

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/07

Date: 6 July 2007

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA**

URGENT

Under Seal

***Ex Parte*, available only to the Prosecution**

**Decision Rejecting the Prosecution Urgent Request and Establishing a Calendar
for the Disclosure of the Supporting Materials of the Prosecution Application for a
Warrant of Arrest against Germain Katanga**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Mr Eric MacDonald, Trial Lawyer

I, Judge Sylvia Steiner, judge at the International Criminal Court ("the Court");

NOTING the *ex parte* hearing held by the Single Judge in closed session with the Prosecution and the Representatives of the Registry on 19 June 2007;

NOTING the "Decision Requesting the Prosecution to Provide a Formatted Version of the Prosecution Requests of 22 and 25 June 2007 and Convening a Hearing," issued by the Single Judge on 29 June 2007;¹

NOTING the Warrant of Arrest for Germain Katanga, issued by Pre-Trial Chamber I on 2 July 2007;²

NOTING the "*Ordonnance relative à l'exécution du mandat d'arrêt à l'encontre de Germain Katanga*" issued by Pre-Trial Chamber I on 2 July 2007;³

NOTING the *ex parte* hearing held by the Single Judge in closed session with the Prosecution and the Representatives of the Victims and Witnesses Unit (VWU) on 4 July 2007, at which the Registry informed the Single Judge that it intended to transmit to the Congolese authorities the request for arrest and surrender on Monday 9 July 2007 and that it was likely that the arrest, surrender and transfer of Germain Katanga to the seat of the Court in The Hague would take place within a few days;

¹ICC-01/04-355-Conf.-Exp.

²ICC-01/04-01/07-1-US.

³ICC-01/04-01/07-2-US.

NOTING the “Urgent Request for the Formatting of the Arrest Warrant issued against Germain Katanga”⁴ (“the Prosecution Urgent Request”), filed by the Prosecution on 5 July 2007;

NOTING the “Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga”⁵ (“the Decision”), issued by the Chamber on 6 July 2007;

NOTING articles 61(2) and 67(1) and (2) of the Rome Statute (“the Statute”) and rules 76 to 83 and 121 of the *Rules of Procedure and Evidence* (“the Rules”);

CONSIDERING that, in the Prosecution Urgent Request, the Prosecution requests that the Single Judge format the warrant of arrest for Germain Katanga in order to remove all references to the *Front des Nationalistes et Integrationnistes* or the FNI before it is transmitted to the Congolese authorities;

CONSIDERING that at the 19 June 2007 hearing, the Prosecution explained that it had decided to make a joint application for warrants of arrest because the individuals concerned had participated in the same attack, that “the facts themselves and the way the attack happened, the facts are interlinked” and that “it is very hard to disassociate one from the other;”⁶

CONSIDERING that at the 4 July 2007 hearing, the Prosecution, after explaining that the warrant of arrest for Germain Katanga is based on a joint attack on Bogoro, added:

⁴ ICC-01/04-01/07-3-US

⁵ ICC-01/04-01/07-4-US.

⁶ ICC-01/04-T-11-Conf-Exp-EN, page 11, lines 4-6.

[...] it's a joint attack on Bogoro, where Mr Ngudjolo was also the commander of one of his groups, so I do not think we cannot hide that fact. I think, referring to the witness statements, for example, you have annexes and most of the witnesses refer to Mr. Ngudjolo one way or another. I think is difficult to redact itself. But all other information that could reveal the identity of the victims and witnesses or any identifying information will be redacted and offered as a redaction by the Office of the Prosecution.”⁷

CONSIDERING that at the 4 July 2007 hearing, the Single Judge listened with much concern to the Prosecution as it repeatedly stated that it had decided to take a “liberal approach” in formatting the Prosecution Application,⁸ and that it was preparing, both for the Defence and “for the Chamber’s appreciation”,⁹ “reformatted and redacted versions” of the statements of certain witnesses included in the Prosecution Application;¹⁰

CONSIDERING that, as stated in the warrant of arrest for German Katanga, there are reasonable grounds to believe that the attack on Bogoro was the object of a common plan by Germain Katanga and other senior FRPI and FNI commanders; that the warrant of arrest for Germain Katanga is based on his alleged responsibility as a co-perpetrator for the crimes committed during and in the aftermath of the attack on Bogoro; and that authorizing the type of redactions proposed by the Prosecution would infringe the rights of Germain Katanga under article 67(2) of the Statute insofar as it would prevent him from having access to a key component of the case against him;

CONSIDERING further that, as this Chamber has repeatedly stated, any redaction of witness statements or other evidence on which the Prosecution intends to rely at the confirmation hearing must be authorized by the Chamber;¹¹ and that any request

⁷ ICC-01/04-01/07-T-1-Conf-Exp-En, page 4, lines 22 to 25, and page 5, lines 1 to 5.

⁸ ICC-01/04-01/07-T-1-Conf-Exp-En, page 3, line 20, page 4, line 2, and page 6, lines 15 to 24.

⁹ ICC-01/04-01/07-T-1-Conf-Exp-En, page 3, line 12, line 25.

¹⁰ ICC-01/04-01/07-T-1-Conf-Exp-En, page 12, lines 22 to 25.

¹¹ ICC-01/04-01/06-T-9-En., page 49, lines 14 to 25, and page 50, line 1 to 25; ICC-01/04-01/06-102; ICC-01/04-01/06-108-Corr

for authorization of redactions must provide the grounds therefore following the example of Annex I to the *Decision on the confirmation of charges* in the Lubanga case;¹²

CONSIDERING that the practice of preparing “reformatted and redacted versions” of witness statements is not provided for in the Statute or the Rules; and that “formatted” or “formatted redacted” versions of witness statements would infringe the rights of the Defence, including those provided for in article 67(2) of the Statute;

CONSIDERING that operational protective measures have already been granted for witnesses 7, 13 and 14 referred to in the Prosecution Application;¹³ that operational protective measures have already been requested by the Prosecution in relation to witnesses 1, 8 and 9 referred to in the Prosecution Application;¹⁴ and that the Prosecution has stated that it will be in a position to decide whether to request operational protective measures for the remaining witnesses referred to in the Prosecution Application by early next week;¹⁵

CONSIDERING that according to the Registry, if the Prosecution makes the requests for operational protective measures with regard to the eight remaining witnesses referred to in the Prosecution Application within the coming days, the Registry will be able (i) to carry out its assessment and decide upon the Prosecution requests by mid-August 2007,¹⁶ and (ii) to complete the implementation of the operational protective measures authorised with regard to the first witnesses by mid-September 2007;¹⁷

¹² ICC-01/04-01/06-796-Conf. Anx 1.

¹³ ICC-01/04-01/07-T-1-Conf-Exp-En, page 11, line 3 and 4.

¹⁴ ICC-01/04-01/07-T-1-Conf-Exp-En, page 12, lines 1-3.

¹⁵ ICC-01/04-01/07-T-1-Conf-Exp-En, page 19, lines 23-25.

¹⁶ ICC-01/04-01/07-T-1-Conf-Exp-En, page 18, lines 7-16, and page 19, lines 3 and 4.

¹⁷ ICC-01/04-01/07-T-1-Conf-Exp-En, page 18, lines 17-25 and page 19, lines 2-8.

CONSIDERING that, according to the Prosecution, following the Registry's decision on the Prosecution request for operational protective measures, the Prosecution would need about a week to prepare its requests for authorization of redactions in the statements of the relevant witnesses;¹⁸

CONSIDERING that, according to the Prosecution, there are no article 54(3)(e) documents in the Supporting Materials of the Prosecution Application for a Warrant of Arrest against Germain Katanga;¹⁹ and that in relation to additional statements or documents on which the Prosecution may intend to rely on at the confirmation hearing, the Prosecution is "definitively looking into that matter as we speak"²⁰ so as to take all necessary steps "not to be at the last minute;"²¹

CONSIDERING that the Prosecution has already started identifying potentially exculpatory materials and that it intends to disclose this information as soon as practicable;²²

CONSIDERING that the Prosecution emphasized that "the Prosecution Team is at the moment taking notice of the different practices in the Lubanga case to make sure that we can follow them as closely as possible and as diligently as requested by the Chamber"²³; and that this includes providing electronic copies of the evidence on which the Prosecution intends to rely at the confirmation hearing with the details required under the *Draft Protocol on the Presentation of Evidence* followed in the Lubanga case;²⁴

¹⁸ ICC-01/04-01/07-T-1-Conf-Exp-En, page 21, lines 10-12.

¹⁹ ICC-01/04-01/07-T-1-Conf-Exp-En, page 23, lines 19-21.

²⁰ ICC-01/04-01/07-T-1-Conf-Exp-En, page 23, lines 22-23.

²¹ ICC-01/04-01/07-T-1-Conf-Exp-En, page 23, line 25 and page 24, line 1.

²² ICC-01/04-01/07-T-1-Conf-Exp-En, page 25, lines 4-11.

²³ ICC-01/04-01/07-T-1-Conf-Exp-En, page 14, lines 19-23.

²⁴ ICC-01/04-01/07-T-1-Conf-Exp-En, page 14, line 9 and lines 17-23.

CONSIDERING that the Single Judge is particularly mindful that, as a result of benefiting from the practices adopted in the proceedings leading to the confirmation hearing in the Lubanga case, the proceedings leading to the confirmation hearing in the present case are to be conducted in a more expeditious manner; and that establishing from the outset a calendar for the disclosure to the Defence of the Supporting Materials of the Prosecution Application may facilitate the achievement of this goal without infringing the rights of the Defence;

CONSIDERING that the Prosecution has already stated that it intends to rely at the confirmation hearing on a few additional witnesses²⁵ and some additional documents;²⁶ and that a calendar for the disclosure of the additional evidence on which the Prosecution intends to rely at the confirmation hearing is to be determined at a later stage once the Defence Team has become fully operational;

CONSIDERING in this regard that, according to the Registry: (i) a 30-day period will be necessary for Germain Katanga to exercise his right to choose counsel and only subsequently will the Defence counsel so chosen be able to put together the rest of the Defence Team;²⁷ and (ii) by the end of August 2007, the Registry will be in a position to provide to the future Defence Team in the present case the same technological resources that were available to the Defence Team in the Lubanga case;²⁸

²⁵ The Prosecution referred to approximately 5 to 10 additional witnesses. ICC-01/04-01/07-T-1-Conf-Exp-En, page 22, lines 12-23.

²⁶ The Prosecution stated that it intends to rely on far less additional documents than it did in the Lubanga case. ICC-01/04-01/07-T-1-Conf-Exp-En, page 25, lines 12-22.

²⁷ ICC-01/04-01/07-T-1-Conf-Exp-En, page 9, lines 11-23.

²⁸ ICC-01/04-01/07-T-1-Conf-Exp-En, page 9, lines 5-10.

FOR THESE REASONS,

REJECT the Prosecution Urgent Request;

DECIDE that (i) the unredacted formatted version of the Prosecution Application that the Prosecution must file according to the 29 June 2007 Decision shall only expunge the information identifying the fact that the Prosecution Application for a warrant of arrest is not limited to Germain Katanga; (ii) no information contained in the Decision shall be expunged for the purpose of preparing such unredacted formatted version of the Prosecution Application and that (iii) the Prosecution shall file it *ex parte* no later than 11 July 2007;

DECIDE that the Prosecution (i) shall prepare a redacted version of the formatted version of the Prosecution Application from which any information which could lead to the identification of witnesses 1, 2, 3, 4, 5, 6, 8, 9 10, 11 and 12 or their families shall be expunged; and (ii) shall file it no later than 11 July 2007;

DECIDE to establish the following calendar for the disclosure of the Supporting Materials to the Prosecution Application for a Warrant of Arrest against Germain Katanga:

- (i) Statements of witnesses 7, 13 and 14: the Prosecution shall have until 7 August 2007 to either disclose unredacted versions of their statements to the Defence, or to request, following the example provided for in Annex I to the *Decision on the confirmation of charges* in the Lubanga case,

the authorisation of the Single Judge for any redaction that the Prosecution might still consider necessary;

- (ii) Statements of witnesses 7, 13 and 14 for which the Prosecution decides to disclose unredacted versions: the Prosecution shall file by 7 August 2007 an electronic version with the details required under the *Draft Protocol on the Presentation of Evidence* followed in the Lubanga case. Moreover, prior to the filing of the Document containing the charges, the relevant fields will be provisionally filled out by reference to the relevant parts of the warrant of arrest for Germain Katanga;
- (iii) Witnesses 2, 3, 4, 5, 6, 10, 11 and 12: the Prosecution shall make the necessary referrals for operational protective measures to the Registry no later than 16 July 2007;
- (iv) Statements of witnesses 1, 2, 3, 4, 5, 6, 9, 10, 11, 12:
 - a. the Registrar shall, upon the request of the Prosecution for operational protective measures, carry out the necessary assessments and decide upon the Prosecution requests by 20 August 2007;
 - b. the Prosecution shall have until 31 August 2007 to request the authorisation of the Single Judge for redactions following the example provided for in Annex I to the *Decision on the confirmation of charges* in the Lubanga case:
 - i. in those statements or transcripts of interviews of those witnesses for whom the Registry declines to grant operational protective measures;
 - ii. in those statements or transcripts of interviews of those witnesses for whom the Registry grants the requested operational protective measures, and that in the view of the Prosecution would still require certain redactions before

being disclosed to the Defence after the relevant protective measures have been implemented;

- c. the Registry shall do its utmost efforts to implement the operational protective measures as soon as practicable and no later than 30 September 2007;
- (v) Documents contained in the Supporting Materials to the Prosecution Application for a Warrant of Arrest against Germain Katanga: the Prosecution shall have until 7 August 2007 to either disclose them to the Defence through the system of pre-inspection and inspection followed in the Lubanga case (including the filing of pre-inspection and inspection reports), or to request, following the example provided for in Annex I to the *Decision on the confirmation of charges* in the Lubanga case, the authorisation of the Single Judge for any redaction that the Prosecution might still consider necessary;
- (vi) Documents for which the Prosecution decides to disclose unredacted versions: the Prosecution shall file by 7 August 2007 an electronic version with the details required under the *Draft Protocol on the Presentation of Evidence* followed in the Lubanga case. Moreover, prior to the filing of the Document containing the charges, the relevant fields will be provisionally filled out by reference to the relevant parts of the warrant of arrest for Germain Katanga;

DECIDE that:

- (i) the Prosecution searches for potentially exculpatory materials under rule 67(2) of the Statute shall continue on an ongoing basis;
- (ii) as soon as the Prosecution identifies any item of a potentially exculpatory nature under article 67(2) of the Statute, it shall:
 - a. disclose it to the Defence;

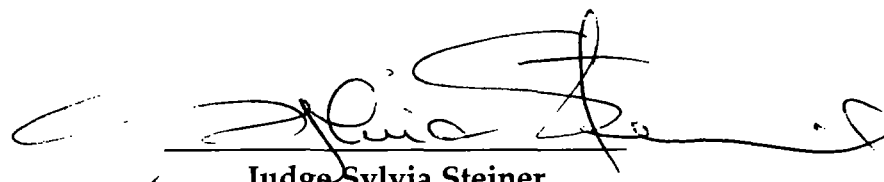
- b. bring to the attention of the Chamber any delay in the disclosure caused by the procedure under articles 54(3)(e), 73 or 93 of the Statute; or
 - c. request an exception to the disclosure requirement under rule 81 of the Rules;
- (iii) as soon as practicable after disclosure of potentially exculpatory materials to the Defence, the Prosecution shall file disclosure notes listing the potentially exculpatory materials so disclosed.

DECIDE that:

- (i) at the beginning of September 2007, once the Defence team of Germain Katanga is fully operational, a hearing will be held to gather the views of the parties in order to set a calendar for the disclosure of the additional evidence on which the Prosecution intends to rely at the confirmation hearing;
- (ii) in the meantime:
 - a. the Prosecution shall, in relation to those additional witnesses on which the Prosecution may decide to rely at the confirmation hearing, do its utmost to make the necessary requests for operational protective measures to the Registry as soon as practicable; and
 - b. the Prosecution shall, in relation those additional books, documents, photographs and other tangible objects on which the Prosecution may decide to rely at the confirmation hearing and which have been obtained under article 54(3)(e) of the Statute, do its utmost to request as soon as practicable the consent of the providers to disclose them to the Defence;

ORDER the Registry to make all possible efforts, with full respect for the rights of Germain Katanga under article 67(1) of the Statute, to ensure that the Defence Team in this case will be fully operational and will have the necessary access to databases and training in software by no later than 1 September 2007.

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



Judge Sylvia Steiner
Single Judge

Dated this Friday 6 July 2007

At The Hague, The Netherlands