

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 May 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 of the "Seventh Decision on Redactions" issued on 26
May 2008**

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Senior Trial Lawyer

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**Unrepresented Applicants for
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**The Office of Public Counsel for the
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REGISTRY

Registrar
Ms Silvana Arbia

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 Court”);

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 14 December 2007;

NOTING the Prosecution² and Defence³ applications for leave to appeal the First Decision on Redactions and the “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions”,⁴ issued by the Single Judge on 14 December 2008 and by which the Single Judge granted leave to appeal in relation to the following issues:

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

NOTING the “Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions”⁵ issued on 19 December 2007, by which the Single Judge

¹ ICC-01/04-01/07-88-Conf-Exp ,ICC-01/04-01/07-90

² ICC-01/04-01/07-92-Conf , ICC-01/04-01/07-107

³ ICC-01/04-01/07-99

⁴ ICC-01/04-01/07-108

⁵ ICC-01/04-01/07-116

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

NOTING the “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”⁶ (“the Second Decision on Redactions”), issued by the Single Judge on 21 December 2007;

NOTING the “Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements”⁷ filed by the Prosecution on 2 January 2008;

NOTING the “Defence Response to Confidential Prosecution’s Document in support of Appeal against the First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”⁸ filed by the Defence for Germain Katanga on 14 January 2008;

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”⁹ (“the Third Decision on Redactions”) issued by the Single Judge on 5 March 2008;

NOTING the “Fourth Decision on the Prosecution Request for Authorisation to Redact Documents related to Witnesses 166 and 233”¹⁰ (“the Fourth Decision on Redactions”) issued by the Single Judge on 2 April 2008;

⁶ ICC-01/04-01/07-123-Conf-Exp, ICC-01/04-01/07-124-Conf, ICC-01/04-01/07-160

⁷ ICC-01/04-01/07-131-Conf

⁸ ICC-01/04-01/07-140

⁹ ICC-01/04-01/07-247-Conf-Exp-Corr; ICC-01/04-01/07-248-Corr and ICC-01/04-01/07-249

¹⁰ ICC-01/04-01/07-358-Conf-Exp, ICC-01/04-01/07-360-Conf, and ICC-01/04-01/07-361

NOTING the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and 77 of the Rules”¹¹ issued by the Single Judge on 18 April 2008;

NOTING the “Fifth Decision on the Prosecution Request for Authorisation to Redact Statements, Investigators, Notes, Written Consents and documents relating to Witnesses 157, 161, 268, 279, 280 and 311 and other Documents”¹² (“the Fifth Decision on Redactions”) issued by the Single Judge on 21 April 2008;

NOTING “the Sixth Decision on the Prosecution Request for Authorisation to Redact Interview Transcripts of Witness 238”¹³ (“the Sixth Decision on Redactions”) issued by the Single Judge on 21 April 2008;

NOTING the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”¹⁴ (“the First Appeals Chamber Judgment”) issued by the Appeals Chamber on 13 May 2008;

NOTING the “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”¹⁵ (“the Second Appeals Chamber Judgment”) issued by the Appeals Chamber on 13 May 2008;

¹¹ ICC-01/04-01/07-411-Conf-Exp, ICC-01/04-01/07-433-Conf, ICC-01/04-01/07-428-Corr

¹² ICC-01/04-01/07-405-Conf-Exp, ICC-01/04-01/07-427

¹³ ICC-01/04-01/07-413-Conf-Exp, ICC-01/04-01/07-425

¹⁴ ICC-01/04-01/07-475

¹⁵ ICC-01/04-01/07-476

NOTING the “Order to the Prosecution to Review and Resubmit its Previous Requests for Redactions Pursuant to 13 May 2008 First Appeals Chamber Judgment”¹⁶ issued by the Single Judge on 16 May 2008, in which the Single Judge, *inter alia*, ordered the Prosecution by no later than 21 May 2008 at 16h00:

- (i) to identify on which specific redactions, out of those remitted by the Appeals Chamber in the First Appeals Chamber Judgment, the Prosecution persists in its request for the authorisation of the Single Judge for redactions;
- (ii) to identify the specific redactions provisionally authorised in the Second, Third, Fourth, Fifth and Sixth Decisions on Redactions, which are of a similar nature as those remitted by the Appeals Chamber in the First Appeals Chamber Judgment to the Pre-Trial Chamber, for which the Prosecution persists in its request for the authorisation of the Single Judge for redactions; and
- (iii) to resubmit its requests for authorization for redactions and provide the Single Judge with the information required by paragraphs 71 to 73, 98, 99 and 111 of the First Appeals Chamber Judgment in relation to those redactions for which the Prosecution persists in its request for the authorisation of the Single Judge for redactions;

NOTING the “Prosecution’s Urgent Application for Extension of Time Pursuant to Regulation 35 to File Application for Redactions in Compliance with Appeals Chamber’s “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for

¹⁶ ICC-01/04-01/07-479

Authorisation to Redact Witness Statements"¹⁷ filed by the Prosecution on 21 May 2008;

NOTING "Decision on the Prosecution's Urgent Application for Extension of Time"¹⁸ issued by the Single Judge on 21 May 2008, in which the Single Judge, *inter alia*, decided (i) that the Prosecution shall, by Thursday 22 May 2008 at 9h30, resubmit its requests for authorisation for redactions in relation to the documents that the Prosecution has already reviewed and (ii) to grant the Application for Extension of Time in relation to the documents that the Prosecution had not yet reviewed and therefore extended the time-limit until Thursday 22 May 2008 at 16h00;

NOTING the Prosecution's Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions in Compliance with Appeals Chamber Judgment (Part I and II)¹⁹ ("the Prosecution Re-Submission") filed by the Prosecution on 22 May 2008;

NOTING the "Corrigendum to Annexes S1, S2 and S4 of the Prosecution's Application pursuant to Rule 81(2) and Rule 81(4) for Redactions in Compliance with Appeals Chamber's "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" (Part II)"²⁰ ("the Corrigendum to Annexes S1, S2 and S4 of the Prosecution Re-submission")

filed by the Prosecution on 26 May 2008;

¹⁷ ICC-01/04-01/07-492-Conf-Exp.

¹⁸ ICC-01/04-01/07-493

¹⁹ ICC-01/04-01/07-494-Conf-Exp and its Conf-Exp-Annexes, ICC-01/04-01/07-495-Conf-Exp and its Conf-Exp-Annexes

²⁰ ICC01/04-01/07-504 and Conf-Exp-AnxS1-Corr, AnxS2-Corr and AnxS4-Corr

NOTING articles 54, 57(3)(c), 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");

I. Introductory Remarks

1. On 13 May 2008, the Appeals Chamber rendered the First Appeals Chamber Judgement, in which it reversed the decisions of the Pre-Trial Chamber to reject the requests of the Prosecutor to authorise redactions:

- a. "in respect of "innocent third parties" on the basis that "rule 81(4) of the Rules does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families";²¹ and
- b. "relating to the place of the interviews and to the identities of the staff members of the Office of the Prosecutor and of the Victims and Witnesses Unit present at these interviews."²²

2. In relation to "innocent third parties" – namely individuals, other than victims, witnesses, their family members and Prosecution sources, who are at risk on account of the activities of the Court - the Appeals Chamber found that:

It is clear that rule 81(4) enables the Chamber to authorise the non-disclosure of the identity of witnesses, victims and members of their families at the current stage of the proceedings for the purposes of protecting their safety. Other provisions, set out above, expressly provide for the protection of other persons at risk on account of the activities of the Court. In those circumstances, it would be illogical and would defeat the object and purpose of those other provisions if the Chamber were not able to authorise the nondisclosure of material pursuant to rule 81(4), in appropriate circumstances, for the protection of such persons as well.²³

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

²¹ ICC-01/04-01/07-475, para 109

²² ICC-01/04-01/07-475, para 110.

²³ *First Appeals Chamber Judgment*, para 55

Procedure and Evidence, as expressed in article 54(3)(f) of the Statute and in other parts of the Statute and the Rules, to protect people at risk.²⁴

Moreover, this interpretation is in adherence with the requirement in article 21(3) of the Statute to apply and interpret the provisions of the Statute and the Rules consistently with internationally recognized human rights.²⁵

3. Nevertheless, the Appeals Chamber stressed that "permitting redactions to be made on this basis pursuant to rule 81(4) in principle does not mean that they will be granted whenever sought"²⁶ and that "a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced by the procedures taken by the Pre-Trial Chamber."²⁷

4. In relation to the second category of redactions, namely redactions relating to the locations of interviews of witnesses and identifying information of staff members of the Prosecution and of the VWU present during such interviews, the Appeals Chamber, considering the matter in the specific context of applications relating to disclosure prior to a hearing to confirm the charges against a suspect, found that:

rule 81(2) provides generally for the non-disclosure of "information", without excluding per se certain categories of information from non-disclosure. Similarly, rule 81(4) does not expressly rule out the information referred to in rule 111(1) from its ambit. The Appeals Chamber therefore concludes that it will have to be determined on a case-by-case basis whether the non-disclosure of information that is required to be recorded pursuant to rule 111(1) may be authorised by a Chamber. This will be determined in light of the conditions stipulated by rule 81(2) and/or (4) of the Rules.²⁸

5. As a result, the Appeals Chamber remitted to the Pre-Trial Chamber for a new determination, on a case-by-case basis, the requests of the Prosecution in relation to the above-mentioned two categories of redactions. In the present decision, the Single Judge carries out such a determination.

²⁴ *First Appeals Chamber Judgment*, para 56

²⁵ *First Appeals Chamber Judgment*, para 57

²⁶ *First Appeals Chamber Judgment*, para 59

²⁷ *First Appeals Chamber Judgment*, para 59

²⁸ *First Appeals Chamber Judgment*, para 93

6. In this regard, the Single Judge recalls that she has emphasised in the previous Decisions on Redactions in the present case that:

[i]n order for any redaction in any given statement to be authorised, the Single Judge must, first and foremost, have reached the conclusion that there is a risk that the disclosure to the Defence – at least at this stage of the proceedings – of the information sought to be redacted could (i) prejudice further or ongoing investigations by the Prosecution (rule 81(2) of the Rules); (ii) affect the confidential character of the information under articles 54, 72 and 93 of the Statute (rule 81(4) of the Rules); or (iii) affect the safety of witnesses, victims or members of their families (rule 81(4) of the Rules). Moreover, after ascertaining the existence of such a risk, the Single Judge will analyse whether (i) the requested redactions are adequate to eliminate, or at least, reduce such a risk; (ii) there is no less intrusive alternative measure that can be taken to achieve the same goal at this stage; and (iii) the requested redactions are not prejudicial to or inconsistent with the rights of the arrested person and a fair and impartial trial. Only when these three additional questions have been answered in the affirmative will the Single Judge authorise the redactions requested by the Prosecution.²⁹

7. The Single Judge notes the further guidance given by the First Appeals Chamber Judgement, in particular at paragraphs 71 to 73, 98, 99 and 111, in which the Appeals Chamber underlines that:

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

- a) the alleged danger must involve an objectively justifiable risk to the safety of the person concerned;
- b) the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, *inter alia* whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.³⁰

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

- a) the Pre-Trial Chamber should consider whether an alternative measure short of redaction is available and feasible in the circumstances. If a less restrictive protective measure is sufficient and feasible, that measure should be chosen;

²⁹ *First Decision on Redactions*, para. 4 See also, ICC-01/04-01/06-773, paras 21, 33 and 34, and ICC-01/04-01/06-774, paras 31-33

³⁰ *First Appeals Chamber Judgment*, para 71

- b) the Pre-Trial Chamber should bear in mind that the non-disclosure is sought at the stage of the proceedings in relation to the hearing to confirm the charges. The Appeals Chamber refers, in this context, to paragraph 68 above;
- c) the Pre-Trial Chamber should carefully assess the relevance of the information in question to the Defence. If, having carried out that assessment, the Chamber concludes that the information concerned is not relevant to the Defence, that is likely to be a significant factor in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. If, on the other hand, the information may be of assistance to the case of the suspect or may affect the credibility of the case of the Prosecutor, the Pre-Trial Chamber will need to take particular care when balancing the interests at stake;
- d) if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.³¹

The following additional factors should be taken into account:

- a) in balancing the various interests at stake, the Pre-Trial Chamber must make sure that adequate safeguards are in place to protect the interests of the suspect so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms;
- b) prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected;
- c) even if it is determined that certain information should not be disclosed, such determination should be kept under review by the Pre-Trial Chamber. It may be necessary to disclose the withheld information subsequently, should circumstances Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber 1 entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", change. The Prosecutor should assist the Pre-Trial Chamber in this regard by bringing to its attention factors that may cause it to reconsider its ruling on nondisclosure.³²

8. Moreover, as the Single Judge has already stated,
 - a. "the Prosecution has the burden of providing the necessary information for the Single Judge to conduct the type of analysis requested by the Appeals Chamber";³³ and
 - b. If the Prosecution does not provide a detailed justification for each of the redactions requested, "the Prosecution's request for redactions will be rejected *in limine*."³⁴

9. As a result, the Single Judge will only analyse the merits of the Prosecution's requests in those instances in which it has provided the Pre-Trial Chamber with the

³¹ *First Appeals Chamber Judgment*, para 72

³² *First Appeals Chamber Judgment*, para 73

³³ ICC-01/04-01/07-479, p 10

³⁴ ICC-01/04-01/07-493, p 5

necessary information to conduct the type of analysis requested by the First Appeals Chamber Judgment. In this regard, the Single Judge considers that the security situation and context, in which the Prosecution requests are made, remain the same as that mentioned in the First Decision on Redactions.³⁵

10. In relation to the format of this decision, the Single Judge observes that the reasons for granting or rejecting the Prosecution's requests to those redactions included within the same category are very similar. Therefore, the Single Judge will follow the practice of the Chamber in Annex I to the *Decision on the Confirmation of Charges* in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, as well as in the previous decisions on redactions in the present case.

11. Consequently, in Annex I to the present decision, which is issued *ex parte* and available only to the Prosecution, following the procedure prescribed by the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*,³⁶ the Single Judge will provide a full explanation of her decision with respect to the category of redactions "innocent third party" or "persons at risk on account of the activities of the Court" as requested by the Prosecution.

12. Finally, the Single Judge would like to call the attention of the Prosecution to the following six issues. First, it appears that the Prosecution has requested in the Prosecution Re-Submission, certain redactions that have already been granted by the Single Judge.³⁷

³⁵ *First Decision on Redactions*, paras. 13 to 22

³⁶ ICC-01/04-01/06-773, para 22

³⁷ Redactions that have already been granted by the Single Judge are (i) the names of the interpreters present during the interviews (ICC-01/04-01/07-495-Conf-Exp-AnxC1, ICC-01/04-01/07-495-Conf-Exp-AnxM1, ICC-01/04-01/07-495-Conf-Exp-AnxT1); (ii) identifying information of Witnesses' family members (ICC-01/04-01/07-495-Conf-Exp-Anx[REDACTED]), (iii) Prosecution Sources (ICC-01/04-01/07-495-Conf-Exp-AnxC1, paras 19, 20, 22, 69, 73, 75, 76 and 77), and (iv) AnxC2, pp 2-7 [REDACTED] See in that respect First, Second, Third, Fourth, Fifth and Sixth Decisions on Redactions, ICC-01/04-01/07-479, p 9, ICC-01/04-01/07-479

13. Second, the Single Judge notes that the Prosecution has requested authorisation to redact, pursuant to rule 81(4) of the Rules, the photograph of Witness 157 in document ICC-01/04-01/07-495-Conf-Exp-AnxE6.³⁸ As the Single Judge has not ruled to date on this request, the Prosecution maintains its request for redaction of the aforementioned photograph. In this regard, the Single Judge recalls that Witness 157 is under the Court's Witness Protection Programme and that his identity has been disclosed to both Defence teams. Therefore, the Single Judge does not authorise the redaction of Witness 157's photograph.

14. Third, the Single Judge notes that the Prosecution has drawn to her attention the fact that the redactions granted by the Single Judge in lines [REDACTED] of document ICC-01/04-01/07-495-Conf-Exp-Anx[REDACTED] have erroneously been classified as being an "interview location".³⁹

15. The Prosecution indicates that the request for authorisation to redact this information was originally made in order not to disclose the current whereabouts of a Prosecution source. Nevertheless, the Single Judge observes that the Prosecution requested authorisation to redact the above mentioned information both as being the "location of a prosecution source"⁴⁰ and the "interview location".⁴¹

16. Moreover, the Single Judge notes that when requesting authorisation to redact the abovementioned information in order to protect a Prosecution source, the Prosecution only refers to a source identified by the name of [REDACTED].⁴² However, although the Single Judge has granted authorisation to redact the name and identifying information of this Prosecution source,⁴³ she observes that the

³⁸ ICC-01/04-01/07-355-Conf-Exp-AnxB2

³⁹ *Third Decision on Redactions*, Annex 1

⁴⁰ ICC-01/04-01/07-190-Conf-Exp-Anx[REDACTED]

⁴¹ ICC-01/04-01/07-190-Conf-Exp-Anx[REDACTED]

⁴² ICC-01/04-01/07-190-Conf-Exp-Anx[REDACTED]

⁴³ *First Decision on Redactions*, Annex 1, p 64, *Third Decision on Redactions*, Annex 1, p 80

information contained in lines [REDACTED] does not refer to the aforementioned [REDACTED] but to [REDACTED] for whom the Prosecution has not requested authorisation to redact his name or alleged that he was a Prosecution source.

17. Therefore, the Single Judge is of the view that no error has been made in the classification of the redactions granted by the Single Judge in lines [REDACTED] of document ICC-01/04-01/07-495-Conf-Exp-Anx[REDACTED].

18. Fourth, the Single Judge recalls that in the Fourth Decision on Redactions, she has provisionally authorised the Prosecution to disclose to the Defence the investigator's notes, statements and documents relating to Witnesses 166 and 233 with the redaction of the names and identifying information of Witnesses 161, 268 and 287.¹¹

19. The Single Judge notes that since then: (i) Witness 161 has consented to the disclosure of his identity to the Defence; (ii) Witness 268 has been included in the Court's Witness Protection Programme and has been relocated; and (iii) Witness 287 has also been included in the Court's Witness Protection Programme and has been relocated.⁴⁴

20. As a result, the Single Judge considers that those redactions in the statements of Witnesses 166 and 233 relating to the names and identifying information of Witness 161, 268 and 287 are no longer necessary and must therefore be lifted.

⁴⁴ ICC-01/04-01/07-482-Conf-Exp, paras 3 and 4 On 19 May 2008, the Registry informed the Single Judge that VWU has recommended that Witness 287 be accepted into the Court's witness protection programme and that the Registry has accepted the Witness inclusion into the Court's witness protection programme and that the protective measures have been fully implemented

21. Fifth, the Single Judge notes that, in the Fifth Decision on Redactions, the only redactions authorised in the document entitled [REDACTED] were the initials and signature of a Prosecution source.⁴⁵ Nevertheless, the Single Judge observes that this document, which is included in the Prosecution List of Evidence, has been disclosed to the Defence with numerous redactions made *proprio motu* by the Prosecution and have never been authorised by the Single Judge.

22. As a result, the Prosecution has infringed the Fifth Decision on Redactions and has missed the 21 April 2008 deadline for the disclosure to the Defence of the evidence included in the Prosecution List of Evidence with only those redactions authorised by the Single Judge. Under these circumstances, the Single Judge decides to declare inadmissible this document for the purpose of the confirmation hearing in the present case.

23. Moreover, if, according to the Prosecution, this document must be disclosed to the Defence pursuant to rule 77 of the Rules, it must do so immediately following the system established in Section VII of the 18 April 2008 Decision on the Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67 (2) of the Statute and Rule 77 of the Rules.

24. Finally, the Single Judge notes that, [REDACTED], the Prosecution requests authorisation to redact the reference to [REDACTED] which refer to [REDACTED]. The Prosecution request the redaction on the basis of [REDACTED] being an interview location. The Single Judge highlights that as the Prosecution has not requested that the interview location in that particular witness statement be redacted, there is no reason to redact the reference [REDACTED]. Therefore, the

⁴⁵ See Fifth Decision on Redactions.

Single Judge does not authorise the redaction to the reference [REDACTED] at line [REDACTED].

II. Categories of Redactions

A. Persons allegedly at risk on account of the activities of the Court

25. At the outset, the Single Judge notes that in relation to some of the redactions requested by the Prosecution and falling under this category, the Prosecution has not provided the necessary information for the Single Judge to conduct the type of analysis requested by the Appeals Chamber. As a result, as specified in Annex I to the present decision, they are rejected *in limine*.⁴⁶

26. In carrying out her analysis of the Prosecution's request with respect to the remaining redactions falling under this category, the Single Judge, following the guidance from the Appeals Chamber, has first looked at whether the disclosure to the Defence of the information concerned would pose a danger that involves an objectively justifiable risk to the safety of the person concerned. Only in those few instances, in which this question is answered in the affirmative, does the Single Judge undertake the analysis of those other factors referred to in the First Appeals Chamber Judgment.

27. In this regard, the Single Judge observes that the Prosecution justifies most Prosecution's requests concerning the names and other identifying information of individuals qualified as "innocent third parties" on the following two facts; (i) the security situation in the Democratic Republic of the Congo ("the DRC"), and in particular in the Ituri and Kinshasa areas, as provided for in the First Decision on

⁴⁶ [REDACTED]

Redactions; and (ii) the fact that because such individuals are referred by Prosecution witnesses in their statements, they could be perceived as cooperating with the Prosecution, and, therefore, be at risk on account of such misperception by the Defence.

28. The Single Judge observes that, according to the Prosecution justification tables, such individuals are neither Prosecution witnesses nor Prosecution sources and they have no involvement in the Prosecution's investigation.

29. Under these circumstances, the Single Judge is convinced that, as long as this fact is made clear to the Defence, the disclosure of their names and identifying information to the Defence would not pose a danger that involves an objectively justifiable risk to their safety. Indeed, the Single Judge considers that these individuals are best protected by emphasising that they are neither Prosecution witnesses nor Prosecution sources and that they have no involvement in the Prosecution's investigation.⁴⁷

30. The Single Judge has reached the same conclusion in relation to Prosecution's requests for authorisation to redact names of Non Governmental Organisations ("the NGOs") operating in DRC, or names of members of such NGOs, or of persons that were, at one point, under the care of these NGOs, which:

- a. are only justified on the basis of the security situation referred to in the First Decision on Redactions and the possible Defence's misperception concerning their possible cooperation with the Prosecution; and

⁴⁷ Anx1A, pp 2-4, Anx2A, p 3, AnxB1, para 12, AnxC1, paras 65, 68-72, 80, 119 and 124, AnxD1, para 3, p 2, footnote 2, AnxD4, para 14, AnxD5, paras 15, 28, 27 and 100, AnxE5, para 29, AnxF11, pp 7-10, paras 75 and 111, AnxF14, paras 75 and 111, AnxI7, pp. 28, lines 853 and 854, AnxI8, pp 12, lines 319, 323 and 325, AnxI12, pp 9 lines 238 and 248 and pp 10 lines 250, 256, 254, AnxK2, pp 14 line 404 and pp 18, lines 560, 566, 576, 577, 561, 569, 570, 571, 578, 579, 580, 581, 585, AnxK3, pp 13 line 323, AnxM1, para 12 line 3, paras 12, 100, 101 and 154 line 1, AnxS1-Corr, paras, 39, 356, 358 and 359, AnxS3, pp 3, pictures 6, 7 and 8, AnxU1, paras 118, 126 and 127, and AnxZ1, pp 2

- b. refer to NGOs, NGOs' staff members or individuals under the care of such NGOs that are neither Prosecution witnesses nor Prosecution sources and have no involvement in the Prosecution's investigation.

31. Moreover, the Single Judge notes that in the specific case of some of the named NGOs operating in the DRC, their existence and functioning in the Ituri area, and their purpose and activities, for instance those related to [REDACTED], or support for [REDACTED], is information publicly available even on the websites of the said NGOs.

32. As a result, the Single Judge rejects the Prosecution's requests for redactions concerning the names and identifying information of the individuals and NGOs [REDACTED] and [REDACTED].⁴⁸

33. Those few instances in which the Single Judge has considered that the disclosure to the Defence of the names and other identifying information of "innocent third parties" would pose a danger that involve an objectively justifiable risk to their safety are cases of:

- a. family members of a deceased Prosecution source living in [REDACTED] that, despite not cooperating with the Prosecution, could be subject, in the context of the security situation in Ituri, to retaliatory measures [REDACTED];⁴⁹
- b. individuals who seem to have [REDACTED], which have not been made available to the Defence pursuant to the Single Judge previous decisions on redactions; in the context of the security situation in Ituri,

⁴⁸ AnxC5, para 33, and AnxE2, paras 27 and 29

⁴⁹ [REDACTED]

these individuals could be subjected to intimidation by persons somehow associated with the suspects and who may [REDACTED];⁵⁰

- c. Individuals who, despite being portrayed by the Prosecution as “innocent third parties”, (i) are to be considered as victims - or victims’ family members - of the alleged 24 February 2003 joint FNI/FRPI attack on the village of Bogoro; and (ii) [REDACTED] and are in a similar situation as other victims - or victim’s family members - of such alleged attack for which redactions have been granted pursuant to rule 81 (4) of the Rules in the previous decisions on Redactions.⁵¹

34. In those few instances, the Single Judge, as required by the Appeals Chamber, has in Annex I analysed whether the proposed redactions could overcome or reduce the risk, whether an alternative measure short of redactions is available and feasible under the present circumstances, and whether, in light of, *inter alia*, the relevance of the information for the Defence, the granting of the requested redactions would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect. Only if the Single Judge has answered all three questions in the negative, would the redactions requested by the Prosecution have been granted.

B. The names and initials of the persons present when the interviews were conducted and interview locations

35. According to the Appeals Chamber, those findings made in relation to redactions sought pursuant to rule 81(4) of the Rules “apply *mutatis mutandis* to redactions sought pursuant to rule 81(2) of the Rules”.⁵² As a result, the Appeals Chamber highlighted that:

⁵⁰ [REDACTED]

⁵¹ [REDACTED]

⁵² *First Appeals Chamber Judgment*, para 97

[...] pursuant to that rule, it will be for the Prosecutor seeking redactions to establish that such redactions are warranted and, in particular, that disclosure of the information for which redactions are sought "may prejudice further or ongoing investigations."⁵³

The guidance set out at paragraphs 68 to 73 above should be taken into account. In this context, for redactions to be granted, the Prosecutor will have to establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the Defence (as opposed to the general public) and could be overcome or reduced by redactions. Dangers that cannot be overcome by redactions because they are inherent in the situation itself cannot, as such, provide a justification for redactions. By way of example, in the present case, the Pre-Trial Chamber would have to assess, on the basis of its knowledge of the factual situation as a whole, whether the danger sought to be protected could be overcome by redactions or arises simply from the fact that personnel of the OTP and of the VWU generally may be easily identifiable in the field.⁵⁴

Once it has been established that disclosure of the information to the Defence may prejudice ongoing or further investigations and that this risk could be overcome by authorising redactions, the Prosecutor will have to establish that the redactions restrict the rights of the suspect only as far as strictly necessary.⁵⁵

36. In analysing whether the Single Judge applied these criteria in the First Decision on Redactions in relation to the Prosecution's requests for redactions concerning the location of interviews of witnesses and the identifying information of staff members of the Prosecution and of the VWU present during such interviews, the Appeals Chamber found that:

[...] in relation to the prejudice that the disclosure of information relating to the place of the interviews and the persons present may cause to the investigations of the Prosecutor, the Pre-Trial Chamber stated only that such disclosure "could, in a few instances, prejudice to a certain extent" the investigations. It is thus unclear whether the Pre-Trial Chamber concluded that such a risk existed and, if so, in relation to which specific requests for redactions [...].⁵⁶

Similarly, the Pre-Trial Chamber found that redactions "might, in certain circumstances, contribute to minimizing" the risk to the investigations. It is unclear whether the Pre-Trial Chamber considered that such a risk could indeed be minimised through redactions or whether this was only a theoretical possibility.⁵⁷

Moreover, it appears from the Impugned Decision that the Pre-Trial Chamber seems to have been significantly influenced in its rejection of the redactions sought by the purported existence of less intrusive measures that could be taken by the Prosecutor. It is, however, unclear on what factual basis the Pre-Trial Chamber concluded that such less intrusive measures existed. This fact and the arguments put forward by the Prosecutor in his Document in Support of the Appeal call into question the viability of these alternative

⁵³ *First Appeals Chamber Judgment*, para 97

⁵⁴ *First Appeals Chamber Judgment*, para 98

⁵⁵ *First Appeals Chamber Judgment*, para 99

⁵⁶ *First Appeals Chamber Judgment*, para 101

⁵⁷ *First Appeals Chamber Judgment*, para 102

measures in a manner that suggests that the Pre-Trial Chamber may not have taken all relevant factors into account.⁵⁸

(i) Interview Locations

37. In the Prosecution Re-Submission, the Prosecution requests authorisation to redact the locations where the interviews with the witnesses occurred either pursuant to rule 81(2) or rule 81(4) of the Rules and submits that:

[REDACTED].⁵⁹

[REDACTED].⁶⁰

38. Moreover, in its Appeals brief, the Prosecution stated that:

- a. the Chamber had already acknowledged in the First Decision on Redactions that [REDACTED]⁶¹ and that
- b. redactions to the interview locations are the least restrictive measures to mitigate the risk to witnesses in part because [REDACTED]⁶² and also because [REDACTED] to alternative locations [REDACTED]⁶³

39. The Single Judge observes that the interview locations for which the Prosecution requests redactions are [REDACTED]. The Single Judge also observes that the size of the [REDACTED] locations is significantly smaller than the size of the [REDACTED]. This along with the findings of the First Decision on Redactions on the security situation in the Ituri District – [REDACTED]– leads to the conclusion that disclosing to the Defence the fact that interviews often take place in these [REDACTED] locations involves an objectively justifiable risk to cause a prejudice to the Prosecution investigation.

⁵⁸ *First Appeals Chamber Judgment*, para 103

⁵⁹ ICC-01/04-01/07-494-Conf-Exp, para 7

⁶⁰ ICC-01/04-01/07-494-Conf-Exp, para 9

⁶¹ ICC-01/04-01/07-131-Conf

⁶² ICC-01/04-01/07-131-Conf, para 35

⁶³ ICC-01/04-01/07-131-Conf, para 36

40. In the view of the Single Judge, the same conclusion cannot be reached, however, for [REDACTED], as they both have a considerable size and are not located in or in the surroundings of the Ituri district.

41. The Single Judge also considers that the redactions of the references to [REDACTED] will certainly minimize this risk insofar as it will prevent the Defence to have knowledge of the places in which the Prosecution's interviews took place. Moreover, upon careful review in light of the arguments brought by the parties in their appeals briefs, as requested by the Appeals Chamber,⁶⁴ the Single Judge is of the view that in relation to [REDACTED] there are no other less intrusive alternative measures that could achieve the same goal. In revisiting the findings made with regard to this matter in the First Decision on Redactions, the Single Judge has given particular weight to the Prosecution's statement that the said locations are the [REDACTED].⁶⁵

42. Finally, the Single Judge does not consider that the redaction of the references to these [REDACTED] above-mentioned locations "would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect." In reaching this conclusion, the Single Judge has given particular weight to the statement of the Defence for Germain Katanga in that "at this early stage of the proceedings, redactions of the locations of the witness interviews do not seriously hamper the ability of the Defence to conduct meaningful investigations."⁶⁶

43. The Single Judge has also taken note of the statement of the Defence of Germain Katanga in that "there could be situations where the Defence would have a real interest in knowing the location of witness interviews" such as when the

⁶⁴ *First Appeals Chamber Judgment*, para 111

⁶⁵ ICC-01/04-01/07-131-Conf, para 36

⁶⁶ ICC-01/04-01/07-140, para 32

interview takes place in police custody or detention.⁶⁷ However, the Single Judge does not need to address this concern in the present decision insofar as none of the interviews took place in police custody or detention.

44. For these reasons, the Single Judge grants authorisation, pursuant to rule 81(2) of the Rules, for the redaction of the references to [REDACTED].⁶⁸

45. Nevertheless, the Single Judge notes that, at line [REDACTED], the Prosecution requests authorisation to redact the reference to [REDACTED] as it refers, according to the Prosecution, to an interview location. With regard to this specific reference, the Single judge observes that the reference to [REDACTED] is made in the middle of the statement of the Witness, and that from an overall reading of the statement, it cannot be understood that [REDACTED] is also the interview location. As the Prosecution does not provide any specific information in relation to that particular reference to [REDACTED], the Single Judge does not authorise this specific redaction.

46. Finally, for the reasons mentioned above, the Single Judge also rejects the Prosecution's requests for the redaction of the references to [REDACTED]^{69,70}

(ii) Current Prosecution staff members

⁶⁷ ICC-01/04-01/07-140, para 32

⁶⁸ [REDACTED]

⁶⁹ [REDACTED] as an interview location. ICC-01/04-01/07-495-Conf-Exp-AnxsD4, D5 and F14

⁷⁰ [REDACTED] as an interview location ICC-01/04-01/07-495-Conf-Exp-AnxsS1 and S2

47. In the Prosecution Re-submission, the Prosecution requests redactions to identifying information of some current Prosecution staff members who frequently [REDACTED].⁷¹

48. The Single Judge observes that neither in its Appeal brief, nor in the Prosecution Re-Submission, the Prosecution has provided any specific information in relation to any of the current Prosecution staff members for which redactions are sought.

49. Furthermore, the Single Judge notes that the Prosecution's arguments are confined to explaining how the less intrusive measures referred to by the Single Judge in the First Decision on Redactions cannot be adopted, including (i) making sure that the relevant Prosecution staff members do not easily stand out from the local population; and (ii) rotating such persons once there are indications that their identification with the Court may endanger their security as well as the Prosecution investigation.⁷² In this regard, the Single Judge observes that the Prosecution highlights that "[REDACTED]".⁷³

50. Under these circumstances, the Single Judge considers that the danger to the Prosecution investigation "arises simply from the fact that personnel of the OTP [...] may be easily identifiable in the field". As a result, the Single Judge is not convinced that disclosure to the Defence of the names, initials and signatures of those current Prosecution staff members for which redactions are sought, will involve an objectively justifiable increased risk to the Prosecution investigation.

FOR THESE REASONS

⁷¹ ICC-01/04-01/07-494-Conf-Exp, para 11

⁷² ICC-01/04-01/07-131-Conf., paras 40 and 41 See also First Decision on Redactions, para 60

⁷³ ICC-01/04-01/07-131-Conf., para 40 and footnote 63

DECIDE to partially grant the Prosecution's requests for authorisation for redactions to the interview notes, interview transcripts, statements and documents contained in Prosecution Re-submission and in the Corrigendum to Annexes S1, S2 and S4 of the Prosecution Re-submission, as specified in Annex I to the present decision;

DECIDE that those redactions for which authorisation is rejected in the present decision shall be immediately lifted, and that the Prosecution, by no later than Tuesday 27 May 2008 at 16h00, shall:

(i) make available to the Defences for Germain Katanga and Mathieu Bgudjolo Chui the above-mentioned interview notes, interview transcripts, statements and documents in which the redactions rejected in the present decisions are lifted;

(ii) shall file in the record of the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, an electronic version of the said interview notes, interview transcripts, statements and documents providing all details required by the Draft Protocol on the Presentation of Evidence in which the redactions rejected in the present decisions are lifted;

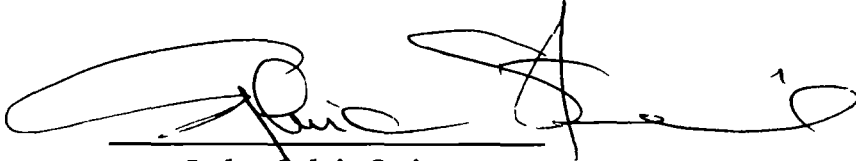
DECIDE that those redactions in the statements of Witnesses 166 and 233 relating to the names and identifying information of Witness 161, 268 and 287 shall be immediately lifted, and that the Prosecution by no later than Tuesday 27 May 2008 at 16h00, shall:

(i) make available to the Defences for Germain Katanga and Mathieu Ngudjolo Chui the statements of Witnesses 166 and 233 in which the said redactions are lifted;

(ii) shall file in the record of the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, an electronic version of the statements of Witness 166 and 233 providing all details required by the Draft Protocol on the Presentation of Evidence in which the above-mentioned redactions are lifted;

DECLARE inadmissible for the purpose of the confirmation hearing in the present case the document entitled [REDACTED]; and **DECIDE** that, in the event, this document must be disclosed to the Defence pursuant to rule 77 of the Rules, the Prosecution will do so immediately following the system established in Section VII of Decision ICC-01/04-01/07-411-Conf-Exp.

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



Judge Sylvia Steiner
Single Judge

Dated this Wednesday 28 May 2008

At The Hague, The Netherlands