

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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***

**URGENT
Public Redacted Version**

**Sixth Decision on the Prosecution Request for Authorisation to Redact the
Interviews Transcripts of Witness 238**

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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Other

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

NOTING the “Warrant of Arrest for Germain Katanga”¹ issued by Pre-Trial Chamber I (“the Chamber”) on 2 July 2007;

NOTING the “Warrant of Arrest for Mathieu Ngudjolo Chui”² issued by the Chamber on 6 July 2007;

NOTING the “First Decision on the Prosecution Request For Authorisation to Redact Witness Statements”³ issued by the Single Judge on 14 December 2007;

NOTING the “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions”⁴ issued on 14 December 2007 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 VWU at this particular stage of the proceedings;

¹ ICC-01/04-01/07-1

² ICC-01/04-02/07-1 [ICC-01/04-01/07-260]

³ ICC-01/04-01/07-84-US-Exp. ICC-01/04-01/07-88-Conf-Exp. and ICC-01/04-01/07-90

⁴ ICC-01/04-01/07-108

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”⁵ filed by the Prosecution on 14 January 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution and the Registry on 21 January 2008;⁶

NOTING the *ex parte*, closed session hearing held with the Prosecution and the Victims and Witnesses Unit (“the VWU”) on 28 January 2008;⁷

NOTING the “Submission of the Document Containing the Charges and of the List of Evidence”⁸ (“the Prosecution’s Charging Document against Germain Katanga”) filed by the Prosecution on 29 January 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution 4 February 2008;⁹

NOTING the “Submission of the Redacted English and French Versions of Prosecution’s Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹⁰ filed by the Prosecution on 14 February 2008;

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

⁵ ICC-01/04-01/07-145, and its confidential and *ex parte* annexes (ICC-01/04-01/07-145-Conf-Exp-Anx1, ICC-01/04-01/07-145-Conf-Exp-AnxK1-K5); and a corrigendum filed thereto on 16 January 2008 (ICC-01/04-01/07-147-Conf-Exp, and its annexes ICC-01/04-01/07-147-Conf-Exp-AnxK1-K6)

⁶ ICC-01/04-01/07-T-14-Conf-Exp-ENG ET 21-01-2008

⁷ ICC-01/04-01/07-T-15-Conf-Exp-ENG ET 28-01-2008

⁸ ICC-01/04-01/07-170; ICC-01/04-01/07-170-Anx1; its confidential annexes (ICC-01/04-01/07-170-Conf-Anx1C-2D), and its confidential and *ex parte* annexes (ICC-01/04-01/07-170-Conf-Exp-AnxA-2B)

⁹ ICC-01/04-01/07-T-16-Conf-Exp-ENG ET 04-02-2008

¹⁰ ICC-01/04-01/07-196 and ICC-01/04-01/07-196-Conf-Anx1-Anx10, AnxA and AnxB

2, 5, 6, 10, 0163, 0238, 0287, 0233, 0267, 0271 and 0132”¹¹ filed by the Prosecution on 26 February 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution and the VWU on 3 March 2008;¹²

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”¹³ issued by the Single Judge on 5 March 2008;

NOTING the “Prosecution's Request for the Issuance of an Order to Protect Witnesses 238 and 163”¹⁴ filed by the Prosecution on 10 March 2008;

NOTING the “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹⁵ issued by the Chamber on 10 March and by which the Chamber decided to join the cases of *The Prosecutor v. Germain Katanga and The Prosecutor v. Mathieu Ngudjolo Chui*;

NOTING the “Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹⁶ issued by the Single Judge on 10 March 2008, in which the Single Judge, *inter alia*, decided:

- (i) to give the Registrar until 1 April 2008 to decide and, if accorded, to implement those protective measures already requested by the Prosecution for witnesses on whom it intends to rely at the confirmation hearing in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*;
- (ii) that the Prosecution shall file by 4 April 2008 its final requests for redactions concerning the statements, interview notes, interview transcripts and

¹¹ ICC-01/04-01/07-240; and its confidential and *ex parte* annexes (ICC-01/04-01/07-240-Conf-Exp-AnxK1-K5).

¹² ICC-01/04-01/07-T-20-Conf-Exp-ENG ET 03-03-2008.

¹³ ICC-01/04-01/07-247-Conf-Exp-Corr, ICC-01/04-01/07-248-Corr and ICC-01/04-01/07-249

¹⁴ ICC-01/04-01/07-255-Conf-Exp.

¹⁵ ICC-01/04-01/07-257, and ICC-01/04-02/07-48 [ICC-01/04-01/07-307]

¹⁶ ICC-01/04-01/07-259.

documents relating to those witnesses on whom the Prosecution intends to rely at the confirmation hearing for whom protective measures will be implemented after the issuance of this decision and prior to the expiration of the above-mentioned 1 April 2008 deadline; and

- (iii) that the Prosecution shall (a) review by 8 April 2008 whether it still intends to rely at the confirmation hearing in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* on the statements, interview notes, interview transcripts and documents relating to those witnesses for whom protective measures cannot be implemented by 1 April 2008; and (b) file by 8 April 2008 its final request for redactions concerning the statements, interview notes, interview transcripts and documents relating to those witnesses under (a) above;

NOTING the “Decision on Prosecution's Request for the Issuance of an Order to Protect Witnesses 238 and 163”¹⁷ issued by the Single Judge on 12 March 2008, in which the Single Judge decided to give the Registrar (i) until 20 March 2008 to decide on the Prosecution request for inclusion of Witness 238 in the Court's witness protection programme; and (ii) until 1 April 2008 to implement those protective measures, if any, granted to Witness 238;

NOTING the “Registrar's report on the status of assessment and implementation of protective measures”¹⁸ filed by the Registry on 31 March 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution and the VWU on 1 April 2008;¹⁹

NOTING the “Registrar's further report on the status of assessment and implementation of protective measures”²⁰ filed by the Registry on 4 April 2008;

¹⁷ ICC-01/04-01/07-317-Conf-Exp.

¹⁸ ICC-01/04-01/07-347-Conf-Exp.

¹⁹ ICC-01/04-01/07-T-22-Conf-Exp-ENG ET 01-04-2008

NOTING the “Prosecution's Submission of Information on the Preventive Relocation of Witnesses 132, 163, 238 and 287”²¹ filed by the Prosecution on 7 April 2008;

NOTING 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”²² filed by the Prosecution on 8 April 2008;

NOTING the *ex parte*, closed session hearing held with the Prosecution and the Registry on 15 April 2008;²³

NOTING 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”²⁴ (“the 18 April 2008 Decision”) issued by the Single Judge on 18 April 2008 and by which the Single Judge *inter alia* ordered, pursuant to article 57(3)(c), the immediate inclusion in the Court's protection programme of Witness 238;

NOTING the “Prosecution's Submission of a New Chart Detailing the Legal Basis for the Requested Redactions to Annex K2 of Court Document ICC-01/04-01/07-240-Conf-Exp”²⁵ filed by the Prosecution on 18 April 2008;

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”);

²⁰ ICC-01/04-01/07-369-Conf-Exp

²¹ ICC-01/04-01/07-374-Conf-Exp.

²² ICC-01/04-01/07-375-Conf-Exp. and a corrigendum filed thereto on 9 April 2008 (ICC-01/04-01/07-375-Conf-Exp-Corr).

²³ ICC-01/04-01/07-T-23-Conf-Exp-ENG ET 15-04-2008.

²⁴ ICC-01/04-01/07-411-Conf-Exp

²⁵ ICC-01/04-01/07-408-Conf-Exp and ICC-01/04-01/07-408-Conf-Exp-AnxK6.

I. Introductory Remarks

1. The Single Judge notes that the Prosecution has stated that it intends to rely for the purposes of confirmation hearing, on the transcripts of interviews with Witness 238.

2. The Single Judge recalls that the immediate inclusion of Witness 238 in the Court's Witness Protection Programme has been ordered by the Single Judge in the 18 April 2008 Decision.²⁶

3. Nevertheless, although the Prosecution is not requesting authorisation to redact the name and identifying information of Witness 238, it is still requesting authorisation to redact, pursuant to rule 81 (2) and (4) of the Rules, certain information in the transcripts of interviews with Witness 238. As a result, the Prosecution's request for authorisation for redactions in relation to Witness 238 constitutes a change in the approach adopted by the Prosecution during the proceedings leading up to the confirmation hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. In those proceedings, the Prosecution did not request authorisation for any redactions in the statement of any of the [REDACTED] who were accepted into the VWU's protection programme.²⁷

4. As the Single Judge stated in the First Decision on Redactions:

Only in a few instances where the Single Judge has found compelling reasons to depart from the practice in the case ICC-01/04-01/06 will the Single Judge authorise the requested redactions. Such redactions will be authorised after ensuring that the requirements set out by the Appeals Chamber in its two 14 December 2006 decisions are met.²⁸

5. As she has already emphasised in the five previous Decisions on Redactions:

[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

²⁶ ICC-01/04-01/07-411-Conf-Exp

²⁷ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 3, lines 4-18.

²⁸ ICC-01/04-01/07-84-US-Exp, para.3, ICC-01/04-01/07-88-Conf-Exp, para.3; ICC-01/04-01/07-90, para.3. See also, ICC-01/04-01/06-773 and ICC-01/04-01/06-774.

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

6. In carrying out her analysis, the Single Judge has classified the redactions requested by the Prosecution into the following four categories: (a) names and identifying information of family members of Witness 238; (b) current whereabouts of family members of Witness 238; (c) innocent third parties; and (d) the names and initials of the persons present when the interviews with Witness 238 were conducted.

7. Moreover, for the purpose of her analysis, 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.³⁰

8. Considering that the reasons for granting or rejecting the Prosecution's requests in relation to those redactions included within the same category are very similar, the Single Judge – following the practice of Pre-Trial Chamber I in Annex I to the *Decision on the Confirmation of Charges* in the case of *The Prosecutor v. Thomas Lubanga Dyilo* – has decided to provide a full explanation of her decision with respect to each category of redactions.

9. In Annex I to the present decision, which is issued *ex parte* and available only to the Prosecution, the Single Judge, following the procedure prescribed by the Appeals Chamber,³¹ specifies to which of the four categories each of the redactions

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

³⁰ *First Decision on Redactions*, paras. 13 to 22

³¹ ICC-01/04-01/06-773, para. 22

requested by the Prosecution belongs. Furthermore, in those instances in which the specific nature of the redactions requested by the Prosecution so requires, the Single Judge has provided in Annex I to this decision an additional explanation of her decision concerning those requests for redactions.

II. Categories of Redactions

A. Names and Identifying Information of Family Members of Witness 238

10. The Prosecution requests authorisation to redact pursuant to rule 81 (4) of the Rules the names and identifying information of [REDACTED] of Witness 238.

11. As the Single Judge has already underlined, Witness 238 [REDACTED] insofar as he was the [REDACTED] and [REDACTED].³² However, the Single Judge is of the view that Witness 238's [REDACTED] are not to be considered as close to the Witness as shown by the fact that such family members are not covered by the [REDACTED]. Furthermore, the Single Judge notes that Witness 238's [REDACTED] are currently residing in [REDACTED] and are [REDACTED]. Hence, the Single Judge is of the view that disclosing identifying information of Witness 238's [REDACTED] - in the security situation and context referred to in the First Decision on Redactions - could pose an additional risk to their safety and/or physical and psychological well-being.

12. In addition, the Single Judge considers that the requested redactions are adequate to minimise this risk and that, at this stage, there is no less intrusive alternative measure that can be taken to achieve the same goal. Furthermore, in the view of the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial insofar as (i) the Defence will have access to the identity of Witness 238 who gave the statement; and (ii) Witness 238's [REDACTED] are not Prosecution sources or witnesses and are not referred to as having any further information or knowledge of the crimes set out

³² ICC-01/04-01/07-411-Conf-Exp, para 47

in the Prosecution's Charging Document against Germain Katanga and in the Warrant of Arrest for Mathieu Ngudjolo Chui.

13. For these reasons, the Single Judge authorises the redaction of the names and identifying information of Witness 238's [REDACTED].

B. Current Whereabouts of Family Members of Witness 238

14. The Prosecution requests authorisation, pursuant to rule 81(4) of the Rules, to redact the information that could lead to the identification of the current whereabouts of family members of Witness 238.

15. Considering the security situation and context referred to in the First Decision on Redactions, the Single Judge is of the view that disclosing to the Defence information that could lead to the identification of the current whereabouts of Witness 238's family members who are currently located in [REDACTED] and are [REDACTED], could pose an additional risk to their safety and/or physical well-being.

16. Moreover, the Single Judge considers that the redactions requested by the Prosecution, which are limited to the current whereabouts of family members of Witness 238 or to information that could lead to the identification of such whereabouts, are adequate to minimise this risk and that, at this stage, there is no less intrusive alternative measure that can be taken to achieve the same goal.

17. Furthermore, in the view of the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial insofar as (i) the Defence will have access to the identity of Witness 238 who gave the statement; and (ii) the family members for whom redaction of their current whereabouts is requested are not Prosecution sources or witnesses and are not referred to as having any further information or knowledge of the crimes set out

in the Prosecution's Charging Document against Germain Katanga and in the Warrant of Arrest for Mathieu Ngudjolo Chui.

18. For these reasons, the Single Judge grants authorisation for the redactions relating to the current whereabouts of the family members of Witness 238 as detailed in Annex I to this decision.

C. Innocent Third Parties

19. The Prosecution requests authorisation pursuant to rule 81(4) of the Rules to redact in the transcripts of interview with Witness 238, all identifying information concerning a number of individuals referred to as "innocent third parties" by the Prosecution. In this regard, the Single Judge has already ruled that:

[r]edactions concerning individuals other than Prosecution witnesses, victims or members of their families may only be authorised (i) if they are needed to ensure the confidentiality of information pursuant to rule 81(4) of the Rules; or (ii) in order not to prejudice further or ongoing Prosecution investigations because such individuals are Prosecution sources pursuant to rule 81(2) of the Rules. Otherwise, the use of redactions is not a measure that is available to ensure the protection of these individuals.³³

20. Since the Prosecution explicitly states that none of the individuals referred to as "innocent third parties" is a Prosecution source or is in any way involved in ongoing or further Prosecution investigations, and that the relevant redactions have only been requested because such individuals could erroneously be perceived as Prosecution sources or witnesses, the Single Judge cannot authorise those redactions requested by the Prosecution in relation to "innocent third parties".

21. However, the Single Judge is mindful that the issue of 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" is currently pending before the

³³ *First Decision on Redactions*, para. 55.

Appeals Chamber, and that, therefore, in order to preserve the effectiveness of the decision of the Appeals Chamber on this matter, it is necessary to authorise the Prosecution to provisionally maintain those redactions in the transcripts of interviews with Witness 238 which the Prosecution requested in order to protect innocent third parties, until the Appeals Chamber rules on the abovementioned issue.

D. The names and initials of the persons present when the interviews with Witness 238 were conducted

22. The Single Judge notes that the Prosecution requests authorisation to redact, pursuant to rule 81(2) of the Rules, the names and initials of current members of the Prosecution who were present when the interview with Witness 238 was conducted in order not to prejudice the ongoing investigation against Germain Katanga and Mathieu Ngudjolo Chui.

23. The Single Judge considers that, for the reasons given in the five previous Decisions on Redactions,³⁴ the authorisation for redactions requested by the Prosecution in relation to the names and initials of current staff members of the Prosecution present when the interviews with Witness 238 was conducted is denied.

24. Nevertheless, the Single Judge is mindful that the issue of “whether the Single Judge erred in the application of the test prescribed by the Appeals Chamber in its 14 December 2006 Decisions when declining to authorise the redaction of the location of interviews of witnesses, and the identifying information of current and former staff members of the OTP and VWU at this particular stage of the proceedings” is currently pending before the Appeals Chamber. Hence, in order to preserve the effective application of the Decision of the Appeals Chamber on this matter, it is necessary to authorise the Prosecution to provisionally maintain those redactions in the transcript of interview with Witness 238, that have been requested to protect the identities of current staff members of the Prosecution present during the interviews

³⁴ *First Decision on Redactions*, paras. 57-64. See also the *Second Decision on Redactions*, paras. 57-60.

with Witness 238, until such time as the Appeals Chamber issues a decision on the above-mentioned matters.

III. Application for Warrants of Arrest against Germain Katanga and Mathieu Ngudjolo Chui

25. The Single Judge notes that the last submission by the Prosecution of the redacted English and French Versions of the Prosecution's Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI was filed on 14 February 2008.

26. The Single Judge further notes that since this last filing, the Single Judge has issued the Third, Fourth and Fifth Decisions on Redactions as well as the present decision, as a result of which, identity of witnesses were subsequently disclosed to the Defences along with the witnesses statements and other related documents.

27. It is the view of the Single Judge that the Prosecution shall re-file a revised redacted English and French Versions of the Prosecution's Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI taking into accounts the findings of the Single Judge in the Third, Fourth and Fifth Decisions on Redactions as well as the present decision.

FOR THESE REASONS

DECIDE to partially grant the Prosecution's requests for authorisation for redactions to the transcripts of interview with Witness 238;

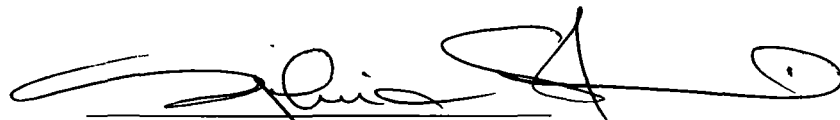
DECIDE to authorise the Prosecution to provisionally maintain those redactions to the transcripts of interviews with Witness 238 which the Prosecution requested in order to protect innocent third parties and the identities of current staff members of the Prosecution present during the interviews of the abovementioned witnesses, until such time as the Appeals Chamber issues a decision on the matters concerning these types of redactions pending before it;

DECIDE that, pursuant to rule 76 of the Rules, the Prosecution shall, no later than 21 April 2008, disclose to the Defence the transcripts of interviews with Witness 238 with the redactions authorised by the Single Judge, as specified in Annex I to the present decision;

DECIDE that, pursuant to rule 121(2) of the Rules, the Prosecution shall, no later than 21 April 2008, file the originals of the transcripts of interviews with Witness 238, in the record of the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* following the guidance given at the hearing held before the Single Judge on 14 December 2007.

DECIDE that the Prosecution shall re-file, by Monday 21 April 2008 at 16h00, a revised redacted English and French Versions of the Prosecution's Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI taking into account the findings of the Single Judge in the Third, Fourth, Fifth Decisions on Redactions as well as the present decision.

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



Judge Sylvia Steiner
Single judge

Dated this Monday, 21 April 2008

At The Hague, The Netherlands