

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-01/07 (OA5)**

Date: **27 May 2008**

**THE APPEALS CHAMBER**

**Before:**  
**Judge Philippe Kirsch, Presiding Judge**  
**Judge Georghios 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 AND MATHIEU NGUDJOLO CHUI**

**Public Document**

**Judgment**

**on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I  
entitled "Decision on the Prosecution Request for Authorisation to Redact Statements of  
Witnesses 4 and 9"**

**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 of Mathieu  
Ngudjolo Chui**  
Mr Jean-Pierre Kilenda Kakengi Basila  
Ms Maryse Alié

**Counsel for the Defence of Germain  
Katanga**  
Mr David Hooper  
Ms Caroline Buisman

**REGISTRY**

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**Registrar**  
Ms Silvana Arbia



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

In the appeal of Mr Mathieu Ngudjolo Chui against the decision of Pre-Trial Chamber I of 21 December 2007 entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” (ICC-01/04-01/07-123-Conf-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(4) of the Rules of Procedure and Evidence, for a ruling as to whether the names, identifying information and whereabouts of alleged victims of sexual offences who are not connected to the charges in the relevant case and to whom reference is made in the statements of Prosecution witnesses must be disclosed to the Defence, so as to protect the safety of such alleged victims as “persons at risk on account of the activities of the Court”.
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.

## II. PROCEDURAL HISTORY

3. On 21 December 2007, Judge Sylvia Steiner, acting as the Single Judge of Pre-Trial Chamber I, rendered the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” (hereinafter “Impugned Decision”).<sup>1</sup> That decision was issued confidentially, *ex parte*, only available to the Office of the Prosecutor. A confidential redacted version of the Impugned Decision, only available to the Office of the Prosecutor and the Defence, was issued on the same day.<sup>2</sup> A public redacted version of the Impugned Decision was issued on 23 January 2008.<sup>3</sup> The paragraph numbers of the Impugned Decision cited in this judgment are the same in the confidential and public versions.

4. The Impugned Decision was triggered by the Prosecutor’s requests to the Pre-Trial Chamber to disclose to Mr Germain Katanga, prior to the hearing to confirm the charges, which is now scheduled to take place on 27 June 2008, redacted versions of the statements and interview notes of Witnesses 4 and 9, pursuant to rule 81 of the Rules of Procedure and Evidence (hereinafter all references to rules are to those of the Rules of Procedure and Evidence (“Rules”)).<sup>4</sup> Of relevance to this appeal are the Prosecutor’s requests for the redaction of the names, identifying information and whereabouts of three alleged victims of sexual offences who were victimised in events other than the alleged joint FRPI/FNI attack on Bogoro on 24 February 2003, which forms the subject-matter of the arrest warrant and charges against Mr Germain Katanga.

5. By the Impugned Decision, the Pre-Trial Chamber held, *inter alia*, that the three alleged victims of sexual offences who were unconnected to the charges against Mr Germain Katanga and who were mentioned within the statement of Witness 9 could be considered as victims within the meaning of rule 81(4) for the sole purpose of their protection by way of redaction of their names, identifying information and whereabouts.<sup>5</sup> The specific redactions in question were addressed in Annex I to the Impugned Decision which was issued confidentially, *ex parte*, Prosecutor only.<sup>6</sup>

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<sup>1</sup> ICC-01/04-01/07-123-Conf-Exp

<sup>2</sup> ICC-01/04-01/07-124-Conf.

<sup>3</sup> ICC-01/04-01/07-160.

<sup>4</sup> Impugned Decision, paragraphs 1, 4 and 5

<sup>5</sup> Impugned Decision, paragraphs 11-20 and 33-36

<sup>6</sup> ICC-01/04-01/07-123-Conf-Anx I. See Impugned Decision, paragraphs 8, 9 and 20. See also Impugned Decision, pages 23-25 (confidential, *ex parte* version) or pages 23-24 (confidential and public redacted versions).

6. On 10 March 2008, the Pre-Trial Chamber joined the cases of Mr Germain Katanga and Mr Mathieu Ngudjolo Chui, *inter alia*, on the basis of their alleged co-responsibility for crimes allegedly committed during, and in the aftermath of, the alleged joint attack on the village of Bogoro by the FRPI/FNI on 24 February 2003 and gave Mr Mathieu Ngudjolo Chui (hereinafter “appellant”) until 28 March 2008 to apply for leave to appeal any decisions rendered in the case against Mr Germain Katanga.

7. On 26 March 2008, the appellant sought,<sup>7</sup> and, on 4 April 2008, the Pre-Trial Chamber granted, leave to appeal in respect of the following issue, namely:

“...whether the Single Judge erred in law in finding that alleged victims of sexual offences not connected to the charges in the relevant case can be considered victims for the purpose of redactions pursuant to rule 81(4) of the Rules”.<sup>8</sup>

8. On 17 April 2008, the appellant filed a document in support of the appeal (hereinafter “Document in Support of the Appeal”) requesting the Appeals Chamber to: (i) declare that the appeal have suspensive effect on the ongoing proceedings; and (ii) reverse the Impugned Decision and order the unredacted disclosure of the documents pertaining to Witnesses 4 and 9.<sup>9</sup> On 28 April 2008, the Prosecutor filed a response thereto, requesting the Appeals Chamber to deny the appeal in its entirety (hereinafter “Response to the Document in Support of the Appeal”).<sup>10</sup>

### III. MERITS OF THE APPEAL

9. The appellant submits, as his sole ground of appeal, that the Pre-Trial Chamber erred in its interpretation of rule 81(4) and hence violated the aforementioned provision. That ground of appeal arises from the finding of the Pre-Trial Chamber that three alleged victims of sexual offences, who were victimised in events other than the alleged joint

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<sup>7</sup> Application for Leave to Appeal the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9 (hereinafter “Application for Leave to Appeal”), ICC-01/04-01/07-340-tENG, paragraph 41. By the Prosecution’s Response to Ngujolo’s Application for Leave to Appeal the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-346, 31 March 2008, the Prosecutor did not oppose the Application for Leave to Appeal.

<sup>8</sup> Decision on the Defence Application for Leave to Appeal the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”, (hereinafter “Decision Granting Leave to Appeal”), ICC-01/04-01/07-365, page 8.

<sup>9</sup> Appeal against the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9, ICC-01/04-01/07-403-tENG, paragraph 34.

<sup>10</sup> Prosecution Response to Defence Document in Support of Appeal against Decision on Redaction of Statements of Witnesses 4 and 9, ICC-01/04-01/07-452, paragraph 32.

FRPI/FNI attack on Bogoro on 24 February 2003, to which the warrants of arrest and charges against Mr Germain Katanga and the appellant are restricted, could be considered victims for the purpose of redactions pursuant to rule 81(4).

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

10. In considering the Prosecutor's requests, pursuant to rule 81(4), for the redaction of information relating to the three alleged victims, the Pre-Trial Chamber observed that rule 81(4) empowers a competent Chamber to provide for the non-disclosure of a person's identity as a possible protective measure for witnesses, victims and members of their families prior to the commencement of the trial.<sup>11</sup> The Pre-Trial Chamber considered that:

"... the Statute and the Rules do not embrace two different notions of 'victims', one for protection purposes pursuant to article 68(1) and rules 81, 87 and 88 of the Statute, and the other for the purpose of participation in situation and case proceedings. On the contrary, in the view of the Single Judge, the notion of 'victim' is the same both in respect of protection and participation in the proceedings."<sup>12</sup>

11. That finding was based on previous jurisprudence of the Pre-Trial Chamber, wherein it was held that:

"... the status of victim in situation and case proceedings is linked to the object of such proceedings. Hence, whenever a cases arises, the procedural status of victim in case proceedings held before the Pre-Trial Chamber can be granted only to those for whom there are reasonable grounds to believe that they have suffered physical or moral harm as a result of a crime within jurisdiction of the Court expressly included in the warrant of arrest or summons to appear - and, subsequently, in the charging document."<sup>13</sup>

12. In the circumstances of the instant case, the Pre-Trial Chamber held that:

"15. As the warrant of arrest for Germain Katanga is restricted to crimes committed during and in the aftermath of the alleged FRPI/FNI attack on Bogoro on 24 February 2003, the Single Judge considers that the three above-mentioned alleged victims of sexual offences which are unrelated to the Bogoro attack cannot, in principle, be considered as victims for the purpose of rule 81(4) of the Rules.

16. Moreover, the Single Judge cannot authorise the redaction of the identities and identifying information of those alleged victims pursuant to

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<sup>11</sup> Impugned Decision, paragraph 12.

<sup>12</sup> Impugned Decision, paragraph 13.

<sup>13</sup> Impugned Decision, paragraph 14.

rule 81(2) of the Rules, insofar as the Prosecution has made it clear that they are not Prosecution sources and that they are in no way involved in any ongoing or further Prosecution investigation.”<sup>14</sup>

13. The Pre-Trial Chamber, nevertheless, went on to state that it was:

“17... aware that the drafters of the Statute and the Rules included a number of provisions specifically governing the protection of alleged victims of sexual offences as a result of crimes within the jurisdiction of the Court. In this regard, the Single Judge notes that under article 68(1) of the Statute the Court is required to take appropriate measures to protect victims and witnesses, and to have regard to all relevant factors, ‘in particular, but not limited to, where the crime involves sexual or gender violence or violence against children’. Furthermore, pursuant to article 54(1)(b) of the Statute, the Prosecution, in investigating any crimes, is required to respect the interests and personal circumstances of victims and witnesses, and take into account the nature of the crime, ‘in particular where it involves sexual violence, gender violence or violence against children’.

18. The Single Judge also recalls rule 86 of the Rules, under which a Chamber is required, ‘in making any direction or order [...] [to] take into account the needs of all victims and witnesses in accordance with article 68, in particular [...] victims of sexual or gender violence’. Furthermore, under rule 88 of the Rules, special protective measures can be granted to a traumatised victim, in particular victims of sexual violence, when called to give oral testimony before the Court. Finally, the Single Judge also recalls rule 70 of the Rules, which provides for very specific principles of evidence in cases of sexual violence.”<sup>15</sup>

14. As a result of the foregoing reasoning, the Pre-Trial Chamber reached the following conclusion:

“19... a systematic and teleological interpretation of rule 81(4) of the Rules - in light of the particular emphasis placed by the drafters of the Statute and the Rules on the protection of alleged victims of sexual offences resulting from crimes within the jurisdiction of the Court - leads to the conclusion that, on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of ‘victim’ under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand.”<sup>16</sup>

15. The Pre-Trial Chamber went on to address, in Annex I to the Impugned Decision, the application of the criteria prescribed by the Appeals Chamber in its two Judgments of

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<sup>14</sup> Impugned Decision, paragraphs 15 and 16.

<sup>15</sup> Impugned Decision, paragraphs 17 and 18.

<sup>16</sup> Impugned Decision, paragraph 19.

14 December 2006,<sup>17</sup> in relation to the requests for redactions concerning the three alleged victims of sexual offences referred to in the statement of Witness 9.<sup>18</sup> The requests for redactions relating to the current whereabouts of the alleged victims of sexual offences were also addressed at paragraphs 34 to 36 of the Impugned Decision. In considering the requests for redactions, the Pre-Trial Chamber noted the security situation and context within which the requests were being made,<sup>19</sup> as set out at paragraphs 13 to 22 of its Decision of 3 December 2007 entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”.<sup>20</sup>

16. In the Decision Granting Leave to Appeal, the Pre-Trial Chamber addressed the consequences of the effect, upon the Defence, of redactions concerning those three alleged victims. The Pre-Trial Chamber considered that:

“... as a result of the interpretation of the Single Judge of rule 81(4) of the Rules, the Defence will not have access to the names of the relevant victims of sexual offences; that the Defence may have an interest in contacting such individuals for the purpose of preparing for the confirmation hearing, and that the redaction of their identity and identifying information would prevent the Defence from doing so.”<sup>21</sup>

#### **B. The submissions of the parties on rule 81(4)**

17. The appellant advanced four arguments in support of his submission that the Pre-Trial Chamber erred in its interpretation of rule 81(4). Each argument, and the response of the Prosecutor thereto, is set out separately below. In relation to the appellant’s second, third and fourth arguments, the Prosecutor primarily argues that they do not relate to the issue on appeal and should be disregarded. In the alternative, it is generally submitted that none of the aforementioned arguments demonstrate any error in the Impugned Decision.<sup>22</sup>

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<sup>17</sup> 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.

<sup>18</sup> Impugned Decision, paragraph 20. The Prosecutor’s requests for redactions in relation to alleged victims of sexual offences unconnected to the warrants of arrest and charges against Mr Katanga and the appellant did not concern the statement of Witness 4. As such, that statement does not form the subject matter of this appeal.

<sup>19</sup> Impugned Decision, paragraph 10.

<sup>20</sup> A revised public version of that decision was issued on 22 February 2008, ICC-01/04-01/07-224, and Annex, ICC-01/04-01/07-224-Anx.

<sup>21</sup> Decision Granting Leave to Appeal, page 7.

<sup>22</sup> Response to the Document in Support of the Appeal, paragraphs 23-25.

1. *The alleged victims of sexual acts are extraneous to the acts imputed to Mr Mathieu Ngudjolo and accordingly cannot fall within the purview of rule 81(4)*

**(a) Arguments of the appellant**

18. Under this head, the appellant argues that ‘nothing’ justifies the Pre-Trial Chamber’s teleological interpretation of rule 81(4), “‘even on an exceptional basis, whether in light of the statutory framework of the Court or of the fundamental legal principles of criminal proceedings, such as the principles of exception, proportionality, necessity, legality and respect for the rights of the accused’”.<sup>23</sup> The appellant recalls that in accordance with rule 85(a), the term ‘victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.<sup>24</sup> In that context, it is argued that since the alleged victims of sexual violence are extraneous to the acts imputed to the appellant, verification of the criteria laid down in rule 85 is impossible.<sup>25</sup> By reference to scholarly literature, it is argued that rule 81(4) must be read in conjunction with article 68 of the Rome Statute (hereinafter all references to articles are to those of the Rome Statute (“Statute”)) and that the victims whose identity may need to be concealed pursuant to rule 81(4) are those who may testify before the Court and not alleged victims who are extraneous to the acts imputed to the appellant.<sup>26</sup> Moreover, it is argued that in order to be recognised as a victim it is necessary to have been a victim of an act contained in the charges, thus the alleged victims of sexual violence cannot be regarded as alleged victims of the acts which the appellant is suspected of having committed and accordingly there cannot be any legal basis for the redactions in relation to them.<sup>27</sup> By reference to the jurisprudence of the Trial Chamber, it is further submitted that the powers of the Pre-Trial Chamber with respect to redactions are limited to the boundaries of the charges against an individual.<sup>28</sup>

**(b) Arguments of the Prosecutor**

19. Contrary to the submissions of the appellant, the Prosecutor argues that the Pre-Trial Chamber’s interpretation of rule 81(4) is consistent with the letter and the spirit of the legal framework of the Court and that the “Single Judge acted within the ambit of her

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<sup>23</sup> Document in Support of the Appeal, paragraph 17.

<sup>24</sup> Document in Support of the Appeal, paragraph 14.

<sup>25</sup> Document in Support of the Appeal, paragraph 15.

<sup>26</sup> Document in Support of the Appeal, paragraph 18.

<sup>27</sup> Document in Support of the Appeal, paragraph 19.

<sup>28</sup> Document in Support of the Appeal, paragraph 19.

jurisdiction when authorising the...redactions".<sup>29</sup> By reference to the preparatory works of the Statute and the Rules, it is argued that those texts are "underpinned by a general concern" to prevent the undue endangerment of persons by the Court's activities. Hence, it is argued that protection is not limited to victims who are guaranteed procedural status pursuant to article 68(3), or victims who are related to the charges, rather it extends to family members and other persons, including victims of crimes unrelated to the charges, who might be at risk on account of the Court proceedings.<sup>30</sup> It is argued that the term 'victims' in rule 81(4) must be interpreted in this context and "cannot be read in such a way as to leave a lacuna in which individuals at risk cannot be protected".<sup>31</sup> Furthermore, the Prosecutor refutes the appellant's argument that the Pre-Trial Chamber does not have jurisdiction *ratione personae* to authorise the redaction of information of victims of sexual violence not related to the charges. It is argued that the fact that the Prosecutor must disclose to the Defence certain statements demonstrates that they relate to the charges against an individual and it is this relevance that triggers the competency of the Pre-Trial Chamber to authorise redactions pursuant to rule 81(4).<sup>32</sup>

2. *The redactions at issue do not meet the criterion of necessity required by rule 81(4)*

**(a) Arguments of the appellant**

20. The appellant argues that since the three alleged victims are not witnesses upon whom the Prosecutor intends to rely, they will neither have to testify nor will their credibility be challenged by the Defence and therefore the redactions pertaining to them are unnecessary and have no legal basis.<sup>33</sup> As such, it is argued that the Pre-Trial Chamber "...wrongly sought to diminish the rights of the Defence by effectively balancing them against those of the Prosecution. However, to adopt such an approach at this stage of the proceedings is to suggest not only that [the appellant] is guilty of the crimes imputed to him (*quod non*), but also that he is guilty of crimes not included in the charges – a form of speculation which violates the principle of the presumption of innocence as enshrined in article 66".<sup>34</sup> By reference to jurisprudence of the International Criminal Tribunal for the former Yugoslavia, it is further argued that under rule 81(4), "the redaction of identifying

<sup>29</sup> Response to the Document in Support of the Appeal, paragraph 16.

<sup>30</sup> Response to the Document in Support of the Appeal, paragraph 18.

<sup>31</sup> Response to the Document in Support of the Appeal, paragraph 19.

<sup>32</sup> Response to the Document in Support of the Appeal, paragraph 20.

<sup>33</sup> Document in Support of the Appeal, paragraph 20.

<sup>34</sup> Document in Support of the Appeal, paragraph 21.

information must be confined to persons whose security is at risk as a result of their testimony or their victim status” in the case at hand.<sup>35</sup>

**(b) Arguments of the Prosecutor**

21. The Prosecutor refutes the submissions of the appellant, arguing that the fact that the victims in question will not be confronted or have their credibility challenged by the Defence does not demonstrate a lack of necessity for the redactions. Moreover, the Prosecutor submits that the fact that he is not relying upon these victims and the fact that they have no other material link with the case reduces any prejudice which the Defence may suffer from the non-disclosure of their identities. It is also disputed that the Impugned Decision contravenes the presumption of innocence or suggests that the appellant is guilty of the charges against him or of any other charges.<sup>36</sup>

3. *The impugned redactions are inconsistent with Mr Mathieu Ngudjolo's right to a fair trial*

**(a) Arguments of the appellant**

22. The appellant argues that information relating to persons extraneous to the acts imputed to him is governed by article 67(2) (on exculpatory material) and rule 77 (on information material to the preparation of the Defence).<sup>37</sup> Hence it is submitted that “...in order not to infringe the right to a fair trial, alleged victims extraneous to the acts imputed to [the appellant] must remain identifiable, so that the Defence can obtain the information needed to cross-check temporal, material and geographical details, including possible exculpatory statements”.<sup>38</sup> It is submitted that this is a legitimate aim and one that is correct in law, pursuant to article 67(1)(e).<sup>39</sup> With reference to article 68(1), the appellant states that whereas protective measures for victims and witnesses shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, in the present case “neither the Prosecution nor the [I]mpugned [D]ecision have shown why the protection of witnesses extraneous to [his] case should prevail over the rights of the Defence, which in any event have priority”.<sup>40</sup>

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<sup>35</sup> Document in Support of the Appeal, paragraph 23.

<sup>36</sup> Response to the Document in Support of the Appeal, paragraph 26

<sup>37</sup> Document in Support of the Appeal, paragraph 25.

<sup>38</sup> Document in Support of the Appeal, paragraph 26.

<sup>39</sup> Document in Support of the Appeal, paragraph 26.

<sup>40</sup> Document in Support of the Appeal, paragraph 26.

**(b) Arguments of the Prosecutor**

23. The Prosecutor submits that none of the alleged victims in question provided potentially exculpatory material that requires disclosure pursuant to article 67(2). It is submitted that the prospect of a victim who has not suffered from any crime with which a person is charged being material to the preparation of the Defence is one factor to be considered on a case-by-case analysis.<sup>41</sup> In relation to the arguments raised by the appellant concerning the rights of the Defence, the Prosecutor argues that “[a] degree of balancing of interests is...required under the Statute, in which the nature of any prejudice to the [D]efence must be considered, alongside the other interests protected by the Statute, including the protection of victims (and in particular victims of sexual violence)”.<sup>42</sup>

*4. The obligation of confidentiality is sufficient to protect the persons concerned by the redactions*

**(a) Arguments of the appellant**

24. By reference to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the appellant argues that the obligation of confidentiality upon Defence counsel renders the need for redactions unnecessary.<sup>43</sup>

**(b) Arguments of the Prosecutor**

25. The Prosecutor argues that the general consideration that Defence counsel are bound by obligations of confidentiality is one factor which may be relevant to a case-by-case determination of a request for redactions.<sup>44</sup>

**C. The submissions of the parties on suspensive effect**

*1. Arguments of the appellant*

26. To support his request that the present appeal have suspensive effect on the ongoing proceedings pursuant to article 82(3) and rule 156(5), the appellant submits that suspension is required because the redactions in question raise major issues affecting the rights of the Defence, the obligations of the Prosecutor and the future course of the proceedings.<sup>45</sup> He submits that suspension is justified due to the irreparable consequences

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<sup>41</sup> Response to the Document in Support of the Appeal, paragraph 27.

<sup>42</sup> Response to the Document in Support of the Appeal, paragraph 28.

<sup>43</sup> Document in Support of the Appeal, paragraph 27.

<sup>44</sup> Response to the Document in Support of the Appeal, paragraph 29.

<sup>45</sup> Document in Support of the Appeal, paragraphs 29-30.

of the admission into evidence of the redacted documents.<sup>46</sup> He submits that the determination of the issue on appeal will require a series of measures to be taken by both the Prosecution and the Defence.<sup>47</sup>

## 2. *Arguments of the Prosecutor*

27. The Prosecutor opposes the request for suspensive effect, submitting that the redactions at issue will not have irreparable consequences for the appellant.<sup>48</sup> The Prosecutor submits that any impact of the redactions on the appellant's ability to prepare for the confirmation hearing has already been considered by the Single Judge.<sup>49</sup> The Prosecutor emphasises that the granting of suspensive effect is exceptional and the fact that a decision has an impact on the proceedings does not in itself justify the granting of suspensive effect.<sup>50</sup>

## D. **Determination by the Appeals Chamber**

### 1. *The application for suspensive effect*

28. The Appeals Chamber is dealing with both the appellant's application for suspensive effect and the merits of the appeal in this judgment. For the reasons expressed below, the appeal is dismissed. Being aware of that outcome, the Appeals Chamber does not deem it necessary to determine the application for suspensive effect in the circumstances of the current case.

### 2. *The merits*

29. The issue on appeal before the Appeals Chamber concerns the decision of the Pre-Trial Chamber to consider as victims, for the purpose of redactions pursuant to rule 81(4), three alleged victims of sexual offences who were victimised in events other than the alleged joint FRPI/FNI attack on Bogoro on 24 February 2003, which forms the subject-matter of the warrants of arrest and charges against Mr Germain Katanga and the appellant.

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

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<sup>46</sup> Document in Support of the Appeal, paragraph 30.

<sup>47</sup> Document in Support of the Appeal, paragraph 30.

<sup>48</sup> Response to the Document in Support of the Appeal, paragraphs 14 and 30.

<sup>49</sup> Response to the Document in Support of the Appeal, paragraph 30.

<sup>50</sup> Response to the Document in Support of the Appeal, paragraph 31.

“... whether the Single Judge erred in law in finding that alleged victims of sexual offences not connected to the charges in the relevant case can be considered victims for the purpose of redactions pursuant to rule 81(4) of the Rules”.<sup>51</sup>

31. Rule 81(4) provides:

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

32. The essence of the appellant’s case is that redactions concerning alleged victims who are unrelated to the case before the Court are unlawful. The Prosecutor argues that the Statute and the Rules are underpinned by a general concern to prevent the endangerment of persons by the activities of the Court and that this protection is not limited to victims and witnesses but extends to family members and ‘other persons’, including victims of crimes unrelated to the charges, who might be at risk on account of the Court proceedings.

33. The Appeals Chamber has had previous occasion to consider the legal regime relating to disclosure prior to the hearing to confirm the charges and has encountered similar arguments in relation to redactions sought pursuant to rule 81(4) for the purposes of protection. In its Judgment of 13 May 2008 entitled “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”<sup>52</sup> (hereinafter “Judgment of 13 May 2008”), the Appeals Chamber found that whilst rule 81(4) makes “no express provision” for the protection of the category “any person”, other provisions of the Statute and the Rules are aimed at ensuring that persons are not put at risk through the activities of the Court and those provisions are not limited to the protection of witnesses and victims and members of their families only.<sup>53</sup> The Appeals Chamber found that there was an overarching concern to ensure that persons are not unjustifiably exposed to risk

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<sup>51</sup> Decision Granting Leave to Appeal, page 8.

<sup>52</sup> ICC-01/04-01/07-475, OA.

<sup>53</sup> Judgment of 13 May 2008, paragraph 43.

through the activities of the Court.<sup>54</sup> The Appeals Chamber proceeded to make the following findings in that appeal:

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

2. While the non-disclosure of information for the protection of persons at risk on account of the activities of the Court is permissible in principle, pursuant to rule 81(4) of the Rules of Procedure and Evidence, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, with specific regard to the rights of the suspect.”<sup>55</sup>

34. The situation in the instant case falls squarely within the parameters of the above findings of the Appeals Chamber in its Judgment of 13 May 2008. The alleged victims of sexual offences unrelated to the charges against Mr Germain Katanga and the appellant may be regarded as potentially falling within the category of “persons at risk on account of the activities of the Court” and as such their names, identifying information and whereabouts may be redacted, in appropriate circumstances, pursuant to rule 81(4) for the purposes of the hearing to confirm the charges against Mr Germain Katanga and the appellant.

35. Whether information relating to persons at risk may be redacted must be determined on a case-by-case basis. The Appeals Chamber has had previous occasion to set out those factors to be addressed by the Pre-Trial Chamber when considering a request for non-disclosure prior to the hearing to confirm the charges, pursuant to rule 81(4). Those factors can be summarised briefly as: a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>56</sup> In its Judgment of 13 May 2008, the Appeals Chamber found it appropriate to issue further guidance on the application of the abovementioned factors, in relation to the regime applicable to

<sup>54</sup> Judgment of 13 May 2008, paragraph 54.

<sup>55</sup> Judgment of 13 May 2008, paragraphs 1 and 2.

<sup>56</sup> Judgment of 13 May 2008, paragraph 67.

requests for redactions pertaining to persons at risk on account of the activities of the Court pursuant to rule 81(4).<sup>57</sup> The Pre-Trial Chamber conducted a case-by-case assessment of the Prosecutor's requests for redactions in line with the Appeals Chamber's previous jurisprudence. In the Impugned Decision, the Pre-Trial Chamber stated that it would "address the application of the criteria prescribed by the Appeals Chamber in its two 14 December 2006 [Judgments] in relation to the three alleged victims of sexual offences".<sup>58</sup> The Pre-Trial Chamber then proceeded to examine each of the individual requests for redactions in Annex I to the Impugned Decision. The approach of the Pre-Trial Chamber appears *prima facie* to be consistent with the further guidance contained in the Judgment of 13 May 2008.

36. In relation to the appellant's first argument, that the Pre-Trial Chamber erred in its interpretation of rule 81(4), the Appeals Chamber deems it unnecessary, in light of the foregoing and in the circumstances of the instant case, to consider whether the Pre-Trial Chamber erred in its interpretation that alleged victims of sexual offences unconnected to the warrants of arrest and charges against Mr Germain Katanga and the appellant fall within the definition of victims for the purpose of protection, pursuant to rule 81(4), at the stage of the proceedings prior to the hearing to confirm the charges.

37. In relation to the admissibility of the second, third and fourth arguments of the appellant, which has been called into question by the Prosecutor, the Appeals Chamber considers that these arguments are properly before it. The Appeals Chamber takes the view that these arguments are intrinsically linked to the issue on appeal as certified by the Pre-Trial Chamber. Furthermore, in his Application for Leave to Appeal, the appellant made the argument that "in light of the particular circumstances surrounding this case...[t]here is no rational, necessary or proportionate justification for such redactions or for a broad interpretation of rule 81(4)".<sup>59</sup> In that application, the appellant also made the argument that there is a distinction between "redactions for the general public and redactions for the [D]efence teams" and that "other less extreme measures to redactions" might have afforded the same protection to the alleged victims of sexual offences.<sup>60</sup> It was also submitted that a broad interpretation of rule 81(4) significantly affects the fairness of proceedings.<sup>61</sup> The second, third and fourth arguments set forth in the Document in

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<sup>57</sup> Judgment of 13 May 2008, paragraphs 68 to 73.

<sup>58</sup> Impugned Decision, paragraph 20. See also paragraphs 6 and 9 of the Impugned Decision

<sup>59</sup> Application for Leave to Appeal, paragraph 26.

<sup>60</sup> Application for Leave to Appeal, paragraphs 23-26.

<sup>61</sup> Application for Leave to Appeal, paragraphs 28-33

Support of the Appeal are an expansion of those arguments contained in the Application for Leave to Appeal.

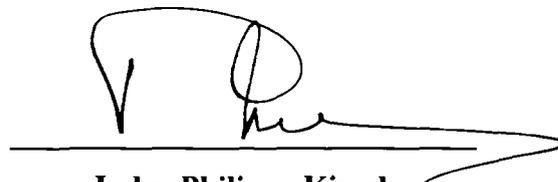
38. However, the Appeals Chamber rejects these arguments on their merits. The Appeals Chamber agrees with the submissions of the Prosecutor that these arguments go to the case-by-base determination to be conducted by the Pre-Trial Chamber in relation to a request for redactions, rather than to whether such redactions can, in principle, be granted. In its Judgment of 13 May 2008, the Appeals Chamber had previous occasion to consider similar arguments on appeal which were taken into account in formulating the guidance contained in that Judgment. It finds that the factors raised by the appellant in relation to the necessity of the redactions, their impact upon the right to a fair trial and the obligation of confidentiality upon Defence counsel, go to the factual assessment of the Pre-Trial Chamber. As previously stated, such factors do not necessarily negate the need for the authorisation of redactions; whether the actual redactions sought would thereafter be granted depends upon an analysis of the various interests involved.<sup>62</sup>

#### IV. APPROPRIATE RELIEF

39. For the foregoing reasons, the Appeals Chamber, pursuant to rule 158(1), confirms the decision of the Pre-Trial Chamber.

Judge Pikis appends a dissenting opinion to this judgment.

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

A handwritten signature in black ink, appearing to be 'P. Kirsch', written over a horizontal line. The signature is stylized and cursive.

**Judge Philippe Kirsch**

**Presiding Judge**

Dated this 27th day of May 2008

At The Hague, The Netherlands

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<sup>62</sup> Judgment of 13 May 2008, paragraph 63.

## Dissenting opinion of Judge Pikis.

1. The Pre-Trial Chamber (its jurisdiction in the matter being exercised by a Single Judge), certified, pursuant to the provisions of article 82 (1) (d) of the Statute, the following question for resolution by the Appeals Chamber:

*“...whether the Single Judge erred in law in finding that alleged victims of sexual offences not connected to the charges in the relevant case can be considered victims for the purpose of redactions pursuant to rule 81 (4) of the Rules”.*<sup>1</sup>

The issue arose from a decision of the Pre-Trial Chamber allowing the redaction of the names of three persons<sup>2</sup> from the statement of the prosecution witness on the ground that they were victims of crimes of sexual violence, be it of crimes unconnected with the crimes allegedly committed by the person under investigation.<sup>3</sup> Non-disclosure of the names of victims may be authorised under the provisions of rule 81 (4) of the Rules of Procedure and Evidence<sup>4</sup>. The Single Judge treated the persons named therein as victims for the purposes of paragraph 4 of rule 81, notwithstanding her assessment that “the three above-mentioned alleged victims of sexual offences which are unrelated to the Bogoro attack cannot, in principle, be considered as victims for the purpose of rule 81(4) of the Rules”<sup>5</sup>. The crimes attributed to the appellant were committed in the context of the Bogoro attack. Nonetheless the Single Judge treated the persons in question as victims for the purposes of rule 81 (4) for the reasons given in the following passage of her decision:

*“ As a result, the Single Judge considers that a systematic and teleological interpretation of rule 81(4) of the Rules – in light of the particular emphasis placed by the drafters of the Statute and the Rules on the protection of alleged victims of sexual offences resulting from crimes within the jurisdiction of the*

<sup>1</sup> *Prosecutor v Katanga and Ngudjolo Chui* “Decision on the Defence Application for Leave to Appeal the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” 4 April 2008 (ICC-01/04-01/07-365), page 8.

<sup>2</sup> Referred to by the Prosecutor as “innocent third parties”, See *Prosecutor v Katanga* “Prosecution’s Application Pursuant to Rule 81(2) and Rule 81(4) to Statements of Witnesses 1 and 9, and Interview Notes of Witnesses 9 and 12” ICC-01/04-01/07-42-Conf-Exp; ICC-01/04-01/07-42-Conf-Exp-Anx1-4, document classified as Confidential and “ex parte Prosecution only”; “Prosecution’s Application Pursuant to Rule 81(2) and Rule 81(4) to Statement of Witness 4” 13 December 2007 (ICC-01/04-01/07-98).

<sup>3</sup> *Prosecutor v Katanga* “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” 23 January 2008 (ICC-01/04-01/07-160).

<sup>4</sup> Hereinafter referred to as “the Rules”.

<sup>5</sup> *Prosecutor v Katanga* “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” 23 January 2008 (ICC-01/04-01/07-160), para. 15

*Court – leads to the conclusion that, on an exceptional basis and only for the purpose of their protection by means of the redaction of their names and identifying information, the notion of “victim” under rule 81(4) of the Rules would also cover alleged victims of sexual offences which are unrelated to the charges in the case at hand.”<sup>6</sup>*

2. One may legitimately infer from the above that what is not permitted “in principle”, understood as the principle extracted from the wording of the particular section of the legislative enactment, can be allowed in practice “on an exceptional basis”, a proposition that cannot readily find legal justification.

3. The appellant challenges the decision upon which the issue before us is founded on four grounds revolving, directly or indirectly, around the interpretation of rule 81 (4), allegedly violated by the impugned decision:

- A. *“The alleged victims of sexual acts are extraneous to the acts imputed to Mr Mathieu Ngudjolo and accordingly cannot fall within the purview of rule 81(4) of the RPE.”<sup>7</sup>*
- B. *“The redactions at issue do not meet the criterion of necessity required by rule 81(4) of the RPE.”<sup>8</sup>*
- C. *“The impugned redactions are inconsistent with Mr Mathieu Ngudjolo’s right to a fair trial.”<sup>9</sup>*
- D. *“The obligation of confidentiality is sufficient to protect the persons concerned by the redactions.”<sup>10</sup>*

4. The essence of the submissions of the appellant may be synthesised as follows: The notion of a victim under rule 81 (4) is confined to victims of the crime or crimes under investigation, a fact acknowledged, in principle, by the Pre-Trial Chamber.<sup>11</sup> A principle admits of no exceptions and none should be countenanced in the absence of a specific provision to that end. No rule of interpretation could provide justification for the construction placed on rule 81 (4) by the Single Judge.

<sup>6</sup> *Ibid*, para. 19.

<sup>7</sup> *Prosecutor v Katanga and Ngudjolo Chui* “Appeal against the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” 17 April 2008 (ICC-01/04-01/07-403-tENG), page 5.

<sup>8</sup> *Ibid*, page 11.

<sup>9</sup> *Ibid*, page 12.

<sup>10</sup> *Ibid*, page 14.

<sup>11</sup> *Prosecutor v Katanga* “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” 23 January 2008 (ICC-01/04-01/07-160).

Independently of the validity of ground A, the necessity for non-disclosure, a prerequisite for sanctioning such a course under rule 81 (4), was, according to the appellant, not established. Assuming it had been established, the need arising for protection could be satisfied by the imposition of an obligation to keep information relevant to the identity of the persons in question confidential.

Lastly, the right of the appellant to a fair trial, as claimed, was infringed by the sub judge decision, particularly the right to examine prosecution witnesses, premised on prior knowledge of the evidence of such persons.

He submits:

*“...in order not to infringe the right to a fair trial, alleged victims extraneous to the acts imputed to Mr Mathieu Ngudjolo must remain identifiable, so that the Defence can obtain the information needed to cross-check temporal, material and geographical details, including possible exculpatory statements. This is a legitimate aim, and also correct in law.”<sup>12</sup>*

We may remind that the rights of the accused and the person under investigation are defined by article 55 of the Statute, rule 121 of the Rules, and article 67 of the Statute; relevant to the same subject are the provisions of article 21 (3) and article 64 (2) of the Statute.

5. The Prosecutor disputes, in his response, the validity of each and every ground of appeal. In his submission<sup>13</sup>, only ground A is relevant to the issue posing for determination<sup>14</sup>, that is, whether the persons named in the statement of the witness do qualify as victims under rule 81 (4). The submission of the Prosecutor is justified subject to the following proviso: Non-disclosure of evidence may be authorised in accordance with article 68 (1) of the Statute provided that this measure is “not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. To that extent, ground C has a bearing on any decision withholding disclosure. The relevance of the other two grounds is marginal, hinging on the periphery of the sub judge issue.

The Prosecutor submits: “Contrary to the submissions of the Appellant, the interpretation of Rule 81(4) by the Single Judge is consistent with the letter and the spirit of the legal framework of the Court, and the Single Judge acted within the ambit of her jurisdiction

<sup>12</sup> *Prosecutor v Katanga and Ngudjolo Chui* “Appeal against the Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9” 17 April 2008 (ICC-01/04-01/07-403-tENG), para. 26.

<sup>13</sup> *Prosecutor v Katanga and Ngudjolo Chui* “Prosecution Response to Defence Document in Support of Appeal against Decision on Redactions of Statements of Witnesses 4 and 9” 28 April 2008 (ICC-01/04-01/07-452).

<sup>14</sup> *Ibid.*, para. 23.

when authorising the redactions.”<sup>15</sup>; adding, in the paragraph following, “Rule 81(4) is one of the primary means by which a Chamber may fulfil its role in facilitating and regulating the protection of persons at risk on account of the Court’s activity.”<sup>16</sup>

6. The Prosecutor intimates, in his document in response to the appeal, that issues similar to those confronting the Chamber in the present appeal, centring on the interpretation of rule 81 (4), are sub judice in another appeal, namely, *The Prosecutor v. Germain Katanga*<sup>17</sup>. Meantime, the decision of the Appeals Chamber in the above appeal was delivered on 13 May 2008. In that case, the Appeals Chamber was required to determine whether the names of “innocent third parties”, that is, persons other than witnesses, victims or members of their families, could be the subject of protective measures under rule 81 (4) of the Rules; in other words, whether categories of persons other than the ones identified in rule 81 (4) could be made the subject of protection by the non-disclosure of their names and material tending to identify them. The statements at issue formed part of the material or information that the Prosecutor was under duty to disclose to the defence for the purposes of the confirmation hearing.

7. The Appeals Chamber determined, by majority, that non-disclosure of the names of persons unrelated to the categories of persons specified in rule 81 (4) could be withheld in a proper case. The reasons for so holding are summarised hereafter.

8. While persons who are not victims, witnesses or members of their families are not included among the subjects of protection under the terms of rule 81 (4), they should be so treated having regard to the objects of the Statute and article 54 (3) (f) in particular. By necessary implication, it was held that “rule 81(4) should be read to include the words “persons at risk on account of the activities of the Court” so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54 (3) (f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk.”<sup>18</sup> Article 21 (3) of the Statute, prescribing that the law applicable under the Statute must be applied and interpreted consistently with “internationally recognized human rights”, also supports the construction of rule 81 (4) put upon it by the Appeals

<sup>15</sup> *Ibid.*, para. 16.

<sup>16</sup> *Ibid.*, para. 17

<sup>17</sup> *Prosecutor v. Katanga* “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” 13 May 2008 (ICC-01/04-01/07-475 OA).

<sup>18</sup> *Prosecutor v. Katanga* “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’” 13 May 2008 (ICC-01/04-01/07-475 OA), para 56., emphasis added.

Chamber<sup>19</sup>. The conclusion of the court is set forth in the following passage of its judgment:

*“The Appeals Chamber considers that the circumstances under consideration in the present appeal may give rise to a situation in which the withholding of certain information from the Defence may be necessary so as to preserve the fundamental rights of an individual put at risk by the activities of the International Criminal Court.”*<sup>20</sup>

The Appeals Chamber followed the above judgment and founded its decision in the present appeal on the interpretation of rule 81 (4) espoused in the above case.

By its judgment in the above appeal, the court reversed the decision of the Single Judge to the effect that “innocent third parties” did not fall within any of the categories of persons entitled to protection under rule 81 (4). In my dissenting opinion<sup>21</sup> I decided otherwise, holding that no justification could be found for extending the provisions of rule 81 (4) to include any class of persons other than the ones specified therein.

### **Determination of the Issue Posed for Resolution**

9. That the notion of “victims” in the context of rule 81 (4) is confined to victims of crimes under investigation or the subject of prosecution, there can be little doubt. Rule 81 deals exclusively with “Restrictions on disclosure” of evidence that the Prosecutor is under a duty to divulge to the defence for the purposes of the confirmation hearing. Such a duty is imposed by the provisions of article 61 (3) of the Statute. Rule 76 (1) of the Rules gives expression to this duty, requiring the Prosecutor to furnish the defence with copies

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<sup>19</sup> See *ibid*, para. 56 and the opening statement of para. 57: “[56. Accordingly, the Appeals Chamber finds that persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. The aim is to secure protection of individuals at risk. Thus, by necessary implication, rule 81(4) should be read to include the words ‘persons at risk on account of the activities of the Court’ so as to reflect the intention of the States that adopted the Statute and the Rules of Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk. 57 Moreover, this interpretation is in adherence with the requirement in article 21 (3) of the Statute to apply and interpret the provisions of the Statute and the Rules consistently with internationally recognized human rights]”.

<sup>20</sup> *Prosecutor v Katanga* “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” 13 May 2008 (ICC-01/04-01/07-475 OA), para. 58.

<sup>21</sup> See Dissenting Opinion of Judge Pikis in *Prosecutor v Katanga* “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” 13 May 2008 (ICC-01/04-01/07-475 OA)

of statements of witnesses upon whose evidence he intends to rely at the confirmation hearing. Rule 81 lays down the conditions under which the Prosecutor may be excused, with the sanction of the Court, from disclosing to the defence evidence that he is otherwise bound to reveal.

10. Paragraph 2 of rule 81 exonerates the Prosecutor from the duty to disclose material or information that “may prejudice further or ongoing investigations”. Material or information, disclosure of which is withheld for this purpose, cannot be used either during the confirmation hearing or at the trial unless adequate prior disclosure is made to the defence.

Under paragraph 3 of rule 81, confidential information, so classified under articles 54, 57, 64, 72 and 93 of the Statute, should not be disclosed except in accordance with the conditions prescribed by the aforesaid articles. This measure is deemed necessary for the protection of the safety of witnesses, victims and members of their families. Where disclosure of such information may create a risk for their safety, the Court must ensure that they are informed of the hazard before disclosure is effected. Paragraph 4 of rule 81 empowers the Court, in accordance with the provisions of article 68, “to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial”. An overriding consideration for non-disclosure to the defence of material and information in the hands of the Prosecutor, stipulated for in article 68 (1), is that such measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” The person under investigation has a right, in the same way as the accused, to be informed of the evidence upon which the Prosecutor will rely at the confirmation hearing, regarded as an indispensable requisite of a fair trial. The right includes exculpatory evidence in the sense particularised in article 67 (2), including evidence relevant to the credibility of prosecution witnesses.

11. As I read the impugned decision wherefrom the question before us arises, the Pre-Trial Chamber acknowledges therein that paragraph 4 of rule 81 does not encompass, by its terms, victims of crimes other than the victims of a crime or crimes under investigation or the subject of prosecution. Despite acknowledgment of this legal reality, the Pre-Trial Chamber extended the provisions of rule 81 (4) or construed it to read that, in exceptional circumstances, this is feasible upon a systematic and teleological interpretation of rule 81 (4). In what way a systematic or teleological interpretation of the relevant provisions of the Rules could justify the introduction of exceptions to a statutory provision is not



explained. This is not explained. A teleological or purposive interpretation of a legislative provision allows for the construction of a section of the law in a manner advancing the goals of an enactment or suppressing the mischief against which it is directed. It acknowledges no power and, far less, it allows no liberty to the Court to either refashion the terms of a legislative provision or add terms to its text that are not there.

12. The meaning of a systematic interpretation or its correlation to the interpretation of rule 81 (4) of the Rules is not addressed in the decision of the Pre-Trial Chamber. To my mind, systematic interpretation denotes an interpretation of a word or phrase in a section of the law consistent with the prior interpretation of the same concept by previous decisions of the Court; an interpretation conforming to a system reflected in the jurisprudence on the subject<sup>22</sup>.

13. In no circumstances can the rule of systematic interpretation justify the restructure of a legislative provision or the introduction of exceptions to it.

14. Here my opinion would have come to an end had it not been for the decision of the Appeals Chamber in *The Prosecutor v. Germain Katanga*<sup>23</sup>. The ratio decidendi of the above judgment lends support to the decision of the Single Judge; it provides a legal foundation upon which it may rest. Consequently, I must examine, having regard to article 21 (3) of the Statute, whether this legal foundation is sound.

15. Principles and rules of applicable law, as depicted in previous decisions of the Court (as the outcome of a process of interpretation), may provide a guide to the identification of the law applicable on a given subject. The Court may apply such principles as they emerge from decided cases but it is not bound to do so. Article 21 (2) of the Statute reads: "The Court may apply principles and rules of law as interpreted in its previous decisions". While article 21 (2) of the Statute does not bind the Court to follow previous decisions reflecting the interpretation of applicable law, it may do so given, on the one hand, that the source wherefrom the principles emanate is a court of law and, on the other, the significance of consistency in its application. Therefore, consideration must be given to previous decisions as I am doing in this case. I find the principle emerging from the above

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<sup>22</sup> See *inter alia* judgments of the European Court of Human Rights: *Sanchez-Reisse v Switzerland*, App. No. 9862/82, judgment of 21 October 1986, para. 49; *Lukanov v. Bulgaria*, Case no. 25/1996/644/829, judgment of 20 March 1997, para.13; *Kopecky v. Slovakia*, App. No. 44912/98, judgment of 28 September 2004, para 21.

<sup>23</sup> *Prosecutor v Katanga* "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'" 13 May 2008 (ICC-01/04-01/07-475 OA).



decision of the Appeals Chamber to be ill-founded. It does not illuminate applicable law. On the contrary, it puts a gloss upon it that it cannot bear. Sequentially, I shall not act upon it. My reasons are indicated below.

16. The principal rule governing the interpretation of the Statute is the one specified in article 31 (1) of the Vienna Convention on The Law of Treaties<sup>24</sup>:

*“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*

As much is affirmed in the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”<sup>25</sup>. The same rule applies to the interpretation of the Rules of Procedure and Evidence, an instrument supplementing the Statute deriving from an agreement concluded between the States Parties to the Rome Statute.<sup>26</sup>

17. The passage from the aforesaid judgment of the Appeals Chamber<sup>27</sup>, quoted hereunder, explains the framework within which provisions of the Statute should be interpreted in light of the Vienna Convention on the Law of Treaties:

*“The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose.<sup>28</sup> The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety.<sup>29</sup> Its objects may be gathered from the chapter of the law in which the particular*

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<sup>24</sup> Vienna Convention on The Law of Treaties, United Nations Treaty Series 18232, vol. 1155, p.331, signed on 23 May 1969 and entered into force on 27 January 1980 [hereinafter “Vienna Convention”].

<sup>25</sup> *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).

<sup>26</sup> The term “treaty” is defined as follows in article 2 (1) (a) of the Vienna Convention: “(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”

<sup>27</sup> *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).

<sup>28</sup> See also International Court of Justice, case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), 3 February 1994 (*available at* Westlaw), para. 41; International Court of Justice, Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Water v Bahrain) (*available at* Westlaw), para. 33.

<sup>29</sup> Vienna Convention article 31, para. 2.

*section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.*<sup>30</sup>

The approach to the interpretation of statutory provisions reflected in the above quotation has been consistently applied by the Appeals Chamber and first instance courts so much so that making reference to specific decisions becomes superfluous.

18. The rule established by the wording of paragraph 4 of rule 81 and the legal norms emerging therefrom, read in the context of the rule as a whole, is not susceptible to exceptions nor does it leave room for supplementation by the addition of a clause therein, extending the range of its application. As earlier indicated, rule 81 enumerates the circumstances under which the Prosecutor may be excused from the discharge of his duty to disclose evidence in his possession. No exception can be admitted unless specified in the enactment itself. Moreover, a rule of law cannot be bypassed in face of exceptional circumstances nor can such circumstances provide a basis for side-stepping its configuration.

The purposes of the Statute as outlined in the preamble can in no way legitimise the reconstruction or the rewording of a statutory provision. The general tenor of the Statute, on the other hand, could not conceivably warrant exceptions to the duty of the Prosecutor to disclose, other than those expressly spelled out.

19. What the preamble and tenor of the Statute provide authority for is to interpret the text of the Statute as worded in a manner promoting the objects and purposes of the law. The remit of interpretation is to construe the law as laid down by the legislator. A purposive interpretation provides no warrant for the redrafting, the remoulding or the addition of new provisions to a section of the Statute. In short, no process of interpretation empowers the Court to remake the law. In this connection, I may cite the following passage from my dissenting opinion in “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”:

*“...Rule 81 (4) of the Rules gives expression to the provisions of article 68 (1) and (2) of the Statute and the tenor of article 68 in its entirety, specifying victims, witnesses and members of their families as the subjects of protection.*

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<sup>30</sup> *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. 33.

*All three categories of persons have distinct attributes, not only in the context of article 68 but in that of many other provisions of the Statute and the Rules too.<sup>31</sup> Persons named in a witness statement do not come within the genus of any of the aforesaid three categories of persons. They belong to a different class of persons, outside the ambit and compass of article 68 of the Statute and rule 81 (4) of the Rules. Victims and witnesses have one thing in common, they are persons directly connected with the crime investigated and the crime that is the subject of prosecution.”<sup>32</sup>*

20. By the decision of the Appeals Chamber, a new class of persons is added to rule 81 (4) of the Rules as the subject of protection, namely, “persons at risk on account of the activities of the Court”. The addition cannot be grounded on any principle of law or rule of interpretation.

21. Article 54 (3) (f) of the Statute invoked by the Appeals Chamber in its judgment under consideration<sup>33</sup> as lending support to the decision taken to include a new class of persons as the subject of protection under rule 81 (4) is, to my mind, irrelevant to the interpretation of this rule. Article 54 of the Statute prescribes the duties and powers of the Prosecutor with respect to the investigation of crime. Amongst them are the measures enumerated in article 54 (3) (f) of the Statute. In this connection I may repeat what I said in my dissenting opinion in the above case:

*“Article 54 (3) (f) does not identify any species of information as confidential; it merely acknowledges power to the Prosecutor to take measures for the protection of “confidential information” so ranking under article 54 (3) (e). Article 54 (3) of the Statute articulates the powers of the Prosecutor in the investigatory process and steps that may be taken for the sustenance of its efficacy. Article 54 (3) of the Statute does not prescribe what material in the possession of the*

<sup>31</sup> See e.g. articles 43 (6), 57 (3) (c), 61 (5), 64 (6) (b), 68 (3), 69 (1) and (2), 75 (3) of the Rome Statute; rules 65, 85, 87, 88 of the Rules of Procedure and Evidence.

<sup>32</sup> See dissenting opinion of Judge Pikis in *Prosecutor v Katanga* “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’” 13 May 2008 (ICC-01/04-01/07-475 OA), para 15.

<sup>33</sup> *Prosecutor v Katanga* “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’” 13 May 2008 (ICC-01/04-01/07-475 OA), para. 56.

*Prosecutor must be disclosed to the defence or what may be held back.*<sup>34</sup>

22. Article 68 (1) of the Statute confers upon the Court authority to protect victims and witnesses and, in addition, members of their families. Both categories of persons, victims and witnesses, are identified by reference to the crime under investigation or the subject of prosecution. In the same spirit, article 68 (3) limits the class of victims who may participate in the proceedings to those personally affected by them. Rule 81, paragraph 4 articulates the procedural framework within which this may be sought.

In the spirit of paragraph 1 of article 68, paragraph 3 of the same article limits participation of victims in a case to those personally affected by the proceedings.

23. In my opinion, the above decision of the Appeals Chamber cannot find support in any principle of law, and for that reason I shall not act upon it. This being the case, I shall not advert either to the interpretation or to the implications of the addition made to rule 81 (4) of the Rules.

24. In conclusion, my answer to the question raised by the issue posed for determination is that the Single Judge erred in finding that alleged victims of sexual offences not connected with the charges in the case under consideration can be treated as victims under rule 81 (4) of the Rules. And on that account, I would reverse the sub judice decision.

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



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**Judge Georghios M. Pikis**

Dated this 27th day of May 2008  
At The Hague, The Netherlands

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<sup>34</sup> See *ibid*, dissenting opinion of Judge Pikis, para. 11.