Decision, paragraphs 44-56.

⁵⁸ Decision Granting Leave to Appeal, pages 6-7.

37. This appeal does not involve a determination in relation to any of the specific redactions contained within the individual witness statements that were sought by the Prosecutor from the Pre-Trial Chamber. It is solely concerned with the question of law set out in the previous paragraph. If the issue were to be answered in the negative, thereby confirming the ruling of the Pre-Trial Chamber, none of the redactions sought by the Prosecutor under this category could be granted as a matter of law. If, on the other hand, the issue were to be answered in the affirmative, the applications by the Prosecutor for redactions falling within this category would need to be considered by the Pre-Trial Chamber on their individual merits.

38. The Appeals Chamber has had previous occasion to consider the legal regime relating to disclosure prior to the hearing to confirm the charges.⁵⁹ Of particular relevance for present purposes is article 61(3)(b) of the Statute which provides that, a reasonable time before the hearing to confirm the charges, the suspect shall be informed of the evidence on which the Prosecutor intends to rely at the hearing. Also of note in the present context is article 61(6) of the Statute which enables the suspect, at the hearing to confirm the charges, *inter alia*, to challenge the evidence presented by the Prosecutor⁶⁰ and to present evidence.⁶¹

39. Section II of Chapter 4 of the Rules contains the relevant rules relating to disclosure. Contained among them rule 76, entitled "Pre-trial disclosure relating to prosecution witnesses" provides, in relevant part:

"1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

...

⁵⁹ Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", ICC-01/04-01/06-568, OA3, 13 October 2006 see, in particular, paragraphs 34-37 and 39; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-773, OA5, 14 December 2006; and Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-774, OA6, 14 December 2006, see, in particular, paragraph 47.

⁶⁰ Article 61(6)(b).

⁶¹ Article 61(6)(c).

4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.”

40. The specific question on appeal is whether article 54(3)(f) of the Statute, when read together with rule 81(4), empowers the Chamber to authorise redactions for the protection of ‘innocent third parties’. The Prosecutor coined the term ‘innocent third parties’ in the applications for redactions. The Pre-Trial Chamber clarified that the term referred to persons who are not victims, current or prospective Prosecution witnesses or sources, or members of their families. Rather than using a specific phrase that is not used in the legal instruments of the Court and that could be misleading in certain circumstances, the Appeals Chamber finds it more accurate to consider the category under consideration as referring to persons who may be placed at risk as a result of the activities of the Court, but “who are not victims, current or prospective prosecution witnesses or sources, or members of their families”.⁶²

41. Article 54(3)(f) provides:

“3. The Prosecutor may:

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.”

42. Rule 81(4) which, as set out above, is one of the exceptions to the general disclosure requirements of rule 76(1), provides as follows:

“The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial”.

43. The Appeals Chamber observes that no express provision is made, within the text of rule 81(4), for the protection of the category “any person”. However, the Appeals Chamber observes that there are other provisions of the Statute and the Rules that are aimed at ensuring that persons are not put at risk through the activities of the Court and which are not limited to the protection of witnesses and victims and members of their families only.

⁶² Decision Granting Leave to Appeal, pages 6-7.

44. Article 54(3)(f), in relation to which the issue on appeal is specifically framed, expressly authorises the Prosecutor to take necessary measures, or to request that necessary measures be taken, to ensure “the protection of *any person*” (emphasis added). This article demonstrates an intention that protection should, in principle, be available to anyone put at risk by the investigations of the Prosecutor.

45. Given the severity and the widespread nature of the crimes over which the Court has jurisdiction, affecting large numbers of persons including whole communities, the unfortunate yet unavoidable reality is that any number of persons may be exposed to risk through the activities of the Court.

46. In the context of the current case, the Appeals Chamber accepts circumstances could arise where individuals who are named within the statements of prosecution witnesses might be placed at risk by disclosing their identities to a suspect. Whether this is in fact the case will need to be determined on the basis of the specific case.

47. The Prosecutor has the above express power either to take necessary measures or to request that necessary measures be taken to ensure the protection of individuals who are at risk. Furthermore, article 54(3)(f) is not the only provision of the Statute and the Rules that provides for the protection of any person who might be put at risk on account of the activities of the Court. Further relevant provisions are set out below.

48. Article 43(6) of the Statute provides, in relevant part:

“The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, *and others who are at risk on account of testimony given by such witnesses*” (emphasis added).

49. Article 68(4) makes direct reference to the above provision in providing that:

“The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6”.

50. Rules 16 to 18, which relate to the responsibilities of the Registrar in relation to, and the functions and responsibilities of, the Victims and Witnesses Unit, each contain provisions referring to “others who are at risk on account of testimony given”. Rule 17(2)(a) specifically provides as follows:



“2. The Victims and Witnesses Unit shall, *inter alia*, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:

(a) With respect to all witnesses, victims who appear before the Court, and *others who are at risk on account of testimony given by such witnesses*, in accordance with their particular needs and circumstances:

(i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;

(ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;

...

(v) Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organisations acting at the request of the Court, as appropriate;

(vi) Cooperating with States, where necessary, in providing any of the measures stipulated in this rule” (emphasis added).

51. That protective measures are available for this category of person is also specified in rule 87(1), which provides, in relevant part, as follows:

“Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, 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).

52. Rule 87(1) applications cannot be submitted *ex parte*, whether protective measures are sought in relation to victims, witnesses or others at risk on account of testimony given by a witness. However, pursuant to rule 81(4), *ex parte* applications can be made for the purpose of non-disclosure for protective reasons in relation to victims and witnesses. The Appeals Chamber therefore does not see rule 87 as a bar to applications being made, pursuant to rule 81(4), for the purpose of non-disclosure for protective reasons in relation to others at risk as well; and it is not necessary, in the context of the present judgment, for the Appeals Chamber to determine the precise stage of the proceedings to which rule 87 applies.

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53. Noteworthy also in this context are the provisions of rule 59(2). Although, unlike the above rules, that rule deals with notification by the Registrar of information to various participants in proceedings relating to the jurisdiction of the Court or the admissibility of a case, it sets out that any such notification shall be performed “in a manner consistent with *the duty of the Court regarding ... the protection of any person*” (emphasis added).

54. The Appeals Chamber finds, on the basis of the above, that the specific provisions of the Statute and the Rules for the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.

55. It is clear that rule 81(4) enables the Chamber to authorise the non-disclosure of the identity of witnesses, victims and members of their families at the current stage of the proceedings for the purposes of protecting their safety. Other provisions, set out above, expressly provide for the protection of other persons at risk on account of the activities of the Court. In those circumstances, it would be illogical and would defeat the object and purpose of those other provisions if the Chamber were not able to authorise the non-disclosure of material pursuant to rule 81(4), in appropriate circumstances, for the protection of such persons as well.

56. Accordingly, the Appeals Chamber finds that persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, rule 81(4) should be read to include the words “persons at risk on account of the activities of the Court” so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk.

57. Moreover, this interpretation is in adherence with the requirement in article 21(3) of the Statute to apply and interpret the provisions of the Statute and the Rules consistently with internationally recognized human rights. The Appeals Chamber has had regard to the jurisprudence of the European Court of Human Rights in this area of the law. The following

passage from the Grand Chamber case of *Rowe and Davis v. the United Kingdom*⁶³ is of relevance in the current context:

“60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 66-67). In addition Article 6 § 1 requires ... that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (see the *Edwards* judgment cited above, p. 35, § 36).

61. However, ... the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused (see, for example, the *Doorson v. the Netherlands* judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 470, § 70). In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 (see the *Van Mechelen and Others v. the Netherlands* judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 58). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see the *Doorson* judgment cited above, p. 471, § 72, and the *Van Mechelen and Others* judgment cited above, p. 712, § 54).

62. In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them (see the *Edwards* judgment cited above, pp. 34-35, § 34). Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.”

58. The principles cited from the *Rowe and Davis* case above have been consistently cited in other cases of the European Court of Human Rights.⁶⁴ The Appeals Chamber considers that the circumstances under consideration in the present appeal may give rise to a situation in which the withholding of certain information from the Defence may be necessary so as to

⁶³ [GC], no. 28901/95, ECHR 2000-II, 16 February 2000.

⁶⁴ See, for example, *Jasper v the United Kingdom* [GC], no. 27052/95, 16 February 2000, unreported, paragraphs 51-53; *Fitt v. the United Kingdom* [GC], no. 29777/96, ECHR 2000-II, 16 February 2000, paragraphs 44-46; *P. G. and J. H. v the United Kingdom*, no. 44787/98, ECHR 2001-IX, 25 September 2001, paragraphs 67-69; *Edwards and Lewis v the United Kingdom* [GC], nos. 39647/98 and 40461/98, 27 October 2004, page 16; *Botmeh and Alami v. the United Kingdom*, no. 15187/03, 7 June 2007, paragraph 37.

preserve the fundamental rights of an individual put at risk by the activities of the International Criminal Court.

59. However, permitting redactions to be made on this basis pursuant to rule 81(4) in principle necessarily does not mean that they will be granted wherever sought. In line with the scheme of the Statute and the Rules, the previous jurisprudence of the Appeals Chamber and the above-cited jurisprudence of the European Court of Human Rights, a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber.

60. The Appeals Chamber emphasises that, when seeking redactions pursuant to rule 81(4), the Prosecutor may only redact information from material and evidence that it must disclose to the Defence after obtaining authorisation from the competent Chamber to do so – a point raised by Counsel for Mr Katanga.⁶⁵ As stated by the Pre-Trial Chamber, this course is consistent with the role of the Prosecutor as a party to the proceedings, as well as with the significant role of the competent Chamber to ensure that the rights of a suspect are protected.⁶⁶

61. Counsel for Mr Katanga was also correct to point out that the Appeals Chamber has previously held that “[t]he Statute and the Rules of Procedure and Evidence place much importance on disclosure to the defence” and that the non-disclosure of portions of witness statements is an exception to the general rule of full disclosure.⁶⁷ The Appeals Chamber has also previously set out considerations to be taken into account by the Pre-Trial Chamber prior to authorising non-disclosure pursuant to rule 81(4). These points are considered further and expanded upon below.

62. However, the Appeals Chamber is not persuaded by the submission of Counsel for Mr Katanga that to allow redactions of the identities of ‘innocent third parties’ in principle would “wholly defeat the object and purpose of Article 54”, “devoid the disclosure scheme ... of any ‘meaningful content’” and be inconsistent with internationally recognized human

⁶⁵ Response to the Document in Support of the Appeal, paragraph 10.

⁶⁶ Impugned Decision, paragraph 52.

⁶⁷ Response to the Document in Support of the Appeal, paragraph 17. See Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06-568, OA3, 13 October 2006, paragraphs 36 and 37.

rights standards in relation to a fair trial.⁶⁸ As stated above, the Statute and the Rules make specific provision to protect those at risk from the activities of the Court. In addition, the relevant jurisprudence of the European Court of Human Rights, cited above, demonstrates that the right to disclosure is not absolute, that the withholding of disclosure of information from the Defence is permissible so as to preserve the fundamental rights of another individual and that not every incident of non-disclosure automatically results in an unfair trial. It would be, in every case, for the Pre-Trial Chamber to assess whether the rights of the defendant to a fair hearing were prejudiced on the facts. In circumstances in which the redaction sought would involve withholding exculpatory information which was required to be disclosed,⁶⁹ or would result in “a manifest inequality of arms, with little, if any prospect for fair proceedings”⁷⁰ the Pre-Trial Chamber would, no doubt, reject the application. However, this is a question of assessing the facts of an individual case rather than ruling out the possibility of redactions to protect people at risk being granted, in principle, in carefully defined circumstances.

63. The Appeals Chamber again emphasises that it is not, in this judgment, considering any specific application for particular redactions. It is determining whether such redactions could, in principle, be authorised pursuant to rule 81(4). Therefore, the factors that Counsel for Mr Katanga raises in this context, such as alleging that there would be “no real danger” to the safety of ‘innocent third parties’ if their identities were disclosed to the Defence,⁷¹ that the defendant would not have any interest in intimidating such people,⁷² and that “[s]weeping statements not supported by any evidence about potential intimidations or reprisals of ‘innocent third parties’ by this particular defendant do not demonstrate that disclosure of their identities to the Defence would cause a genuine risk to their safety”,⁷³ are all factors that would need to be assessed on the facts by the Pre-Trial Chamber. They are not, however, arguments that would negate the need for the authorisation of redactions were such factors to be established. Whether the actual redaction sought would thereafter be granted would depend upon balancing the various interests involved.



⁶⁸ Response to the Document in Support of the Appeal, paragraph 16.

⁶⁹ Response to the Document in Support of the Appeal, paragraph 12, referring to the case of *Prosecutor v Bagasora*, ICTR-98-41-T, Decision On Disclosure Of Identity Of Prosecution Informant, 24 May 2006, paragraph 8.

⁷⁰ Response to the Document in Support of the Appeal, paragraph 14.

⁷¹ Response to the Document in Support of the Appeal, paragraph 19.

⁷² Response to the Document in Support of the Appeal, paragraph 19.

⁷³ Response to the Document in Support of the Appeal, paragraph 20.

64. Furthermore, the Appeals Chamber is not convinced by the argument of Counsel for Mr Katanga that to authorise redactions on the basis under consideration would completely undermine the right to a fair trial.⁷⁴ It is submitted that “any persons referred to in a Prosecution witness statement are potential defence witnesses, since they may be in a position to discredit certain aspects of the Prosecution witness statement or the credibility of the Prosecution witness”.⁷⁵ However, whether a particular individual referred to in a statement would be in such a position is a question of fact. The Appeals Chamber does not accept that *any* individual referred to within a statement would necessarily be relevant to the Defence. These are matters that would need to be assessed on the individual facts by the Pre-Trial Chamber.

65. The Appeals Chamber also notes that the judgment of the United Kingdom House of Lords in *R v H and C* [2004] 2 AC 134, to which Counsel for Mr Katanga refers in this context,⁷⁶ itself foresaw derogations from “the golden rule”⁷⁷ of full disclosure in certain circumstances. Having carefully analysed, *inter alia*, the relevant jurisprudence of the European Court of Human Rights,⁷⁸ the House of Lords concluded that, when a question of withholding information from the defence arose, the court had to ask itself a series of seven questions. This involved assessing the nature of the information; whether the information was such as might weaken the prosecution case or strengthen that of the defence, without which disclosure should not be ordered; whether there was a real risk of serious prejudice if full disclosure were ordered; whether the interest of the defendant could be protected without disclosure (which could include, in appropriate cases, “the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge”); whether any measures taken to protect the information were the minimum necessary; whether the effect of the non-disclosure was to render the trial process as a whole unfair to the defendant; and, if not, whether that remained the case as the trial progressed.⁷⁹ The Appeals Chamber is therefore neither persuaded that *R v H and C* itself foresaw that full disclosure must always be made regardless of the circumstances, nor, as a result, that it fully supports the argument made by Counsel for Mr Katanga in this context.

⁷⁴ Response to the Document in Support of the Appeal, paragraph 23.

⁷⁵ Response to the Document in Support of the Appeal, paragraph 24.

⁷⁶ See paragraph 35 above.

⁷⁷ See paragraph 35 above.

⁷⁸ *R v H and C* [2004] 2 AC 134 at 151-154.

⁷⁹ *R v H and C* [2004] 2 AC 134 at 155-156.

66. The Appeals Chamber concludes that, while the non-disclosure of information for the protection of persons at risk is permissible in principle pursuant to rule 81(4) of the Rules, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake.

67. The Appeals Chamber has had previous occasion to set out those factors that must be addressed by the Pre-Trial Chamber when considering whether to authorise the non-disclosure of the identity of a witness pursuant to rule 81(4). The same general factors apply in the current case, which can be summarised briefly as a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁸⁰

68. Those factors, the essence of which were appropriately formulated by the Pre-Trial Chamber at paragraph 4 of the Impugned Decision, apply generally to requests for redactions of this nature. In the circumstances of the current case, the Appeals Chamber considers it appropriate to provide more specific guidance to the Pre-Trial Chamber on how to proceed with a consideration of whether to grant particular redactions sought. Given that it is doing so in the absence of any specific factual application before it, what is said below is only by way of guidance which must be understood to be capable of being interpreted flexibly depending upon the specific circumstances of the particular application. In addition, it must be emphasised that this judgment concerns the stage of the proceedings relating to the confirmation of the charges against a suspect and must be seen in that light. A hearing to confirm the charges is not a trial to establish guilt or innocence. It is a phase of the proceedings designed to “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” prior to confirming any charges and committing the person to a Trial Chamber to be tried on the charges as confirmed.⁸¹ As such, it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial.



⁸⁰ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773, OA5, 14 December 2006, paragraphs 21 and 33-34.

⁸¹ Article 61(7).

69. The Appeals Chamber finds that, upon an application for the non-disclosure of identifying information for the protection of persons at risk pursuant to rule 81(4), the Pre-Trial Chamber must carefully assess the type of information in respect of which authorisation for non-disclosure is sought. It is imperative that the Pre-Trial Chamber, which will have an overall view of the proceedings as a whole, take fully into account the individual facts and circumstances of each case and each specific request for any individual redaction before it.

70. The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule.

71. In the circumstances under consideration in the present case, non-disclosure pursuant to rule 81(4) may only be authorised if, first of all, disclosure of the information concerned would pose a danger to the particular person. In such circumstances, the Pre-Trial Chamber should consider the following factors in relation to the alleged risk of danger:

- a) the alleged danger must involve an objectively justifiable risk to the safety of the person concerned;
- b) the risk must arise from disclosing the particular information *to the Defence*, as opposed to disclosing the information to the public at large. The Chamber should consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.

72. If the Pre-Trial Chamber concludes that it has been demonstrated that the risk addressed above in fact exists, it should proceed to assess whether the proposed redactions could overcome or reduce the risk. If not, the redactions should not be granted. If so, the following factors should be considered in determining whether the rights of the suspect will be restricted only as far as strictly necessary:



- a) the Pre-Trial Chamber should consider whether an alternative measure short of redaction is available and feasible in the circumstances. If a less restrictive protective measure is sufficient and feasible, that measure should be chosen;⁸²
- b) the Pre-Trial Chamber should bear in mind that the non-disclosure is sought at the stage of the proceedings in relation to the hearing to confirm the charges. The Appeals Chamber refers, in this context, to paragraph 68 above;
- c) the Pre-Trial Chamber should carefully assess the relevance of the information in question to the Defence. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor,⁸³ the Pre-Trial Chamber will need to take particular care when balancing the interests at stake;
- d) if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.

73. The following additional factors should be taken into account:

- a) in balancing the various interests at stake, the Pre-Trial Chamber must make sure that adequate safeguards are in place to protect the interests of the suspect so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms;
- b) prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected;
- c) even if it is determined that certain information should not be disclosed, such determination should be kept under review by the Pre-Trial Chamber. It may be necessary to disclose the withheld information subsequently, should circumstances

⁸² Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-773, OA5, 14 December 2006, paragraph 33.

⁸³ See article 67(2) of the Statute and rule 83 of the Rules.

change. The Prosecutor should assist the Pre-Trial Chamber in this regard by bringing to its attention factors that may cause it to reconsider its ruling on non-disclosure.

B. The Second Issue: Protection of Locations of Interview and Identities of Current OTP and VWU Staff Members Present During Interview

74. The Prosecutor raises his second and third grounds of appeal against the Impugned Decision in relation to the second issue on appeal. He argues that, in failing to authorise the redactions of the locations of interviews and the identities of current staff of the OTP and the VWU who were present during interviews, the Pre-Trial Chamber failed to consider a range of relevant factors and hence rendered a decision which was unreasonable (second ground of appeal). The Prosecutor submits furthermore that the Pre-Trial Chamber denied him any meaningful opportunity to be heard on the viability or effectiveness of the alternative measures upon which the refusal to authorise the aforementioned redactions was founded (third ground of appeal). The Prosecutor requested the Appeals Chamber to authorise the redactions sought were it to find in his favour.⁸⁴

1. Relevant part of the decision of the Pre-Trial Chamber

75. In considering the applications for redactions in the Impugned Decision generally, the Pre-Trial Chamber stated that the test set out by the Appeals Chamber in its judgments of 14 December 2006⁸⁵ must be applied, namely: disclosure to the Defence, at least at this stage of the proceedings, of the information sought to be redacted could pose a risk set out in rule 81(2) and rule 81(4) of the Rules of Procedure and Evidence; the “redactions are adequate to eliminate, or at least, reduce such a risk”; “there is no less intrusive alternative measure that can be taken to achieve the same goal at this stage”; and “the requested redactions are not prejudicial to or inconsistent with the rights of the arrested person and a fair and impartial trial”.⁸⁶

⁸⁴ Document in Support of the Appeal, paragraph 49.

⁸⁵ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773, OA5, 14 December 2006, and Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-774, OA6, 14 December 2006

⁸⁶ Impugned Decision, paragraph 4.

76. In relation to the requests for the redactions relevant to the second issue on appeal, the Pre-Trial Chamber held:

“... disclosing the place where the interviews with the witnesses were conducted, and the names, initials and signatures of current staff members of the Office of the Prosecutor and of the VWU ... who were present when the interviews were conducted could, in a few instances, prejudice to a certain extent the Prosecution’s investigations. This can be particularly so if the interviews were conducted in small villages, when the staff members of the Office of the Prosecutor easily stand out from the local population or when the staff members of the Office of the Prosecutor repeatedly travel to small areas for lengthy periods of time.”⁸⁷

77. The Pre-Trial Chamber noted that “[l]ogically, the risks increase” in a context such as the one in existence in the DRC.⁸⁸ It accepted that the requested redactions “might, in certain circumstances,” contribute to minimising the risks identified.⁸⁹ However, the Pre-Trial Chamber found that there were less intrusive measures that could be taken properly to protect those staff members of the OTP and the VWU present when witness statements were taken and to avoid any prejudice to the investigations of the Prosecutor. The Pre-Trial Chamber went on to list the following examples of those measures which it considered to be less intrusive: “(i) avoiding to take statements in small villages or cities; (ii) making sure that such persons do not easily stand out from the local population; or (iii) rotating such persons once there are indications that their identification with the Court may endanger their security as well as the Prosecution investigation”.⁹⁰

78. Moreover, the Pre-Trial Chamber considered the identification of at least the staff members of the OTP and the VWU present during interviews to be a “key guarantee of procedural propriety in the taking of the statements, as well as a formal requirement for their admissibility, and redacting this information would be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.”⁹¹

79. For the aforementioned reasons, the Pre-Trial Chamber refused the requests of the Prosecutor to redact the names, initials, signatures and other identifying information of OTP and VWU staff members present when the witness statements were taken.⁹² Although not

⁸⁷ Impugned Decision, paragraph 59.

⁸⁸ Impugned Decision, paragraph 59.

⁸⁹ Impugned Decision, paragraph 60.

⁹⁰ Impugned Decision, paragraph 60.

⁹¹ Impugned Decision, paragraph 62.

⁹² Impugned Decision, paragraph 63.

stated expressly, the Pre-Trial Chamber appears to have refused to redact the locations where the interviews were conducted on the same basis.

2. Arguments of the Prosecutor

80. As his second ground of appeal, the Prosecutor submits that in refusing to authorise the redactions of the locations of interviews and the identities of the current staff members of the OTP and the VWU, the Pre-Trial Chamber erred in the exercise of its discretion in failing to consider a range of relevant factors in assessing the degree to which the redactions would impact upon the Defence and the viability of the alternative measures proposed by the Pre-Trial Chamber. The Prosecutor contends that this failure ultimately rendered the Impugned Decision unreasonable in light of the absence of impact on the Defence of the redactions and the serious risks to individuals and ongoing investigations which the failure to authorise the redactions may well exacerbate.⁹³ The Prosecutor contended that the need for the redactions had been informed by experience in conducting investigations to date.⁹⁴

81. The Prosecutor submits that the redactions generally do not affect the substance of the witness statement in any way and are the least intrusive way to protect the relevant interests.⁹⁵ The Prosecutor contends that the Pre-Trial Chamber failed to consider that the locations of interview are of no meaningful interest to the Defence, and points out that the Chamber did not, in fact, hold them to be of any such interest or discuss this sub-category of redactions at any length in the Impugned Decision.⁹⁶ In addition, the Pre-Trial Chamber failed to consider that redacting the identities of staff present during interviews will, at this stage, cause no material detriment to the rights of the Defence or their ability to prepare for the confirmation hearing. The Prosecutor acknowledges that, closer to trial, the Defence may have a legitimate interest in the disclosure of the identities of staff members present during interviews, but submits that, at this stage, whilst the “information may ... guarantee the procedural propriety of the taking of the statements and be a formal requirement for admissibility, these factors must be weighed in the context of the confirmation hearings, where the Prosecution may, without infringing the rights of the Defence, rely on summary evidence, which would not necessarily include either the location of the original statement or the identities of those present.”⁹⁷ The Prosecutor submits that the refusal of the Pre-Trial

⁹³ Document in Support of the Appeal, paragraphs 27 and 30.

⁹⁴ Document in Support of the Appeal, paragraphs 28-29.

⁹⁵ Document in Support of the Appeal, paragraph 31.

⁹⁶ Document in Support of the Appeal, paragraph 32.

⁹⁷ Document in Support of the Appeal, paragraph 32.



Chamber to grant the redactions was unreasonable “[i]n light of the disproportion between the marginal relevance of this information to the Defence at this stage, and the acknowledged risks of disclosure to continuing investigations and the security of individuals.”⁹⁸

82. It is further submitted by the Prosecutor that the alternative measures suggested in the Decision “either do not practicably exist, or would actually increase the risks to the safety of witnesses or the conduct of the investigations.”⁹⁹ In relation to the first alternative measure that the Prosecutor avoid taking statements in small villages or cities, it is submitted that the Pre-Trial Chamber failed to consider the specific character of the environment of the eastern DRC in which the investigation is being conducted. It is argued that disclosing the present locations would deny the Prosecutor and other organs of the Court any viable sites for interviews in the region where most victims and witnesses reside.¹⁰⁰ It is contended that forcing the Prosecutor to conduct interviews in even the next largest towns will only increase the risks involved, for reasons that the Prosecutor elaborates, and the Appeals Chamber has examined, but which have been kept confidential to the parties to the appeal.¹⁰¹ The Prosecutor adds that the risks are further amplified if the identities of OTP and VWU staff are known, as their presence may alert interested parties to the fact that a mission is being conducted and allow those parties to focus on the movements of people towards known interview locations.¹⁰² In relation to the second alternative measure that the Prosecutor should make sure that OTP and VWU staff do not easily stand out from the local population, it is argued that the Pre-Trial Chamber failed to consider the ease with which outsiders may be identified as such.¹⁰³ Furthermore, the Prosecutor states that the “ability of staff members to blend in with the local population for a particular investigation, especially where the pool of persons who can do so may be very small, cannot be a recruitment criterion [for the OTP] and should not be a relevant factor for a judicial determination relating to the protection of investigations and witnesses”.¹⁰⁴ In relation to the third alternative measure that the Prosecutor rotate staff who conduct missions in the DRC, it is argued that the Pre-Trial Chamber failed to consider that the Prosecutor seeks to have each witness meet with the same member of staff in the course of an investigation in order to

⁹⁸ Document in Support of the Appeal, paragraph 33.

⁹⁹ Document in Support of the Appeal, paragraph 34.

¹⁰⁰ Document in Support of the Appeal, paragraph 35.

¹⁰¹ Document in Support of the Appeal, paragraphs 36-39.

¹⁰² Document in Support of the Appeal, paragraphs 34-39.

¹⁰³ Document in Support of the Appeal, paragraph 40.

¹⁰⁴ Document in Support of the Appeal, paragraph 40 and footnote 63.

minimise trauma to witnesses and to build a relationship of trust. It is contended that compelled staff rotation could compromise the Prosecutor's compliance with its obligations to respect the interests and personal circumstances of victims and witnesses, including their psychological well-being and impact upon the efficiency and effectiveness of investigations.¹⁰⁵

83. As his third ground of appeal, the Prosecutor argues that the Pre-Trial Chamber denied him any meaningful opportunity to present submissions on the alternative measures upon which the Impugned Decision was founded. He argues that this constituted an independent procedural error meriting appellate relief.¹⁰⁶ The Prosecutor contends that as a crucial component of the right to be heard, a Chamber is under a duty to "provide adequate notice to the participants of the issues which are critical for the proper determination of the matters before it."¹⁰⁷ It is submitted that the specific alternative measures upon which the Pre-Trial Chamber based its decision not to authorise the requested redactions were not raised during the *ex parte* hearings with the OTP and the VWU on the applications for redactions and hence "no meaningful notice was given to the Prosecution that these alternative measures were being considered or would ultimately be imposed."¹⁰⁸ Hence, "the [Impugned] Decision effectively ruled on the methods by which the Prosecution would conduct its investigations, and on the manner by which it would manage risks to witnesses, without hearing from the Prosecution itself".¹⁰⁹

3. *Arguments of Mr Katanga*

84. Counsel for Mr Katanga submits that the arguments of the Prosecutor are unmeritorious and should be dismissed, arguing that the decision of the Pre-Trial Chamber on this issue was entirely reasonable.¹¹⁰ It is argued that the Prosecutor wrongly approached the test for redactions, in that the presumed lack of relevance of the redactions to the Defence is not the first consideration; the Prosecutor must first demonstrate that disclosure of the interview locations and the identities of OTP and VWU staff members present during interviews would prejudice further and ongoing investigations and that no alternative, less intrusive, measures to achieve the same result exist. If such prejudice does not exist, the

¹⁰⁵ Document in Support of the Appeal, paragraph 41.

¹⁰⁶ Document in Support of the Appeal, paragraph 47.

¹⁰⁷ Document in Support of the Appeal, paragraph 43.

¹⁰⁸ Document in Support of the Appeal, paragraph 44.

¹⁰⁹ Document in Support of the Appeal, paragraph 46.

¹¹⁰ Response to the Document in Support of the Appeal, paragraph 30.

redactions will not be authorised. If such prejudice does exist, the redactions may be authorised only if consistent with internationally recognised human rights principles, including a right to a fair and independent trial.¹¹¹

85. Counsel for Mr Katanga refutes the Prosecutor's submission that the information is of no relevance to the Defence. Whilst it is conceded that, "at this early stage of the proceedings, redactions of the locations of the witness interviews do not seriously hamper the ability of the Defence to conduct meaningful investigations", it is submitted that there could be situations where the Defence would have a real interest in knowing the location of interviews (for example, whether an interview was conducted in police custody or in detention). Thus, it is argued that there should be no blanket redaction of such information.¹¹² It is further submitted that redactions of interview locations violate the Prosecutor's disclosure obligations and, where possible, the Prosecutor should explore less intrusive measures.¹¹³ As to the identification of OTP and VWU staff members present during interviews, Counsel for Mr Katanga argues that such information is clearly relevant in order to verify procedural propriety in the taking of witness statements.¹¹⁴ It is asserted, by reference to national and international practice,¹¹⁵ that the importance of such information to the Defence to test the credibility of the statements is universally recognised and is specifically reflected in rule 111 of the Rules.¹¹⁶ Counsel for Mr Katanga contends that the disclosure of such information may even have particular relevance prior to the hearing to confirm the charges: it is to be expected that the Prosecutor may rely almost exclusively on witness statements rather than *viva voce* witness testimony and the Defence should not, at the very least, be deprived of information to verify the procedural regularity of the taking of the statements.¹¹⁷ Counsel for Mr Katanga submits that, given the "real need for the Defence to receive the identities of the OTP and VWU staff members and the absence of any serious ground to justify their redactions, ... they should be disclosed as soon as possible."¹¹⁸

86. Counsel for Mr Katanga further submits that the Prosecutor "failed to demonstrate that the redactions sought are needed to protect the ongoing and further investigations pursuant

¹¹¹ Response to the Document in Support of the Appeal, paragraph 31.

¹¹² Response to the Document in Support of the Appeal, paragraph 32.

¹¹³ Response to the Document in Support of the Appeal, paragraph 33.

¹¹⁴ Response to the Document in Support of the Appeal, paragraph 34.

¹¹⁵ Response to the Document in Support of the Appeal, paragraphs 36-40.

¹¹⁶ Response to the Document in Support of the Appeal, paragraph 35.

¹¹⁷ Response to the Document in Support of the Appeal, paragraph 41.

¹¹⁸ Response to the Document in Support of the Appeal, paragraph 41.

to Rule 81(2)".¹¹⁹ It is maintained that "[t]he Single Judge did not make a conclusive determination that non-disclosure of the information in question would be justified if no alternative measures were available to the Prosecution."¹²⁰ Moreover, relying, *inter alia*, upon jurisprudence of Pre-Trial Chamber I and the International Criminal Tribunal for Rwanda, it is argued that given the "world-wide recognition of the importance of disclosure of the information sought", the redactions of the identities of OTP and VWU staff members present during witness interviews would not be justifiable irrespective of the availability of alternative measures.¹²¹

87. In the event that the Appeals Chamber finds the redactions sought to be justifiable, Counsel for Mr Katanga submits that alternative measures to redaction are available to the Prosecutor.¹²² In this respect, Counsel for Mr Katanga counters the Prosecutor's assertions that the alternative measures suggested by the Pre-Trial Chamber would increase the risk of identification of witnesses.¹²³ Counsel for Mr Katanga maintains that the Pre-Trial Chamber did not exclusively sum up all alternative measures available to the Prosecutor but merely made suggestions as to the availability of such measures. It is asserted that the Prosecutor should be able to devise other alternative measures, and possible examples are put forward.¹²⁴ It is argued that whilst the implementation of alternative measures might inconvenience the Prosecutor, that alone cannot justify the serious infringements of the defendant's fair trial rights which would be caused by non-disclosure of the information concerned. Moreover, it is submitted that most of the concerns of the Prosecutor cannot in any case be met by withholding the names and identities of OTP and VWU staff members from the Defence, since they are the unavoidable side effects of conducting investigations in a volatile environment where persons working for the Court are easily recognisable.¹²⁵

88. Counsel for Mr Katanga also invites the Appeals Chamber to dismiss the Prosecutor's third ground of appeal in relation to the Pre-Trial Chamber's purported failure to grant him an opportunity to be heard. Counsel for Mr Katanga submits that the Prosecutor failed to request leave to appeal on this issue and "cannot now, for the first time, introduce this alleged procedural error as an independent ground of appeal".¹²⁶ Counsel for Mr Katanga

¹¹⁹ Response to the Document in Support of the Appeal, paragraph 42.

¹²⁰ Response to the Document in Support of the Appeal, paragraph 44.

¹²¹ Response to the Document in Support of the Appeal, paragraphs 45-49.

¹²² Response to the Document in Support of the Appeal, paragraph 50.

¹²³ Response to the Document in Support of the Appeal, paragraphs 51-53.

¹²⁴ Response to the Document in Support of the Appeal, paragraphs 55-56.

¹²⁵ Response to the Document in Support of the Appeal, paragraphs 57-58.

¹²⁶ Response to the Document in Support of the Appeal, paragraph 60.

further contends that, had the Prosecutor sought leave to appeal the Impugned Decision on this ground, such application would most probably have been rejected given that the Defence application for leave to appeal on similar grounds had been denied even though they had been “completely deprived of any opportunity to be heard on any of the issues in the [I]mpugned Decision” prior to its issuance (given the *ex parte* nature of both the applications and hearings on the matter).¹²⁷ Additionally, Counsel for Mr Katanga submits that the Prosecutor’s argument is unfounded on its merits, as he had ample opportunity, during the *ex parte* hearings on the applications, to justify the requested redactions and demonstrate that no alternative less intrusive measures were available. Counsel for Mr Katanga argues, by reference to jurisprudence of Pre-Trial Chamber I, that the burden to demonstrate the unavailability of alternative measures to redaction rests upon the Prosecutor.¹²⁸

4. Determination by the Appeals Chamber

89. The second issue before the Appeals Chamber is:

“[W]hether the Single Judge erred in the application of the test prescribed by the Appeals Chamber in its 14 December 2006 Decisions by refusing to authorise the redaction of the location of interviews of witnesses, and the identifying information of current and former staff members of the OTP and the VWU at this particular stage of the proceedings”.¹²⁹

90. This issue relates to requests by the Prosecutor to the Pre-Trial Chamber to authorise, pursuant to rule 81(2) and/or rule 81(4) of the Rules, the redaction from witness statements and interview notes of information relating to the locations of interviews and the identities of current staff of the OTP and the VWU who were present during the interviews. Of relevance in this context is rule 111(1) of the Rules, which reads as follows:

“A record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record shall be signed by the person who records and conducts the questioning and by the person who is questioned and his or her counsel, if present, and, where applicable, the Prosecutor or the judge who is present. The record shall note the date, time and place of, and all persons present during the questioning. It shall

¹²⁷ Response to the Document in Support of the Appeal, paragraph 61. On 13 December 2007, the Defence sought leave to appeal the public version of the Impugned Decision *inter alia* on the following issue: “The Decision was issued without hearing the Defence”. The Pre-Trial Chamber, by its decision of 19 December 2007, denied leave to appeal in respect of that issue (Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116, pages 5 and 7).

¹²⁸ Response to the Document in Support of the Appeal, paragraphs 62-63.

¹²⁹ Decision Granting Leave to Appeal, pages 6-7.

also be noted when someone has not signed the record as well as the reasons therefor”.

91. The Appeals Chamber notes that it is mandatory to record the date, the time and the place of the statement, as well as the persons present – such information shall be contained in any record of a formal statement that has been made. However, the Appeals Chamber considers that such information can be withheld from the Defence in appropriate circumstances. This results from the fact that the obligation upon the Prosecutor to disclose witness statements to the Defence is subject, *inter alia*, to rule 81 of the Rules (see rule 76(4) of the Rules, set out at paragraph 39 above).

92. Rule 81(2) provides, in relevant part:

“Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence.”

93. The terms of rule 81(4) are set out at paragraph 42 above. The Appeals Chamber observes that rule 81(2) provides generally for the non-disclosure of “information”, without excluding *per se* certain categories of information from non-disclosure. Similarly, rule 81(4) does not expressly rule out the information referred to in rule 111(1) from its ambit. The Appeals Chamber therefore concludes that it will have to be determined on a case-by-case basis whether the non-disclosure of information that is required to be recorded pursuant to rule 111(1) may be authorised by a Chamber. This will be determined in light of the conditions stipulated by rule 81(2) and/or (4) of the Rules.

94. In reaching this conclusion, the Appeals Chamber has taken into account the national and international case-law and legislation relied upon by Counsel for Mr Katanga to submit that the redaction of the identities of OTP and VWU staff members should not be permitted irrespective of the availability of alternative measures. In this regard, the Appeals Chamber notes that it must first apply the Statute and the Rules,¹³⁰ which have led it to its above conclusion. Moreover, the Appeals Chamber is considering this matter in the specific context of applications relating to disclosure prior to a hearing to confirm the charges against a suspect at this Court. Furthermore, it is not persuaded that the authorities provided by Counsel for Mr Katanga do not permit for any exception to be made to the general rule.

¹³⁰ See article 21(1).

95. Having come to the above conclusion, in addressing the present issue on appeal the Appeals Chamber recalls its judgment entitled “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”¹³¹ (hereinafter “Judgment of 14 December 2006”) in which the Appeals Chamber explained that:

“[T]hree of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81 (4) of the Rules of Procedure and Evidence [are]: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial (article 68 (1), last sentence, of the Statute).”¹³²

96. The Appeals Chamber went on to state that:

“As the Appeals Chamber has explained already in paragraph 37 of its “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’” of 13 October 2006 (ICC-01/04-01/06-568), “[t]he use of the word ‘necessary’ emphasises the importance of witness protection and the obligation of the Chamber in that respect; at the same time, it emphasises that protective measures should restrict the rights of the suspect or accused only as far as necessary.” Thus, if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.”¹³³

97. The above findings were made in relation to redactions sought pursuant to rule 81(4) of the Rules. However, the same considerations apply *mutatis mutandis* to redactions sought pursuant to rule 81(2) of the Rules. Accordingly, pursuant to that rule, it will be for the Prosecutor seeking redactions to establish that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought “may prejudice further or ongoing investigations”.

98. The guidance set out at paragraphs 68 to 73 above should be taken into account. In this context, for redactions to be granted, the Prosecutor will have to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the Defence (as opposed to the general public) and could be overcome or reduced by redactions. Dangers that cannot be overcome by redactions because they are inherent in the

¹³¹ ICC-01/04-01/06-773, OA5, 14 December 2006.

¹³² Judgment of 14 December 2006, paragraph 21.

¹³³ Judgment of 14 December 2006, paragraph 33.

situation itself cannot, as such, provide a justification for redactions. By way of example, in the present case, the Pre-Trial Chamber would have to assess, on the basis of its knowledge of the factual situation as a whole, whether the danger sought to be protected could be overcome by redactions or arises simply from the fact that personnel of the OTP and of the VWU generally may be easily identifiable in the field.

99. Once it has been established that disclosure of the information to the Defence may prejudice ongoing or further investigations and that this risk could be overcome by authorising redactions, the Prosecutor will have to establish that the redactions restrict the rights of the suspect only as far as strictly necessary. The Pre-Trial Chamber should consider, in this context, those factors that the Appeals Chamber set out at paragraphs 72 and 73 above.

100. The Pre-Trial Chamber in the present case identified the principal considerations that are to be taken into account for a decision on non-disclosure pursuant to rule 81(2) of the Rules.¹³⁴ Nevertheless, for the reasons further explained below, the Appeals Chamber is not in a position to conclude that the Pre-Trial Chamber applied these considerations correctly to the case at hand.

101. The Appeals Chamber recalls that, in paragraph 20 of the Judgment of 14 December 2006, it underlined that sufficient reasoning must be provided for a decision of a Pre-Trial Chamber on requests for the authorisation of non-disclosure. Based on the reasoning provided in the Impugned Decision, it is unclear on what precise grounds the Pre-Trial Chamber rejected the requests of the Prosecutor for authorisation of redactions. Notably, in relation to the prejudice that the disclosure of information relating to the place of the interviews and the persons present may cause to the investigations of the Prosecutor, the Pre-Trial Chamber stated only that such disclosure “could, in a few instances, prejudice to a certain extent”¹³⁵ the investigations. It is thus unclear whether the Pre-Trial Chamber concluded that such a risk existed and, if so, in relation to which specific requests for redactions. The Appeals Chamber notes furthermore that in respect of redactions sought for the location of interviews, no specific explanation is given in the Impugned Decision as to why these were refused.



¹³⁴ Impugned Decision, paragraph 4, summarised at paragraph 75 above.

¹³⁵ Impugned Decision, paragraph 59.

102. Similarly, the Pre-Trial Chamber found that redactions “might, in certain circumstances, contribute to minimizing” the risk to the investigations.¹³⁶ It is unclear whether the Pre-Trial Chamber considered that such a risk could indeed be minimised through redactions or whether this was only a theoretical possibility.

103. Moreover, it appears from the Impugned Decision that the Pre-Trial Chamber seems to have been significantly influenced in its rejection of the redactions sought by the purported existence of less intrusive measures that could be taken by the Prosecutor.¹³⁷ It is, however, unclear on what factual basis the Pre-Trial Chamber concluded that such less intrusive measures existed. This fact and the arguments put forward by the Prosecutor in his Document in Support of the Appeal call into question the viability of these alternative measures in a manner that suggests that the Pre-Trial Chamber may not have taken all relevant factors into account.

104. Furthermore, the Pre-Trial Chamber stated that the identification of the names of the staff members of the OTP and of the VWU present during the interviews was a “key guarantee of procedural propriety in the taking of the statements, as well as a formal requirement for their admissibility, and redacting this information would be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial”.¹³⁸ As the Pre-Trial Chamber did not explain this statement further, the Appeals Chamber cannot discern whether or how the Pre-Trial Chamber assessed the competing interests at stake or whether it regarded this material as information that could never be redacted.

105. In sum, on the basis of the reasoning given in the Impugned Decision, the Appeals Chamber cannot conclude whether the Pre-Trial Chamber properly applied the test relating to the authorisation of redactions in relation to the present issue on appeal.

106. However, the Appeals Chamber is not persuaded by the argument put forward by the Prosecutor as his third ground of appeal, namely that the Pre-Trial Chamber failed to give him an opportunity to be heard in respect of the availability of less intrusive measures.

107. Contrary to the submission of Counsel for Mr Katanga,¹³⁹ the Appeals Chamber considers that this argument can be raised by the Prosecutor noting that, at paragraphs 15

¹³⁶ Impugned Decision, paragraph 60.

¹³⁷ See Impugned Decision, paragraph 60.

¹³⁸ Impugned Decision, paragraph 62.

¹³⁹ See paragraph 88 above.

and 16 of his application for leave to appeal,¹⁴⁰ the Prosecutor expressly made the argument that the Pre-Trial Chamber reached its conclusions in relation to the alternative measures without seeking or considering the views of the Prosecution on the viability of the alternatives proposed. In the circumstances of the present case, the failure to hear from the Prosecutor appears inherently linked to the issue for which leave to appeal was granted.

108. The Appeals Chamber rejects this ground of appeal on its merits, as the Prosecutor had many opportunities to be heard in the course of several *ex parte* hearings. In fact, it was a failure by the Prosecutor to outline sufficiently why lesser alternative measures might not be available that led, at least in part, to the Pre-Trial Chamber failing to take factors into consideration which the Prosecutor now alleges are relevant. The Prosecutor should have been more specific in his submissions. The Prosecutor was in no way limited in relation to the submissions that he could make before the Pre-Trial Chamber, having been able to make several written filings and attend a number of *ex parte* hearings. Furthermore, there is no obligation upon the Pre-Trial Chamber to share every conceivable aspect of the decision-making process with the parties before arriving at a decision.

IV. APPROPRIATE RELIEF

109. In relation to the first issue on appeal, for the reasons expressed above, the Appeals Chamber, pursuant to rule 158(1), reverses the decision of the Pre-Trial Chamber to reject the requests of the Prosecutor to authorise redactions in respect of “innocent third parties” on the basis that “rule 81(4) of the Rules does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families”.¹⁴¹

110. In relation to the second issue on appeal, for the reasons expressed above, the Appeals Chamber, pursuant to rule 158(1), reverses the decision of the Pre-Trial Chamber to reject the requests of the Prosecutor to authorise redactions relating to the place of the interviews and to the identities of the staff members of the Office of the Prosecutor and of the Victims and Witnesses Unit present at these interviews.

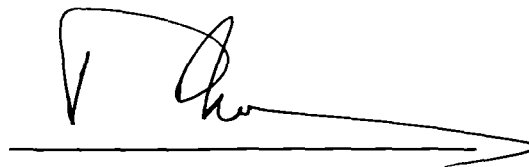
¹⁴⁰ ICC-01/04-01/07-92-Conf; ICC-01/04-01/07-107.

¹⁴¹ Impugned Decision, paragraph 54.

111. The matter is remitted to the Pre-Trial Chamber, which has daily control of the case and a full awareness of the complete factual background, for a new determination of the requests of the Prosecutor that formed the subject-matter of the two issues on appeal. The Appeals Chamber emphasises in this context that it has not considered the merits of the individual requests made for redactions, as this question was not the issue raised by the granting of leave to appeal. Therefore, the fact that the requests are remitted to the Pre-Trial Chamber does not, as such, mean that the requests should be granted. Whether or not the requests should be granted is to be determined by the Pre-Trial Chamber on a case-by-case basis, guided by the factors set out in the present judgment and, in relation to the second issue, with reference, as appropriate, to the arguments that the parties have raised on appeal.

Judge Pikis appends a dissenting opinion to this judgment.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a stylized 'P' followed by a cursive 'Kirsch', written over a horizontal line.

Judge Philippe Kirsch

Presiding Judge

Dated this 13th day of May 2008

At The Hague, The Netherlands

Dissenting opinion of Judge Pikis.

1. The Prosecutor petitioned Pre-Trial Chamber I¹ (its jurisdiction on the matter being exercised by a Single Judge), to withhold disclosure of the names and particulars of identification of persons referred to in witnesses' statements to be disclosed to the defence for the purposes of the confirmation hearing. Non-disclosure is sought in the interests of the safety of the persons named therein. These persons were labelled by the Prosecutor as "innocent third parties" described as being "individuals that are neither Prosecution witnesses, victims, family members nor Prosecution sources, and they are not involved in the investigation of the Prosecutor"²; a description to which the Pre-Trial Chamber took no exception. It is self-evident that "further or ongoing investigations", the criteria for non-disclosure under rule 81 (2), cannot be prejudiced by the disclosure of the aforesaid persons.

2. The application was heard in the absence of the defence, dealt with on the basis of "*ex parte*, Prosecutor only". The Pre-Trial Chamber refused the application, holding that neither article 54 (3) (f) of the Statute nor rule 81 (4) of the Rules of Procedure and Evidence,³ read separately⁴ or conjointly,⁵ provide ground for sanctioning the redactions, underlining that the persons whose names are sought to be removed from the statements are neither witnesses, victims, members of their families nor prosecution sources.

3. By the same application, the Prosecutor requested that the names of the persons who took the statements of witnesses and those present at the interviews, as well as the place where the interviews took place, be withheld. The request was turned down. In coming to this decision, the Pre-Trial Chamber relied on the majority judgment of the Appeals Chamber of 14 December 2006 in the case *Prosecutor v. Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for

¹ Hereinafter referred to as "Pre-Trial Chamber".

² *Prosecutor v. Katanga* "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 3 December 2007 (ICC-01/04-01/07-84-US-Exp), 6 December 2007 (ICC-01/04-01/07-88-Conf-Exp), 7 December 2007 (ICC-01/04-01/07-90 and ICC-01/04-01/07-224-Anx), footnote 63 of public redacted version.

³ Hereinafter referred to as "the Rules".

⁴ See *Prosecutor v. Katanga* "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 7 December 2007 (ICC-01/04-01/07-90 and ICC-01/04-01/07-224-Anx), para 52.

⁵ See *ibid.*, paras 47, 53 and 54.

Redactions under Rule 81”⁶, where it was ruled that, before measures are adopted for the protection of a witness or a victim pursuant to the provisions of rule 81 (4) it must be made to appear: a) that a witness or victim or a member of their family is truly in danger. If so, b) the suggested protective measures must appear to be necessary and c) such measures must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁷ In the above decision, it is explained that any protective measures to be taken must heed the rights of the person investigated or the accused in such a manner as to keep a balance between the competing needs of the two causes.⁸ In a separate opinion concurring in the result, I espoused the view that sustenance of the rights of the person investigated or the accused can admit of no exceptions, doubting whether proportionality enters into the spectrum of decision-making at all.⁹ In the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”¹⁰, the Appeals Chamber held that, for the purposes of rule 81 (2) of the Rules, the crucial test for withholding disclosure is whether such a course is likely to prejudice further or ongoing investigations¹¹.

4. The Pre-Trial Chamber concluded that the necessity for the redactions sought had not been made out; more so, as there were alternative measures that the Prosecutor could take that would equally ensure the safety of the persons in question and the efficacy of the investigations of the Prosecutor.¹² The Pre-Trial Chamber did point out, in line with the case law of the Appeals Chamber,¹³ that non-disclosure is a measure of last resort. The decision of the Pre-Trial Chamber in its original form was redacted and served on the

⁶ *Prosecutor v. Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” 14 December 2006 (ICC-01/04-01/06-773 OA5).

⁷ *Ibid*, para. 21.

⁸ *Ibid*, para. 34.

⁹ See separate opinion of Judge Pikis in *Prosecutor v. Lubanga Dyilo* “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” 14 December 2006 (ICC-01/04-01/06-774 OA6), para. 11.

¹⁰ *Prosecutor v. Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” 14 December 2006 (ICC-01/04-01/06-774 OA6).

¹¹ *Ibid* para 32.

¹² *Prosecutor v. Katanga* “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” 7 December 2007 (ICC-01/04-01/07-224-Anx), para 60.

¹³ *Prosecutor v. Lubanga* “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence” 13 October 2006 (ICC-01/04-01/06-568 OA3).

defendant on a confidential basis. A third version still, stripped of confidential matters, was made public.

5. Leave was granted to the Prosecutor to appeal the decision of the Pre-Trial Chamber in so far as it affected the aforesaid two aspects of it, listing them separately as the appealable issues:

- “(a) whether ‘Article 54(3)(f) authorizes the Prosecution to seek, and Rule 81 (4) read in conjunction with that article empower the Chamber to authorize, redactions for the protection of ‘innocent third parties’, i.e. person who are not victims, current or prospective Prosecution witnesses or sources, or members of their families’; and
- (b) whether the Single Judge erred in the application of the test prescribed by the Appeals Chamber in its 14 December 2006 Decisions by refusing to authorize the redaction of the location of interviews of witnesses, and the identifying information of current and former staff members of the OTP and the VWU at this particular stage of the proceedings.”¹⁴

6. The two issues raised for resolution will be addressed separately in the order set out above.

Issue 1:

7. The Prosecutor submitted that the identity of the persons named in witnesses’ statements constitutes confidential information, disclosure of which would jeopardise the safety of the individuals named therein.¹⁵ Article 54 (3) (f) of the Statute and rule 81 (4) of the Rules confer power upon a Chamber to adopt the suggested measure.¹⁶ Not only in his contention is redaction permissible but it is also the most cost-effective means of protecting the persons in question from foreseeable risks to which they are exposed.¹⁷

8. Why the term “innocent third parties” was adopted to describe persons named in the statements is not altogether clear to me. The term “third party” denotes, in a judicial

¹⁴ *Prosecutor v Katanga* “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions” 14 December 2007 (ICC-01/04-01/07-108).

¹⁵ *Prosecutor v Katanga* “Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements” 2 January 2008 (ICC-01/04-01/07-131-Conf), public redacted version filed on 20 February 2008 (ICC-01/04-01/07-215), paras 13 to 23.

¹⁶ *Ibid.*, paras 15 to 17

¹⁷ *Ibid.*, para 21



context, a person other than the parties to the proceedings. If the term is used to distinguish such persons from witnesses, this is a misnomer. The witnesses cannot be identified as parties to the proceedings.

9. By his first ground of appeal, the Prosecutor contests the classification of “confidential information” within the context of rule 81 (4) adopted by the Pre-Trial Chamber and suggests that this is based on a misinterpretation of the aforesaid rule.¹⁸

10. The defendant joined issue with the Prosecutor respecting the character of the relevant information, portrayed by the Prosecutor as confidential.¹⁹ The Prosecutor acknowledged in his address that these persons “are generally not related to the case”²⁰. Holding back the information under consideration would, in the submission of the defendant, deprive the defence of the amenity to inquire into the credibility of the witnesses.²¹ Article 54 (3) (f) of the Statute does not, in the view of the defendant, confer power upon a Chamber to take measures for the protection of either confidential information or persons.²² Article 54 (3) of the Statute merely identifies in terms, in the contention of the defendant, measures the Prosecutor may take in the interests of the efficacy of the investigation and the protection of individuals at risk of harm. Therefore, the only provision that has any bearing on the issue under consideration is rule 81 (4) of the Rules. But protective measures under that rule, as argued, are confined to steps that may be taken for the protection of victims, witnesses and their families from the disclosure of information.²³ Consequently, rule 81 (4) could not provide support for the request of the Prosecutor. Irrespective of a lack of power to grant the measures sought, the need, as suggested, for the protection of the persons’ identity has in no way been substantiated.²⁴

¹⁸ *Ibid.*, para 9.

¹⁹ *Prosecutor v. Katanga* “Defence Response to Confidential Prosecution’s Document in support of Appeal against the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” 14 January 2008 (ICC-01/04-01/07-140).

²⁰ *Prosecutor v. Katanga* “Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements” 2 January 2008 (ICC-01/04-01/07-131-Conf), public redacted version filed on 20 February 2008 (ICC-01/04-01/07-215), para. 11.

²¹ *Prosecutor v. Katanga* “Defence Response to Confidential Prosecution’s Document in support of Appeal against the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” 14 January 2008 (ICC-01/04-01/07-140), para 24.

²² *Ibid.*, para 8.

²³ *Ibid.*, para 18.

²⁴ *Ibid.*, paras 18 to 23.



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11. Rule 81 (4) of the Rules permits in a proper case the non-disclosure of information classified as confidential under *inter alia* article 54, the article that concerns us in this case. Confidential documents or information in the context of article 54 of the Statute is material identified as such by the relevant provisions of article 54 of the Statute, i.e. by article 54 (3) (e). Article 54 (3) (f) does not identify any species of information as confidential; it merely acknowledges power to the Prosecutor to take measures for the protection of “confidential information” so ranking under article 54 (3) (e). Article 54 (3) of the Statute articulates the powers of the Prosecutor in the investigatory process and steps that may be taken for the sustenance of its efficacy. Article 54 (3) of the Statute does not prescribe what material in the possession of the Prosecutor must be disclosed to the defence or what may be held back. The duty to disclose prosecution evidence to the defence is addressed by other provisions of the Statute and the Rules, a separate and distinct subject from the powers of the Prosecutor to provide protection to persons at risk.²⁵ Rule 81 of the Rules creates exceptions to the duty cast on the Prosecutor to disclose material and information in his possession.

12. Rule 81 (3) of the Rules envisages the non-disclosure of information classified as confidential under *inter alia* article 54 (3) (e) of the Statute unless the conditions specified therein for non-disclosure are lifted. Evidently, the naming of a person or persons in witnesses’ statements does not constitute confidential information in the sense of article 54 (3) (e) or any other provision of the Statute or the Rules. Such persons provided no information whatsoever to the Prosecutor, let alone the provision of information in confidence.

13. Confidential information, disclosure of which may justifiably be withheld under rule 81 (4) of the Rules, has the same meaning in relation to article 54 as the one earlier specified, i.e. information obtained on condition of confidentiality. Consequently, the first part of rule 81 (4) of the Rules cannot be invoked by the Prosecutor in aid of his submission that information about the identity of the persons named in witnesses’ statements qualifies as confidential.

²⁵ See separate opinion of Judge Pikis in *Prosecutor v Lubanga Dyilo* “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’” 14 December 2006 (ICC-01/04-01/06-774 OA6), para. 14

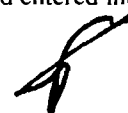
14. Equally unavailable to the Prosecutor is the second part of rule 81 (4) of the Rules, procedurally regulating the exercise of power to offer protection to persons envisaged by article 68 of the Statute, i.e. “witnesses and victims and members of their families”. The persons whose identity is sought to be concealed do not have the status of anyone forming part of the aforesaid three categories or classes of persons.

15. Is there anything in rule 81 (4) of the Rules viewed in isolation or in the context of rule 81 in its entirety to suggest that persons other than victims, witnesses and members of their families are meant to be the subjects of protection and were fortuitously left out? In other words, is there an unintended lacuna in the provisions of rule 81 (4), that is, something intended to be included but omitted because of oversight? The subject is discussed at length in the decision of the Appeals Chamber in the *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”²⁶. Manifestly the answer is in the negative. Rule 81 (4) of the Rules gives expression to the provisions of article 68 (1) and (2) of the Statute and the tenor of article 68 in its entirety, specifying victims, witnesses and members of their families as the subjects of protection. All three categories of persons have distinct attributes, not only in the context of article 68 but in that of many other provisions of the Statute and the Rules too.²⁷ Persons named in a witness statement do not come within the genus of any of the aforesaid three categories of persons. They belong to a different class of persons, outside the ambit and compass of article 68 of the Statute and rule 81 (4) of the Rules. Victims and witnesses have one thing in common, they are persons directly connected with the crime investigated and the crime that is the subject of prosecution. The guide to the interpretation of the Statute is the Vienna Convention on the Law of Treaties²⁸ as authoritatively determined in the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave

²⁶ *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168 OA3). See *inter alia* para 39.

²⁷ See e.g. articles 43 (6), 57 (3) (c), 61 (5), 64 (6) (b), 68 (3), 69 (1) and (2), 75 (3) of the Statute, rules 65, 85, 87, 88 of the Rules.

²⁸ 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.



to Appeal”²⁹. The same applies to the Rules of Procedure and Evidence adopted by the Assembly of States Parties as a complement to the Statute.

16. In my view, the remedy sought by the Prosecutor is one unknown to the law, a conclusion warranting the confirmation of the decision of the Pre-Trial Chamber on the matter.

Issue 2

17. The subject matter of this issue revolves around the existence or non-existence of power to order the redaction of the names of persons who took the statements of witnesses, those who attended the depositions made to the investigating authorities and the places where the statements were taken.

18. By his appeal the Prosecutor maintains that the decision of the Pre-Trial Chamber to refuse redactions is fraught with substantive and procedural errors because the Single Judge a) misapplied the threefold test laid down by the Appeals Chamber in its two judgments of 14 December 2006³⁰ and b) failed to hear the Prosecutor on the availability of alternative measures.³¹

19. The defendant supports the decision of the Pre-Trial Chamber as sound, arguing that the need for redactions of the names of persons who took the statements, those present at the interviews and the location where they took place was in no way established, a fact sealing the outcome of this appeal.³² Furthermore, the information as submitted is relevant to the preparation of the defence, particularly with regard to the testing of the truthfulness and credibility of the witnesses.³³

²⁹ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168), para 6.

³⁰ See *supra* para 3.

³¹ *Prosecutor v Katanga* “Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements” 2 January 2008 (ICC-01/04-01/07-131-Conf), public redacted version filed on 20 February 2008 (ICC-01/04-01/07-215), paras 13 to 23.

³² *Prosecutor v Katanga* “Defence Response to Confidential Prosecution’s Document in support of Appeal against the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” 14 January 2008 (ICC-01/04-01/07-140)

³³ *Ibid.*, paras 31 to 41.

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20. To answer the question raised, we must first identify the provisions of the law prescribing the constituents of a witness statement. The next question must be whether it is feasible in law to withhold disclosure or information postulated by law as a necessary attribute of a witness statement. I shall not debate in these proceedings the presence or absence of authority under rule 81 (2) of the Rules to withhold disclosure of parts of evidential material. I confine myself to referring to the decision of the Appeals Chamber on the subject *Prosecutor v. Lubanga* “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”³⁴ and my separate opinion in that case. Deletion of particulars from a witness statement referable to the manner it was taken and the circumstances surrounding its taking, is impermissible by virtue of the provisions of rule 111.

21. Article 54 (3) of the Statute entitles the Prosecutor to a) collect and examine evidence and b) to request the presence of persons with a view to questioning them. Article 55 (1) of the Statute provides that no one shall be compelled to incriminate himself or herself or to confess guilt. Moreover no one shall be “subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment”.

22. Rule 111 of the Rules lays down, in imperative terms signified by the use of the auxiliary verb “shall”, that a) a record must be made of a statement, b) the statement must be signed by the person who records it and conducts the questioning, and also c) by the person who is questioned and his or her counsel, if present. The statement must also be signed by the Prosecutor or a judge if present in statements obtained pursuant to rule 47 of the Rules. The statement must also mandatorily record the names of everybody present at the making of the statement and the place where it is made. What the Prosecutor sought here was to erase from the statements reference to a) the person or persons who took the statements, b) the person or persons present and c) the place where the statements were made.

It is worth noting that the statement of the accused must be likewise attested to, if it cannot be video-taped, in the manner that a witness statement is taken under rule 111 of the Rules

³⁴ *Prosecutor v. Lubanga*, “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” 14 December 2006 (ICC-01/04-01/06-774 OA6).

and provide the same information about the person or persons taking the statement, those attending the making of it and the place where it is taken. As much is laid down in rule 112 (2).

23. A witness statement or a summary of it may be used in evidence at the confirmation hearing. The pertinent question is whether a statement lacking the statutory attributes or insignia does qualify as a statement under the Rules. The obligation to keep a record of the circumstances surrounding the making of a written statement in the course of the investigations is not a mere formality but an essential element of the statement itself. It indicates that the statement was taken according to law and as such it has the attributes of authenticity required thereby. Stripped of these attributes, the statement forfeits the character attached to it by law; it is denuded of information that illuminates its provenance. At the same time the defence would be denied material information to which the person under investigation or the accused are entitled in making his/her defence. If power resided with the court to by-pass disclosure of the essential record of a statement, that would be tantamount to by-passing the ordinance of the law. That cannot be. Neither paragraph 2 nor any other provision of rule 81 confer power upon the Court to sidestep the plain provisions of the law, a course that would derail the process from its ordained course.

24. There is yet another reason, equally compelling against leaving out from a statement to be disclosed to the defence facts surrounding the taking of it. In accordance with rule 81 (2) of the Rules, what may be withheld from the defence is "material and information that may prejudice further or ongoing investigations". The material and information that may, under rule 81 (2), be not disclosed to the defence, is material and information "which must be disclosed to the defence under the Statute". What is then the Prosecutor under obligation to disclose? The answer is to be found in article 61 (3) (b) of the Statute imposing a duty upon the Prosecutor to inform the defence "of the evidence on which the Prosecutor intends to rely at the hearing". In this context, evidence denotes facts having a bearing on the proof of the charges preferred against the person. The evidence must also include facts tending to show the innocence of the accused, as provided for in article 67 (2) of the Statute. Evidence in a legal context has a settled meaning. It is a term of art. In Black's Law Dictionary evidence is identified as, "1. Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an



alleged fact [...]”³⁵. What the Prosecutor seeks to redact in this case does not relate to the crime investigated but to the manner of conducting the investigation, in particular, the part associated with the collection of evidence, and the propriety of the process of gathering it. As such, it cannot be withheld from the defence given that the manner of conducting the investigation and the presence of the attributes of the statements as laid down in rule 111 is a condition of its acceptability as evidential material. Withholding the disclosure of evidence has to do with facts surrounding the commission of the offence, likely to be unearthed or emerge, not the manner of conducting the investigation.

25. For each one of the above reasons, the appeal is liable to be dismissed and so would I hold, confirming the decision of the Pre-Trial Chamber.

Done in both English and French, the English version being authoritative.



Judge Georghios M. Pikis

Dated this 13th day of May 2008

At The Hague, The Netherlands

³⁵ Garner, B.A. (ed. in chief) “Black’s Law Dictionary” (Eight Edition, Thomson West), page 594; see also Shorter Oxford English Dictionary on historical principles (Fifth edition, Volume I A-M, Oxford University Press), page 875.