

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07 (OA2)

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 Mr Germain Katanga 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 Mr Germain Katanga 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

The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. The Prosecutor may apply to the Pre-Trial Chamber, pursuant to rule 81(2) of the Rules of Procedure and Evidence, for a ruling as to whether the identities and identifying information of ‘potential prosecution witnesses’ must be disclosed to the Defence.

2. Whether any such application for non-disclosure should be authorised requires a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.

In this appeal ‘potential prosecution witnesses’ are individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses.



II. PROCEDURAL HISTORY

3. 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. 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 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.

4. 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 (hereinafter “appellant”), 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 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

5. In the Impugned Decision, the Pre-Trial Chamber, *inter alia*, considered applications by the Prosecutor to redact, from the statements of certain witnesses, identifying information of ‘potential prosecution witnesses’ mentioned therein, pursuant to rule 81(2) of the Rules of Procedure and Evidence (hereinafter “the Rules”).⁸

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.

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 39-43.

6. On 13 December 2007, the appellant applied for leave to appeal the Impugned Decision on two issues, namely: (i) “The Decision was issued without hearing the Defence” and (ii) “The Pre-Trial Judge incorrectly determined that potential Prosecution Witnesses who had been or were about to be interviewed by the Prosecution could be characterised as ‘Prosecution sources’ and, hence, their identities and identifying information be redacted pursuant to Rule 81(2) of the Rules”.⁹ The same day, the Prosecutor disclosed to the appellant the redacted statements of the seven witnesses in question.¹⁰

7. On 19 December 2007, the Pre-Trial Chamber granted leave to appeal in respect of the second issue only, which it certified as:

“whether the Single Judge enlarged the scope of application of rule 81(2) of the Rules by considering as Prosecution sources those individuals – whose identity and identifying information could be redacted pursuant to the said rule – who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution”.¹¹

8. On 2 January 2008, the appellant filed his document in support of the appeal (hereinafter “Document in Support of the Appeal”) requesting the Appeals Chamber “to find that the Single Judge erroneously enlarged the scope of application of Rule 81(2) of the Rules; to reverse the [I]mpugned Decision; and to order the Prosecution to disclose the identities and identifying information of the potential witnesses whose statements the Prosecution intends to use at the confirmation hearing”.¹² On 14 January 2008, the Prosecutor filed a response to the Document in Support of the Appeal, therein requesting the Appeals Chamber to dismiss the appeal in its entirety on the basis that the appellant’s grounds of appeal were premised on a misreading of the terms of the Impugned Decision which invalidated the totality of his arguments (hereinafter “Response to the Document in Support of the Appeal”).¹³



⁹ Defence Motion for Leave to Appeal the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-99, paragraph 8.

¹⁰ See ICC-01/04-01/07-142, paragraphs 8 and 12 and footnote 17, ICC-01/04-01/07-142-Conf-Anx1, ICC-01/04-01/07-142-Conf-Anx2 and ICC-01/04-01/07-150, paragraph 14.

¹¹ Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116, page 7.

¹² Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, ICC-01/04-01/07-132, paragraph 39.

¹³ Prosecution’s Response to the Defence Appeal Brief concerning Document in Support of Appeal against the First Decision on Redaction of Witness Statements, ICC-01/04-01/07-142, paragraphs 1, 8 and 9. The Prosecutor is also appealing a separate issue arising out of the Impugned Decision (Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements, ICC-01/04-01/07-131-Conf (confidential version) and ICC-01/04-01/07-215-Anx. (public redacted version)). Judgment in relation to that appeal is also being delivered today.

III. REASONS FOR THE ORDER OF 24 JANUARY 2008 GRANTING THE REQUEST OF THE APPELLANT TO PROVIDE ADDITIONAL DETAILS AND AUTHORITIES PURSUANT TO REGULATION 28

9. By an application of 18 January 2008, the appellant requested that the Appeals Chamber allow him, pursuant to regulation 28 of the Regulations of the Court (hereinafter "the Regulations"), to provide additional details and authorities on his Document in Support of the Appeal (hereinafter "Application to Provide Additional Details").¹⁴ On 22 January 2008, the Prosecutor responded that the appellant's Application to Provide Additional Details should be dismissed in its entirety (hereinafter "Response to the Application to Provide Additional Details").¹⁵ On 24 January 2008, the Appeals Chamber, by majority, Judge Pikis dissenting, granted the appellant's Application to Provide Additional Details and ordered that the Prosecutor might respond to the appellant's additional details (hereinafter "order of 24 January 2008").¹⁶ On 1 February 2008, the appellant submitted additional details and authorities on the Document in Support of the Appeal (hereinafter "Additional Details").¹⁷ On 8 February 2008, the Prosecutor responded to the Additional Details (hereinafter "Response to the Additional Details").¹⁸ The reasons of the majority of the Appeals Chamber for the order of 24 January 2008 follow hereafter. The dissenting opinion of Judge Pikis to the order of 24 January 2008 is appended to this judgment.

10. In the Impugned Decision, the Pre-Trial Chamber defined those whom the Prosecutor had termed 'potential Prosecution witnesses' as "individuals who have already been interviewed by the Prosecution or that the Prosecution intends to interview in the near future, and in relation to whom the Prosecution has not yet decided whether they will become Prosecution witnesses".¹⁹ By the Impugned Decision, the Pre-Trial Chamber

¹⁴ Defence Application to Request Leave to Provide Additional Details and Authorities on the "Public Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-150, paragraphs 1 and 31.

¹⁵ Prosecution's Response to the Defence Application to Request Leave to Provide Additional Details and Authorities on the "Public Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-154, paragraph 10.

¹⁶ Order in relation to the Defence Application to Request Leave to Provide Additional Details and Authorities, ICC-01/04-01/07-164.

¹⁷ Defence Document Providing Additional Details on the "Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-176. A bundle of authorities was annexed to that document as Annex A (ICC-01/04-01/07-176-AnxA).

¹⁸ Prosecutor's Response to Defence Additional Details on the "Defence Appeal Brief concerning Document in Support of Appeal against the First Decision on Redaction of Witness Statements", ICC-01/04-01/07-189.

¹⁹ Impugned Decision, paragraph 39.

considered whether to redact identifying information of potential prosecution witnesses referred to in the statements of *actual* prosecution witnesses. before the Prosecutor disclosed those statements to the appellant for the purpose of the confirmation hearing.

11. In the Application to Provide Additional Details, the appellant pointed out that he had misunderstood the terms of the Impugned Decision as allowing the Prosecutor to “redact [from witness statements] the *identities of makers* of statements – the makers being potential Prosecution witnesses rather than actual Prosecution witnesses”.²⁰ The appellant, following the Response to the Document in Support of the Appeal which brought to his attention the fact that many of the arguments in the Document in Support of the Appeal had been coloured by that erroneous premise, argued that it was necessary for the proper disposal of the appeal to clarify the arguments raised therein.²¹ In addition, and in the alternative, the appellant requested the Appeals Chamber to “be allowed to provide additional authorities of cases in other international criminal tribunals and the European Court of Human Rights (“ECHR”)”, which were “directly on point”.²²

A. Arguments of the appellant

12. The appellant submitted that his misunderstanding of the Impugned Decision was reasonable given that its terms were ambiguous and “[g]iven the very thin layer of information the Defence had”,²³ bearing in mind that “the Defence had not been privy to any of the Prosecution’s applications and could, therefore, not tell ... what types of redactions were sought. All hearings and filings that preceded the [Impugned Decision] were *ex parte* prior to the appointment of Mr. Katanga’s defence team”.²⁴ The appellant argued that the witness statements disclosed to the appellant by the Prosecutor on 13 December 2007 did not clarify the matter, as it was not specified under which category the redactions contained therein had been approved.²⁵

13. The appellant further argued that he would suffer real prejudice if no opportunity were given to his legal team to provide informed submissions on the scope of rule 81(2) as, if the Impugned Decision were wrong, it would “set a precedent for Rule 81(2) redactions as regards all potential Prosecution witnesses in the case against Mr.

²⁰ Application to Provide Additional Details, paragraph 2, emphasis added.

²¹ Application to Provide Additional Details, paragraphs 6 and 9.

²² Application to Provide Additional Details, paragraph 7.

²³ Application to Provide Additional Details, paragraph 18.

²⁴ Application to Provide Additional Details, paragraph 12.

²⁵ Application to Provide Additional Details, paragraph 14.

Katanga”²⁶ and the latter would “unfairly be deprived of information important to the Defence investigations”.²⁷ Moreover, it was argued that it would be unfair to the appellant if he were to suffer “severe prejudice due to an error of his legal team”.²⁸

14. The appellant further submitted that the Court may order the provision of additional information pursuant to regulation 28 of the Regulations in the interests of justice, which would be served in the instant case, as the additional information the appellant sought to provide would assist the Appeals Chamber in making a fair determination on the scope of rule 81(2), without which it would not be in possession of all the relevant information necessary to determine the appeal.²⁹

B. Arguments of the Prosecutor

15. In contesting the submissions of the appellant, the Prosecutor argued that regulation 28 of the Regulations “provides an authority to the Chamber (and clearly not a right to the participants) to instruct participants to clarify or provide additional details on any document ... or to address specific issues”. It was pointed out that in the instant proceedings, no such instruction had been given.³⁰ Moreover, the Prosecutor argued that the appellant was not seeking to “clarify or supplement an ambiguous point”, rather, he was attempting to “vary his first ground of appeal, claiming a different error and substituting new arguments for most of the old ones”.³¹ The Prosecutor argued that “[r]egulation 28 is not a vehicle for an appealing party to substitute or vary its grounds of appeal. The Appeals Chamber cannot, under the applicable legal framework, grant the relief requested by the Appellant”.³² Instead, the Prosecutor submitted that if the appellant considered that “some of his grounds of appeal or aspects thereof are no longer valid, the proper course of action would be to discontinue his appeal, in whole or in part, following the prescriptions of Rule 157”.³³ The Prosecutor had previously argued that the terms of the Impugned Decision should have been clear to the appellant at all times and any doubts

²⁶ Application to Provide Additional Details, paragraph 22.

²⁷ Application to Provide Additional Details, paragraph 20.

²⁸ Application to Provide Additional Details, paragraph 21.

²⁹ Application to Provide Additional Details, paragraphs 24 and 26.

³⁰ Response to the Application to Provide Additional Details, paragraph 9.

³¹ Response to the Application to Provide Additional Details, paragraph 10.

³² Response to the Application to Provide Additional Details, paragraph 10.

³³ Response to the Application to Provide Additional Details, paragraph 11.

should have disappeared once the appellant received the statements referred to therein on 13 December 2007, which contained the identities of the makers of the statements.³⁴

C. Determination of the Appeals Chamber

16. The preliminary issue before the Appeals Chamber concerned the admissibility of the appellant's Application to Provide Additional Details. In its decision of 12 September 2006 on the request by the Prosecutor for leave to reply in the case against Mr Thomas Lubanga Dyilo (hereinafter "decision of 12 September 2006"), the Appeals Chamber previously had occasion to rule that applications to reply to responses to documents in support of the appeal, for appeals brought under rules 154 or 155, may not be filed pursuant to regulation 24(5).³⁵ However, in that decision the Appeals Chamber also held that:

"should the arguments that are raised in a response to a document in support of the appeal make further submissions by the appellant necessary for the proper disposal of the appeal, the Appeals Chamber will issue an order to that effect pursuant to regulation 28 (2) of the Regulations of the Court, bearing in mind the principle of equality of arms and the need for expeditious proceedings".³⁶

17. The Appeals Chamber considers that its decision of 12 September 2006 left open the possibility of a Chamber being moved to act pursuant to regulation 28 of the Regulations. Indeed, in its judgment of 13 July 2006 on the Prosecutor's application for extraordinary review of the decision of the Pre-Trial Chamber, the Appeals Chamber held:

"[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it".³⁷

18. As such, contrary to the submissions of the Prosecutor, the Appeals Chamber considers that a Chamber may act pursuant to regulation 28 of the Regulations upon request or upon its own motion. Therefore, the appellant's Application to Provide Additional Details was properly before the Appeals Chamber.

³⁴ Response to the Document in Support of the Appeal, paragraphs 8 and 12.

³⁵ Decision on the Prosecutor's "Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'", ICC-01/04-01/06-424, paragraphs 5 and 6. That decision was affirmed in Decision on the Prosecution's Request for Leave to Reply, 18 January 2008, ICC-01/04-01/07-148, paragraphs 1-3.

³⁶ ICC-01/04-01/06-424, paragraph 7.

³⁷ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168. OA3, paragraph 20.

19. On the facts before it in the instant case, the Appeals Chamber deemed that this was a situation which merited resort to regulation 28. The Appeals Chamber accepted that the terms of the Impugned Decision might have been ambiguous to the appellant, bearing in mind that he had not been privy to the *ex parte* proceedings before the Pre-Trial Chamber upon which the Impugned Decision was based. For that reason, the Appeals Chamber did not accept the Prosecutor's contention that the appellant should have realised his misunderstanding upon the disclosure of the witness statements in question.

20. Furthermore, the Appeals Chamber was of the opinion that it would not have been in the interests of justice to deprive the appellant of the opportunity to make informed submissions in the circumstances of the present case. It is acknowledged that some of the arguments raised by the appellant in his Document in Support of the Appeal were indeed relevant to the issue on appeal as certified by the Pre-Trial Chamber.³⁸ However, given: (i) the importance of the issue on appeal in shaping the disclosure process in this and in other cases; (ii) the fact that the appellant had not been involved in the *ex parte* proceedings that led to the Impugned Decision; and (iii) the fact that restrictions to the disclosure process are likely to be addressed, at least in part, in the context of *ex parte* proceedings, making the involvement of the Defence in this appeal especially important, the Appeals Chamber considered that the receipt of additional details from the appellant, specifically targeted at the issue on appeal in light of the Prosecutor's clarification, was necessary for the proper determination of the appeal in the unusual situation that had arisen. The Appeals Chamber therefore decided to grant the appellant's application in the exceptional circumstances of the instant case.

³⁸ At paragraph 3 of his Document in Support of the Appeal, the appellant raised three arguments in support of his appeal, namely "(1) Statements of potential witnesses do not qualify as Prosecution sources; (2) Rule 81(2) requires disclosure of identities of sources; (3) Widening the scope of Rule 81(2) defeats the purpose of disclosure". In his Application to Provide Additional Details, the appellant confirmed that "the arguments under ground 3 [of the Document in Support of the Appeal] still stand ... They clearly concern the scope of Rule 81(2)", Application to Provide Additional Details, paragraph 2.

IV. MERITS OF THE APPEAL

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

21. The appellant's ground of appeal arises out of the findings of the Pre-Trial Chamber in relation to applications by the Prosecutor to redact references by certain witnesses, in their statements, to the identities and identifying information of potential prosecution witnesses. In this appeal 'potential prosecution witnesses' are individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses.³⁹ The Prosecutor originally made this application pursuant to rule 81(4), considering the term "witnesses" in that provision also to cover "prospective witnesses"; but subsequently also made the application, in the alternative, pursuant to rule 81(2), arguing that ongoing and further investigations could be prejudiced if such individuals were interfered with.⁴⁰

22. The Pre-Trial Chamber rejected the Prosecutor's arguments that the term witnesses in rule 81(4) also covered 'prospective witnesses' on the grounds that this approach was "too broad and not consistent with the literal interpretation of rule 81(4) of the Rules, which only refers to 'witnesses', and not to 'prospective witnesses'".⁴¹ The Pre-Trial Chamber held that:

"...in the proceedings leading to the confirmation hearing, only those individuals on whose statements the Prosecution intends to rely at the confirmation hearing can be considered 'witnesses' within the meaning of rule 81(4) of the Rules. Any other individual who has already been interviewed by the Prosecution, or whom the Prosecution intends to interview in the near future, in relation to the case at hand is more appropriately characterised as a 'Prosecution source' rather than as a 'Prosecution witness'. Hence, any redaction relating to their identities must be justified by the need to ensure the confidentiality of information pursuant to rule 81(4) of the Rules or to avoid any prejudice to further or ongoing investigations pursuant to rule 81(2) of the Rules".⁴²

³⁹ Impugned Decision, paragraph 39.

⁴⁰ Impugned Decision, paragraph 39.

⁴¹ Impugned Decision, paragraph 40.

⁴² Impugned Decision, paragraph 41.



23. Having come to that conclusion, the Pre-Trial Chamber observed that it was not alleged that the redactions were needed to ensure the confidentiality of information under rule 81(4),⁴³ but nevertheless noted that:

“...the individuals concerned by this category of redactions have been interviewed by the Prosecution, or are about to be interviewed by the Prosecution, in relation to the case against Germain Katanga or in relation to further Prosecution investigations. Therefore, the Prosecution’s further or ongoing investigations could be prejudiced if such individuals were to be threatened, intimidated or interfered with”.⁴⁴

24. On the basis of that reasoning, the Pre-Trial Chamber held that, in principle, the Prosecutor may properly seek a ruling from the Chamber to redact the identities and identifying information of potential prosecution witnesses in order to prevent prejudice to further or ongoing investigations, pursuant to rule 81(2). The Pre-Trial Chamber went on to discuss each of the redactions sought on this basis in Annex I to the Impugned Decision.⁴⁵

25. The Pre-Trial Chamber stated that, for any redaction in any given statement to be authorised, the requirements set out by the Appeals Chamber⁴⁶ must be met, 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); 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”.⁴⁷

⁴³ Impugned Decision, paragraph 42.

⁴⁴ Impugned Decision, paragraph 42.

⁴⁵ Impugned Decision, paragraph 43.

⁴⁶ 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.

⁴⁷ Impugned Decision, paragraphs 3 and 4.

B. The initial submissions of the parties

1. Arguments of the appellant in the Document in Support of the Appeal

26. As outlined above, the appellant premised the Document in Support of the Appeal on an erroneous factual basis. However, the below arguments were raised in that document which are pertinent, at least to some extent, to the issue under consideration.

27. The appellant submits that widening the scope of rule 81(2) defeats the purpose of disclosure.⁴⁸ By reference to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY"), the appellant argues that the objectives of witness protection and respecting the right to a fair trial must be carefully balanced; the former cannot override the latter.⁴⁹ He argues, on that premise, that "the rule is to fully disclose the materials that support the charges" and to redact only on an exceptional basis with leave of the Court, bearing in mind the principles of necessity (where less extreme measures are unavailable) and proportionality, pursuant to which "the redactions must be strictly limited to the exigencies of the situation, and must not infringe the right of the Defence to a fair and impartial trial. Where a protective measure (temporarily) infringes the rights of the defence, the Chamber is obliged to implement appropriate counterbalancing measures".⁵⁰ In the instant case, the appellant argues that, *prima facie*, the Prosecutor did not demonstrate the necessity of the requested redactions. Nor did the Pre-Trial Chamber properly explain its reasons for authorising the requested redactions.⁵¹ Moreover, the appellant submits that the redactions granted severely infringe upon his right to a fair and impartial trial, there being no grounds to redact identifying information of individuals who are not actual witnesses. He further submits that such redactions are excessive, bearing in mind that they were not authorised to protect individuals but in order to "avoid hindrance to the Prosecution's ongoing or further investigations".⁵²

28. The appellant states that any fear expressed by a potential witness must have an objective foundation⁵³ and submits that hypothetical claims of witness interference cannot justify non-disclosure of information to the Defence.⁵⁴ The appellant further contends that if fears of threats, intimidation or interference are not purely hypothetical, then rule 87(1),

⁴⁸ Document in Support of the Appeal, paragraphs 25-37.

⁴⁹ Document in Support of the Appeal, paragraphs 25 and 26.

⁵⁰ Document in Support of the Appeal, paragraph 26.

⁵¹ Document in Support of the Appeal, paragraphs 27 and 29.

⁵² Document in Support of the Appeal, paragraphs 27 and 30.

⁵³ Document in Support of the Appeal, paragraph 28.

⁵⁴ Document in Support of the Appeal, paragraph 31.

which refers to those ‘at risk on account of testimony given by a witness’, is applicable to the situation at hand. The appellant points out that rule 87 only allows for protective measures if they are requested *inter partes* and that it therefore aims at preventing disclosure to the public rather than to the Defence. He submits that allowing the Prosecutor to bypass rule 87(1) and to rely on rule 81(2) in order to avoid the need to disclose such information to the Defence would “clearly contradict the intention of the drafters”.⁵⁵ He further argues that the drafters indicated, by adopting rule 87, that an order for confidentiality between the parties was sufficient to protect potential witnesses who were unlikely to face any threat to their security as a result of disclosure to the Defence.⁵⁶ The appellant contends the Prosecutor must demonstrate that disclosure exclusively to the Defence increases the threat.⁵⁷ In this respect, it is argued that the redactions are unnecessary as the appellant is currently detained in The Hague and, as such, is in no position to threaten, intimidate or interfere with any person residing in his region of the Democratic Republic of the Congo.⁵⁸

2. Arguments of the Prosecutor in the Response to the Document in Support of the Appeal

29. The Prosecutor submits that the appellant did not seek leave to appeal any issues pertaining to “the necessity of the redactions in question, their extension or the sufficiency of the reasons advanced by the Single Judge in her ruling, nor were any of these issues otherwise certified for appeal.”⁵⁹ Consequently, it is submitted that “none of the issues raised in this particular part of the Appellant’s brief are properly before the Appeals Chamber”.⁶⁰ Furthermore, the Prosecutor contests the appellant’s arguments in relation to the applicability of rule 87(1). He submits that rule 87(1) is inapplicable to the present situation, as it is primarily a means to protect persons at risk as a result of the live testimony of a witness.⁶¹ It is emphasised that rules 81 and 82, and not rule 87, are the specific provisions governing the non-disclosure of materials in the possession of the Prosecutor.⁶²

⁵⁵ Document in Support of the Appeal, paragraph 32.

⁵⁶ Document in Support of the Appeal, paragraph 32.

⁵⁷ Document in Support of the Appeal, paragraph 33.

⁵⁸ Document in Support of the Appeal, paragraph 35.

⁵⁹ Response to the Document in Support of the Appeal, paragraph 18.

⁶⁰ Response to the Document in Support of the Appeal, paragraph 18.

⁶¹ Response to the Document in Support of the Appeal, paragraph 19.

⁶² Response to the Document in Support of the Appeal, paragraph 20.

C. The additional submissions of the parties

30. The appellant elaborated five arguments in his Additional Details. Each argument, and the response of the Prosecutor thereto, is set out separately below.

*1 Disclosure to the Defence of information or statements from potential prosecution witnesses does not ipso facto prejudice prosecution investigations and, as such, does not in itself trigger the protection of rule 81(2)*⁶³

a. Arguments of the appellant

31. The appellant argues that potential prosecution witnesses “do not necessarily feel a subjective fear that is objectively justified for their safety as a direct result of the statement they have given or will give to the Prosecution”. By reference to jurisprudence of the ICTY, it is argued that “[t]his must remain a case-to-case determination and the perceived threat must come from the Defence. Authorising redactions of potential witnesses without any further qualification results in a risk determination per category rather than per individual and creates a blanket privilege for the Prosecution”.⁶⁴ The appellant argues further that the parameters, if any, of this “unmerited privilege” are hard to determine since “[a]ny person who is in contact with the Prosecution is a potential witness.”⁶⁵ The appellant contends that the blanket assignment of protection to potential prosecution witnesses could lead to many more people enjoying protection under rule 81(2) than was intended by the drafters of the governing instruments of the Court.⁶⁶

32. By reference to jurisprudence of the ICTY, the appellant submits that “[i]t is not sufficient to withhold information [from the defence] simply to make it easier for the Prosecution to conduct further investigations”, thus the phrase ‘disclosure may prejudice further or ongoing investigations’ in rule 81(2) should be construed strictly.⁶⁷ The appellant questions the grounds upon which potential prosecution witnesses need protection and expresses particular concern over the fact that persons who have not yet given statements to the Prosecutor may enjoy protection if the Impugned Decision is not overturned. The appellant submits that “[t]he fear that motivates the granting of protection to such persons out of an overabundance of caution is completely hypothetical and

⁶³ Additional Details, paragraphs 11-16

⁶⁴ Additional Details, paragraph 11.

⁶⁵ Additional Details, paragraph 12.

⁶⁶ Additional Details, paragraph 12.

⁶⁷ Additional Details, paragraph 13.

therefore not objectively justified. Indeed, in light of the fact that they are not identified as Prosecution witnesses and have not given a statement to the Prosecution, there is no factual basis to conclude that the disclosure of their identity to the Defence could create a real risk or threat to their security".⁶⁸ The appellant contends that potential prosecution witnesses could condition their co-operation with the Prosecutor upon advanced promises of protective measures.⁶⁹ The appellant further argues that there are other means available to the Prosecutor to safeguard his investigations, such as: (i) withholding the identities and identifying information of potential prosecution witnesses from the public as opposed to the Defence; (ii) engaging in a constructive dialogue with potential witnesses and explaining the protective options available should they elect to testify; or (iii) searching for other sources.⁷⁰

b. Arguments of the Prosecutor

33. The Prosecutor contests the submissions of the appellant under this head, arguing that they "misconstrue or misrepresent" the Impugned Decision. He argues that "[t]he Single Judge did not declare that every potential witness would be protected. Rather, she recognized that 'the Prosecution's further or ongoing investigations could be prejudiced if such individuals were to be threatened, intimidated or interfered with', and stated that she would 'discuss each of the redactions included under this specific category separately'.⁷¹ Thus, the Prosecutor argues that the Pre-Trial Chamber did not make a blanket finding that every potential witness would necessarily require redaction, nor did it create a privilege for this category. Rather, the Pre-Trial Chamber performed a case-by-case analysis of the need for protection of each potential witness. On this basis alone, the Prosecutor argues that the appellant's submissions should be dismissed.⁷² Furthermore, the Prosecutor strongly objects to what he deems the "unsubstantiated" and "speculative" submissions of the appellant that he would "abuse the ability to seek the protection of the identity of potential witnesses or otherwise act in bad faith".⁷³

⁶⁸ Additional Details, paragraph 13

⁶⁹ Additional Details, paragraph 14.

⁷⁰ Additional Details, paragraph 15.

⁷¹ Response to the Additional Details, paragraphs 16 and 17, emphasis added by the Prosecutor.

⁷² Response to the Additional Details, paragraph 18.

⁷³ Response to the Additional Details, paragraph 19.

2. *Rule 81(2) should not apply to information which is relevant to the preparation of the defence, or potentially exculpatory*⁷⁴

a. Arguments of the appellant

34. The appellant argues, by reference to the jurisprudence of Trial Chamber I and the ICTY, that “if material is of potential assistance to the Defence, the Prosecution has an obligation to make this material available to the Defence irrespective whether this material would otherwise fall under the protection of rule 82(1)”.⁷⁵ It is submitted that “the Prosecution should not be authorised to withhold from the Defence the identities and identifying information of potential Prosecution witnesses without first assessing whether these identities and identifying information are relevant to the Defence preparations or are potentially exculpatory”.⁷⁶

35. The appellant argues that, in the instant case, “[i]n evaluating the Prosecution’s request for a blanket protection of potential Prosecution witnesses without any further qualification, there has been no assessment as to whether the information is potentially exculpatory for the Defence or would assist the Defence to prepare its case”.⁷⁷ The appellant submits that “many of the redactions sought will assist the Defence in its investigations and preparations. Not only does the Defence have a real interest in contacting persons who may be called to testify..., it also has an interest in contacting persons who will not testify but who have made statements to the Prosecution which have been used for purposes other than serving as evidence in support of the charges against Mr. Katanga”.⁷⁸ For example, it is contended that “[t]he Defence has a genuine interest in knowing the identity of witnesses whose statements have led to the arrest warrant” against the appellant in order to challenge the warrant or the appellant’s detention or to apply for interim release pending trial pursuant to article 60(2) of the Rome Statute (hereinafter, all references to articles are to those of the Rome Statute (“the Statute”)); for which purpose “the Defence will seek to contact the persons upon whom the Prosecution relied in its application for issuing a warrant of arrest ... and verify their allegations”.⁷⁹ In support of this argument, the appellant relies upon jurisprudence of Pre-Trial Chamber I,⁸⁰ the

⁷⁴ Additional Details, paragraphs 17-24.

⁷⁵ Additional Details, paragraphs 17 and 18.

⁷⁶ Additional Details, paragraph 24.

⁷⁷ Additional Details, paragraph 19.

⁷⁸ Additional Details, paragraph 20.

⁷⁹ Additional Details, paragraph 21.

⁸⁰ Additional Details, paragraph 22.

ECHR, the ICTY and national courts, to demonstrate that “a defendant is entitled to know the identities of the informants relied upon in support of an arrest warrant or detention order”.⁸¹

b. Arguments of the Prosecutor

36. The Prosecutor argues that many of the appellant’s submissions under this head are “either hypothetical, based on a false premise, or do not go to the issue on this appeal”.⁸² It is argued that “[r]egardless of whether Rule 81(2) could or could not be used, at this stage of the proceedings, to redact information which is potentially exculpatory, this argument does not fall within the scope of the issue certified for appeal” as none of the redactions authorised in the Impugned Decision concerned exculpatory material.⁸³ The Prosecutor further submits that the appellant’s arguments relating to the need to know the identity of witnesses whose statements were used in support of the warrant of arrest “are entirely speculative and, in the instant case, based on a false premise - none of the potential witnesses whose identities were redacted in the [Impugned] Decision were relied upon in any way in the application for a warrant of arrest against the Appellant”.⁸⁴

37. By reference to the jurisprudence of the Appeals Chamber, the Prosecutor argues that “the fact that the identity of a potential witness, like that of an actual witness, may be material to the preparation of the defence does not preclude the redaction of this information prior to the confirmation hearing”.⁸⁵ The Prosecutor submits that “the degree of impact [of the redactions] on the preparation of the defence is one of the factors that a Pre-Trial Chamber should consider and balance in deciding whether to authorize the redactions”.⁸⁶ It is argued that, at this stage of the proceedings, there is “no absolute priority of one interest over another. Rather, Rule 81(2) recognizes that there may be a conflict between obligations of disclosure and protection of investigations, grants the Prosecution the ability to withhold disclosure, and places a judicial check on this discretion”.⁸⁷

⁸¹ Additional Details, paragraph 23.

⁸² Response to the Additional Details, paragraph 20.

⁸³ Response to the Additional Details, paragraph 20.

⁸⁴ Response to the Additional Details, paragraph 20.

⁸⁵ Response to the Additional Details, paragraph 21.

⁸⁶ Response to the Additional Details, paragraph 22.

⁸⁷ Response to the Additional Details, paragraph 22.

3. *Extending the protection of rule 81(2) to prosecution sources would render the strict requirements of article 54(3)(e) nugatory*⁸⁸

a. *Arguments of the appellant*

38. The appellant submits that only on the basis of article 54(3)(e) may the Prosecutor, in exceptional circumstances and for the sole purpose of generating new evidence, agree with a source not to disclose information that was obtained on the condition of confidentiality.⁸⁹ It is submitted, however, that the Pre-Trial Chamber's "expansion of the scope of rule 81(2) so as to include prosecution sources would allow the Prosecution to circumvent the strict conditions of Article 54(3)(e)".⁹⁰ The appellant argues, by reference to the jurisprudence of the ICTY, that, if the Prosecutor's request for redactions is based on the refusal of potential witnesses otherwise to co-operate then, "the Prosecution may only use their information if, pursuant to article 54(3)(e), it was obtained on the condition of confidentiality and solely for the purpose of generating new evidence".⁹¹

39. The appellant contends that "[t]he entitlement to confidentiality under article 54(3)(e) applies only to information upon which the Prosecution does not intend to rely as evidence in the case. It does not apply to information upon which the Prosecution may rely as evidence, as is the case in respect of potential Prosecution witnesses. Potential Prosecution witnesses, therefore, do not enjoy protection under article 54(3)(e)".⁹² The appellant argues that "[t]he Prosecution should not be allowed to bypass article 54(3)(e), which is the principal provision concerning Prosecution sources, and grant protection to Prosecution sources, not meeting the criteria of article 54(3)(e), under article 81(2)".⁹³ It is argued that once the information provider consents to the use of the information as evidence, "he or she cannot impose conditions as to the timing of disclosure to the Defence, or the right of the Defence to be informed of the source of the information...".⁹⁴ The appellant submits that "[u]nder rule 81(2), on the other hand, any potential Prosecution witness may enjoy protection as long as their status of 'neither being a witness, nor being a non-witness' is not amended" by the Prosecutor;⁹⁵ and the agreement between the potential prosecution witness and the Prosecutor as to the status of the former

⁸⁸ Additional Details, paragraphs 25-32.

⁸⁹ Additional Details, paragraphs 25 and 26.

⁹⁰ Additional Details, paragraph 27.

⁹¹ Additional Details, paragraph 27.

⁹² Additional Details, paragraph 28.

⁹³ Additional Details, paragraph 28.

⁹⁴ Additional Details, paragraph 29.

⁹⁵ Additional Details, paragraph 30.

is not subject to the control of the Pre-Trial Chamber. The appellant contends that “the expansion of the scope of rule 81(2) so as to include prosecution sources has the effect to implicitly abrogate the powers of the Court in that it removes from the Pre-Trial Chamber the discretion to determine whether a Prosecution source must disclose his or her identity to the Defence and vests this discretion with the Prosecution source him or herself. Hence, it creates a privilege, which is not foreseen by either the Statute or the Rules...”⁹⁶ He submits that no one should be able to condition their co-operation with the Court on the basis of the non-disclosure of their identity to the Defence.⁹⁷

b. Arguments of the Prosecutor

40. The Prosecutor contests the arguments of the appellant under this head, submitting that the Pre-Trial Chamber conducted a “case-by-case analysis of the applications to protect the potential witnesses, as sources,” pursuant to the jurisprudence of the Appeals Chamber.⁹⁸ The Prosecutor argues that “[no] privilege has been created or discretion abrogated” by the terms of the Impugned Decision.⁹⁹ The Prosecutor submits that “[i]n contrast, the Appellant is asking the Appeals Chamber to declare in the abstract that no sources can be protected under Rule 81(2)”.¹⁰⁰ He further submits that there is no indication in the Impugned Decision that the Pre-Trial Chamber considered any agreement between the Prosecutor and the potential witness to be binding.¹⁰¹ The Prosecutor argues that, contrary to the submissions of the appellant, article 54(3)(e) is not the principal provision concerning prosecution sources. He submits that the protection of information under article 54(3)(e) is based upon the particular circumstances and purpose of its collection, whereas restriction on the disclosure of information under rule 81(2) is based upon whether disclosing that information may prejudice ongoing or further investigations, “which may arise for a range of reasons, and regardless of the circumstances of its collection”.¹⁰² The Prosecutor submits that, given the differences between the provisions, “the argument of the Appellant that Article 54(3)(e) is not intended to cover potential witnesses is irrelevant to the question of whether the Single



⁹⁶ Additional Details, paragraph 31.

⁹⁷ Additional Details, paragraph 32.

⁹⁸ Response to the Additional Details, paragraph 24.

⁹⁹ Response to the Additional Details, paragraph 25.

¹⁰⁰ Response to the Additional Details, paragraph 24.

¹⁰¹ Response to the Additional Details, paragraph 25.

¹⁰² Response to the Additional Details, paragraph 26.

Judge erred in holding that potential witnesses could be covered by the provision in issue, namely Rule 81(2)".¹⁰³

4. *Extending the protections of rule 81(2) to potential OTP witnesses contravenes the principle that there is no property in a witness (particularly a potential witness), and that utilising the materials provided by the Prosecutor pursuant to rule 77 or article 67(2) is a legitimate method for the Defence to conduct its investigations*¹⁰⁴

a. Arguments of the appellant

41. The appellant argues that "[i]n withholding the identities of potential witnesses from the Defence, the Prosecution has effectively deprived the Defence of the right to contact those persons".¹⁰⁵ It is submitted that the Defence has a real interest in contacting any person falling within the category of a potential prosecution witness, as such individuals must have useful information for the Defence as a result of their connection to the case against Mr. Katanga. Since they are not actual witnesses, the Defence should be entitled to contact them.¹⁰⁶ The appellant argues that the identities and identifying information of potential prosecution witnesses "fall under materials which would assist the Defence in its investigations and should, as such, be disclosed to the Defence pursuant to rule 77 or article 67(2)".¹⁰⁷ The appellant contends that it cannot be right "if one party is authorised to safeguard its investigations by means which frustrate the investigations of the other party".¹⁰⁸ Failure to provide the names of prosecution sources could affect the ability of the Defence to challenge fully prosecution evidence at the confirmation hearing.¹⁰⁹ The appellant recalls that "there is no property in a witness, particularly not a potential witness", and that if such a person is unwilling to speak to the Defence it is for that person, not the Prosecutor, to say so.¹¹⁰

b. Arguments of the Prosecutor

42. The Prosecutor's arguments under this head are the same as those set out above at paragraphs 36 and 37.

¹⁰³ Response to the Additional Details, paragraph 26.

¹⁰⁴ Additional Details, paragraphs 33-38.

¹⁰⁵ Additional Details, paragraph 33.

¹⁰⁶ Additional Details, paragraph 33.

¹⁰⁷ Additional Details, paragraph 34.

¹⁰⁸ Additional Details, paragraph 35.

¹⁰⁹ Additional Details, paragraph 36.

¹¹⁰ Additional Details, paragraph 37

5. *The fact that a person is a potential witness does not prejudice ongoing investigations if the Defence is not aware of that fact*¹¹¹

a. Arguments of the appellant

43. The appellant argues that “the mere fact that a name appears in a statement does not immediately put that person at risk” and that the Defence would not know that the person is a potential prosecution witness if that fact were not indicated by the Prosecutor.¹¹² The appellant proposes, as a compromise, that the identities of potential prosecution witnesses be disclosed to the Defence without disclosing their status in the Katanga trial, if the Appeals Chamber finds that rule 81(2) can be used to protect potential prosecution witnesses. The Defence could then contact them and neither the investigations of the Defence, nor those of the Prosecutor, would be prejudiced.¹¹³

b. Arguments of the Prosecutor

44. The Prosecutor argues that the fact that an individual is a potential witness may often be readily inferred from the context of the statement and that risks to investigations must be assessed on a case-by-case basis. The Prosecutor submits that, in the instant case, the Pre-Trial Chamber set out the principles to be applied before authorising any redaction, including considering whether any less intrusive alternative measures could be taken. It is argued that “[t]he potential availability of other measures to avoid some risks, in certain instances, does not demonstrate any error on the part of the Single Judge and is irrelevant to this appeal”.¹¹⁴

D. Determination by the Appeals Chamber

45. The issue before the Appeals Chamber was framed by the Pre-Trial Chamber as follows:

“whether the Single Judge enlarged the scope of application of rule 81(2) of the Rules by considering as Prosecution sources those individuals - whose identity and identifying information could be redacted pursuant to the said rule - who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution”.



¹¹¹ Additional Details, paragraphs 39-40.

¹¹² Additional Details, paragraph 39.

¹¹³ Additional Details, paragraph 40.

¹¹⁴ Response to the Additional Details, paragraph 28.

46. The Appeals Chamber notes that, contrary to the impression that could be gained from the manner in which the issue was framed, the term "Prosecution sources" is not one that is used in rule 81(2), or indeed elsewhere in the Statute or the Rules. The Appeals Chamber is therefore not considering whether people who have been or are about to be interviewed by the Prosecutor can be classified as "Prosecution sources" as such. The issue before the Appeals Chamber is rather whether the non-disclosure of the identities and identifying information of 'potential prosecution witnesses' can, in principle, be sought and, if appropriate, granted pursuant to rule 81(2).¹¹⁵ The Appeals Chamber answers that question in the affirmative, for the reasons set out below.

47. Rule 81(2) provides:

"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. The matter shall be heard on an ex-parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused".

48. The Appeals Chamber recalls that the Pre-Trial Chamber concluded that further or ongoing investigations of the Prosecutor could be prejudiced if potential prosecution witnesses were to be threatened, intimidated or interfered with.¹¹⁶

49. The Appeals Chamber accepts that further or ongoing investigations may be prejudiced if potential prosecution witnesses are interfered with in a manner that could lead to them being unable to co-operate further with the Prosecutor. As such, if it can be demonstrated by the Prosecutor that the disclosure of the identities and identifying information of such individuals to the Defence could lead to the intimidation of or interference with such individuals, further or ongoing investigations could be prejudiced. In such a situation, the Pre-Trial Chamber would need to rule, pursuant to rule 81(2), whether the specific information had to be disclosed to the Defence in all the circumstances of the case.



¹¹⁵ Potential prosecution witnesses are defined at paragraph 21 above ("Potential prosecution witnesses are individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses").

¹¹⁶ Impugned Decision, paragraph 42.

50. The difficulty in cases of this nature was correctly pointed out by the Pre-Trial Chamber in its decision granting leave to appeal, wherein the Pre-Trial Chamber held:

“... those individuals who have been interviewed or are about to be interviewed by the Prosecution, and who have not yet become Prosecution witnesses, may have valuable information concerning the case at hand; ... as they have not yet become Prosecution witnesses, the Defence may have an interest in contacting them; and ... the redaction of their identities and identifying information would prevent the Defence from contacting them for the purpose of the preparation of the confirmation hearing”.¹¹⁷

51. The above paragraphs demonstrate the underlying tension that may arise in situations of this nature. The interests in protecting the investigations of the Prosecutor may conflict with the interests of the Defence in having full disclosure of the information contained within the statements upon which the Prosecutor intends to rely at the hearing to confirm the charges.

52. For the reasons expressed below, that underlying tension does not lead the Appeals Chamber to conclude that redactions on the basis under consideration cannot be permitted in principle. The Appeals Chamber instead concludes that the correct approach in such circumstances is for the Pre-Trial Chamber to rule on a case-by-case basis, pursuant to rule 81(2), where the balance of interests lies on the facts of a specific application for non-disclosure. This is consistent with the wording of rule 81(2) itself which requires the Prosecutor to apply to the relevant Chamber to rule upon whether information, the disclosure of which may prejudice further or ongoing investigations, must be disclosed to the Defence.

53. The essence of the case of the appellant is that the non-disclosure of the type of information under consideration in this appeal can never be permitted. However, the Appeals Chamber does not find that the provisions and general arguments upon which the appellant relies support this conclusion.

54. In the Document in Support of the Appeal, the appellant argued that rule 87, as opposed to rule 81(2), applied to the present situation and that, by adopting rule 87, the drafters indicated that an order for confidentiality between the parties would suffice to protect those persons under consideration in this appeal.¹¹⁸ The Appeals Chamber accepts that requests for protective measures in relation to those at risk on account of testimony

¹¹⁷ ICC-01/04-01/07-116, page 6.

¹¹⁸ Document in Support of the Appeal, paragraph 32, summarised at paragraph 28 above.

given by a witness pursuant to rule 87 may only be made on an *inter partes* basis. 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. However, the Appeals Chamber notes that rule 81(2), which deals specifically with applications for non-disclosure in circumstances where disclosure may prejudice further or ongoing investigations, provides expressly for *ex parte* applications to be made. Furthermore, the Appeals Chamber notes that rule 87 applies equally to requests for protective measures by victims and witnesses which, pursuant to that rule, can also only be made on an *inter partes* basis. However, in relation to applications for non-disclosure of the identity of victims and witnesses prior to the commencement of the trial, *ex parte* applications can be made pursuant to rule 81(4). The fact that *ex parte* applications cannot be made in relation to protective measures pursuant to rule 87 therefore neither prevents such applications from being made in relation to non-disclosure pursuant to rule 81 nor demonstrates that the drafters believed that an order for confidentiality between the parties would always be sufficient in relation to the situation under consideration in this appeal.

55. The appellant further argued in his Additional Details that applying rule 81(2) to potential prosecution witnesses would render the requirements of article 54(3)(e) of the Statute nugatory.¹¹⁹ However, the Appeals Chamber is not persuaded that the Impugned Decision allows the Prosecutor “to circumvent the strict conditions of Article 54(3)(e)”¹²⁰ or creates a privilege, not foreseen in the Statute or the Rules, for potential prosecution witnesses to set conditions upon which they are willing to co-operate.¹²¹

56. This argument of the appellant is premised upon the assertion that an agreement between a potential prosecution witness and the Prosecutor would not be subject to the control of the Pre-Trial Chamber and “removes from the Pre-Trial Chamber the discretion to determine whether a Prosecution source must disclose his or her identity to the Defence and vests this discretion with the Prosecution source him or herself”.¹²² The Appeals Chamber re-emphasises that this appeal concerns whether the Prosecutor can, in principle, apply to the Pre-Trial Chamber pursuant to rule 81(2) for the non-disclosure of identifying information of potential prosecution witnesses that is contained within the statement of a witness upon whom the Prosecutor intends to rely at the hearing to confirm the charges. Without prior authorisation from the Pre-Trial Chamber, the Prosecutor would be obliged

¹¹⁹ Additional Details, paragraphs 25-32, summarised at paragraphs 38 and 39 above.

¹²⁰ Additional Details, paragraph 27.

¹²¹ Additional Details, paragraph 31.

¹²² Additional Details, paragraphs 30-32.

to disclose this information pursuant to rule 76(1). Rule 81(2) constitutes an exception to this general rule,¹²³ which requires the Prosecutor to make an application to the Pre-Trial Chamber to authorise the redaction of information on the grounds that its disclosure may prejudice further or ongoing investigations. This situation therefore specifically requires a judicial determination as to whether the Prosecutor is permitted to withhold such information. Any agreement that may have been entered into between the Prosecutor and the person concerned will not in any way bind the Pre-Trial Chamber in its determination, which will be based solely upon the facts of an individual application. The situation is therefore different from that provided for in article 54(3)(e) of the Statute, which itself is separately regulated by rule 82 and concerns information obtained on the condition of confidentiality and “solely for the purpose of generating new evidence”. Unlike the information under consideration in the present appeal, the Prosecutor may agree not to disclose material obtained under article 54(3)(e) of the Statute for the purpose of generating new evidence unless the provider of the information consents.

57. Furthermore, the Appeals Chamber is not persuaded by the argument of the appellant, in the context of the present appeal, that rule 81(2) can never apply to information which is relevant to the Defence or potentially exculpatory at the stage of the proceedings prior to the hearing to confirm the charges.¹²⁴ The Appeals Chamber notes that the Prosecutor asserts that none of the identifying information in the current case was exculpatory. The Appeals Chamber determines that a thorough assessment will need to be made by the Pre-Trial Chamber of the potential relevance of the information to the Defence on a case-by-case basis. If the information is relevant or potentially exculpatory, the balancing exercise performed by the Pre-Trial Chamber between the interests at stake will require particular care. However, in principle, rule 81(2) applies to information “which must be disclosed in accordance with the Statute”. While exculpatory material must be disclosed pursuant to article 67(2) of the Statute, the Appeals Chamber does not accept that applications to withhold potentially exculpatory material at the stage of the proceedings prior to the hearing to confirm the charges cannot, in principle, be made pursuant to rule 81(2) on the basis of the plain reading of the terms of that provision quoted above. The Appeals Chamber has also not been persuaded by the authority relied upon by the appellant to make the argument addressed in this paragraph.¹²⁵ The Appeals

¹²³ See rule 76(4).

¹²⁴ Additional Details, paragraphs 17-24, summarised at paragraphs 34 and 35 above.

¹²⁵ *Prosecutor v. Brdanin and Talic*, ‘Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002’, IT-99-36-T, 23 May 2002, paragraphs 18-21.

Chamber notes that the authority relied upon was decided prior to an amendment to the Rules of Procedure and Evidence that apply to the ICTY. The current version of those Rules contains a specific provision permitting the Prosecutor to apply to the Chamber to be relieved from an obligation to disclose exculpatory material to the Defence if its disclosure may prejudice further or ongoing investigations.¹²⁶

58. Moreover, the Appeals Chamber does not accept the argument of the appellant that the Impugned Decision results “in a risk determination per category rather than per individual and creates a blanket privilege for the Prosecution”.¹²⁷ The Appeals Chamber finds that the correct approach is to analyse any individual application for non-disclosure on a case-by-case basis – an approach that was adopted by the Pre-Trial Chamber in the instant case. The Appeals Chamber recalls that, in the Impugned Decision, the Pre-Trial Chamber specifically affirmed that for any redaction in any given statement to be authorised, the requirements set out by the Appeals Chamber in this context must be met.¹²⁸ The Impugned Decision proceeded to examine each of the redactions sought individually.¹²⁹ No question of a blanket privilege arises. Each application for non-disclosure, and each specific request for an individual redaction, must be individually examined.

59. Indeed, many of the arguments raised by the appellant in this context are more relevant to how the Pre-Trial Chamber should proceed when determining an individual application than to the principle of whether such redactions can be sought at all. In this context, the Appeals Chamber refers to its previous jurisprudence, in which it has 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, *mutatis mutandis*, in the current case, which can be summarised briefly as a thorough consideration of the danger that the disclosure of the information may cause; the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to avoid prejudice to the investigations of the Prosecutor; and the fact that any measures taken shall not be prejudicial to or inconsistent

¹²⁶ Rule 68 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia. IT/32/Rev. 40, 12 July 2007.

¹²⁷ Additional Details, paragraph 11.

¹²⁸ See paragraph 4 of the Impugned Decision and paragraph 25 above.

¹²⁹ Impugned Decision, paragraph 43.

with the rights of the accused and a fair and impartial trial.¹³⁰ Further guidance on the application of these principles has been given in the Appeals Chamber's "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", which is also being delivered today, at paragraphs 68 to 73. Any such guidance must be interpreted flexibly to allow for a factual determination in relation to each specific application. It must also be seen in light of the Appeals Chamber determining this appeal in the context of non-disclosure that may be made prior to the confirmation hearing, as opposed to prior to trial.

60. By reference to the above guidance, in the type of situation under consideration in the present appeal, the Pre-Trial Chamber would need to consider whether there was an objectively justifiable risk of prejudice to the investigations and whether any such risk would arise from disclosing the particular information to the Defence. In circumstances in which an alleged fear "is completely hypothetical"¹³¹ or where there is no factual basis to conclude that any risk arises out of disclosure to the Defence of the identifying information of potential prosecution witnesses,¹³² the Pre-Trial Chamber would not, without more, authorise the redaction sought. In addition, the argument of the appellant that the fact that a person named in a witness statement is a potential prosecution witness would not prejudice ongoing investigations if the Defence were not aware of that fact¹³³ would need to be examined by the Pre-Trial Chamber on the merits of an individual application.

61. Furthermore, whether other means are available to the Prosecutor to safeguard the investigations¹³⁴ also needs to be examined by the Pre-Trial Chamber on a case-by-case basis.

62. The relevance of the information to the Defence is another important consideration. In the present appeal, the Prosecutor asserts, in response to arguments of the appellant on this point, that none of the potential witnesses whose identities were redacted in the Impugned Decision were relied upon in any way in the application for a warrant of arrest

¹³⁰ 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.

¹³¹ Additional Details, paragraph 13.

¹³² Additional Details, paragraph 13.

¹³³ Additional Details, paragraphs 39-40, summarised at paragraph 43 above.

¹³⁴ Additional Details, paragraph 15.

against the appellant.¹³⁵ More generally, the relevance of any individual potential prosecution witness to the Defence would need to be carefully assessed. The Appeals Chamber agrees with the appellant that, in principle, the Defence is entitled to contact persons who the Prosecutor either has interviewed or is about to interview prior to their becoming prosecution witnesses and recognises that such persons may have information which is potentially relevant to the Defence. In such circumstances, the assessment carried out by the Pre-Trial Chamber in deciding whether or not to authorise any particular redaction will necessarily take this factor into account.

63. More generally, 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. In addition, adequate procedural safeguards should be in place to ensure that the interests of the Defence are protected so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms.

64. Even if non-disclosure is authorised, this determination must be kept under review and altered should changed circumstances make that appropriate. In this regard, the Prosecutor should assist the Pre-Trial Chamber by bringing to its attention factors that may cause it to reconsider its ruling on non-disclosure. 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.

65. For the above reasons, the Appeals Chamber concludes that, while the Prosecutor may apply to the Pre-Trial Chamber for a ruling as to whether the identities and identifying information of potential prosecution witnesses may be withheld from the Defence prior to the hearing to confirm the charges, whether any such application will be granted will require a careful assessment on a case-by-case basis.

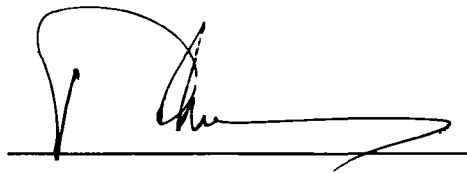
¹³⁵ Response to the Additional Details, paragraph 20.

V. APPROPRIATE RELIEF

66. The Appeals Chamber, pursuant to rule 158(1), confirms the decision of the Pre-Trial Chamber that redactions relating to the identities and identifying information of potential prosecution witnesses, to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the hearing to confirm the charges, can, in principle, be made so as to avoid prejudicing further or ongoing investigations pursuant to rule 81(2).

Judge Pikis appends two dissenting opinions to this judgment, one in relation to the order of 24 January 2008 and the other on the merits of the appeal.

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

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a series of loops and a long horizontal stroke ending in a small flourish.

Judge Philippe Kirsch

Presiding Judge

Dated this 13th day of May 2008

At The Hague, The Netherlands

Dissenting opinion of Judge Pikis in relation to the order of 24 January 2008

(ICC-01/04-01/07-164)

1. Pre-Trial Chamber I¹ set down the following issue for determination by the Appeals Chamber, “whether the Single Judge enlarged the scope of application of rule 81 (2) of the Rules of Procedure and Evidence by treating as Prosecution sources those individuals – whose identity and identifying information could be redacted pursuant to the said rule – who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution.”²

2. The appealable issue arises from and is defined by reference to the decision³ of the Pre-Trial Chamber authorising the redaction of the names of certain persons referred to in witnesses’ statements in the possession of the Prosecutor. In the exercise of the powers vested in the Pre-Trial Chamber by rule 81 (2) of the Rules of Procedure and Evidence⁴, the Pre-Trial Chamber treated persons referred to in witnesses’ statements as “prosecution sources”, seemingly adopting the Prosecutor’s description as “potential witnesses”, the disclosure of whose identity might interfere with or hamper the investigations of the Prosecutor. The Single Judge dismissed the submission of the Prosecutor that the redaction of the names of the aforesaid persons could find justification in rule 81 (4) of the Rules inasmuch as the persons in question could not be treated as witnesses or assimilated to them.⁵ The issue raised for consideration by the Appeals Chamber is whether by authorising the redactions in question the Pre-Trial Chamber unjustifiably extended the range of application of rule 81 (2) of the Rules. The question then is whether the Pre-Trial Chamber exceeded its powers, given that the persons whose identity will be concealed are not witnesses for the purposes of the confirmation hearing.

¹ Hereinafter referred to as Pre-Trial Chamber.

² *Prosecutor v. Katanga* “Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions” 19 December 2007 (ICC-01/04-01/07-116), page 7.

³ *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)

⁴ Hereinafter referred to as “the Rules”.

⁵ *Prosecutor v. Katanga* “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” 7 December 2007 (ICC-01/04-01/07-90), paras 39 and 40.



3. In his document in support of the appeal⁶, the appellant advanced a number of grounds that expose, in his submission, the decision of the Pre-Trial Chamber to allow the redactions as erroneous and for that reason reversible by the Appeals Chamber. The appellant contended that there is no power to engage in the exercise upon which the Pre-Trial Chamber embarked because, *inter alia*, the names of potential witnesses do not constitute “material”, disclosure of which could be withheld under rule 81 (2) of the Rules, while such “prosecution sources” as to the facts of the case are of equal use and relevance to the person under investigation or to the accused.⁷ Witness protection can be sought only under the provisions of rule 81 (4) of the Rules; no other alternative is available to pursue such a course. Rule 81 (2) of the Rules affords no such option.⁸ According to the appellant, withholding the names of the persons in question may prejudice the fairness of the proceedings.⁹

4. The Prosecutor supported the decision of the Pre-Trial Chamber as validly taken under rule 81 (2) of the Rules.¹⁰ Furthermore, he disputed the relevance of a number of grounds and arguments in support of the appeal advanced by the appellant based, in his submission, on a misapprehension of the issue raised for determination.¹¹

5. Shortly after he received the response of the Prosecutor, the appellant made an application¹² seeking “leave to provide additional details and authorities” in support of his position acknowledging¹³ therein that many of the arguments advanced in his document in support of the appeal are based on a misconception of the precise issue set down as the subject of appeal. Perusal of the application reveals that the appellant under the guise of supplying “further details” in support of his grounds of appeal seeks to introduce new grounds, not touched upon or even hinted at in his document in support of the appeal. In the closing part of his application, the appellant specifies what may legitimately be

⁶ *Prosecutor v. Katanga* “Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” 2 January 2008 (ICC-01/04-01/07-132).

⁷ *Ibid.*, paras 10, 22

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, para. 25

¹⁰ *Prosecutor v. Katanga* “Prosecution’s Response to the Defence Appeal Brief concerning Document in Support of Appeal against the First Decision on Redaction of Witness Statements” 14 January 2008 (ICC-01/04-01/07-142).

¹¹ *Ibid.*, paras 1, 8 and 9.

¹² *Prosecutor v. Katanga* “Defence Application to Request Leave to Provide Additional Details and Authorities on the ‘Public Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’” 18 January 2008 (ICC-01/04-01/07-150).

¹³ *Ibid.*, para. 2.

identified as five new grounds of appeal¹⁴ he intends to put forward, if allowed to supplement his grounds and arguments in support of his cause.

6. The application is premised on the provisions of regulation 28 of the Regulations of the Court¹⁵, on sub-regulation 1 as may be inferred from the nature of the relief sought. The Prosecutor opposes¹⁶ the application on two grounds. Firstly, because regulation 28 does not confer on a litigant a right to either clarify or add further details to his appeal. Regulation 28 (1) merely empowers the Chamber itself to seek clarification of the position of a party or ask for further details of his position on a matter at issue. Secondly, what is sought by the application is neither the clarification nor the supply of details to his grounds of appeal, but to amend and supplement them in a substantive way.¹⁷

7. Indisputably the application of the appellant was prompted by the response of the Prosecutor to the document in support of the appeal. And as the appellant has no right to reply, as authoritatively pronounced in the case *Prosecutor v. Lubanga*¹⁸ and reiterated on a prior occasion in the case in hand,¹⁹ regulation 28 was invoked to overcome the hurdles in his way.

8. The appellant did not have recourse to regulation 61 of the Regulations of the Court, entitling the Appeals Chamber to approve in a proper case a variation of the grounds of appeal, possibly because he took the view that regulation 61 is inapplicable to appeals under rule 155 of the Rules. Whether that is so or not is not a matter arising for

¹⁴ *Ibid*, para. 30: "If leave is given, the Defence will be in a position to submit arguments and case law to the effect that: - disclosure to the defence of information or statements from potential Prosecution witnesses does not *ipso facto* prejudice Prosecution investigations, and as such, does not in itself, trigger the protection of Rule 81(2), - Rule 81 (2) should not apply to information which is relevant to the preparation of the defence, or potentially exculpatory; - extending the protection of Rule 81(2) to prosecution sources would render the strict requirements of Article 54(3)(e) nugatory; - extending the protections of Rule 81(2) to potential OTP witnesses contravenes the principle that there is no property in a witness (particularly a potential witness), and that utilising the materials provided by the Prosecution pursuant to Rule 77 or Article 67(2) is a legitimate method for the defence to conduct its investigations – particular in circumstances in which it is difficult for the defence to conduct lengthy or comprehensive investigations on the ground due to the limited time before the confirmation hearing, and the security situation in the DRC – however to interview these persons the Defence needs their identities; - the fact that a person is a potential witness would not prejudice ongoing if the defence is not aware of the fact that the person is a potential witness. (i.e. the mere fact that a person is referred to in a statement does not in itself put the defence on notice that this person is a potential OTP or actual OTP witnesses)."

¹⁵ Regulation 28 of the Regulations of the Court is hereinafter referred to as "Regulation 28".

¹⁶ *Prosecutor v. Katanga* "Prosecution's Response to the Defence Application to Request Leave to Provide Additional Details and Authorities on the "Public Defence Appeal Brief concerning the First Decision on the Prosecution Request for Authorization to Redact Witness Statements"" 22 January 2008 (ICC-01/04-01/07-154).

¹⁷ *Ibid.*, para 10.

¹⁸ *Prosecutor v. Lubanga* "Decision on the Prosecutor's 'Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur'" 12 September 2006 (ICC-01/04-01/06-424).

¹⁹ *Prosecutor v. Katanga* "Decision on the Prosecution's Request for Leave to Reply" 18 January 2008 (ICC-01/04-01/07-148).

consideration in these proceedings and nothing said herein is meant to provide an answer to that question.

9. The issue under consideration is whether regulation 28, paragraph 1 in particular, confers a right on the appellant to provide clarifications of his position or additional details of the document in support of the appeal. Regulation 28 does not explicitly or implicitly confer such a right. The right or authority to seek clarifications or further particulars of the grounds raised in support of the appeal lies with the Chamber. The word “clarification” denotes nothing other than what the word ordinarily signifies, namely shedding light on what is obscure, complex or, on the face of it, incomprehensible.²⁰ The Chamber can seek clarification of nebulous propositions and arguments. “Detail” is also a word with a settled meaning,²¹ importing in the context of regulation 28 the notion of “particulars” exemplifying or illustrating the application of a statement or proposition. The Chamber may seek “additional” details, i.e. further particulars documenting the argument(s) advanced. The need for clarifications can only arise if the court considers it necessary to elicit an obscurity or a proposition of doubtful purport in the document itself. If not, no question of clarification could arise. The same applies with regard to details. The need for exemplification of a given argument or proposition must be sensed by the court itself. Where such need was felt, as in the case *Prosecutor v. Lubanga* “Decision on the Appellant’s application for an extension of the time limit for the filing of the document in support of the appeal and order pursuant to regulation 28 of the Regulations of the Court”²², clarifications and further details were sought by the Appeals Chamber.

10. Even if it were permissible for a party to clarify the position advanced or provide further details to the document in support of the appeal, the application would not be sustainable either in whole or in part, since what the appellant endeavours to do is neither to clarify nor exemplify his position but to amend his appeal and in a substantial way at that.

²⁰ See e.g. Shorter Oxford Dictionary, A-M, page 419.

²¹ See e.g. Shorter Oxford Dictionary, A-M, page 657.

²² *Prosecutor v. Lubanga*, “Decision on the Appellant’s application for an extension of the time limit for the filing of the document in support of the appeal and order pursuant to regulation 28 of the Regulations of the Court 30 May 2006 (ICC-01/04-01/06-129).



11. In “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”²³, the following was said with regard to the emergence of a right of appeal from the exercise of the powers of the Pre-Trial Chamber under article 82 (1) (d) to certify one or more appealable issues for consideration by the Appeals Chamber:

“Article 82 (1) (d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord. If it fails to address the appealability of an issue it may do so on the application of any party to the proceedings. It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it.”

What emerges from the above is that if a right is conferred (on a party) contingent on a decision of the Court, as is the case with article 82 (1) (d), and the Court does not address the issue, a party may ask the Court to do so. In fact in the case of article 82 (1) (d), the Rules of Procedure and Evidence lay down the procedure for invoking the jurisdiction of the Court in the matter (see rule 155 of the Rules). In contrast, no right can accrue to a party from the exercise of the power acknowledged to the Court under regulation 28 (1) either from a decision to seek or not to seek clarification or elaboration of the position of a party. Not seeking clarifications or exemplification of the position of a party does not involve or entail the issuance of an order or a decision of the Court. If the non-seeking of clarifications by the Court signifies anything, it is that the position of the party on the issues raised on appeal is well understood.

12. In conclusion, I regard the application as groundless and as such it should be dismissed.

²³ *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 20.



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

Dissenting opinion of Judge Pikis on the merits

1. The question requiring resolution is whether the Pre-Trial Chamber (its jurisdiction on the matter being exercised by a Single Judge) justifiably allowed, pursuant to the provisions of rule 81 (2) of the Rules of Procedure and Evidence¹, redaction of the names of certain persons referred to in witnesses' statements.² These persons, "despite not being Prosecution witnesses for the purpose of the confirmation hearing have been or are about to be interviewed by the Prosecution", as stated in the issue raised for determination. In its judgment, the Pre-Trial Chamber categorises these persons as "Prosecution sources", disclosure of whose identity through the non-editing of witnesses' statements would prejudice further or ongoing investigations.³ Consequently, the Pre-Trial Chamber authorised the deletion of their names from the statements of the aforesaid witnesses deeming, as may be gathered, the measure necessary for their protection.⁴

2. The term "Prosecution sources" was used in the majority judgment of the Appeals Chamber in *Prosecutor v Lubanga*⁵ in the context of examination of the admissibility of such redactions from statements of witnesses. The use of the term "Prosecution sources" in the present case is not a happy one considering that what is sought to be deleted from the statements are the names and details identifying certain persons named therein. The primary meaning of the word "source" given in Black's Law Dictionary is "the originator or primary agent of an act, circumstance"⁶. The definition of the same word in the Shorter Oxford Dictionary, relevant to our inquiry, is to the same effect: "a person who or thing which is the chief or prime cause of a specified condition, quality, emotion etc"⁷. The

¹ Hereinafter referred to as "the Rules."

² *Prosecutor v Katanga*, "Prosecution's Response to Defence Additional Details on the "Defence Appeal Brief concerning Document in Support of Appeal against the First Decision on Redaction of Witness Statements" 8 February 2008 (ICC-01/04-01/07-189).

³ *Prosecutor v Katanga*, "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 7 December 2007, (ICC-01/04-01/07-90), para 41.

⁴ The decision on the request for redaction is under seal and no reference shall be made to it other than recounting the outcome that gave rise to the certification of the appealable issues. To the same result reference is made by the Prosecutor in "Prosecution's Response to Defence Additional Details on the "Defence Appeal Brief concerning Document in Support of Appeal against the First Decision on Redaction of Witness Statements", 8 February 2008 (ICC-01/04-01/07-189), para 11. See also *Prosecutor v Germain Katanga*, "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 7 December 2007, (ICC-01/04-01/07-90), para 42.

⁵ *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).

⁶ 8th ed., (USA, 2004), p. 1429.

⁷ 5th ed. Volume 2, p. 2931.

persons, whose names were sought to be erased from the statements of witnesses to be disclosed to the defence were at best prospective witnesses.

3. The interpretation of rules 81 (2) and 81 (4) and the identification of their parameters and ambit, were at issue in *Prosecutor v Lubanga*⁸. The judgment of the Appeals Chamber was unanimous resulting in the setting aside of the impugned decision for lack of reasoning. The majority view with regard to the purport and ambit of rule 81 (2) is encapsulated in the following paragraph:

“63. As to the second issue raised under the third ground of appeal, the Appeals Chamber, by majority, considers that in light of the insufficient reasoning in relation to the redactions authorized under rule 81 (2) of the Rules of Procedure and Evidence in the Impugned Decision, the Appeals Chamber is unable to determine conclusively whether information relevant to the sources of the Prosecutor covered by the Impugned Decision could be redacted pursuant to rule 81 of the Rules of Procedure and Evidence. Whether a source can be protected under these provisions has to be analysed on a case-by-case basis and cannot be decided in the abstract.”

In my separate opinion I adverted to the interpretation of rule 81 (2). The passage cited below summarises my views on the matter:

“16. A piece of evidence like a witness statement or information is a unified entity that cannot be pierced. It cannot be fragmented because it entails alteration of or detracting from its content. Rule 81 (2) of the RPE makes no provision for partial disclosure of a set piece of evidence or information. Unambiguously, it provides that where disclosure of evidence or information is likely to prejudice further or ongoing investigations, the court may authorize its non-disclosure. There is no halfway house allowing the disclosure of parts of the evidence or information through a process of redaction of its content. The price of non-disclosure is prohibition of the use of the evidence in court proceedings, a fetter that may subsequently be removed by adequate prior disclosure.”

⁸ *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).

Previous decisions of the Court are an independent source of law, a species of applicable law under the provisions of article 21 (2) of the Statute. The concept of a judicial decision embraces the reasons founding it- the *raison d' être* of the judgment made. Stripped of its reasoning, the decision is denuded of its essence. Where more lines of reasoning than one underlie a decision, every aspect of it forms part of the judgment, especially when the minority reasoning does not explicitly conflict with the majority reasoning. In the case of *Prosecutor v Lubanga*⁹ there is no such conflict between the majority and the minority reasoning. I am not exploring in this case the value, significance or consequence of judicial precedent. All I do is draw attention to the provisions of article 21 (2), which lays down that previous decisions of the Court *are* a source of law that may find application in relation to “principles and rules of law as interpreted in its previous decisions”.

The decision of the Appeals Chamber in *Prosecutor v Lubanga*¹⁰ concentrates on the interpretation of rule 81 (4). It sheds no light as such on the interpretation of Rule 81 (2).

4. Revisiting rule 81 (2), I am reassured of the correctness of the construction and interpretation accorded to it in my separate opinion in *Prosecutor v Lubanga*¹¹. The object of rule 81 (2) is to relieve, under the specified circumstances, the Prosecutor from the duty cast upon him by the Statute to disclose to the Defence material or information in his possession. Such material or information, as explained in *Prosecutor v Lubanga*¹², is evidential matter that the Prosecutor has a duty to disclose to the Defence. A witness statement constitutes such material and information. What he is bound to disclose, is the statement itself, not a part of it, or the statement in a varied form. Rule 81 (2) defines the circumstances under which the Prosecutor may be excused from disclosing the statement itself to the Defence.

5. Excuse from the discharge of this duty can be provided if disclosure “may prejudice further or ongoing investigations”. It is the obstruction that disclosure may cause to the

⁹ *Ibid*

¹⁰ *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).

¹¹ *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).

¹² *Ibid*



investigation as such that may legitimise non-disclosure, as may be the case where disclosure would reveal the lead or leads of an investigation.

6. The object of rule 81 (2) is not to establish a process for the protection of victims, witnesses or confidential information. This is another dimension of the subject under consideration concerning the interpretation of rule 81 (2) not directly explored on any previous occasion. The protection of the aforementioned classes of persons and of confidential information are specifically dealt with by rule 81 (3) and rule 81 (4). Authority for the protection of victims and witnesses is conferred by article 68 (5) of the Statute to the dictates of which rule 81 (4) is fashioned. The withholding of confidential information, likewise attuned to the relevant provisions of the Statute (articles 54, 72 and 93), is also the subject of regulation under rule 81 (4). What constitutes confidential information is specified by the Statute. The relevant provisions of the Statute respecting both witnesses' and victims' protection and the withholding of confidential information, clear as they are in their meaning, are exhaustive of the parameters of both subjects. The relevance, if any, of decisions of the European Court of Human Rights,¹³ on anonymity of witnesses for the sake of their protection and the withholding of information on grounds of national security, lies in the delineation of the ambit of rule 81 (4). Such decisions concern, in the main, applications directed against the United Kingdom affecting the compatibility of the relevant English legislation with the requisites of a fair trial safeguarded by article 6 (1) of the European Convention on Human Rights¹⁴.

7. The issue raised for determination in this appeal is "...whether the Single Judge enlarged the scope of application of rule 81 (2) of the Rules by considering as Prosecution sources those individuals –whose identity and identifying information could be redacted



¹³ See *Rowe and Davis v the United Kingdom*, Application No. 28901/95, judgment of 16 February 2000-II, paras 60-62, *Jasper v United Kingdom*, Application No. 27052/95, judgment of 16 February 2000, unreported, *Fitt v the United Kingdom*, Application No. 29777/96, judgment of 16 February 2000, *P G and J.H v the United Kingdom*, Application No. 44787/98, ECHR 2000-IX, judgment of 25 September 2001, *Edwards and Lewis v the United Kingdom*, Application Nos 39647/98, judgment of 27 October 2004, *Botmeh and Alami v the United Kingdom*, Application No. 15187/03, judgment of 7 June 2007. Relevant to the subject is also the recent decision of the House of Lords in *Secretary of State for the Home Department v MB*, 1 All ER 657-[2007] UKHL 46.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

pursuant to the said rule – who, despite not being Prosecution witnesses for the purpose of the confirmation hearing, have been or are about to be interviewed by the Prosecution.”¹⁵

In light of the foregoing, I answer the question raised in the affirmative. The Pre-Trial Chamber *did* enlarge “the scope of application of rule 81 (2) of the Rules...” by sanctioning the redaction of information identifying persons named in witnesses’ statements. In consequence, the decision of the Pre-Trial Chamber on the issue raised for determination by the Appeals Chamber is judged to be wrong and, as such, liable to be reversed and so I would order.

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

A handwritten signature in black ink, consisting of a stylized 'G' followed by a horizontal line and a small dot, positioned above a solid horizontal line.

Judge Georghios M. Pikis

Dated this 13th day of May 2008

At The Hague, The Netherlands

¹⁵ *Prosecutor v Katanga*, “Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions” 19 December 2007 (ICC-01/04-01/07-116).