

**Cour
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**International
Criminal
Court**

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Date: 25 April 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. Germain Katanga and Mathieu Ngudjolo Chui***

Public Redacted Version

URGENT

**Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing,
Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule
77 of the Rules**

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

The Office of the Prosecutor

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**Unrepresented Applicants for
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Registrar

Ms Silvana Arbia, Registrar

Defence Support Section

Victims and Witnesses Unit

Mr Simo Väätäinen

Detention Section

**Victims Participation and Reparations
Section**

Other

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I, Judge Sylvia Steiner, judge at the International Criminal Court (“the Chamber” and “the Court”, respectively);

NOTING the “First Decision on the Prosecution Request For Authorisation to Redact Witness Statements”¹ (“the First Decision on Redactions”), issued by the Single Judge on 3 December 2007;

NOTING the *ex parte*, closed session hearing with the Prosecution and the Victims and Witnesses Unit² (“the VWU”) held on 10 December 2007;

NOTING the “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions”³ issued by the Single Judge on 14 December 2007;

NOTING the “Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions”⁴ issued by the Single Judge on 19 December 2007;

NOTING the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 97”⁵ (“the Second Decision on Redactions”) issued by the Single Judge on 21 December 2007;

NOTING the “Prosecution’s Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing”⁶ filed by the Prosecution on 15 January 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution and the VWU on 21 January 2008;⁷

¹ ICC-01/04-01/07-84-US-Exp, issued on 3 December 2007, the confidential, *ex parte* version, available only to the Office of Prosecutor and the Defence (ICC-01/04-01/07-88-Conf-Exp), issued on 6 December 2007, and the public redacted version (ICC-01/04-01/07-90), issued on 7 December 2007; The First Decision on Redactions was revised on 22 February 2008 (ICC-01/04-01/07-223-Conf-Anx and ICC-01/04-01/07-224).

² ICC-01/04-01-07-T-10-Conf-Exp-ENG-ET

³ ICC-01/04/01/07-108

⁴ ICC-01/04-01/07-116.

⁵ ICC-01/04-01/07-123-Conf-Exp, the confidential redacted version available to the Defence (ICC-01/04-01/07- 124-Conf), issued on 21 December 2007, and the public redacted version (ICC-01/04-01/07-160), issued on 23 January 2008.

⁶ ICC-01/04-01/07-145 and ICC-01/04-01/07-145-Conf-Exp-Anx1 to AnxP2

NOTING the “Prosecution’s Submission of Information on Witness Protection”⁸ filed by the Prosecution on 24 January 2008;

NOTING the “Victims and Witnesses Unit report on reasons for rejection”⁹ filed by the Registry on 25 January 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution on 4 February 2008;¹⁰

NOTING the “Amended Submission of Prosecution’s Application Pursuant to Rules 81(1), 81(2) and 81(4) for Redactions to Screening Notes and Transcripts of Witnesses 2,5,6, 10, 0163, 0238, 0287,0233, 0267, 0271 and 0132”,¹¹ filed by the Prosecution on 26 February 2008, in which the Prosecution requested the authorisation of the Single Judge to redact certain parts of the screening notes and transcripts of Witnesses 2, 5, 6, 10, 0163, 0238, 0287, 0233, 0267, 0271 and 0132;

NOTING the “Registrar’s Report on Protective Measures”¹² filed by the Registry on 26 February 2008;

NOTING the “Addendum to the Registrar’s Report on Protective Measures”¹³ filed by the Registry on 29 February 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution and the VWU on 3 March 2008;¹⁴

⁷ ICC-01/04-01/07-T-14-Conf-Exp-ENG ET

⁸ ICC-01/04-01/07-161-Conf-Exp.

⁹ ICC-01/04-01/07-165-Conf-Exp and ICC-01/04-01/07-165-Conf-Exp-Anx.

¹⁰ ICC-01/04-01/07-T-16-Conf-Exp-ENG ET

¹¹ ICC-01/04-01/07-240, and its confidential and *ex parte* annexes (ICC-01/04-01/07-240-Conf-Exp-Anx1, ICC-01/04-01/07-240-Conf-Exp-Anx1-Q).

¹² ICC-01/04-01/07-239-Conf-Exp

¹³ ICC-01/04-01/07-244-Conf-Exp

¹⁴ ICC-01/04-01/07-T-20-Conf-Exp-ENG ET

NOTING the “Third Decision on the Prosecution Request for Authorisation to Redact materials related to the statements of Witnesses 7, 8, 9, 12 and 14” (“the Third Decision on Redactions”)¹⁵ issued by the Single Judge on 5 March 2008;

NOTING the “Prosecution’s Request for an Issuance of an Order to Protect Witnesses 238 and 163”¹⁶ filed by the Prosecution on 10 March 2008;

NOTING the “Prosecution’s Submission regarding the Written Consents of Witnesses 166, 233 and 271”¹⁷ filed by the Prosecution on 10 March 2008;

NOTING the “Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹⁸ issued by the Single Judge on 10 March 2008;

NOTING the “Decision on Prosecution’s Request for the Issuance of an Order to Protect Witnesses 238 and 163”¹⁹ issued by the Single Judge on 12 March 2008;

NOTING the “Corrigendum to the Prosecution’s Submission regarding the Written Consents of Witnesses 166, 233 and 271”²⁰ filed by the Prosecution on 13 March 2008;

NOTING the “Registrar’s report on the status of assessment and implementation of protective measures”²¹ filed by the Registry on 31 March 2008;

NOTING the “Prosecution’s Report on the Status of Witness Protection and Request for the Postponement of the 1 April 2008 Deadline in Regards to the Admissibility of

¹⁵ ICC-01/04-01/07-247-Conf-Exp-Corr issued 5 March 2008; the confidential redacted version available to the Defence (ICC-01/04-01/07-248-Corr), issued 5 March 2008. and the public redacted version (ICC-01/04-01/07-249) issued 5 March 2008.

¹⁶ ICC-01/04-01/07-255-Conf-Exp

¹⁷ ICC-01/04-01/07-256-Conf-Exp.

¹⁸ ICC-01/04-01/07-259.

¹⁹ ICC-01/04-01/07-317-Conf-Exp

²⁰ ICC-01/04-01/07-320-Conf-Exp and ICC-01/04-01/07-320-Conf-Exp-AnxA.

²¹ ICC-01/04-01/07-347-Conf-Exp

the Statement, Interview Notes, Interview Transcripts and Documents Relating to Witness 163"²² filed by the Prosecution on 31 March 2008;

NOTING the closed session *ex parte* hearing²³ held on 1 April 2008 with the Prosecution and representatives of the Registrar;

NOTING the "Fourth Decision on the Prosecution Request for Authorisation to Redact materials related to the statements of Witness 166 and 233"²⁴ ("the Fourth Decision on Redactions") issued by the Single Judge on 2 April 2008;

NOTING the "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'"²⁵ issued by the Single Judge on 4 April 2008;

NOTING the "Registry's further report on the status of assessment and implementation of protective measures"²⁶ ("the Registry's Further Report") filed by the Registry on 4 April 2008;

NOTING the "Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238, and 287"²⁷ filed by the Prosecution on 7 April 2008, in which the Prosecution provides information regarding the preventive relocation of four of its witnesses;

NOTING the "Prosecution's Application Pursuant to Rules 81(2) and 81(4) for Redactions to the Written Consents of Witnesses 161, 267 and 271",²⁸ filed by the Prosecution on 8 April 2008, in which the Prosecution requested the authorisation of

²² ICC-01/04-01/07-349-Conf-Exp.

²³ ICC-01/04-01/07-T-22-Conf-Exp-ENG ET.

²⁴ ICC-01/04-01/07-358-Conf-Exp, issued 3 April 2008; the confidential redacted version available to the Defence (ICC-01/04-01/07-360-Conf), issued 3 April 2008, and the public redacted version (ICC-01/04-01/07-361) issued 3 April 2008

²⁵ ICC-01/04-01/07-365

²⁶ ICC-01/04-01/07-369-Conf-Exp.

²⁷ ICC-01/04-01/07-374-Conf-Exp

²⁸ ICC-01/04-01/07-376; and its confidential and *ex parte* annexes (ICC-01/04-01/07-376-Conf-Exp-Anx1; and ICC-01/04-01/07-376-Conf-Exp-Anx1A-1C)

the Single Judge to redact certain parts of written consents of Witnesses 161, 267 and 271;

NOTING the “Order Requesting the Prosecution to Clarify and Review its Application pursuant to 81(2) and (4) of the Rules of Procedure and Evidence”²⁹ issued by the Single Judge on 10 April 2008;

NOTING the “Prosecution’s Response to Order Requesting the Prosecution to Clarify and Review its Application pursuant to 81(2) and (4) of the Rules of Procedure and Evidence”³⁰ filed by the Prosecution on 11 April 2008;

NOTING the “Order Requesting the Prosecution to Clarify and Review its Application pursuant to 81(2) and (4) of the Rules of Procedure and Evidence in relation to Witness 268”³¹ issued by the Single Judge on 11 April 2008;

NOTING the “Prosecution’s Response to ‘Order Requesting the Prosecution to Clarify and Review its Application pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence in relation to Witness 268’”³² filed by the Prosecution on 14 April 2008;

NOTING the “Decision Convening a Hearing”³³ issued by the Single Judge on 14 April 2008 and the Hearing³⁴ held in closed session and *ex parte* with the Prosecution and VWU on 15 April 2008, during which, *inter alia*, (i) it was decided that the Prosecution had until 16 April 2008 to re-file a confidential redacted version and a public redacted version of the “Prosecution’s Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238, and 287”; and (ii) the Prosecution requested guidance in respect of its disclosure obligation pursuant to

²⁹ ICC-01/04-01/07-386 and ICC-01/04-01/07-386-Conf-Exp-Anx I

³⁰ ICC-01/04-01/07-388-Conf-Exp

³¹ ICC-01/04-01/07-389 and 389-Conf-Exp-Anx I

³² ICC-01/04-01/07-391-Conf-Exp

³³ ICC-01/04-01/07-394-Conf-Exp.

³⁴ ICC-01/04-01/07-T-23-Conf-Exp-ENG ET 14-04-2008

article 67(2) of the Statute and rule 77 of the Rules in relation to summaries of [REDACTED] potential witnesses statements on which the Prosecution does not intend to rely for the purpose of the confirmation hearing and which contain exculpatory information or otherwise material for the Defence's preparation of the confirmation hearing;

NOTING the "Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238 and 287"³⁵ filed by the Prosecution on 16 April 2008;

NOTING the "Prosecution's Submission of Information regarding the Preventive Relocation of Witness 132"³⁶ filed by the Prosecution on 17 April 2008;

NOTING the "Fifth Decision on the Prosecution Request for Authorisation to Redact Statements, Investigators' Notes and Written Consent of Witnesses 161, 268, 279, 280 and 311 and Other Documents"³⁷ ("the Fifth Decision on Redactions") issued by the Single Judge on 17 April 2008;

NOTING articles 43, 54, 57, 61, 67 and 68 of the *Rome Statute* ("the Statute") and rules 15, 76, 77, 81 and 121 of the *Rules of Procedure and Evidence* ("the Rules"); regulation 53 of the *Regulations of the Court* ("the Regulations") and regulation 96 of the *Regulations of the Registry* ("the RoR");

I. Preliminary Remarks

³⁵ ICC-01/04-01/07-398 (public redacted version)

³⁶ ICC-01/04-01/07-404-Conf-Exp

³⁷ ICC-01/04-01/07-405-Conf-Exp and ICC-01/04-01/07-405-Conf-Exp-Anx1

1. At the outset, the Single Judge notes that in the present decision some excerpts of *ex parte* filings and of transcripts of *ex parte* hearings held in closed session are reclassified so as to be quoted in the present decision.
2. Furthermore, the “Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238 and 287”, filed on 7 April 2008, the Prosecution informs the Single Judge that it has provided for the preventive relocation of witnesses 132, 238 and 287, but that it “has not been able to confirm with Witness 163 [REDACTED].”³⁸
3. Moreover, according to the “Prosecution's Submission of Information Pursuant to the Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI Dated 10 March 2008”, filed on 8 April 2008, the Prosecution informed the Single Judge that it would continue to [REDACTED] Witness 163,³⁹ although:

In light of the current deadlines of the Decision establishing a calendar and considering the difficulties the Prosecution is experiencing in [REDACTED] Witness 163, the Prosecution is withdrawing its request for the proposed redactions to the interview notes, interview transcripts and any documents of Witness 163. The Prosecution will not rely on the said material for the Confirmation of the charges in this case. The Prosecution is reviewing the interview notes, interview transcripts and documents of Witness 163 to comply with its obligations pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence.⁴⁰

4. In this regard, the Single Judge would like to highlight that the findings of the Single Judge in the present decision in relation to the Prosecution's practice of preventive relocation must also be applied in relation to Witness 163.

II. Scope, Object and Purpose of the Confirmation Hearing

³⁸ ICC-01/04-01/07-374-Conf-Exp. p.3. footnote 1

³⁹ ICC-01/04-01/07-375-Conf-Exp. para. 6.

⁴⁰ ICC-01/04-01/07-375-Conf-Exp. para 5.

5. The confirmation hearing is one stage of the criminal procedure before the Court which aims at ensuring that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she has been charged.⁴¹
6. The confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial.
7. Furthermore, there must be consistency between the proceedings leading to the confirmation hearing, the hearing itself and, in the eventuality of the confirmation of the charges, the proceedings held before the Trial Chamber. Hence, the procedural activities carried out for the purpose of the confirmation hearing must also aim at facilitating the preparation for trial in the event that the charges are confirmed.
8. These considerations underlie the requirement of article 61(1) of the Statute that “within a reasonable time after the person’s surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial.”
9. In this regard, the Single Judge is mindful that the confirmation hearing in the present case is currently scheduled for 21 May 2008, which is approximately six months after the transfer of Germain Katanga to the Detention Centre at the seat of the Court in The Hague.
10. As has been expressed by the Single Judge on numerous occasions, the Single Judge observes with grave concern that there are a number of issues which may have an impact on the starting date of the confirmation hearing, including the

⁴¹ See ICC-01/04-01/06-803, para 37

problems lately arising between the Prosecution and Victims and Witnesses Unit in relation to the protection of certain witnesses on whom the Prosecution still intends to rely at the confirmation hearing in the present case, as well as the fact that the Appeals Chamber has not yet ruled on certain issues for which leave to appeal was granted several months ago.⁴²

III. Preventive Relocation of Witnesses 132, 238 and 287

11. The Single Judge agrees with the Prosecution's basic premise in relation to the system of protection of victims and witnesses provided for in the Statute and the Rules, in that:

Under Article 68 (1) of the Statute, the Court, including the Prosecution, bears the responsibility to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." Under Article 43 (6) of the Statute, the Registry through the establishment of the VWU, is mandated "to provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses". The VWU is also empowered to "advise the Prosecutor and the Court on the appropriate protection measures." In accordance with those provisions, the Prosecution relies on the VWU to implement the measures required for the protection of its witnesses.⁴³

12. The Court's Witness Protection Programme ("the ICCPP") is developed within this regulatory framework. As such, pursuant to regulation 96(1), (2) and (4) of the RoR:

- (i) "the Registry shall take all necessary measures to maintain a protection programme for witnesses";
- (ii) "an application for inclusion in the programme may be filed by the Prosecutor or by counsel"; and
- (iii) "inclusion in the protection programme shall be subject to the decision of the Registrar after the assessment made under sub-regulation 3."⁴⁴

⁴² Including, the issues on the statutory basis for the redaction of information concerning innocent third parties or whether Germain Katanga's knowledge of the French language is sufficient to fulfill the requirements of article 67(1) of the Statute

⁴³ ICC-01/04-01/07-374-Conf-Exp. para 5

⁴⁴ ICC-01/04-01/07-317-Conf-Exp. p 4.

13. Nevertheless, the Prosecution submits that:

- (i) Pursuant to article 68(1) of the Statute, the starting point for protective measures should be the elimination of all foreseeable risks – which the Prosecution alleges is the standard agreed by the Presidency, the Registry and the Prosecution – because any lower standard of risk would not permit the Court, or the Prosecution, to discharge its obligations to protect victims and witnesses as mandated by article 68(1) of the Statute;⁴⁵
- (ii) Article 68 of the Statute gives a special responsibility to the Prosecution to protect its witnesses, and the Prosecution must have the means to implement this particular duty, through its independent assessment of the risks affecting its witnesses and the protection they need;⁴⁶
- (iii) Adequate protection is an integral part of the investigation, and as the Prosecution, who has a mandate to prove its case beyond a reasonable doubt, independently decides how to lead its case, must also be able to independently assess the need to protect each of its witnesses at risk;⁴⁷ and
- (iv) One of the measures to which the Prosecution can resort to fulfil its mandate under article 68 of the Statute is what the Prosecution refers to as “preventive relocation”.⁴⁸

14. The Prosecution defines preventive relocation as follows:

Preventive relocation is a provisional measure. When the Prosecution assesses that a witness for whom protective measures have been rejected is at risk, the OTP organises for the relocation of the witness [REDACTED] and assists the witness to [REDACTED]. These measures are temporary and put in place, pending the provision of protection by the VWU, which is the proper Unit to implement adequate protective measures on the longer term.⁴⁹

After the preparatory steps with the witness, the main components of the preventive relocation undertaken by the OTP include [REDACTED].⁵⁰
[REDACTED]⁵¹

⁴⁵ ICC-01/04-01/07-374-Conf-Exp, p 10.

⁴⁶ ICC-01/04-01/07-374-Conf-Exp, para. 6.

⁴⁷ ICC-01/04-01/07-374-Conf-Exp, paras 6 and 7.

⁴⁸ ICC-01/04-01/07-374-Conf-Exp, paras 6 and 9.

⁴⁹ ICC-01/04-01/07-374-Conf-Exp, para. 9.

⁵⁰ ICC-01/04-01/07-374-Conf-Exp, para. 15.

⁵¹ ICC-01/04-01/07-374-Conf-Exp, paragraphs 18 and 19.

15. Moreover, according to the Prosecution:

Preventive relocation [REDACTED] is not a new approach. Witness 7 (witness 128) was preventively relocated by the OTP [REDACTED]. Witness 9 (Witness 250) was also preventively relocated by the OTP, [REDACTED].

16. At the outset, the Single Judge highlights that in the present case most of the witnesses on whom the Prosecution intends to rely at the confirmation hearing live in the province of Ituri. The security situation in this area remains volatile as described by the Single Judge in the First Decision on Redactions,⁵² including several instances of intimidation of witnesses on whom the Prosecution intends to rely at the confirmation hearing by alleged members of the FNI and the FRPI.⁵³

17. Under these conditions, when a witness decides to authorise the use of his or her statement for the purpose of the confirmation hearing in the knowledge that his or her identity might be disclosed to the Defence, the witness is inevitably undertaking a certain amount of risk. It is for this reason that in the “Decision on Written Consent of Witness 271”, issued on 12 March 2008, the Single Judge emphasised that the Prosecution cannot give any witness on whom it intends to rely at the confirmation hearing any assurance of anonymity⁵⁴ and stated that:

- (i) The first and foremost protective measure is to give the witnesses a clear idea of what they can expect from the Court in terms of protection, which requires that it be explained to the witness upfront and in detail the type of operational and procedural measures that may be available to them, as well as the basic features of the procedure for the granting of such measures;⁵⁵ and that
- (ii) The consent given by witnesses for the use of their statements for the purpose of the confirmation hearing will only be valid after the Prosecution has given them a clear idea of what they can expect from the

⁵² First Decision on Redactions, paras 13-22. The security situation was subsequently confirmed by the Single judge in her Second Decision on Redactions, para. 10. Third Decision on Redactions, para 9. Fourth Decision on Redactions, para 8, and the Fifth Decision on Redactions, para 10

⁵³ ICC-01/04-01/07-223-Conf-Anx and ICC-01/04-01/07-224, paras 17-22

⁵⁴ ICC-01/04-01/07-316-Conf-Exp, pp 4.

⁵⁵ ICC-01/04-01/07-316-Conf-Exp, p 4

Court in terms of protection and in particular in terms of non-disclosure of their identities.⁵⁶

18. As the Prosecution acknowledges, the Defence can only be in a position to fully challenge the evidence provided for in the statement of a given witness if the identity of the witness is disclosed to the Defence.⁵⁷ It is for this reason that, as Pre-Trial Chamber I has already stated, summary evidence or statements in which the witness's identifying information has been redacted, have a lesser probative value than the statements of witnesses whose identities have been disclosed to the Defence.⁵⁸ It is also for this reason that, as the Prosecution states in relation to Witnesses 132, 163, 238 and 287, in light of the upcoming confirmation hearing in the present case, when witnesses "provide important information to the case of the Prosecution [...] their identity will have to be disclosed to the Defence."⁵⁹
19. The Single Judge also notes that the lack of a police force for the Court, the distance from the witnesses' places of residence to the seat of the Court and the above-mentioned volatile security situation in their places of residence, limit to an important extent the range of available measures which can effectively ensure the protection of those witnesses who are at risk.
20. As a result, the implementation by the Prosecution, in the context of the policy of "elimination of all foreseeable risks," has led to a number of Prosecution applications for relocation of witnesses through their inclusion in the ICCPP that is unprecedented. For instance in the present case the Prosecution has requested that [REDACTED] witnesses be relocated for the purpose of the confirmation hearing.

⁵⁶ ICC-01/04-01/07-316-Conf-Exp. p 5

⁵⁷ ICC-01/04-01/07- 374, paras. 41 to 44.

⁵⁸ ICC-01/04-01/06-517, pp 4 and 6.

⁵⁹ ICC-01/04-01/07-374, para. 41

21. The Single Judge does not intend to discuss the feasibility of the witness protection policy which led to these results. Nevertheless, the Single Judge would like to highlight that, as long as this policy is maintained, it will have to be implemented in accordance with the model of witness protection embraced by the Statute and the Rules.
22. In this regard, the Single Judge recalls that article 43(6) of the Statute and regulations 96 (1), (2) and (4) of the RoR:
- (i) establish a single ICCPP;
 - (ii) provide that the ICCPP shall be run by the Registrar, who has the competence to decide which witnesses are accepted into the programme and to implement the protective measures granted to such witnesses; and
 - (iii) expressly regulate the role to be played by the Prosecution and the Defence within the framework of the programme, which is limited to making applications to the Registrar for the inclusion of witnesses into the programme;
23. As a consequence, in the view of the Single Judge, there is no provision in the Statute, the Rules, the Regulations or the RoR, which expressly confers upon the Prosecution the power to preventively relocate witnesses until they are included in the ICCPP. Any such power could only be recognised as a result of an interpretation by the Prosecution of its mandate, pursuant to article 68(1) of the Statute in accordance with the interpretative criteria provided for in the Vienna Convention of the Law of Treaties (“the Vienna Convention”);
24. In this regard, the literal interpretation of article 68(1) of the Statute does not expressly grant the Prosecution any power to preventively relocate witnesses insofar as it only refers to the general mandate of the Prosecution - as well as the other organs of the Court - to take “appropriate measures to protect the safety,

the physical and psychological well-being, dignity and privacy of victims and witnesses” in particular during the investigation and prosecution of crimes.

25. The contextual interpretation of article 68(1) of the Statute in light of the other provisions concerning the competent organ of the Court to adopt and implement protective measures, and in particular article 43(6) of the Statute and regulations 96(1), (2) and (4) of the RoR, requires that the Prosecution’s mandate under article 68(1) of the Statute not be extended to the preventive relocation of witnesses for the following reasons:

- (i) When the Prosecution carries out the preventive relocation of a witness before referring that witness to the Victims and Witnesses Unit of the Registry or before the Registrar takes a decision on his or her inclusion in the ICCPP, the power to decide on whether the relevant witness should be relocated shifts *de facto* from the Registrar to the Prosecution. In the view of the Single Judge, once a witness is taken to a new location (alone or with members of his or her family) where he or she remains for a certain period of time in this new environment, returning the witness to their former place of residence as a result of the Registrar’s decision not to include the witness in the ICCPP would be disruptive for the witness and his or her family and would also most likely put them at risk;
- (ii) When, as is the case with Witnesses 132, 238 and 287, the Prosecution *proprio motu* carries out the preventive relocation of the Witnesses after the Registrar has formally rejected the Prosecution’s application for the inclusion of the relevant witnesses in ICCPP, the Prosecution is infringing the decision of the competent organ of the Court to decide upon the relocation of a witness. In the view of the Single Judge, relocating a witness immediately after the Registrar has decided not to relocate that witness cannot be qualified on its face as “preventive relocation.” Quite the contrary, it should be qualified as a “reactive relocation”, which aims

at compelling the Registrar to review his decision by presenting the relocation of the relevant witness as a *fait accompli*;

- (iii) Article 68(1) of the Statute should be interpreted in a manner which is fully consistent with the attribution to the Registrar of the power to decide which witnesses of the Court can be included in the ICCPP and to implement their relocation. In this regard, the Prosecution's mandate, pursuant to article 68(1) of the Statute, is limited to, *inter alia*, (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different protective measures; (ii) requesting the inclusion of witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber.

26. Finally, the teleological interpretation of article 68(1) of the Statute also requires that the Prosecution's mandate under this provision not be extended to the preventive relocation of witnesses. Article 68(1) of the Statute is a provision of a general nature, which aims at placing on all organs of the Court, including the Prosecution, the obligation to take "appropriate measures" for the protection of witnesses.

27. The object and purpose of this provision is not to attribute to any of the organs of the Court, including the Prosecution, the power to take whichever protective measure the relevant organ may consider necessary to protect a given witness. On the contrary, this provision aims at placing on every organ of the Court the obligation to pay particular attention to the needs of the witnesses in performing their functions and to cooperate, whenever necessary, with those organs of the Court that are competent to adopt specific protective measures such as the relocation of witnesses.

28. As the Prosecution acknowledges, “the drafters of the Rome Statute carefully considered whether there should be a separate unit for prosecution witnesses in the Office of the Prosecutor or whether there should be only one unit located in the Registry”.⁶⁰ The decision of the drafters to create a single Victims and Witnesses Unit within the Registry constitutes a clear endorsement of a system of witness protection in which the core role is played by the Registry and a limited mandate is given to the Prosecution which, in the view of the Single Judge, is consistent with the attribution to the Registrar of the overall competence for the operation of the ICCPP.
29. The central role given to the Registry and the limited mandate of the Prosecution in terms of witness protection, is also consistent with the fact that the Statute embraces an accusatorial system of criminal procedure -in the sense that it is the Prosecution who exercises the penal action – which is not a purely adversarial system because it includes a mixture of procedural features from the Romano-Germanic and common law traditions.
30. In this regard, the Single Judge recalls that both Pre-Trial Chamber I and the Trial Chamber, in their decisions on witness familiarisation and witness proofing in the case of *The Prosecution v. Thomas Lubanga Dyilo*, have already stated that, under the system of the Statute, there are no witnesses of either the Prosecution or the Defence because all witnesses are “witnesses of the Court.”⁶¹ It can therefore be no surprise that in a system where witnesses are “witnesses of the Court”, the main role in respect to their protection is granted to the Registry, as the main administrative body of the Court which is characterised by its impartiality and takes no part in the proceedings.

⁶⁰ ICC-01/04-01/07-374, p. 4, para 8. See also Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, Draft Statute, UN Doc. A/CONF.183/2/ADD.1, 14 April 1998, article 44 (4), footnote 24

⁶¹ ICC-01/04-01/06-1049, para 34 and 01/04-01/06-679, para. 26.

31. The central role given to the Registry and the limited mandate of the Prosecution in terms of witness protection also ensure, as the Prosecution acknowledges, equality of arms between the parties as well as the effective use of the Court's resources.⁶² This central role further prevents the credibility of the relocated witnesses from being affected by the fact that [REDACTED] in the proceedings.
32. As a result, the Single Judge is of the view that in implementing the practice of preventive relocation, as defined by the Prosecution, the latter is not only exceeding its mandate under the Statute and the Rules but it is also misusing its mandate in order to *de facto* shift the power to decide on the relocation of a given witness from the Registry to the Prosecution.
33. Furthermore, the implementation of such a practice also constitutes an ineffective use of the limited resources of the Court. The tasks carried out by [REDACTED] during the preventive relocations are similar to those carried out by the members of the VWU during the actual relocations.
34. Moreover, unless the Prosecution immediately puts an end to this practice, the principle of equality of arms could be infringed and the credibility of the relevant witnesses could be affected.
35. The Single Judge acknowledges, however, that there might be exceptional circumstances in which, according to the Prosecution, a witness on whom the Prosecution intends to rely at the confirmation hearing or even a potential witness,⁶³ is facing a serious threat of imminent harm related to his or her cooperation with the Court.

⁶² ICC-01/04-01/07-374, para 6

⁶³ Individuals who have been interviewed by the Prosecution prior to the Prosecution filing in any given case, pursuant to rule 121 of the Rules, of its list of evidence, and in relation to whom the Prosecution will likely rely for the purpose of the confirmation hearing, or if the charges are confirmed, for the purpose of the trial

36. The Court as a whole must be in a position to respond immediately to these types of exceptional situations within the framework of the system of witness protection provided for in the Statute and the Rules. In the view of the Single Judge, this requires that:

- (i) as soon as the Prosecution is aware that a witness or a potential witness is subject to a serious threat of imminent harm related to his or her cooperation with the Court, the Prosecution must make an application to include the relevant witness in the ICCPP, and must request the Registrar to adopt the necessary provisional measures while the Registrar makes a decision on the Prosecution's request;
- (ii) the Prosecution must also provide the Registrar with all information requested by the latter with regard to the relevant witness on an expedited basis;
- (iii) the Registrar must consider as an urgent priority the setting up of an [REDACTED], which would provide, *inter alia*, for the possibility of [REDACTED] witnesses or potential witnesses from [REDACTED] while he decides on the Prosecution's requests for their inclusion in the ICCPP in these types of exceptional situations;
- (iv) the Registrar shall decide immediately on the necessary provisional measures on the basis of the existence of such a threat, unless the Prosecution's allegations are, on their face, fully unsupported. In other words, in these types of exceptional situations, the need for immediate provisional measures of protection prevails over the need for a comprehensive reassessment by the Registrar of the Prosecution's statement relating to the existence of a serious threat of imminent harm to a witness or potential witness.

37. The Single Judge would like to highlight that the Defence should also benefit, on the same conditions, from the above-mentioned system to be set up by the Registrar. Furthermore, in the view of Single Judge, the Court can only

adequately address these types of exceptional situations if the Prosecution and the Defence do not abuse the system and only resort to it when exceptional circumstances make it absolutely necessary.

38. The Single Judge does not intend to address the effectiveness of the model of witness protection embraced by the Statute and the Rules, particularly at a time when it is not fully developed. Nevertheless, as long as the current model is in place, the Prosecution and the Defence must operate within its framework and must refrain from practices that are contrary to it.

39. The Single Judge is of the view that, except for the particular case of witness 238 which is addressed below, the appropriate remedy for the Prosecution's unauthorised preventive relocations of witnesses 132 and 287 is the exclusion of their statements, interview notes and interview transcripts for the purpose of the confirmation hearing.

40. Moreover, Witnesses 132 and 287 shall immediately be put under the supervision of the Registrar, who will decide upon the appropriate protective measures to be taken in relation to them given that:

- (i) their identities will not be revealed to the Defence, and their statements, interview notes and interview transcripts are not admissible for the purpose of the confirmation hearing; and
- (ii) according to the Prosecution, the witnesses [REDACTED] and have been [REDACTED];

IV. Registrar's Implementation of Single Judge's Decision of 12 March 2008 in relation to Witness 238

41. In relation to Witness 238, the Single Judge has already stated in the decision of 12 March 2008 that:

In taking his decision on the Prosecution's request for the inclusion of Witness 238 in the Court's witness protection programme, the Registrar completely disregarded the findings of the Single Judge on the seriousness of the threats received by Witness 238.⁶⁴

42. In that decision, the Single Judge gave the Registrar until 20 March 2008 to review his decision on the Prosecution's application for the inclusion of Witness 238 in the ICCPP taking into account the findings of the Single Judge that the threats reported by the said witness were serious and indeed took place.⁶⁵

43. In the Registry's Further Report, the Registrar stated that he upheld his decision to reject the inclusion of Witness 238 in the ICCPP "on the basis of the information provided, in particular the Single Judge's finding that the threats were serious and indeed took place."⁶⁶

44. If in reviewing his decision the Registrar indeed considered that the threats received by Witness 238 were serious and indeed took place, the Single Judge can only conclude that the Registrar, by upholding his decision, departed from the criteria that the Registrar himself has established to assess whether requests for inclusion in the ICCPP should be granted.⁶⁷

45. In this regard, it is important to stress that, according to previous submissions from the Registrar in the case of *The Prosecutor v. Thomas Lubanga Dyilo*,⁶⁸ a request for inclusion in the ICCPP shall be granted if two of the following four criteria are met: [REDACTED];⁶⁹ [REDACTED];⁷⁰ [REDACTED]; and [REDACTED].⁷¹

⁶⁴ ICC-01/04-01/07-317-Conf-Exp, p 6

⁶⁵ ICC-01/04-01/07-317-Conf-Exp, p 8

⁶⁶ ICC-01/04-01/07-369-Conf-Exp, para 9.

⁶⁷ ICC-01/04-01/06-T-6-Exp-Conf-EN (02May2006), pp 38, lines 23-25 and 39, lines 1-24. See also ICC-01/04-01/07-165-Conf-Exp, paras.4-7; and ICC-01/04-01/07-255-Conf-Exp, para.11

⁶⁸ ICC-01/04-01/06-T-6-Exp-Conf-EN (02May2006), pp 38, lines 23-25 and 39, lines 1-24

⁶⁹ [REDACTED]

⁷⁰ [REDACTED]

⁷¹ [REDACTED]

46. Subsequently, the Registrar appears to have increased the threshold for inclusion in the ICCPP insofar as he has highlighted in his filings in the present case that the inclusion in the programme is based on a new standard: “[t]he fundamental principle that we have is that the acceptance of an individual to the ICCPP will have to be [REDACTED]”.⁷² This new standard was also noted by the Single Judge in the 1 April 2008 hearing, where she stated that according to previous practice, “the [REDACTED] was not the basis for their relocation but the real possibility, the concrete likelihood that they would be [REDACTED] [...]”.⁷³
47. The Single Judge does not intend to review the former or the new criteria set out by the Registrar for the inclusion of witnesses in the ICCPP. However, in the view of the Single Judge, it is important to highlight that the Registrar stated that he upheld his rejection of Witness 238 in spite of taking the following into consideration: (i) the Witness lives [REDACTED];⁷⁴ (ii) the Witness is [REDACTED]; and (iii) the Witness has been subjected to [REDACTED].⁷⁵
48. In the view of the Single Judge these facts meet, on their face, any of the thresholds established by the Registrar in order to grant inclusion in the ICCPP. They satisfy all four criteria for the inclusion in the ICCPP set out by the Registrar in the case of *The Prosecutor v. Thomas Lubanga Dyilo* in that Witness 238 (i) [REDACTED]; (ii) is [REDACTED]; (iii) provides, according to the Prosecution, important evidence [REDACTED], which are all essential to the case of the Prosecution;⁷⁶ and (iv) has received [REDACTED]. Moreover, it also satisfies the new [REDACTED] threshold established by the Registrar in the present case.

⁷² ICC-01/04-01/07-T-22-Conf-Exp-ENG ET, page 10, lines 21-22 See also ICC-01/04-01/07-369-Conf-Exp, paras.30 and 31. It was following this newly established criterion that the Registrar found that the indicated threats Witness 238 was exposed to did not lead to a change in the level of risk to the witness, which would justify entry into the Court’s Witness Protection Programme. See ICC-01/04-01/07-349-Conf-Exp, page 4 and ICC-01/04-01/07-349-Conf-Exp-Anx1. See also ICC-01/04-01/07-369-Conf-Exp, paras 8 and 9 For the different level of risks established by the Registrar see ICC-01/04-01/07-369-Conf-Exp, paras 24 to 28.

⁷³ ICC-01/04-01/07-T-22-Conf-Exp-ENG ET, page 21, lines 11-21

⁷⁴ [REDACTED]

⁷⁵ ICC-01/04-01/07-369-Conf-Exp, paras.3 to 9

⁷⁶ ICC-01/04-01/07-255-Conf-Exp, paras.13 and 14

49. Hence, if as the Registrar states, the Registrar reviewed his decision considering in particular the Single Judge's finding that the threats against Witness 238 were serious and indeed took place, one can only conclude that the Registrar departed from all previous criteria he has previously set out to assess these types of applications. This way of proceeding is unacceptable in light of the fact that the success of the ICCPP and of the model of witness protection embraced by the Statute and the Rules is fully dependent on the clear pre-determination and transparent application of the criteria for inclusion in the programme.
50. In addition, upon a careful reading of the Registry's Further Report, the Single Judge is of the view that the decision also raises the issue of lack of compliance with the decisions of the Single Judge. In this regard, the Single Judge refers to paragraphs 4 to 6 of the Registry's Further Report, which explain in detail how the [REDACTED] in his reassessment informed the Registrar that, contrary to the findings of the Single Judge and to the order of the Single Judge of 12 March 2008, the threats received by Witness 238, even if they took place, were not serious.
51. Therefore, despite the Decision of the Single Judge of 12 March 2008, the Registrar continues to completely disregard the findings of the Single Judge on the seriousness of the threats received by Witness 238. The Single Judge is very concerned about Registrar's behaviour, in relation to Witness 238, which has created a serious risk for the witness's safety and has also created a further delay in the proceedings in the present case.
52. Under these exceptional circumstances, the Single Judge considers it necessary to resort to the powers expressly entrusted to the Chamber by paragraph 3(c) of article 57 of the Statute in order to provide for the adequate protection of Witness 238 by ordering his immediate inclusion in the ICCPP.

V. Evidence on Which the Prosecution Intends to Rely at the Confirmation Hearing and ICCPP

A. Preliminary Remarks: Sustainability of the Current Situation

53. The problems addressed in the two previous sections in relation to several aspects of the system of witness protection, as embraced by the Statute and the Rules, have taken place in spite of the fact that Germain Katanga was transferred at the seat of the Court in The Hague on 18 October 2007. The Single Judge notes that since the issuance of the warrants of arrest for Germain Katanga and Mathieu Ngudjolo Chui, and even more so since the transfer of Germain Katanga, she has repeatedly encouraged the Prosecution to cooperate with the Registrar, and in particular with the VWU, to facilitate the Registrar's assessments and decisions on the Prosecution's requests for inclusion in the ICCPP of witnesses on whom the Prosecution intends to rely at the confirmation hearing.

54. The Prosecution and the VWU cooperated in a fruitful manner for several months, which resulted in the relocation of [REDACTED] witnesses on whom the Prosecution intends to rely at the confirmation hearing. Nevertheless, since the end of January 2008 the discrepancies in the approach of the Prosecution and the VWU have steadily increased, which has led to the above-mentioned problems.

55. Despite the fact that the current situation is the result of a combination of factors, in the view of the Single Judge, what underlies the discrepancies in the approach of the Prosecution and the Registrar and has led the Prosecution to unilaterally start its so-called preventive relocation program, could be explained by at least three categories of reasons. The first category of reasons include the fact that the ICCPP is still developing, that there is no certainty yet as to the Registrar's criteria for inclusion of witness in the ICCPP, and that the relevant units of the

Registry may not have sufficient staff to cope with the particularly demanding situation in which they are operating.

56. The second category of reasons revolves around the Prosecution's practice of referring the great majority of the witnesses on whom it intends to rely at the confirmation hearing to the ICCPP. In the view of the Single Judge, this practice is the result of, *inter alia*, the following circumstances:

- (i) most witnesses live in one area – the Ituri District - where the security situation is volatile as has been found by the Single Judge in the First Decision on Redactions;
- (ii) some of the witnesses on whom the Prosecution intends to rely at the confirmation hearing have already received serious threats [REDACTED];
- (iii) under these circumstances, there is a certain level of risk in disclosing to the Defences of Germain Katanga and Mathieu Ngudjolo Chui the identity of those witnesses on whom the Prosecution intends to rely at the confirmation hearing and who live in areas as volatile as the Ituri District;
- (iv) as acknowledged by the Prosecution, there is a need to disclose the identity of the witnesses in order to avoid affecting the rights of the suspects and limiting the probative value of their statements;
- (v) under these conditions, and considering what has been said above in sections III and IV of the present decision, relocation often appears as the only measure capable of fully guaranteeing the safety, physical and psychological well-being, dignity and privacy of the witnesses.

57. Nevertheless, despite of the above-mentioned circumstances, one cannot overlook the fact that the Prosecution's practice has led to an unprecedented number of applications for relocation, as illustrated by the fact that the Prosecution made applications for relocation in relation to all but three witnesses on whom it intends to rely at the confirmation hearing.⁷⁷

⁷⁷ The Prosecution did not request the relocation of witnesses [REDACTED]

58. Finally, the third category of reasons relate to the high number of witnesses on whom the Prosecution intends to rely at the confirmation hearing. In this regard, the Single Judge notes that in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, which was a case confined to the enlistment, conscription and active use in hostilities of children under the age of 15 in a handful of training camps and military operations, the Prosecution relied for the purpose of the confirmation hearing on the statements of around thirty-five witnesses.
59. Moreover, in the present case the Prosecution initially intended to rely on the statements of more than [REDACTED] witnesses despite the fact that (i) it is limited to crimes allegedly committed during one attack on one village on one day (the alleged joint FNI/FRPI attack against the village of Bogoro on or about 24 February 2003); and that (ii) according to the Prosecution, the suspects were in Bogoro commanding their respective forces during the attack.
60. The Single Judge emphasises that the above-mentioned Prosecution's practices have led to a situation that is not sustainable in relation to every confirmation hearing held before this Court, as shown by the difficulties that ICCPP is already facing in coping with the numerous Prosecution's requests for relocation of witnesses in the present case and in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.
61. In this regard, it is important to note that, according to the VWU, it takes an average of two to three months from the moment the Prosecution makes a request for the inclusion of a witness in the ICCPP until the witness is relocated upon acceptance in the Programme. Logically, this amount of time increases when, as is presently the case, the VWU is processing dozens of requests in relation to the various cases before the Court.

62. As a result when, as is presently the case, the Prosecution requests the relocation of approximately [REDACTED] witnesses for the purpose of a confirmation hearing, and some of those requests are made two to three months after the transfer of the suspect to the seat of the Court in The Hague, it takes at least five to six months for the Registrar to decide upon and implement the decisions on the Prosecution's requests for relocation.
63. Furthermore, the Single Judge notes that the decision of the Registrar on the Prosecution's requests for relocation is only the initial step of the proceedings leading to the confirmation hearing. In this regard, the Single Judge points out that only after the Prosecution's requests for relocation have been decided upon, is the Prosecution in a position to file a final version of its requests for redactions concerning the relevant witnesses.
64. Concerning redactions, the Single Judge notes that in the present case the Prosecution's requests for redactions in relation to those witnesses on whom it intends to rely at the confirmation hearing, and for whom anonymity is not requested, extends to hundreds of names and locations.⁷⁸
65. In deciding upon these requests, and given the precariousness of the security situation in the DRC, in particular in the Ituri and Kinshasa areas, and the several instances of intimidation of Prosecution witnesses [REDACTED], the Single Judge has already found that a number of the redactions are justified at this stage of the proceedings pursuant to rule 81 of the Rules.
66. Nevertheless, as a result of the Appeals Chamber Judgements of 14 December 2006,⁷⁹ the Single Judge must provide specific reasons why any given piece of information is redacted from any given statement, interview note, interview

⁷⁸ The Single Judge also notes the several numbers of corrigenda of those requests for redactions and the fact that the Single Judge has had to order, on many occasions, that the Prosecution review and clarify its requests

⁷⁹ ICC-01/04-01/06-773 and ICC-01/04-01/06-774.

transcript or document, even if such reasons are filed in an *ex parte* annex which is not available to the Defence.

67. This has already led to the issuance of several decisions on redactions by the Single Judge in which more than four hundred pages have been necessary to justify the redactions authorised in the statements, interview notes, transcripts of interviews and related documents concerning [REDACTED] witnesses.⁸⁰ The Single Judge required several weeks after the filing by the Prosecution of requests for redactions in order to accomplish this task.

68. The issuance of a decision on the Prosecution's requests for redactions does not necessarily mean that the identity of the relevant witnesses, and their statements, interview notes and interview transcripts can be immediately disclosed to the Defence. Quite the contrary, only after the relocation of the relevant witnesses has taken place, can their statements, interview notes and transcripts of interviews be disclosed to the Defence with the redactions authorised by the Single Judge.

69. Moreover, only after all statements, interview notes and transcripts of interviews of witnesses, as well as the documentary evidence, on which the Prosecution intends to rely at the confirmation hearing are disclosed to the Defence, does the 30 day time-limit prior to the commencement of the confirmation hearing provided for in rule 121 of the Rules start to run.

70. All in all, in the view of the Single Judge, this situation brings the proceedings leading to the confirmation hearing to a period ranging from seven to nine months at a minimum, as demonstrated by the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and in the present case. Subsequently, one will have to account for the confirmation hearing, the decision of the confirmation of

⁸⁰ ICC-01/04-01/07-88-Conf-Exp, ICC-01/04-01/07-123-Conf-Exp, ICC-01/04-01/07-247-Conf-Exp; ICC-01/04-01/07-308-Conf-Exp, ICC-01/04-01/07-358-Conf-Exp, and ICC-01/04-01/07-405-Conf-Exp

the charges (which, according to regulation 53 of the Regulations shall be delivered within 60 days) and any interlocutory appeals against such a decision. In the case of *The Prosecution v. Thomas Lubanga Dyilo* this period of time extended for several additional months.⁸¹

71. In the view of the Single Judge, this situation is not consistent with the fact that the confirmation hearing has a limited scope, must be carried out within a reasonable time after the surrender or voluntary appearance of the suspect before the Court, and must also aim at facilitating the preparation for trial in the event that the charges are confirmed.

B. Prosecution Core Evidence

72. In the view of the Single Judge, the high number of witnesses on whom the Prosecution intends to rely for the purpose of the confirmation hearing in cases as confined as those against Thomas Lubanga Dyilo and Germain Katanga and Mathieu Ngudjolo Chui might be the result of: (i) the Prosecution's lack of certainty in relation to the Chamber's application of the evidentiary threshold provided for in article 61(7) of the Statute; and (ii) the Prosecution's assumption that the evidence provided by witnesses has a higher probative value than other types of evidence such as documentary, audio or video evidence.

73. Concerning the lack of certainty that the Prosecution might have in relation to the application of the evidentiary threshold provided for in article 61(7) of the Statute, the Single Judge recalls that the "Decision on the Confirmation of the Charges" in the case of *The Prosecution v. Thomas Lubanga Dyilo* has provided for a more concrete definition of this standard,⁸² as well as practical guidance in

⁸¹ The confirmation hearing in the case of *The Prosecution v. Thomas Lubanga Dyilo* started on 9 November 2006 and extended until the issuance on 13 June 2007 by the Appeals Chamber of its "Decision on the Admissibility of the Appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges' of 29 January 2007" (ICC-01/04-01/06-926).

⁸² ICC-01/04-01/06-803-tENG, paras 38-39

relation to its application.⁸³ In particular, in that case the factual basis contained in the Prosecution Charging Document, which had a broader temporal and territorial scope than the present case, was considered proven by Pre-Trial Chamber I under the “sufficient evidence to establish substantial grounds to believe” standard provided for in article 61(7) of the Statute in light of: (i) the oral testimony of one witness; (ii) the statements, interview notes and witness interviews of a dozen of additional witnesses; and (iii) a relative small amount of documentary and video evidence.⁸⁴

74. Concerning the assumption that the Prosecution might have that the evidence provided by witnesses has a higher probative value than other types of evidence such as documentary, audio or video evidence, the Single Judge recalls that article 69 of the Statute and rule 63 of the Rules provide for the principle of free assessment of evidence. Hence, it is up to the competent Chamber to decide on the probative value of any piece of evidence introduced for the purpose of the confirmation hearing or the trial.

75. In this regard, the Single Judge observes that Pre-Trial Chamber I, in the Decision on the Confirmation of the Charges in the case of *The Prosecution v. Thomas Lubanga Dyilo*, heavily relied on documentary evidence, such as those orders signed by the suspect and other official documents of the UPC/RP and the FPLC,⁸⁵ and on the video evidence introduced by the Prosecution, such as the video of the visit of the suspect to the Rwampara Training Camp on 13 February 2003.⁸⁶

⁸³ ICC-01/04-01/06-803-tENG, para 39

⁸⁴ ICC-01/04-01/06-803-tENG, para. 405.

⁸⁵ ICC-01/04-01/06-803-tENG, paras 193-196 and 199

⁸⁶ ICC-01/04-01/06-803-tENG, para 405

76. This approach is not unique at the international level.⁸⁷ For instance, those cases held before the Nuremberg and Tokyo Tribunals, as well as in application of Control Council Law Number 10, heavily relied on documentary evidence.⁸⁸ Moreover, although in the early days of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the evidence given by witnesses was given particular weight⁸⁹ (which resulted in trials with well over a hundred witnesses),⁹⁰ the more access the Prosecution had to official documents of the

⁸⁷ Nor is it unique at the national level, in light of the fact that some national legal systems, such as the Brazilian one, establish a limitation of a maximum of eight witnesses *per case*. See Article 398 of the *Brazilian Criminal Procedure Code*.

⁸⁸ The Judgment delivered by the International Military Tribunal in Nuremberg on 1 October 1946 stated that "Much of the evidence presented to the Tribunal on behalf of the Prosecution was documentary evidence, captured by the Allied Armies in German army headquarters, Government buildings, and elsewhere [...]. The case, therefore, against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases", see also Bernard D Meltzer "The Nuremberg Trial: a Prosecutor's Perspective" (2002) 4(4) *Journal of Genocide Research*, 561-568. The Charter of the Military Tribunal of the Far East provides at article 13(a) Admissibility "The Tribunal shall not be bound by technical rules of evidence [...] and shall admit any evidence which it deems to have probative value". The Judgment delivered by the Tokyo Tribunal stated at page 13 that 4336 exhibits (various documents) were admitted as evidence, 419 witnesses testified in court and 779 witnesses gave evidence in depositions and affidavits. The judgment notes at page 19-20 that a great number of documents were tendered and received into evidence, however, it was disappointed with the evidence given by witnesses. The judgment of the Tokyo Tribunal is available at <http://www.ibiblio.org/hyperwar/PTO/IMTIE/index.html#index>

⁸⁹ See also General Assembly, Fifth Annual Report on International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (10 August 1998), para. 15. Available at: <http://www.un.org/icty/rappannu-e/1998/index.htm>

"The evidence heard by the Trial Chamber has consisted of substantial direct testimony of fact from witnesses who were themselves detained in the Celebici camp, as well as those who worked there. In addition, significant time has been spent hearing the evidence of military personnel who were active in the relevant area in 1992 and who were familiar with the structures of command and control which were operating at the relevant time. The Trial Chamber has also had the benefit of expert military, political and historical testimony and reports."

Also see ICTR, *The Prosecutor v Akayesu* [ICTR-96-4-T] Judgment of 2 September 1998, paras 132-136; *The Prosecutor v Kayishema* [ICTR-95-1-T] Judgment of 21 May 1999, para 65; see also Judgment (Reasons) of 1 June 2001, para 208; *The Prosecutor v Alfred Musema* [ICTR-96-13-A] Judgment and sentence of 27 January 2000, para 75; *The Prosecutor v Kajelijeli* [ICTR-98-44A-1] Judgment of 1 December 2003, para 37; *The Prosecutor v Aloys Simba* [ICTR-01-76-T] Judgment of 13 December 2005, c.g. paras 20-23, 27-30, 35-37, 40-44, 49-53, and 56-57

⁹⁰ ICTY, *The Prosecution v Stanslav Galic* [Case No.], Judgment of the Trial Chamber (5 December 2003), para 179: "The Trial Chamber heard 171 witnesses, resulting in 22,016 pages of transcript. In addition, a total of 1,268 exhibits and 15 experts' reports were admitted." See also, "Handbook on Establishing an International Law Tribunal" p.150. Available at: <http://www.pilpg.org/EstablishingWarCrimesTribunal.pdf> "The 66 charges were so burdensome and complex that the prosecution was forced to call hundreds of witnesses and submit thousands of documents into evidence. The Milosevic trial was a mega-case involving acts that spanned nearly a decade."

See also, "Remarks made by Judge Gabrielle Kirk McDonald, President of International Criminal Tribunal for the Former Yugoslavia, to the Preparatory Commission for the International Criminal Court", New York, 30 July 1999. Available at: www.un.org/icty/pressreal/p425-e.htm

"With regard to the control of the trial itself, the judges have found that a recurring issue has been the number of witnesses called by the parties. For instance, in one case one of the parties proposes to call over 300 witnesses, which would have the effect of causing the proceedings to last for years. We have thus adopted a Rule which allows the Trial Chamber to reduce the number of witnesses if a party appears to be calling an excessive number of witnesses to prove the same fact, and it also allows us to reduce the estimated length of time required for each witness. Our Rules thus provide a means by which the trial may be conducted in a more expeditious manner."

Also see ICTR, *The Prosecutor v Bagosora et al* [ICTR-98-41-T].

See also <http://69.94.11.53/ENGLISH/speeches/dieng070711.htm>, according to the source, the "law enforcement agencies and governments helped to arrest suspects and accused persons and assisted in facilitating the travel of hundreds of witnesses [...] to make their travel to Arusha possible". See also <http://69.94.11.53/ENGLISH/newsletter/jun-jul06/june-july06.pdf>, according to which "[t]he management of the evidence in the major multi-accused cases involving hundreds of witnesses and thousands of pages of evidence transcripts has been a big challenge [...]"; <http://www.hrwcalifornia.org/south-newsletters/Fall2005newsletter.pdf>, according to which "[a]s a prosecutor for the International Criminal Tribunal for Rwanda (ICTR), [...] interviews hundreds of witnesses"; http://www.ictj.org/en/news_coverage/article/990.html, according to which "[t]he reason for the size of the expenditure is

entities involved or to audio or video evidence, the lesser weight was placed on the evidence given by witnesses.⁹¹

77. In the view of the Single Judge, the approach taken by Pre-Trial Chamber I in the Decision on the Confirmation of the Charges in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, is particularly appropriate at the stage of the confirmation hearing if one considers that:

- (i) the evidence given by witnesses is, for the most part, introduced in a written format with a number of redactions authorised by the Single Judge pursuant to rule 81 of the Rules; and
- (ii) It is likely that most of the witnesses on whom the Prosecution intends to rely at the confirmation hearing will have to be protected before their identities can be disclosed to the Defence, given the volatile security situation in the areas in which they live and the precedents of intimidation.

78. As a consequence, the Single Judge considers that the limited scope of the confirmation hearing, and its object and purpose within the criminal procedure embraced by the Statute and the Rules, require from the Prosecution a particular effort to limit the number of witnesses on whom it intends to rely at the confirmation hearing to the very “core witnesses” of the case.

that the cases that are being brought are highly complex. They often involve multiple defendants, hundreds of witnesses [. . .]”

⁹¹ ICTY, *The Prosecutor v. Delalic* [Case No. IT-96-21], Decision on the Motion of the Prosecution for the Admissibility of Evidence (19 January 1998); ICTY, *The Prosecutor v. Dragomir Milosevic* [Case No. IT-98-29/1], Decision on Prosecution Motion to Admit Under Seal a Digital Video Disc Containing Video Interviews (24 September 2007). See Also: ICTY, *The Prosecutor v. Dragomir Milosevic* [Case No. IT-98-29/1], Judgement of the Trial Chamber (12 December 2007), paras. 162, 168, 235, 336, 339, 340, 448, 596, 698, 744, etc.; See also: General Assembly, Fifth Annual Report on International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (10 August 1998), para. 14. Available at: <http://www.un.org/icty/rappannu-c/1998/index.htm>

“The joint trial of Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo for various offences allegedly committed at the Celebici camp in central Bosnia in 1992, commenced on 10 March 1997. Witness testimony as well as documentary and video evidence has been heard and submitted to Trial Chamber II *quater* (Judge Karibi-Whyte, presiding, Judge Odio-Benito and Judge Jan) in relation to the charges of, *inter alia*, killing, torture, sexual assault, inhumane conditions and unlawful confinement of civilians.”

79. In this regard, in the view of the Single Judge, a confirmation hearing of limited scope that must be held within a reasonable time and aims, *inter alia*, to facilitate the preparation for trial in the event that the charges are confirmed, requires that the debate of the Prosecution evidence be limited to analysing the core evidence supporting the charges against the suspect.
80. Moreover, this approach will also limit the number of witnesses exposed to any risk as a result of voluntarily accepting that their statements, interview notes or interview transcripts be relied on by the Prosecution for the purpose of the confirmation hearing, and will reduce the pressure currently placed on the ICCPP.
81. For this reason, if the Prosecution cannot meet the evidentiary threshold provided for article 61(7) of the Statute on the basis of a limited and careful selection of the best evidence in its possession, such a case – regardless of whether the competent Chamber decides to act pursuant to paragraph (b) or (c) (i) of article 61(7) of the Statute - will not be ready to go to trial, even if the Prosecution could hypothetically argue that it could prove the charges by relying on inferences made from the evidence given by a broad range of witnesses.
82. As a result, the Single Judge is of the view that, in future cases before this Court, the following measures shall be taken, bearing in mind that (i) they are fully consistent with the limited nature of the confirmation hearing and the need to hold it within a reasonable period of time; and (ii) will also facilitate the preparation for trial in the event that the charges are confirmed because the core evidence on which the Prosecution relies at the confirmation hearing will most likely also be presented at trial:
- (i) the Prosecution must pay particular attention to limiting the number of witnesses on whom it intends to rely at the confirmation hearing to the very “core witnesses” of the case;

- (ii) the Prosecution, immediately after the issuance of an arrest warrant or a summons to appear or after the transfer or voluntary surrender of the suspect to the seat of the Court, must apply for the inclusion by the Registrar in the ICCPP of those few carefully selected “core witnesses” that, in the Prosecution’s view, need to be relocated; and
- (iii) the Registrar, and in particular the VWU, must focus on ensuring that the assessment of such witnesses and the implementation of the protective measures granted is all completed within a period of two to three months of the Prosecution’s requests.

83. In light of the foregoing, the Single Judge considers, in the current case, that the Prosecution can claim no prejudice if the confirmation hearing proceeds on the basis of (i) statements, interview notes and transcripts of witness interviews of those [REDACTED] witnesses who have already been relocated or for whom protective measures are not necessary;⁹² (ii) witness 238, whose immediate relocation by the VWU is ordered in the present decision; (iii) the redacted or summary version of the statements of Witnesses 267 and 311⁹³ for whom anonymity for the purpose of the confirmation hearing has already been granted by the Single Judge;⁹⁴ and (iv) a careful selection of documentary, audio and video evidence in the possession of the Prosecution.

C. Redacted Versions of Statements, Interview Notes and Interview Transcripts of Witnesses for whom Anonymity is Requested

84. The Single Judge recalls that Witnesses 271 and 311 are both witnesses (i) on whose redacted statements the Prosecution intends to rely at the confirmation hearing; and (ii) for whom anonymity has been requested. The Single Judge

⁹² Immediately after the issuance of this decision, a decision with the ruling of the Single Judge on the admissibility for the purpose of the confirmation hearing of the interview transcripts of the deceased Witness 12 shall be issued

⁹³ The Prosecution has until 21 April 2008 to inform the Single Judge and the Defence whether it intends to rely on the summary version of the statement of Witness 243, for whom the Single Judge has already granted anonymity.

⁹⁴ See section below regarding Witness 271

observes that the Prosecution has produced the written consent of Witness 271 requested by the Single Judge during the hearing on 3 March 2008 and in the "Decision on Written Consent of Witness 271", issued on 12 March 2008.⁹⁵ Moreover, Witness 311 has also consented in writing to the use of [REDACTED] statement at the confirmation hearing for the purpose of proving [REDACTED].⁹⁶

85. At the outset, the Single Judge would like to emphasise that the scope of the redactions requested by the Prosecution in relation to witnesses on whom it intends to rely at the confirmation hearing and for whom anonymity is requested is far broader as it includes all allegedly identifying information of the relevant witness.⁹⁷

86. As a result, the amount of time and resources that are necessary to decide on these requests in compliance with the detailed justification requested by the Appeals Chamber Judgements of 14 December 2006 is substantial, which inevitable slows down the proceedings further. Moreover, the probative value of the unredacted parts of the statements is limited due to the extensiveness of the authorised redactions.

87. Under these circumstances, the Single Judge considers that, save for those isolated cases - such as the statement of Witness 311 - in which the number of redactions requested is limited, the balancing between the limited probative value of heavily redacted statements, interview notes and interview transcripts of anonymous witnesses, and the right of the suspects to have the confirmation hearing within a reasonable time after their surrender or voluntary appearance before the Court, must be done in favour of the rights of the suspects.

⁹⁵ ICC-01/04-01/07-T-20-Conf-Exp-ENG-ET, p 15, lines 18-22, and p.16, lines 5-17, and ICC-01/04-01/07-316-Conf-Exp, pp.5 and 6.

⁹⁶ ICC-01/04-01/07-355-Conf-Exp-AnxA1

⁹⁷ As illustrated by the experience in the case of *The Prosecution v Thomas Lubanga Dyilo* or by the recent Prosecution's request for redactions in the statement of Witness 271.

88. In the view of the Single Judge, this conclusion is reinforced by the fact that, according to article 61(5) of the Statute, the Prosecution can rely on summaries of the statements, interview notes and interview transcripts of the relevant witnesses as long as the information provided by the witnesses is such that a summary of their statements, interview notes or interview transcripts will not identify them.

89. Moreover, despite the fact that, as already stated by the Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, summaries have a lesser probative value than unredacted parts of redacted statements, interview notes or interview transcripts, the difference in probative value between a summary and the unredacted parts of heavily redacted statements, interview notes or interview transcripts is minimal.⁹⁸

90. As a result, the Single Judge is of the view that, as a general rule, the Prosecution's requests for redactions in the statements, interview notes and transcripts of interviews of witnesses on whom it intends to rely at the confirmation hearing and for whom it requires anonymity shall be rejected *in limine*. Consequently, if the Prosecution wishes to rely on such statements, interview notes and transcripts despite their limited probative value, the Prosecution will have to submit summaries to the Single Judge, taking into account, as the Single Judge has recently stated in the "Decision on the Use of Summaries of the Statements of Witnesses 267 and 243", that:

[...] the burden of providing the relevant incriminating information in the summaries as well as the obligation to provide all potentially exculpatory evidence or exonerating information in such summaries lies with the Prosecution.⁹⁹

91. In applying this general rule to the Prosecution's request for redactions in the statement of Witness 271, the Single Judge is of the view that the Prosecution's request for anonymity of Witness 271 must be granted.

⁹⁸ ICC-01/04-01/06-517, pp 4 and 6.

⁹⁹ ICC-01/07-362-Conf-Exp, p. 8

92. In relation to Witness 271, [REDACTED] the Single Judge notes that [REDACTED] is allegedly a victim of sexual violence who has been victimised in events other than the alleged 24 February 2003 joint FRPI/FNI attack on the village of Bogoro; and that the Single Judge has already established, in the Second and Third Decisions on Redactions 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 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.¹⁰⁰

93. The Single Judge observes that, in the current case, this victim of the alleged sexual violence (i) is also a witness on whom the Prosecution intends to rely for the purpose of the confirmation hearing; (ii) is [REDACTED]; and (iii) currently lives [REDACTED] in the Ituri district. The Single Judge is therefore of the view that disclosing the identity of Witness 271 in the security situation and context referred to in the First Decision on Redactions, could pose an additional risk to the Witness safety and/or physical and psychological well-being.

94. However, the Single Judge considers that, due to the numerous redactions included in the Prosecution's request for redactions to the statement of Witness 271, the above-mentioned general rule shall be applicable to such Prosecution request. As a result, the Single Judge decides to reject *in limine* the Prosecution's request for redactions in the statement of Witness 271, and to give the Prosecution until Monday 21 April 2008 at 16h00 to file a summary of the statement of Witness 271 as long as the information provided by the witness can be summarised without identifying the witness.

¹⁰⁰ ICC-01/04-01/07-123-Conf-Exp, para.19 , its confidential redacted version ICC-01/04-01/07-124-Conf, para 19 and its public redacted version ICC-01/04-01/07-160, para.19, See also ICC-01/04-01/07-247-Conf-Exp-Corr, para.37, its confidential redacted version ICC-01/04-01/07-248-Conf-Corr, para 37 and its public redacted version, ICC-01/04-01/07-249, para. 37.

95. In relation to Witness 311, the Single Judge notes that, due to the limited scope of the redactions included in the Prosecution's request for redactions in the statement of Witness 311, the Single Judge has not rejected it *in limine* and therefore has analysed and decided on the merits of the request in the Fifth Decision on Redactions.

VI. Witness Statements, Interview Notes and Interview Transcripts which contain excerpts which are potentially exculpatory or otherwise material for the Defence's preparation of the confirmation hearing

96. At the hearings held on 1 April 2008 and 15 April 2008, the Prosecution informed the Single Judge that it has in its possession the statements, interview notes and interview transcripts of [REDACTED] additional potential witnesses on whom the Prosecution does not intend to rely for the confirmation hearing¹⁰¹ – although, according to the Prosecution, it is likely that it will rely on their testimony at trial in the event the charges against Germain Katanga and Mathieu Ngudjolo Chui are confirmed.¹⁰²

97. According to the Prosecution, when certain excerpts from these statements, interview notes and interview transcripts that are potentially exculpatory or otherwise material for the Defence's preparation of the confirmation hearing have been found, the Prosecution is under the obligation to disclose them to the Defences of Germain Katanga and Mathieu Ngudjolo Chui under article 67(2) of the Statute and rule 77 of the Rules.¹⁰³

98. Nevertheless, at the hearings of 1 April 2008 and 15 April 2008, the Prosecution also pointed out that if the identity of these potential witnesses is disclosed to the Defences of Germain Katanga and Mathieu Ngudjolo Chui at this stage, they will

¹⁰¹ ICC-01/04-01/07-T-22-Conf-Exp-ENG E1, p 32, lines 4-8 and 11-12; and ICC-01/04-01/07-1-23-Conf-Exp-ENG ET, p 17, lines 9 to 13.

¹⁰² ICC-01/04-01/07-T-23-Conf-Exp-ENG ET, p 17, lines 9 to 13.

¹⁰³ ICC-01/04-01/07-T-22-ENG ET W1, p.25, lines 17-25 and p.26, lines 1-6.

be put at risk as they live in the Ituri District, and [REDACTED]. The Prosecution therefore sought the guidance of the Single Judge on:

- (i) whether the Prosecution, in order to comply with its obligations pursuant to article 67(2) of the Statute and rule 77 of the Rules, had to file with the Single Judge requests for redactions to the statements, interview notes and interview transcripts of these potential witnesses, so that the Prosecution can disclose such statements, interview notes and interview transcripts after the Single Judge rules on the Prosecution's requests for redactions; or
- (ii) whether the Prosecution can comply with its article 67(2) and rule 77 disclosure obligations by directly disclosing to the Defence summaries of the statements, interview notes and interview transcripts of these potential witnesses, in which (a) all information potentially exculpatory or otherwise material for the Defence's preparation of the confirmation hearing is included and (b) all identifying information of the said potential witnesses is excluded.¹⁰⁴

99. In the view of the Single Judge, these questions must be addressed in light of the limited scope, object and purpose of the confirmation hearing.

100. In this regard, it is important to highlight that those individuals who have given a statement or have been interviewed by the Prosecution are regarded as potential witnesses due to the Prosecution's choice not to rely on them for the purpose of the confirmation hearing. Consequently, their statements, interview notes and/or interview transcripts, whether in an unredacted, redacted or summary format, are not, in principle, part of the evidentiary debate held at the confirmation hearing, nor can be used to meet the evidentiary standard provided for in article 61(2) of the Statute. As a consequence, the Defence need not challenge their credibility.

¹⁰⁴ ICC-01/04-01/07-T-22-Conf-Exp-ENG ET. p 7. lines 10-18 , ICC-01/04-01/07-T-23-Conf-Exp-ENG ET. p 41. lines 4-22

101. Hence, any disclosure of the statements, interview notes, and interview transcripts of these potential witnesses, pursuant to article 67(2) of the Statute and rule 77 of the Rules, will be *inter partes*,¹⁰⁵ and the materials so disclosed between the Prosecution and the Defences of Germain Katanga and Mathieu Ngudjolo Chui will not be part of the record of the present case unless either of the Defences decide to introduce them into evidence for the purpose of the confirmation hearing.¹⁰⁶

102. The question then arises as to whether, in those cases in which the Prosecution finds excerpts which are potentially exculpatory or otherwise material for the Defence in statements, interview notes, or interview transcripts given by potential witnesses of the present case,¹⁰⁷ the Prosecution must file requests for redactions if it considers that the said statements, interview notes and interview transcripts can only be disclosed to the Defence in a redacted form.

103. A positive answer to this question would mean that the Single Judge would have to decide upon the Prosecution's requests for redactions concerning the statements, interview notes and interview transcripts given by the vast majority of the individuals interviewed by the Prosecution for the purpose of the present case.¹⁰⁸

104. In the view of the Single Judge, this conclusion is supported by the following factors:

- (i) it can be expected that the existence of a few excerpts, which may be potentially exculpatory, or otherwise material for the Defence's

¹⁰⁵ ICC-01/04-01/06-102, p. 5, ICC-01/04-01/07-T-12-ENG ET WT, p.4, lines 14-25, and p.18, lines 4-11; ICC-01/04-01/07-T-21-Conf-Exp-ENG ET WT, p.20, lines 21-25, and p.21, lines 1-8.

¹⁰⁶ ICC-01/04-01/06-102, para. 54; ICC-01/04-01/07-102, p.6. See also ICC-01/04-01/07-T-12-ENG ET WT, p.10, lines 2-15 and p.18, lines 4-17

¹⁰⁷ Or even by individuals who have been interviewed by the Prosecution in relation to other investigations or cases.

¹⁰⁸ As seen above, the Prosecution has referred to the statements, interview notes and interview transcripts of over [REDACTED] witnesses. Moreover, the statements, interview notes, and interview transcripts of other individuals interviewed for the purpose of flip-side cases could, at least hypothetically, be also in the same situation

preparation for the confirmation hearing, constitutes the general rule, as opposed to an exception;

- (ii) most potential witnesses interviewed by the Prosecution for the purpose of the present case live in the Ituri District, which is a risk area and where there have been precedents of intimidation [REDACTED]; and
- (iii) even in those cases in which the disclosure to the Defence of the identity of those individuals who gave the statements will not place them at risk, the present case has shown that certain redactions might still be necessary.¹⁰⁹

105. Therefore, a positive answer to the question above would lead to the following inconsistent result:

- (i) On the one hand, the limited scope, object and purpose of the confirmation hearing requires the Prosecution to limit the witnesses on whom it intends to rely at the confirmation hearing to the “core witnesses” of the case; and
- (ii) On the other hand, the Prosecution will have to file requests for redactions concerning the statements, interview notes and interview transcripts of potential witnesses on whom the Prosecution does not intend to rely at the confirmation hearing.

106. Moreover, in light of the detailed justifications of the redactions requested by the Appeals Chamber Judgements of 14 December 2006,¹¹⁰ a number of additional weeks, if not months, would be necessary in order to analyse and decide on the Prosecution’s requests for redactions (which will also include the redaction of identifying information) to the statements, interview notes and transcripts of interviews of the [REDACTED] potential witnesses referred to by the Prosecution in the 1 April 2008 and 15 April 2008 hearings. In the view of the Single Judge, this situation would affect the right of Germain Katanga and

¹⁰⁹ ICC-01/04-01/07-88-Conf-Exp, ICC-01/04-01/07-123-Conf-Exp. ICC-01/04-01/07-247-Conf-Exp-Corr: ICC-01/04-01/07-358-Conf-Exp and ICC_01/04-01/07-405-Conf-Exp

¹¹⁰ As explained above, the application of the Appeals Chamber Judgements of 14 December 2006 to the Prosecution’s requests for redactions to the statements, interview notes and transcripts of interviews of ten of the witnesses on which the Prosecution intends to rely at the confirmation hearing has led so far to several weeks of analysis and hundreds of pages of justification of the authorised redactions

Mathieu Ngudjolo Chui to have the confirmation hearing held within a reasonable time after their surrender before the Court.

107. Furthermore, at least in relation to those potential witnesses on whom the Prosecution decides to rely for the purpose of the trial in the event that the charges are confirmed, the redactions that the Single Judge could authorise at this stage would, for the most part, be useless at the trial stage because, in principle, they will have to be lifted by the Trial Chamber in the proceedings leading to the commencement of the trial.
108. Hence, in the view of the Single Judge, the task of the Trial Chamber will be simplified if, instead of revising all redactions authorised for the purpose of the confirmation hearing in the statements, interview notes and interview transcripts of potential witnesses, the Trial Chamber has to rule only on the limited redactions, if any, requested by the Prosecution for the purpose of the trial.
109. For these reasons, the Single Judge considers that at this stage the use of redactions is not an adequate procedural mechanism for discharging the Prosecution's disclosure obligations pursuant to article 67(2) of the Statute and rule 77 of the Rules in relation to statements, interview notes and interview transcripts of potential witnesses.¹¹¹
110. As a consequence, in the view of the Single Judge, the appropriate procedural mechanism to discharge the above-mentioned disclosure obligations is the use of summaries of the relevant statements, interview notes and interview transcripts, as provided for in article 61(5) of the Statute.

¹¹¹ That is, individuals who have been interviewed by the Prosecution in relation to the present case, or in relation to any other investigation and/or case, and on whom the Prosecution does not intend to rely at the confirmation hearing because they are not part of the "core evidence" of the present case

111. In these summaries the Prosecution, in addition to providing an overall account of the relevant statements, interview notes, and interview transcripts, shall include all information of a potentially exculpatory nature or otherwise material for the Defence's preparation of the confirmation hearing.
112. Concerning the Prosecution's use of summaries for the purpose of the confirmation hearing, the Appeals Chamber has already stated that even if the Prosecution intends to rely on summaries of witness statements, interview notes and interview transcripts in support of the charges, "[n]either the Statute nor the Rules of Procedure and Evidence foresee that such summaries must be approved by the Pre-Trial Chamber prior to their presentation at the confirmation hearing".¹¹²
113. Therefore, according to the Appeals Chamber, the current system does not provide for the Single Judge's approval of the content of the summaries on which the Prosecution intends to rely at the confirmation hearing. It is for this reason that the Single Judge has recently stated that she "will not analyse the content of the summaries presented by the Prosecution in its Application for the Use of Summaries" as the burden of providing all incriminating information as well as all information potentially exculpatory or otherwise material for the Defence lies with the Prosecution.¹¹³
114. Hence, if the Single Judge's approval of the content of the summaries on which the Prosecution intends to rely at the confirmation hearing is not provided for in the Statute or the Rules, then the Single Judge's approval of those Prosecution's summaries which only aim at complying with its article 67(2) and rule 77 disclosure obligations cannot be required.

¹¹² ICC-01/04-01/06-773, para. 43.

¹¹³ ICC-01/04-01/07-362-Conf-Exp

115. Nevertheless, in the view of the Single Judge, this does not mean that there is no oversight over the summaries prepared by the Prosecution. In the event the charges are confirmed, the Defence may have access for the purpose of the trial to the statements, interview notes and interview transcripts of, at least, those potential witnesses on which the Prosecution decides to rely at trial. The appropriate remedy could then be sought before the competent Chamber.
116. The Single Judge recalls that according to the case law of Pre-Trial Chamber I in the case of *The Prosecution v. Thomas Lubanga Dyilo*,¹¹⁴ as well as in the present case,¹¹⁵ the Prosecution must obtain the authorisation of the Single Judge for the granting of anonymity to those witnesses on whose statements, interview notes and interview transcripts it intends to rely at the confirmation hearing by way of summary. In the view of the Single Judge, the need to secure this authorisation derives from the fact that the Prosecution intends to use the evidence provided for by these witnesses in order to meet the evidentiary standard provided for in article 61(7) of the Statute in relation to the facts contained in the charging document.
117. Nevertheless, the Single Judge considers that the need to secure the Single Judge's authorisation for anonymity is not applicable when the Prosecution does not intend to rely on the relevant summaries to prove the facts contained in the charging document.
118. Therefore, when the Prosecution resorts to summaries of statements, interview notes and interview transcripts of potential witnesses for the sole purpose of complying with its article 67(2) of the Statute and rule 77 of the Rules disclosure obligations, the Prosecution does not need to first secure the authorisation of the Single Judge for the anonymity of the relevant individuals. Hence, the Prosecution can disclose such summaries directly to the Defence as long as it

¹¹⁴ ICC-01/04-01/06-517, pp. 8 and 9.

¹¹⁵ ICC-01/04-01/07-362-Conf-Exp. p. 9

immediately files a disclosure note enumerating the summaries that have been disclosed.

119. The question then arises as to the time-limit for the disclosure to the Defence of the summaries, so that the Defence can make appropriate use of them during the confirmation hearing.
120. In the view of the Single Judge, it is only upon the transmission to the Defence of the Prosecution Charging Document and List of Evidence, as well as of the statements, interview notes, interview transcripts and documentary, audio and video evidence on which the Prosecution intends to rely at the confirmation hearing, according to rule 121(3) and (5) of the Rules, that the Defence will be in a position to make an informed decision as to the use of some of the above-mentioned summaries as evidence for the purpose of the confirmation hearing.
121. For these reasons, in the present case, the Prosecution must make the utmost effort to disclose to the Defences of Germain Katanga and Mathieu Ngudjolo Chui by 21 April 2008, and no later than fifteen days prior to the commencement of the confirmation hearing, the summaries of the statements, interview notes and interview transcripts of the [REDACTED] potential witnesses referred to at the 1 April 2008 and 15 April 2008 hearings.
122. The Single Judge also considers that when the Prosecution complies with its disclosure obligations pursuant to article 67(2) of the Statute and rule 77 of the Rules through the use of summaries of statements, interview notes and interview transcripts of potential witnesses, the Defence can only rely at the confirmation hearing on the information contained therein if it decides to include the relevant summaries in the Defence List of Evidence provided for in rule 121(6) of the Rules.

123. Therefore, in the present case, the Defences of Germain Katanga and Mathieu Ngudjolo Chui will then have until 15 days prior to the initiation of the confirmation hearing to decide whether they intend to rely at the hearing on any of the summaries disclosed by the Prosecution by 21 April 2008. Furthermore, in relation to those summaries disclosed by the Prosecution after 21 April 2008, the Defence will have until seven days prior to the commencement of the confirmation hearing to make such a decision.
124. In the view of the Single Judge, the above-mentioned temporal framework provided for in rule 121 of the Rules does not seem compatible with a situation in which the Defence requests access to the names of the relevant potential witnesses and their statements as a basis to carry out its own investigation to gather evidence for the purpose of the confirmation hearing.
125. Moreover, any such Defence request will be confronted with the need for the protection of the relevant individual, who will most likely not yet be under any protective measure as the Prosecution does not intend to rely on his or her statement, interview notes or interview transcripts for the purpose of the confirmation hearing.
126. In such cases, either the confirmation hearing is postponed as a result of the need to assess the security situation of the relevant individual and to implement any necessary operational protective measures before disclosing his or her identity to the Defence;¹¹⁶ or, as a result of the unavailability of operational protective measures due to time constraints, it will be necessary to resort to redactions pursuant to rule 81 of the Rules.
127. In the view of the Single Judge, insofar as the first scenario would require the postponement of the confirmation hearing for several months, it is incompatible with the temporal framework provided for in rule 121 of the

¹¹⁶ As explained in sections III and IV, if relocation is required, this may very well take up to three months.

Rules and with the right of the suspects pursuant to article 61(3) of the Statute to have the confirmation hearing held within a reasonable period of time after their surrender or voluntary appearance before the Court.

128. The Single Judge considers that the second scenario would not, in principle, require the postponement of the hearing for several months. Nevertheless, it would require the approval and justification, in accordance with the case law of the Appeals Chamber, of numerous redactions to the statements, interview notes and interview transcripts of the relevant individuals.¹¹⁷
129. The time and resources needed to authorise the disclosure of such redacted versions will be substantial, which could lead to a postponement of the confirmation hearing in a situation of a plurality of Defence requests.
130. At the same time, the Single Judge observes that (i) the benefit for Defence's investigation of having access to a heavily redacted version of the relevant statements, interview notes and interview transcripts will be, at best, very limited; and that (ii) the difference in probative value between a summary, and a heavily redacted version, of the relevant statements, interview notes and interview transcripts is negligible.
131. For these reasons, the Single Judge finds that the Defence's reliance at the confirmation hearing on the summaries provided by the Prosecution in compliance with its disclosure obligations pursuant to article 67(2) of the Statute and rule 77 of the Rules is the only measure that is consistent with: (i) the temporal framework provided for by rule 121 of the Rules; and (ii) the limited scope, object and purpose of the confirmation hearing.

¹¹⁷ Including, most likely, the redaction of their identifying information.

132. In the view of the Single Judge, any prejudice that could hypothetically be suffered by the Defence as a result of this system will be pre-empted through the adoption of the measure referred to in the following paragraphs.
133. In this regard, the Single Judge recalls that, according to the case law in the case of *The Prosecution v. Thomas Lubanga Dyilo* and in the present case,¹¹⁸ the use by the Prosecution of witness statements, interview notes and interview transcripts in a summary format diminishes, as a general rule, the probative value of such evidence.
134. Nevertheless, the Single Judge considers that this general rule cannot be applied to those summaries disclosed by the Prosecution pursuant to article 67(2) of the Statute and rule 77 of the Rules and on which the Defence intends to rely at the confirmation hearing.
135. In the view of the Single Judge, given the fact that the Defence shall not have access for the purpose of the confirmation hearing to redacted or unredacted versions of the relevant statements, interview notes and interview transcripts, the probative value of such summaries shall only be subject to the principle of free assessment of evidence provided for in article 69 of the Statute and rule 63 of the Rules.
136. By so doing, the Single Judge complies with the request of the Appeals Chamber to take sufficient steps to ensure that summaries of evidence “are used in a manner which is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial.”¹¹⁹
137. As a result, the Single Judge concludes that the Prosecution’s use, under the above-mentioned conditions, of summaries to comply with its article 67(2) of

¹¹⁸ ICC-01/04-01/06-517, pp. 4 and 6

¹¹⁹ ICC-01/04-01/07-773, para 51

the Statute and rule 77 of the Rules disclosure obligations is not only consistent with the limited scope, the object and the purpose of the confirmation hearing, but also satisfies the right of the suspects to have the confirmation hearing held within a reasonable time, without being prejudicial to or inconsistent with their other rights and with a fair and impartial trial.

138. Moreover, in the event that the charges are confirmed, it will also facilitate the preparation of the trial because it will:

- (i) give the Defence, prior to the confirmation of the charges, a clear idea of the content of those statements, interview notes and interview transcripts of those individuals interviewed by the Prosecution for the purpose of the present case and on whom the Prosecution has decided not to rely at the confirmation hearing because they are not part of the “core evidence” of the case;
- (ii) place the Defence in a position to request from the Trial Chamber at an early stage of the proceedings leading to the trial for the disclosure of the identity of those potential witnesses, as well as their statements, interview notes and interview transcripts, whom the Defence may have an interest in contacting in its preparation for the trial; and
- (iii) place the Trial Chamber in a position to request from the Prosecution immediately after the confirmation of the charges those summaries so as to have an initial overview of the case.¹²⁰

VII. Redactions in documents which contain information that is potentially exculpatory or otherwise material for the Defence’s preparation for the confirmation hearing

¹²⁰ In the case of *The Prosecution v Thomas Lubanga Dyilo*, the Trial Chamber has requested the Prosecution to file several months before the commencement of the trial a document containing the Summary of the Prosecution Evidence. See *Decision Regarding the Timing and Manner of Disclosure and the Date of Trial*, 01/04-01/06-1019, para 26

139. At the hearing held on 1 April 2008, the Prosecution also informed the Single Judge that it has identified approximately 47 documents (i) on which it does not intend to rely at the confirmation hearing; (ii) that should be disclosed to the Defence pursuant to article 67(2) of the Statute or rule 77 of the Rules; and (iii) that require a number of redactions before being disclosed to the Defence.¹²¹

140. At the said hearing, the Prosecution explained that, according to the practice established by Pre-Trial Chamber I in the case of *The Prosecution v. Thomas Lubanga Dyilo*, redactions to these documents must be approved by the Single Judge prior to their disclosure to the Defence. Nevertheless, in order to expedite proceedings the Prosecution proposed to the Single Judge to review this practice so that:

- (i) the Prosecution can directly disclose the relevant documents to the Defences of Germain Katanga and Mathieu Ngudjolo Chui with the redactions that the Prosecution considers necessary and without a prior authorisation from the Single Judge; and subsequently
- (ii) the Defences of Germain Katanga and Mathieu Ngudjolo Chui are given a certain period of time to request from the Single Judge the lifting of some of the redactions made by the Prosecution.¹²²

141. The Defence of Germain Katanga did not object to the new practice proposed by the Prosecution.¹²³ Nevertheless, the Defence of Mathieu Ngudjolo Chui opposed such a new practice and requested that “all redactions should be submitted to the Chamber”¹²⁴ because “it is a matter of safeguarding the rights of the Defence.”¹²⁵

¹²¹ ICC-01/04-01/07-T-21-ENG ET, p.32, lines 4-15, and ICC-01/04-01/07-T-22-Conf-Exp-ENG ET, p 25, lines 19-25, and p 26, lines 1-6.

¹²² ICC-01/04-01/07-T-21-ENG ET WT, p.25, lines 12-14. See also ICC-01/04-01/07-T-22-Conf-Exp-ENG ET, p 33, lines 11-14

¹²³ ICC-01/04-01/07-T-21-ENG ET WT, p.34, line 10

¹²⁴ ICC-01/04-01/07-T-21-ENG ET W I, p 36, lines 24-25

¹²⁵ ICC-01/04-01/07-T-21-ENG ET WT, p 37, lines 2 to 4

142. The Single Judge agrees with the Defence of Mathieu Ngudjolo Chui that the practice followed in the case of *The Prosecution v. Thomas Lubanga Dyilo* safeguarded adequately the rights of the Defence because only those redactions authorised by the Chamber could be maintained by the Prosecution when disclosing the relevant documents to the Defence.
143. Nevertheless, the Single Judge considers that the system proposed by the Prosecution also allows for the proper protection of the rights of the Defence insofar as: (i) the Prosecution does not intend to rely on any of the above-mentioned documents, (ii) the disclosure process is an *inter partes* process; and (iii) the system proposed by the Prosecution would permit the Defence to request from the Single Judge the lifting of redactions prior to the commencement of the confirmation hearing.
144. Under these circumstances, and in light of the number of documents involved and the time and resources that are necessary to justify redactions in application of the case law of the Appeals Chamber, the Single Judge considers appropriate to adopt the new practice proposed by the Prosecution. The Single Judge reaches this conclusion in light of the need to expedite the proceedings leading to the confirmation hearing in the present case - which in the case of Germain Katanga has already lasted for more than five months - and in order to respect the rights of the suspects to the holding of the confirmation hearing within a reasonable period of time after their transfer to the seat of the Court in The Hague.
145. Consequently, the Prosecution shall directly disclose to the Defences of Germain Katanga and Mathieu Ngudjolo Chui the above-mentioned documents with the redactions that the Prosecution considers necessary as soon as practicable but no later than 21 April 2008 at 16h00. Immediately after their disclosure, the Prosecution shall file in the record of the present case the

necessary disclosure notes, pre-inspection reports and/or inspection reports listing the documents that have been made available to the Defence.

146. Moreover, the Defence shall have 15 days upon the receipt of these documents to request from the Single Judge the lifting of those redactions made by the Prosecution that the Defence considers necessary for the purpose of their preparation for the confirmation hearing.

FOR THESE REASONS

DECIDE that the Prosecution shall immediately put an end to the practice of preventive relocation of witnesses.

DECIDE that for the purpose of the confirmation hearing, the statements, interview notes and interview transcripts of Witnesses 132 and 287, either in an unredacted, redacted or summary format are inadmissible.

DECIDE that Witnesses 132 and 287 shall immediately be placed under the supervision and control of the Registrar, who will decide on the appropriate protective measures to be afforded to them, [REDACTED].

RECALL the need for pre-determination, transparency and consistent application by the Registrar of the criteria for inclusion of witnesses in the Court's Witness Protection Programme.

STRONGLY RECOMMEND that the Registrar establish [REDACTED] for the urgent and provisional relocation of witnesses subjected to a serious threat of imminent harm related to his or her cooperation with the Court as provided in the present decision;

ORDER pursuant to article 57(3)(c) of the Statute, the immediate inclusion in the Court's Witness Protection Programme of Witness 238.

DECIDE that the redacted versions of the statement, interview notes and interview transcripts of Witness 238 shall be admitted into evidence for the purpose of the confirmation hearing with the redactions to be authorised by the Single Judge in a separate decision.

DECIDE that:

- (i) except for cases of limited redactions, the Prosecution's requests for redactions in the statements, interview notes and transcripts of interviews of witnesses on whom it intends to rely at the confirmation hearing and for whom it requires anonymity shall be rejected *in limine*; and that
- (ii) the Prosecution can rely on summaries of such statements, interview notes and transcripts, if the Prosecution secures the authorisation of the Single Judge for the anonymity of the witness, and as long as the information provided by the witness can be summarised without identifying the witness.

DECIDE to:

- (i) reject *in limine* the Prosecution's request for redactions in the statement of Witness 271;
- (ii) grant the Prosecution's request for anonymity of Witnesses 271; and
- (iii) give the Prosecution until Monday 21 April 2008 at 16h00 to file a summary of the statement of Witness 271, if it intends to rely on the summary for the purpose of the confirmation hearing, as long as the information provided by the witness can be summarised without identifying the witness.

DECIDE that:

- (i) the procedural mechanism of redactions will not be applicable in relation to the Prosecution's disclosure obligations pursuant to article 67(2) of the Statute and rule 77 of the Rules for the statements, interview notes and interview transcripts of potential witnesses on whom the Prosecution does not intend to rely at the confirmation hearing;
- (ii) the appropriate procedural mechanism to discharge the above-mentioned Prosecution's disclosure obligations will be the use of summaries of the relevant statements, interview notes and interview transcripts, as provided for in article 61(5) of the Statute.
- (iii) that in these summaries, the Prosecution in addition to providing an overall account of the relevant statement, interview notes, or interview transcript, shall include all information of a potentially exculpatory nature or otherwise material for the Defence's preparation of the confirmation hearing.
- (iv) when the Prosecution uses summaries of statements, interview notes and interview transcripts of potential witnesses for the sole purpose of complying with its article 67(2) of the Statute and rule 77 of the Rules disclosure obligations, the Prosecution:
 - a. does not need to first secure the authorisation of the Single Judge for the anonymity of the relevant individuals.
 - b. the Prosecution shall disclose such summaries directly to the Defence
 - c. the Prosecution shall immediately file a disclosure note enumerating the summaries that have been disclosed.
- (v) the Defence shall not have access for the purpose of the confirmation hearing to the unredacted or redacted version of the statements, interview notes and interview transcripts of those potential witnesses for whom summaries are transmitted by the Prosecution under (iii)(b) above.
- (vi) The Defence can only rely at the confirmation hearing on the information contained in the Prosecution's summaries if it decides to include the

relevant summaries in the Defence List of Evidence provided for in rule 121(6) of the Rules.

- (vii) if the Defence decides to include the relevant summaries in the Defence List of Evidence provided for in rule 121(6) of the Rules, the probative value of such summaries shall only be subject to the principle of free assessment of evidence provided for in article 69 of the Statute and rule 63 of the Rules.

DECIDE that the Prosecution:

- (i) shall make the utmost effort to disclose to the Defences of Germain Katanga and Mathieu Ngudjolo Chui by 21 April 2008, the summaries of the statements, interview notes and interview transcripts of the [REDACTED] potential witnesses referred to at the 1 April 2008 and 15 April 2008 hearings;
- (ii) shall complete the disclosure of the remaining summaries no later than fifteen days prior to the commencement of the confirmation hearing; and
- (iii) shall file immediately afterwards a disclosure note enumerating the summaries that have been disclosed.

DECIDE that the Defences of Germain Katanga and Mathieu Ngudjolo Chui:

- (i) shall have to decide, within the time limit provided for in rule 121(6) of the Rules, whether they intend to rely for the purpose of the confirmation hearing on any of the summaries which would have been disclosed by the Prosecution by 21 April 2008; and
- (ii) shall have until 7 days prior to the commencement of the confirmation hearing to make such a decision with regard to those summaries disclosed by the Prosecution after 21 April 2008.

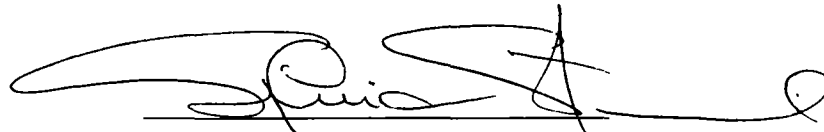
DECIDE that the Prosecution shall directly disclose to the Defences of Germain Katanga and Mathieu Ngudjolo Chui, as soon as practicable but no later than

Monday 21 April 2008 at 16h00, the documents that contain potentially exculpatory information with the redactions that the Prosecution considers necessary.

DECIDE that immediately after the disclosure of such documents, the Prosecution shall file in the record of the case the necessary disclosure notes, pre-inspection reports and/or inspection reports listing the documents that have been made available to the Defence.

DECIDE that the Defence shall have 15 days from the receipt of these documents to request from the Single Judge the lifting of those redactions made by the Prosecution that the Defence considers necessary for the purpose of their preparation for the confirmation hearing.

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



Judge Sylvia Steiner
Single Judge

Dated this Friday, 25 April 2008

At The Hague

The Netherlands