

1 International Criminal Court

2 Appeals Chamber

3 Situation Democratic Republic of the Congo - ICC-01/04-01/07

4 Judgement - Open Session

5 Tuesday, 13 May 2008

6 The hearing starts at 10.05 a.m.

7 COURT USHER: All rise. The International Criminal Court is now
8 in session. Please be seated.

9 PRESIDING JUDGE KIRSCH: Would the Court Officer please call the
10 case.

11 THE REGISTRAR: The Appeals Chamber, Presiding Judge Philippe
12 Kirsch, Judge Georgios Pikis, Judge Navanethem Pillay, Judge Sang-Hyun
13 Song, and Judge Erkki Kourula sitting today in the Situation in the
14 Democratic Republic of the Congo, case of The Prosecutor against Germain
15 Katanga and Mathieu Ngudjolo Chui, case of ICC-01/04-01/07.

16 PRESIDING JUDGE KIRSCH: Would counsel for the Prosecution please
17 introduce himself, herself, and his and her team.

18 MR. GUARIGLIA: Good morning, your Honours. Fabricio Guariglia,
19 Senior Appeals Counsel, for the Office of the Prosecutor, appearing
20 together with Eric MacDonald, Senior Trial Lawyer; and Mr. Ben Batros,
21 Associate Appeals Counsel.

22 PRESIDING JUDGE KIRSCH: I note that Mr. Germain Katanga is
23 present. I note that counsel for Mr. Germain Katanga is not present.
24 Would the representative of the Defence please introduce herself and her
25 team.

1 MS. BUISMAN: Good morning, your Honours. I'm Caroline Buisman.
2 I'm the Legal Assistant on the team for Germain Katanga, and I'm here
3 with Sophie Menegon, our case manager. Thank you very much.

4 PRESIDING JUDGE KIRSCH: Thank you. Today the Appeals Chamber
5 delivers two judgements in the case against Mr. Katanga concerning the
6 disclosure of evidence prior to the hearing to confirm the charges. The
7 first is the judgement on the appeal of the Prosecutor against a decision
8 of the Pre-Trial Chamber of the 3rd of December, 2007, entitled First
9 Decision on the Prosecution Request for Authorisation to Redact Witness
10 Statements.

11 The second is the judgement on the appeal of Mr. Katanga against
12 that same decision of Pre-Trial Chamber I. Both judgements are by
13 majority with Judge Pikis dissenting.

14 I will give a brief summary of the two judgements, although I
15 emphasise that the judgements themselves are authoritative. Judge Pikis
16 will give a summary of his dissents at the end of each judgement.

17 In giving the summaries, I will first outline the relevant
18 procedural history before arriving at the determination of the Appeals
19 Chamber. I turn first to the appeal of the Prosecutor. The relevant
20 history is as follows:

21 Between September and November 2007, the Prosecutor applied to
22 Pre-Trial Chamber I to redact certain information from the statements of
23 seven Prosecution witnesses before disclosing those statements to
24 Mr. Katanga in preparation for the hearing to confirm the charges against
25 him.

1 Of relevance to this appeal are the Prosecutor's requests for two
2 categories of redactions. The first category concerns requests pursuant
3 to Rule 181(4) of the Rules of Procedure and Evidence to redact from the
4 statements of Prosecution witnesses information concerning the identities
5 and identifying information of individuals referred to as innocent third
6 parties. The term "innocent third parties" was used by the Prosecutor to
7 define individuals who are not current or prospective Prosecution
8 witnesses, victims, or members of their families but who are referred to
9 by Prosecution witnesses in their statements. The Prosecutor explained
10 that innocent third parties are not part of his investigations but may be
11 put at risk by virtue of the fact that they are mentioned in the
12 statements of Prosecution witnesses.

13 The second category concerns requests pursuant to Rules 81(2) and
14 81(4) of the Rules to redact from the statements of Prosecution witnesses
15 information concerning the locations of interviews of witnesses and the
16 identities and identifying information of the staff of the Office of the
17 Prosecutor and of the Victims and Witnesses Unit who were present during
18 interviews in order to prevent prejudice to the investigations of the
19 Prosecutor or to protect persons at risk.

20 On the 3rd of December, 2007, the Pre-Trial Chamber rendered its
21 decision on those applications. That decision rejected the requests of
22 the Prosecutor that I have outlined.

23 The redactions relating to innocent third parties were rejected
24 on the ground that Rule 81(4) of the Rules does not empower a Chamber to
25 authorise redactions whose sole purpose is to protect individuals other

1 than Prosecution witnesses, victims, and members of their families.

2 The redactions relating to the locations of interviews and the
3 identifying information of staff present during those interviews were
4 also rejected. Those issues were certified for appeal against the
5 decision of the Pre-Trial Chamber on application by the Prosecutor.

6 The first issue was whether Article 54(3)(f) authorises the
7 Prosecution to seek and Rule 81(4) read in conjunction with that Article
8 empower the Chamber to authorise redactions for the protection of
9 innocent third parties.

10 On the first issue, the Prosecutor advanced one ground of appeal;
11 namely, that the Single Judge erred as a matter of law in finding Rule
12 81(4) of the rules did not empower redaction of witness statements to
13 protect innocent third parties.

14 Counsel for Mr. Katanga argued that neither a literal nor
15 theological interpretation of Rule 81(4) read together with Article
16 54(3)(f) authorises the redactions of the identities of innocent third
17 parties.

18 In relation to the first ground of appeal and for the reasons set
19 out in the judgement, the Appeals Chamber reverses the decision of the
20 Pre-Trial Chamber to the extent that it refused to authorise redactions
21 for the protection of persons at risk other than victims, Prosecution
22 witnesses, or members of their families pursuant to Rule 81(4) of the
23 Rules.

24 The requests for redactions are remitted to the Pre-Trial Chamber
25 to be determined on their individuals merits. I will briefly highlight a

1 few of the findings of the Appeals Chamber on the first issue on appeal.

2 In assessing the issue, it is noted that the term "innocent third
3 parties" employed by the Prosecutor is not found in the legal instruments
4 of the court. The Appeals Chamber find it's more accurate to consider
5 the category of persons concerned as referring to persons who may be
6 placed at risk as a result of the activities of the court but who are not
7 victims, witnesses, or members of their families.

8 In coming to its determination on this issue, the Appeals Chamber
9 considers the legal regime relating to disclosure prior to the hearing to
10 confirm the charges as well as Article 54(3)(f) of the Statute.

11 The Appeals Chamber notes that whilst Rule 81(4) of the Rules
12 clearly enables the Pre-Trial Chamber to authorise the non-disclosure of
13 the identity of witnesses, victims, and members of their families at the
14 current stage of the proceedings for the purposes of protecting their
15 safety, it makes no express provision for the protection of the category
16 of any person at risk.

17 However, the Appeals Chamber finds that other provisions of the
18 Statute and the Rules are expressly aimed at ensuring that persons are
19 not put at risk through the activities of the court. These other
20 provisions are not limited to the protection of witnesses and victims and
21 members of their families.

22 Article 54(3)(f) in relation to which the issue on appeal is
23 specifically framed expressly authorises the Prosecutor to take necessary
24 measures or to request that necessary measures be taken to ensure the
25 protection of any person.

1 This Article demonstrates an intention that the protection should
2 in principle be available to anyone put at risk by the investigations of
3 the Prosecutor. Given the severity and the widespread nature of the
4 crimes over which the court has jurisdiction, the Appeals Chamber accepts
5 that circumstances could arise where individuals who are named within the
6 statements of Prosecution witnesses might be placed at risk by disclosing
7 their identities to a suspect.

8 The Appeals Chamber further considers additional provisions to
9 Article 54(3)(f) that expressly provide for the protection of persons
10 other than witnesses, victims, or members of their families including
11 Article 43(6), and Rules 16 to 18, 59(2) and 87(1).

12 On that basis the Appeals Chamber finds that the specific
13 provisions of the Statute and the Rules for the protection not only of
14 witnesses and victims and members of their families, but also others at
15 risk on account of the activities of the court, are indicative of an
16 overarching concern to ensure that persons are not unjustifiably exposed
17 to risk through the activities of the court. In those circumstances, it
18 would be illogical and would defeat the object and purpose of those other
19 provisions if the Chamber were not able to authorise the non-disclosure
20 of material pursuant to Rule 81(4) in appropriate circumstances for the
21 protection of such persons as well.

22 Accordingly, the Appeals Chamber finds that Rule 81(4) must be
23 read to include the words "persons at risk on account of the activities
24 of the court," so as to reflect the intentions of the States that adopted
25 the Rome Statute and the Rules as expressed in Article 54(3)(f) of the

1 Statute and in other parts of the Statute and the Rules to protect that
2 category of persons.

3 However, whilst in principle the non-disclosure of information
4 for protection of persons at risk on account of the activities of the
5 court is permissible pursuant to Rule 81(4) of the Rules, whether any
6 such non-disclosure should be authorised on the facts of an individual
7 case will require a careful assessment by the Pre-Trial Chamber on a
8 case-by-case basis with specific regard to the rights of the suspect.

9 The Appeals Chamber has previously set out those factors to be
10 addressed by the Pre-Trial Chamber when considering whether to authorise
11 the non-disclosure of information contained in witness statements. Those
12 factors are elaborated upon in the circumstances of the current case in
13 order to provide more specific guidance to the Pre-Trial Chamber.

14 Upon an application for the non-disclosure of the Defence of
15 identifying information for the protection of persons at risk pursuant to
16 Rule 81(4), the Pre-Chamber must carefully assess the type of information
17 in respect of which authorisation for redactions is sought. It will be
18 for the Prosecutor seeking redactions to establish that such redactions
19 are warranted. The overriding principle is that full disclosure should
20 be made. Non-disclosure may only be made if the disclosure of the
21 information concerned would pose a danger to the person concerned. The
22 risk to the safety of the person concerned must be an objectively
23 justifiable one and must arise from disclosure of the information to the
24 Defence.

25 If such a risk exists, the Chamber should assess whether or not

1 the proposed redactions would overcome or reduce the risk. If not, the
2 redactions should not be granted. If so, the Chamber should take into
3 account the following factors in order to determine whether the
4 redactions are strictly necessary: The Chamber should consider whether
5 alternative measures to redaction is available, the fact that
6 non-disclosure is sought at the stage of the confirmation hearing, and
7 the relevance of the information to the Defence.

8 If non-disclosure of the information would result in a hearing to
9 confirm the charges viewed as a whole to be unfair to the suspect, then
10 the requested redactions should not be granted.

11 In balancing the interests at stake, the Pre-Trial Chamber must
12 ensure that there are adequate safeguards to protect the interest of the
13 suspect so as to comply with the requirements of adversarial proceedings
14 and equality of arms.

15 Prior to ruling on an application for redactions, the Pre-Trial
16 Chamber should give the Defence the greatest possible opportunity to make
17 submission on the issues involved. Any rulings or non-disclosure should
18 be kept under review by the Pre-Trial Chamber. The Prosecutor should
19 assist the Pre-Trial Chamber in this regard by bringing to its attention
20 factors that may cause it to reconsider its rulings on non-disclosure.

21 I will now move to the second issue in the Prosecutor's appeal.
22 The second issue certified for appeal was whether the Single Judge erred
23 in the test prescribed by the Appeals Chamber in its decision of 14th of
24 December, 2006, by refusing to authorise the redaction of the location of
25 interview of witnesses and the identifying information of current and

1 former staff members of the OTP and VWU at the stage of the proceedings
2 relating to the hearing to confirm the charges.

3 On the second issue the Prosecutor advanced two grounds of
4 appeal.

5 First it was argued that failing to authorise the redactions of
6 the locations of interview and the identities of staff who were present
7 during those interviews, the Pre-Trial Chamber failed to consider a range
8 of relevant factors and hence rendered a decision which was unreasonable.

9 Second, it was argued a that the Pre-Trial Chamber denied the
10 Prosecutor any meaningful opportunity to be heard on relevant factors.

11 Counsel for Mr. Katanga submitted that the arguments of the
12 Prosecutor were unmeritorious and should be dismissed, arguing that the
13 decision of the Pre-Trial Chamber on this issue was entirely reasonable.

14 In relation to the second issue on appeal and for the reasons set
15 out in the judgement, the Appeals Chamber reverses the decision of the
16 Pre-Trial Chamber to reject the requests of the Prosecutor to authorise
17 redactions relating to the locations of interviews and the identities of
18 staff present at those interviews.

19 The requests for redactions are remitted to the Pre-Trial Chamber
20 to be determined on their individual merits.

21 The Appeals Chamber finds that non-disclosure of information that
22 is required to be recorded in the witness statement pursuant to Rule 111
23 of the Rules, namely the date, time, place of the statement as well as
24 the persons present may be authorised by Pre-Trial Chamber pursuant to
25 Rules 81(2) or 81(4) of the Rules in appropriate circumstances.

1 This results from the fact that the obligation of the Prosecutor
2 to disclose witness statements to the Defence is subject to Rule 81 of
3 the Rules.

4 Requests for non-disclosure of information required pursuant to
5 Rule 111 of the Rules will require a careful assessment by the Pre-Trial
6 Chamber on a case-by-case basis with specific regard to the rights of the
7 Defence in accordance with the guidance set out earlier in relation to
8 the first issue on appeal.

9 In the instant case, based on the reasoning provided in the
10 decision of the Pre-Trial Chamber, it was unclear on what precise grounds
11 the Pre-Trial Chamber had rejected the requests of the Prosecutor for the
12 authorisation of redactions. The Pre-Trial Chamber found that the
13 redactions, and I quote: "Could in a few instances prejudice to a
14 certain extent the Prosecutor's investigations."

15 It was unclear whether the Pre-Trial Chamber concluded that such
16 a risk existed and, if so, in relation to which specific requests for
17 redactions. Similarly, the Pre-Trial Chamber found that redactions
18 "might in certain circumstances contribute to minimising" the risk to the
19 investigations. Again, it was unclear whether the Pre-Trial Chamber
20 considered that such a risk could indeed be minimised through redactions
21 or whether this was only a theoretical possibility.

22 The Pre-Trial Chamber seems to have been significantly influenced
23 in its rejection of the redactions sought by the purported existence of
24 less intrusive measures that could be taken by the Prosecutor. It is,
25 however, unclear on what factual basis the Pre-Trial Chamber concluded

1 that such intrusive measures existed.

2 The arguments put forward by the Prosecutor call into question
3 the viability of these alternative measures in a manner that suggests
4 that the Pre-Trial Chamber may not have taken all relevant factors into
5 account.

6 On the basis of the reasoning given by the Pre-Trial Chamber, the
7 Appeals Chamber cannot, therefore, conclude whether or not the Pre-Trial
8 Chamber had properly applied the test relating to the authorisation of
9 redactions in relation to the issue on appeal.

10 The Prosecutor's second ground of appeal, namely that he had been
11 denied the opportunity to be heard, is rejected on its merits as the
12 Appeals Chamber finds it had ample opportunity to make written filings
13 and to be heard during the course of the various ex parte hearings on his
14 applications.

15 In conclusion, the decision of the Pre-Trial Chamber on the two
16 issues on appeal is reversed and the matters are remitted to the
17 Pre-Trial Chamber, which has daily control of the case and a full
18 awareness of the complete factual background for it to determine anew the
19 Prosecutor's requests on their individual merits.

20 It is emphasised in this context that the Appeals Chamber has not
21 considered the merits of the individual requests made for redactions.

22 Therefore, the fact that the requests are remitted to the
23 Pre-Trial Chamber does not as such mean that the requests should be
24 granted. Whether or not the requests should be granted is to be
25 determined by the Pre-Trial Chamber on a case-by-case basis guided by the

1 factors which were outlined earlier.

2 Judge Pikis will now summarise his dissenting opinion on this
3 judgement.

4 Judge Pikis.

5 JUDGE PIKIS: I refer, to begin with, to the background of the
6 case, definition of the issues arising for resolution before us, and the
7 rival submissions made by the parties. The two issues have already been
8 identified, and I shall proceed reading from my judgement providing
9 answer to the questions raised.

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

18 Why the term "innocent third parties" was adopted to describe
19 persons named in the statements is not altogether clear to me. The term
20 "third party" denotes in a judicial context a person other than the
21 parties to the proceedings. If the term is used to distinguish such
22 persons from witnesses, this is a misnomer. The witnesses cannot be
23 identified as parties to the proceedings.

24 By his first ground of appeal the Prosecutor contests the
25 classification of confidential information within the context of Rule

1 81(4) adopted by the Pre-Trial Chamber and suggests that this is based on
2 a misinterpretation of the aforesaid Rule.

3 The defendant joined issue with the Prosecutor respecting the
4 character of the relevant information portrayed by the Prosecutor as
5 confidential. The Prosecutor acknowledged in his address that these
6 persons are, and I quote: "Generally not related to the case." Holding
7 back the information under consideration would, in the submission of the
8 defendant, deprive the Defence of the amenity to inquire into the
9 credibility of the witnesses. Article 54(3)(f) of the Statute does not
10 in the view of the defendant confer power upon a Chamber to take measures
11 for the protection of either confidential information or persons.
12 Article 54(3) merely identifies in terms in the contention of the
13 definite measures the Prosecutor may take in the interest of the efficacy
14 of the investigation and the protection of these individuals at a risk of
15 harm. Therefore, the only provision that has any bearing on the issue
16 under consideration is Rule 81(4), but protective measures under that
17 Rule as argued are confined to steps that may be taken for the protection
18 of victims, witnesses, and their families from the disclosure of
19 information. Consequently, Rule 81(4) could not provide support for the
20 request of the Prosecutor irrespective of lack of power to grant the
21 measures sought. The need, as suggested for the protection of the
22 persons identity, has no way been substantiated.

23 And now I shall address the merits. Rule 81(4) of the Rules
24 permits in the proper case the non-disclosure of information classified
25 as confidential inter alia under Article 54. The article that concerns

1 us in this case. Confidential documents or information in the context of
2 Article 54 of the Statute is material identified as such by the relevant
3 provisions of Article 54, that is, by Article 54(3)(e). Article 54(3)(f)
4 does not identify any pieces of information as confidential. It merely
5 acknowledges power to the Prosecutor to take measures for the protection
6 of confidential information so ranking under Article 54(3)(e).
7 Article 54(3) articulates the powers of the Prosecutor in the
8 investigatory process and steps to be taken for sustaining its efficacy.
9 Article 54(3)(e) does not describe the material in the possession of the
10 Prosecutor must be disclosed to the Defence or what maybe held back. The
11 duty to disclose Prosecution evidence to the Defence is addressed by
12 other provisions of the Statute as separate and distinct subjects from
13 the powers of the Prosecutor to provide protection to persons at risk.

14 Rule 81 creates exceptions to the duty cast on the Prosecutor to
15 disclose material and information in his possession. Rule 81(3) of the
16 Rules envisages that non-disclosure of information classified as
17 confidential under inter alia Article 54(3)(e) of the Statute, unless the
18 conditions specified therein for non-disclosure are lifted. Evidently
19 the naming of person or persons in witnesses' statements does not
20 constitute confidential information in the sense of Article 54(3)(e) or
21 any other provision of the Statute or the Rules. Such persons provided
22 no information whatever to the Prosecutor let alone the provision of
23 information in confidence.

24 Confidential information, disclosure of which may justifiably be
25 withheld under Rule 81(4) has the same meaning in relation to Article 54

1 as the one earlier specified that this information obtained on condition
2 of confidentiality. Consequently, the first part of Rule 81(4) cannot be
3 invoked by the Prosecutor in aid of his submission that information about
4 the identity of the persons named in witnesses' statements qualifies as
5 confidential.

6 Equally unavailable to the Prosecutor is the second part of Rule
7 81(4) of the Rules. Procedurally regulating the exercise of power to
8 offer protection to persons envisaged by Article 68 of the Statute; that
9 is, witnesses, victims, and members of their families. The persons whose
10 identity is sought to be concealed do not have the Statute of any one
11 forming part of the aforesaid three categories or classes of persons.

12 Is there anything in Rule 81(4) of the Rules viewed in isolation
13 or in the context of Rule 81 in its entirety to suggest that persons
14 other than victims, witnesses, and members of their families are meant to
15 be the subjects of protection and were fortuitously left out? In other
16 words, is there an unintended lacuna in the provisions of Rule 81(4) that
17 is something intended to be included but omitted because of oversight.
18 The subject is discussed at length in the decision of the Appeals Chamber
19 in the situation in the Democratic Republic of the Congo judgement on the
20 Prosecutor application for extraordinary review of 31 March 2006.
21 Manifestly, the answer is in the negative. Rule 81(4) gives expression
22 to the provisions of Article 68(1) and (2) of the Statute and the tenure
23 of Article 68 in its entirety specifying victims, witnesses, and members
24 of their families as the subjects of protection. All three categories of
25 persons have distinct attributes, not only in the context of Article 68

1 but in that of many other provisions of the Statute and the Rules too,
2 and reference is made in the footnote to the other provision of the
3 Statutes and the Rules.

4 Persons named in a witness statement do not come within the
5 channels of any of the aforesaid three categories of persons. They
6 belong to a different class outside the ambit and compass of Article 68
7 and Rule 81(4) of the Rules. Victims and witnesses have one thing in
8 common: They are persons directly connected with the crime investigated
9 and the crime that is the subject of Prosecution. The guide to the
10 interpretation of the Statute is the Vienna convention on the law of
11 treaties as authoritatively determined in the judgement on the
12 Prosecutor's application for extraordinary review. The same applies to
13 the Rules of Procedure and Evidence adopted by the assembly of State
14 parties as a complement to the Statute.

15 In my view the remedy sought by the Prosecutor is one unknown to
16 the law in conclusion -- yes, I shall.

17 I repeat. In my view, the remedy sought by the Prosecutor is not
18 one -- is one unknown -- on the law, a conclusion warranting the
19 confirmation of the decision of the Pre-Trial Chamber on the matter.

20 Issue two: The subject matter of this issue revolves around the
21 evidence existence or non-existence of power to order the redaction of
22 the names of persons who took the statements of witnesses, those who
23 attempted the depositions made in the -- made to the investigating
24 authorities and the places where the statements were taken. By this --
25 by his appeal the Prosecutor maintains that the decision of the Pre-Trial

1 Chamber to refuse redactions is fraught with substantive and procedural
2 errors because the Single Judge aim is applied to the threshold test laid
3 down by the Appeals Chamber in its two judgements of the 14th of December
4 2006 and secondly, B, failed to hear the Prosecutor on the availability
5 of alternative measures. It supports the decision as sound arguing that
6 the need for redactions of the names of persons who drew those
7 statements, those present at the interviews, and the location where they
8 took place was in no way established, a fact sealing the outcome of the
9 appeal. Furthermore the information as submitted is relevant to the
10 preparation of the defence, particularly with regard to the testing of
11 the truthfulness and credibility of witnesses and the merits of the case.

12 To answer the question raised, we must first identify the
13 provisions of the law prescribing the constituents of a witness
14 statement. The next question must be whether it is visible in law to
15 withhold disclosure or information postulate by law as a necessary
16 attribute of a witness statement. I shall not debate in these
17 proceedings the presence or absence of authority under Rule 81(2) of the
18 Rules to withhold disclosure of parts of evidential material. I confine
19 myself to referring to the decision of the Appeals Chamber in the -- on
20 the subject Prosecutor versus Lubanga, second decision on the Prosecution
21 requests.

22 In my separate opinion in that case, the admission of particulars
23 from a witness statement referable to the manner it was taken and the
24 circumstances surrounding its taking is impermissible by virtue of the
25 provisions of Rule 111.

1 Article 54(3) of the Statute entitles the Prosecutor, A, to
2 collect and examine -- and examine evidence to request the presence of
3 persons with a view to questioning them. Article 55(1) of the Statute
4 provides that no one shall be compelled to incriminate himself or herself
5 or to confess guilt; moreover, no one shall be subjected to any form of
6 coercion, duress, or threat, to torture, or to any other form of cruel,
7 inhuman, or degrading treatment or punishment.

8 Rule 111 lays down in imperative terms signified by the use of
9 the auxiliary verb "shall" that, (a) a record must be made of a
10 statement; (b) the statement must be signed by the person who records it
11 and conducts the questioning and also; (c) by the person who is
12 questioned and his or her counsel if present. The statement must also be
13 signed by the Prosecutor or a Judge, if present, in statements obtained
14 pursuant to Rule 47 of the Rules.

15 A statement must also mandatorily record the names of everybody
16 present at the making of the statement and the place where it is made.
17 What the Prosecutor sought here was to erase from the statements a
18 reference to a person or persons who took the statements, the person or
19 persons present, and C, the place where the statements were made.

20 It is worth noting that the statement of the accused must
21 likewise be attested to if it cannot be videotaped in the manner that the
22 witness statement is taken under Rule 111 of the Rules and provide the
23 same information about the person or persons taking the statement, those
24 attempting the making of it, and the place where it is taken. As much is
25 laid down in Rule 112(2).

1 A witness statement or a summary of it may be used in evidence at
2 the confirmation hearing. The pertinent question is whether a statement
3 lacking the statutory attributes or insignia does qualify as a statement
4 under the Rules. The obligation to keep a record of the circumstances
5 surrounding the making of a written statement in the course of the
6 investigation is not a mere formality but an essential element of the
7 statement itself. It indicates that the statement was taken according to
8 law and as such it has the attributes of authenticity required thereby.
9 Stripped of these attributes the statement forfeits the character
10 attached to it by law; it is denuded of information that illuminates its
11 provenance. At the same time the Defence would be denied material
12 information to which the person under investigation or the accused are
13 entitled in making his or her defence. If power resided with the Court
14 to bypass disclosure of the essential record of a statement, that would
15 be tantamount to by passing the ordnance of the law. This cannot be.
16 Neither paragraph 2 nor any other provision of Rule 81 confer power upon
17 the court to sidestep the plain provisions of the law, a course that
18 would derail the process from its ordained course.

19 There is yet another reason equally compelling against leaving
20 out from a statement to be disclosed to Defence facts surrounding the
21 taking of it. In accordance with Rule 81(2) of the Rules, what may be
22 withheld from the Defence is material and the information that may
23 prejudice further or ongoing information. The material and the
24 information that may under Rule 81(2) be not disclosed to the Defence is
25 material and the formation which must be disclosed to Defence under the

1 Statute.

2 What is then the Prosecutor under obligation to disclose? The
3 answer is to be found in Article 61(3)(b) of the Statute, imposing a duty
4 upon the Prosecutor to inform the Defence of the evidence on which the
5 Prosecutor intends to rely at the hearing. In this context evidence
6 denotes fact having a bearing on the proof of the charges prefaced
7 against the person. The evidence must also include facts tending to show
8 the innocence of the accused as provided in Article 67(2). Evidence in a
9 legal context has a certain meaning. It is a term of art. In Black's
10 Law Dictionary evidence identified as: "Something (including testimony,
11 documents, and tangible objects) that tends to prove or disprove the
12 existence of an alleged fact..."

13 What the Prosecutor seeks to redact in this case does not relate
14 to the crime investigated but to the manner of conducting the
15 investigation, in particular the part associated with the collection of
16 evidence and the propriety of the process of gathering it. As such it
17 cannot be withheld from the Defence given that the manner of conducting
18 the investigation and the presence of the attributes of statements laid
19 down in Rule 111 is a condition of its acceptability as evidential
20 material.

21 Withholding the disclosure of evidence has to do with facts
22 surrounding the commission of the offence likely to be unearthed or
23 emerge not the manner of conducting the investigation. For each one of
24 the above reasons, the appeal is liable to be dismissed and so would, I
25 hold, confirming the decision of the Pre-Trial Chamber.

1 PRESIDING JUDGE KIRSCH: Having heard Judge Pikis' reading of his
2 dissenting opinion in the case of the Prosecutor's appeal, I turn now to
3 the appeal of Mr. Katanga against the decision of the Pre-Trial Chamber.

4 This appeal is based on the same procedural history as that which
5 I outlined earlier but for the fact that it concerns a different category
6 of redactions to that in the appeal of the Prosecutor.

7 The category at issue in the appeal of Mr. Katanga concerns
8 requests pursuant to Rule 81(2) of the Rules to redact from the
9 statements of Prosecution witnesses to be relied upon at the hearing to
10 confirm the charges against Mr. Katanga, information concerning the
11 identities and identifying information of individuals referred to as
12 potential Prosecution witnesses in order to prevent prejudice to further
13 or ongoing investigations of the Prosecutor.

14 The term "potential Prosecution witnesses" was used by the
15 Prosecutor to define individuals to whom reference is made in the
16 statements of actual witnesses upon whom the Prosecutor wishes to rely at
17 the Confirmation Hearing. They are individuals who have been interviewed
18 by the Prosecutor or who the Prosecutor intends to interview in the near
19 future but in relation to whom the Prosecutor has not yet decided whether
20 they will become Prosecution witnesses.

21 One issue was certified for appeal against the decision of
22 Pre-Trial Chamber on application by Mr. Katanga; namely, whether the
23 Single Judge enlarged the scope of application of Rule 81(2) of the Rules
24 by considering as Prosecution sources those individuals whose identity
25 and identifying information could be redacted pursuant to the said Rule,

1 who despite not being Prosecution witnesses for the purpose of the
2 confirmation hearing have been or are about to be interviewed by the
3 Prosecution.

4 The Defence originally advanced three grounds in support of the
5 appeal. It then became apparent that the Defence had misunderstood the
6 terms of the decision of the Pre-Trial Chamber, and they applied to
7 provide additional details and authorities on the document in support of
8 the appeal pursuant to Regulation 28 of the Regulations of the Court.
9 That application was opposed by the Prosecutor who submitted that
10 Regulation 28 of the regulations was not a vehicle for an appealing party
11 to substitute or vary its ground of appeal and the correct course of
12 action for the Defence would be a discontinuance of the appeal in whole
13 or in part pursuant to Rule 157.

14 By its order on the 24th of January, 2008, the Appeals Chamber by
15 majority, Judge Pikis dissenting, allowed the application of the Defence
16 to provide additional details and authorities in support of the appeals
17 for the reasons provided in the judgement. I will briefly summarise
18 those reasons.

19 Contrary to the submissions of the Prosecutor, the Appeals
20 Chamber considered that the Chamber may act pursuant to Regulation 28 of
21 the Regulations upon request or upon its own motion. As such, the
22 application to provide additional details and authorities was properly
23 before the Appeals Chamber.

24 On the fact of the instant case, the Appeals Chamber deemed that
25 this was a situation which merited resort to Regulation 28. It would not

1 have been in the interests of justice to deprive the Defence of the
2 opportunity to make informed submissions in the circumstances of the
3 present case given, first, the importance of the issue on appeal in
4 shaping the disclosure process in this and in other cases; second, the
5 fact that the Defence had not been involved in the ex parte proceedings
6 that led to the decision of the Pre-Trial Chamber; and third, the fact
7 that restrictions to the disclosure process are likely to be addressed,
8 at least in part, in the context of ex parte proceedings making the
9 involvement of the Defence in this appeal especially important.

10 Judge Pikis will summarise his dissent from the order of the 24th
11 of January, 2008, shortly.

12 I turn now to the merits of the issue of appeal. In assessing
13 the issue, it is noted that contrary to the manner in which the issue on
14 appeal was framed by the Pre-Trial Chamber, the term "Prosecution
15 sources" is not one that is found in the legal instruments of the court.
16 The Appeals Chamber therefore is not considering whether people who have
17 been or are about to be interviewed by the Prosecutor could be classified
18 as Prosecution sources as such. The issue before the Appeals Chamber is,
19 rather, whether the non-disclosure of the identities and identifying
20 information of potential Prosecutor witnesses can in principle be sought
21 and, if appropriate, granted pursuant to Rule 81(2) in order to prevent
22 prejudice to further or ongoing investigations of the Prosecutor.

23 The Defence advanced several grounds in support of the appeal.
24 The essence of the case of the Defence was that the non-disclosure of the
25 type of information under consideration in this appeal should not be

1 permitted. The Prosecutor opposed each of the grounds put forward by the
2 Defence. For the reasons set out in the judgement, the appeal is
3 dismissed. I shall briefly highlight a few of the findings of the
4 Appeals Chamber on this appeal.

5 The difficulty in cases of this nature was correctly pointed out
6 by the Pre-Trial Chamber in its decision granting leave to appeal wherein
7 it was held that: "Those individuals who have been interviewed or are
8 about to be interviewed by the Prosecution and who have not yet become
9 Prosecution witnesses may have valuable information concerning the case
10 at hand. As they have not as yet become Prosecution witnesses, the
11 Defence may have an interest in contacting them, and the redaction of the
12 identities and identifying information would prevent the Defence from
13 contacting them for the purpose of the preparation of the Confirmation
14 Hearing."

15 This exact of the decision of the Pre-Trial Chamber demonstrates
16 the underlying tension that may arise in situations of this nature. The
17 interests in protecting the investigations of the Prosecutor may conflict
18 with the interest of the Defence in having full disclosure of the
19 information contained within the statements upon which the Prosecutor
20 intends to rely at the hearing to confirm the charges. However, for the
21 reasons expressed in the judgement, the Appeals Chamber concludes that
22 redactions of the identifying information of potential Prosecution
23 witnesses can be permitted in principle notwithstanding that underlying
24 tension.

25 The Appeals Chamber accepts that further or ongoing

1 investigations may be prejudiced if potential Prosecution witnesses are
2 interfered with in a manner that could lead to them being unable to
3 cooperate further with the Prosecutor. The Appeals Chamber concludes
4 that the correct approach in such circumstances is for the Pre-Trial
5 Chamber to rule on a case-by-case basis pursuant to Rule 81(2) where the
6 balance of interests lie on the facts of a specific application for
7 non-disclosure. This is consistent with the wording of Rule 81(2) itself
8 which requires the Prosecutor to apply to the relevant Chamber to rule
9 upon whether information, the disclosure of which may prejudice further
10 or ongoing investigations, must be disclosed to the Defence.

11 Whether any such application for non-disclosure should be
12 authorised requires a careful assessment by the Pre-Trial Chamber on a
13 case-by-case basis with specific regard to the rights of the suspect and
14 with reference to the guidance touched upon in this judgement and
15 elaborated in the previous judgement. The Appeals Chamber therefore
16 confirms the decision of the Pre-Trial Chamber that redactions relating
17 to the identities and identifying information of potential Prosecution
18 witnesses can be made so as to avoid prejudicing further or ongoing
19 investigations pursuant to Rule 81(2).

20 Judge Pikis will now summarise his dissenting opinions on the
21 order of the Appeals Chamber on the 24th of January 2008 and on the
22 merits of the judgement.

23 Judge Pikis.

24 JUDGE PIKIS: The issue confronting the court in relation to the
25 question, resolved the 24th of January, is whether a party to the

1 proceedings can invoke its provisions in order to either further clarify
2 or exemplify his grounds and arguments in support of the appeal. In
3 terms, Regulation 28 confines this right to the court.

4 After referring to arguments raised and matters preliminary to
5 addressing the issue raised before the court, I proceed at page 3 with
6 the following: Perusal of the application reveals that the appellant in
7 the guise of supplying further details in support of his grounds to
8 appeal seeks to introduce new grounds not touched upon or even hinted at
9 in his document in support of the appeal. In the closing part of his
10 application, the appellant specifies what may legitimately be identified
11 as five new grounds of appeal. He intends to put forward, if allowed to
12 supplement his grounds, in documents in support of his cause.

13 The application is premised on the provisions of Regulation 28 of
14 the Regulations of the Court on sub-regulation (1) as may be inferred
15 from the nature of the relief sought. Prosecutor opposes the application
16 on two grounds. Firstly, because Regulation 28 does not confer on a
17 litigant the right to either clarify or add further details to his
18 appeal. Regulation 28(1) merely empowers the Chamber itself to seek
19 clarifications of the position of a party or ask for further details of
20 his position on the matter at issue.

21 Secondly, what is sought by the application is neither the
22 clarification nor the supply of details to his grounds of appeal but to
23 amend and supplement them in a substantive way.

24 Indisputably the application of the applicant was prompted by the
25 response of the Prosecutor to the document in support of the appeal, and

1 thus the appellant has no right to reply as authoritatively pronounced in
2 the case of Prosecutor versus Lubanga, and reiterated on a prior occasion
3 in the case in hand. Regulation 28 was invoked to overcome the hurdles
4 in his way.

5 The appellant did not have recourse to Regulation 61 the
6 Regulations of the Court entitling the Appeals Chamber to approve in the
7 case a variation of the grounds of appeal, possibly because he took that
8 Regulation 61 is inapplicable to appeals under Rule 155 of the Rules.
9 Whether that is so or not is not a matter arising for consideration in
10 these proceedings and nothing said herein is meant to provide an answer
11 to that question.

12 The issue under consideration is whether Regulation 28,
13 paragraph (1) in particular, confers a right on the applicant to provide
14 clarifications of his position or additional details of the document in
15 support of the appeal. The right or authority to seek clarifications or
16 the particulars of the grounds raised in support of the appeal lies with
17 the Chamber. The word "clarification" denotes nothing other than what
18 the word ordinarily signifies, namely shedding light on what is obscure,
19 complex or, on the face of it, incomprehensible.

20 The Chamber can seek clarification of nebulous propositions and
21 arguments. "Detailed" is also a word with a subtler meaning, importing
22 in the context of Regulation 28 the notion of particulars exemplifying or
23 illustrating the application of a statement or proposition.

24 The Chamber may seek additional details, further particulars
25 documenting the arguments advanced. The need for clarifications can only

1 arise if the court considers it necessary to elicit an obscurity or a
2 proposition of doubtful purport in the document itself. If not, no
3 question of clarification could arise. The same applies with regard to
4 details.

5 Where -- the need for exemplification of a given argument or
6 proposition must be sensed by the court itself. Where such need was
7 felt, as in the case of Prosecutor versus Lubanga, on the appellant's
8 application for an extension of the time limit for filing the document in
9 support of the appeal, the order -- and order pursuant to Regulation 28
10 clarifications and vested details were sought by the Appeals Chamber.
11 Even if we were to -- even if it were permissible to clarify the position
12 advanced or provide further details to the document in support of the
13 appeal the application would not be sustainable, either in whole or in
14 part, since what the appellant endeavours to do is neither to clarify nor
15 exemplify his position but to amend his appeal and in a substantial way
16 at that.

17 In the judgement -- then reference is made in the next paragraph
18 to the judgement on the Prosecutor's application for extraordinary review
19 wherein we make the following statement:

20 "Article 82(1)(d) of the Statute does not confer a right to
21 appeal interlocutory or intermediate decisions of the Appeals Chamber. A
22 right to appeal arises only if the Pre-Trial or Trial Chamber is of
23 opinion that such decision must receive the immediate attention of the
24 Appeals Chamber. This opinion constitutes the definitive element for the
25 genesis of a right to appeal. In essence the Pre-Trial or Trial Chamber

1 is vested with power to state or, more accurately still, to certify the
2 existence of an appealable issue. By the plain provisions of Article
3 81 -- 82(1)(d) of the Statute the Pre-Trial or Trial Chamber may
4 certificate such a decision on its own accord. If it fails to address
5 the appealability of an issue, it may do so on the application of any
6 party to the proceedings. It may be regarded as axiomatic that if any
7 power is conferred upon a court to make an order or issue a decision, the
8 parties have an implicit right to move the Chamber to exercise it."

9 What emerges from the above is that the varieties conferred on a
10 party contingent on a decision of the court, as is the case with Article
11 82(1)(d), and the court does not address the issue, a party may ask the
12 court to do so. In fact, in the case of Article 82(1)(d), the Rules of
13 Procedure and Evidence laid down the procedure for invoking the
14 jurisdiction of the court in the matter.

15 Rule 155, in contrast, no right can accrue to a party from the
16 exercise of the power acknowledged to the court under Regulation 28
17 either from a decision to seek or not to seek clarification or
18 elaboration of the position of a party. Not seeking clarification or
19 exemplification of the position of a party does not involve or entail the
20 issuance of an order or a decision by the court. If the non-seeking of
21 the clarifications by the court signifies anything, it is that the
22 position of the party on the issues raised on appeal is well understood.

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

25 With regard to the merits, the questions -- the question arising

1 for resolution is identified and defined in paragraph 1 of the judgement.
2 Reference is made in paragraph 2 that the term "Prosecution sources,"
3 what is used in the majority judgement of the Appeals Chamber in
4 Prosecutor versus Lubanga, in context of examination of the admissibility
5 of such redactions from such statements of witnesses, and I do note that
6 the term is not a happy one in this case given the facts surrounding the
7 issues raised for resolution.

8 The interpretation of Article -- of Rule -- Rules 81(2) and 81(4)
9 and the identification of their parameters and ambit were at issue in
10 Prosecutor versus Lubanga. The judgement of the Appeals Chamber was
11 unanimous, resulting in the setting assigned of the impugned decision for
12 lack of reasoning. The majority view with regard to the purport and
13 ambit of Rule 81(2) is encapsulated in a passage that is cited in the
14 judgement, and also cited in the judgement is the relevant extract from
15 my separate opinion.

16 Then I do note in my judgement that previous decisions of the
17 court are an independent source of law under Article 21(2) of the Statute
18 and examine aspects of the issue in the paragraph that follows.

19 The decision of the Appeals Chamber in Prosecutor versus Lubanga
20 concentrates on the interpretation of Rule 81(4). It sheds no light on
21 the interpretation of Rule 81(2).

22 Then there is a paragraph where I explain why I am reinforced in
23 my approach to the subject of interpretation of Rule 81(2), and of course
24 judgement, as the President as earlier said, is the only authoritative
25 guide to what is decided and resolved.

1 Such material or informations explained in the case of Prosecutor
2 versus Lubanga is evidential matter that the Prosecutor has a duty to
3 disclose to the Defence. A witness statement constitutes such material
4 and information. What he is bound to disclose is the statement itself,
5 not a part of it.

6 As excuse from the duty -- from the discharge of this duty can be
7 provided if disclosure, and I quote, "May prejudice further or ongoing
8 investigation. It is the obstruction that disclosure may cause to the
9 investigation as such that may legitimise non-disclosure, as may be the
10 case where disclosure would reveal the lead or leads of an
11 investigation."

12 The object of Rule 81(2) is not to establish the process for the
13 protection of victims, witnesses, or confidential information. This is
14 another dimension of the subject under consideration concerning the
15 interpretation of Rule 81(2), not directly explored on any previous
16 occasion.

17 The protection of the aforesaid classes of persons and of
18 confidential information are specifically dealt with by Rule 81(3) and
19 Rule 81(4). Authority for the protection of victims and witnesses is
20 conferred by Article 68(5) of the Statute to the dictates of which
21 Rule 81(4) is fashioned. The withholding of confidential information
22 likewise attuned to the relevant provisions of the Statute, Articles 54,
23 72, and 93, is also the subject of regulation under Rule 81(4). What
24 constitutes confidential information is specified in the Statute. The
25 relevant provisions of the Statute respecting both witnesses' and

1 victims' protection and the withholding of confidential information,
2 clear as they are in their meaning, are exhaustive of the parameters of
3 both subjects. The relevance, if any, of the decision the European Court
4 of Human Rights and anonymity of witnesses for the sake of their
5 protection and withholding of information on the grounds of national
6 security lies in determination of the ambit of Rule 81(4).

7 And I conclude: The issue raised for determination in this
8 appeal is whether the Single Judge enlarged the scope of application of
9 Rule 81(2) of the Rules by considering as Prosecution sources those
10 individuals whose identity and identifying information could be redacted
11 pursuant to the said Rule, who, despite not being Prosecution witnesses
12 for the purposes of the Confirmation Hearing, have been or are about to
13 be interviewed by the Prosecution.

14 In light of the foregoing, I answer the question raised in the
15 affirmative: The Pre-Trial Chamber did enlarge the scope of application
16 of Rule 81(2) of the Rules by sanctioning the redaction of information
17 identifying persons named in witnesses' statements. In consequence, the
18 decision of the Pre-Trial Chamber on the issue raised for determination
19 by the Appeals Chamber is judged to be wrong and, as such, liable to be
20 reversed, and so I would order.

21 PRESIDING JUDGE KIRSCH: The session is now closed.

22 The hearing ends at 11.11 a.m.

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