

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07

Date: 16 May 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

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

Public Document

**Order to the Prosecution to Review and Resubmit its Previous Requests for
Redactions Pursuant to 13 May 2008 First Appeals Chamber Judgment**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Senior Trial Lawyer

**Counsel for the Defence
of Germain Katanga**

Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J.L. Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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 “Prosecution's Application for Leave to Appeal and Urgent Application for Confined Variation of the First Decision on Redaction of Witness Statements”², (“the Prosecution Application for Leave to Appeal”) filed by the Prosecution on 14 December 2007;

NOTING the “Defence Motion for Leave to Appeal the First Decision on the Prosecution request for Authorization to redact Witness Statements”³, (“the Defence Motion for leave to Appeal”) filed by the Defence for Germain Katanga on 13 December 2007;

NOTING the “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions”⁴, 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

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.

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 ("the VWU") 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 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, by which the Single Judge (i) partially granted the Prosecution's request for authorisation to redact information in the interview notes and statements of Witnesses 4 and 9; and (ii) authorised the Prosecution to provisionally maintain those redactions to the interview notes and statements of Witnesses 4 and 9 which the Prosecution requested in order to protect innocent third parties, the identities of Prosecution and VWU staff present during the interviews of such witnesses, and the location of the interviews, until the Prosecution's interlocutory appeal relating to such redactions is decided upon;

⁵ ICC-01/04-01/07-116.

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

NOTING the "Defence Application for Leave to Appeal the 'Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9'"⁷ ("the Defence Application for Leave to Appeal"), filed by the Defence for Mathieu Ngudjolo Chui on 26 March 2008;

NOTING the "Decision on the Defence Application for Leave to Appeal the 'Decision on the Prosecution Request for Authorization to redact Statements of Witnesses 4 and 9'"⁸, issued by the Single Judge on 4 April 2008, by which leave to appeal was partially granted;

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 and by which the Single Judge (i) partially granted the Prosecution's request for authorisation to redact information in materials related to the statements of witnesses 7, 8, 9, 12 and 14; and (ii) authorised the Prosecution to provisionally maintain those redactions which the Prosecution requested in order to protect innocent third parties, the identities of current members of the Prosecution and of VWU present during the interviews of the above-mentioned witnesses, and the location of the interviews, until the Prosecution's interlocutory appeal relating to such redactions is decided upon;

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, in which the Single Judge (i) partially granted the Prosecution's request for authorisation to redact information in materials related to the statements of witnesses 166 and 233 as well as to their written consents; (ii) authorised the Prosecution to provisionally maintain those

⁷ ICC-01/04-01/07-340.

⁸ ICC-01/04-01/07-365

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.

redactions which the Prosecution requested in relation to Witnesses 2, 5 and 287; and (iii) authorised the Prosecution to provisionally maintain those redactions which the Prosecution requested in order to protect innocent third parties, the identities of current members of the Prosecution present during the interviews of the above-mentioned witnesses, and the location of the interviews, until the Prosecution's interlocutory appeal relating to such redactions is decided upon;

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 ("the Decision on the Evidentiary Scope of the Confirmation Hearing") 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 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 issued by the Single Judge on 21 April 2008 and by which the Single Judge (i) partially granted the Prosecution's request for authorisation to redact information in materials related to transcripts of interview with Witness 238; and (ii) authorised the Prosecution to provisionally maintain those redactions which the Prosecution requested in order to protect innocent third parties, the identities of current members of the Prosecution present during the interviews of the above-mentioned witness, until the Prosecution's interlocutory appeal relating to such redactions is decided upon;

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.

NOTING the Status Conference held on 22 April 2008;¹⁴

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”¹⁵ (“the First Appeals Chamber Judgment”) issued by the Appeals Chamber on 13 May 2008 and by which the Appeals Chamber:

- (i) reversed the Single Judge decision not to authorise redactions for the protection of individuals other than “victims, current or prospective Prosecution witnesses or sources, or members of their families”; and
- (ii) reversed the Single Judge decision not to authorise redactions relating to the locations of interviews of witnesses and identifying information of staff members of the Office of the Prosecutor and of the VWU present at those interviews.

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’”¹⁶ (“the Second Appeals Chamber Judgment”) issued by the Appeals Chamber on 13 May 2008 and by which the Appeals Chamber confirmed the decision of the Single Judge that “redactions relating to the identities and identifying information of potential prosecution witnesses, to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the hearing confirming the charges, can, in principle, be made so as to avoid prejudicing further or ongoing investigations pursuant to rule 81(2)”;

¹⁴ ICC-01/04-01/07-T-26-ENG ET

¹⁵ ICC-01/04-01/07-475.

¹⁶ ICC-01/04-01/07-476.

NOTING the Status Conference held on 14 May 2008;¹⁷

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");

CONSIDERING at the outset that the Single Judge underlined in its Second, Third, Fourth, Fifth and Sixth Decisions on Redactions that any authorisation for redactions of the names and identifying information of "potential Prosecution witnesses" is subject to the final decision of the Appeals Chamber on whether such redaction are covered by rule 81 (2) of the Rules;

CONSIDERING that the Second Appeals Chamber Judgment confirmed the decision of the Single Judge that redactions relating to the identities and identifying information of "potential Prosecution witnesses", to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing can, in principle, be made so as to avoid prejudicing further or ongoing investigations pursuant to rule 81(2);¹⁸

CONSIDERING further that the Appeals Chamber, in the same Judgment, underlined that:

While the Prosecutor may apply to the Pre-Trial Chamber for a ruling as to whether the identities and identifying information of potential prosecution witnesses may be withheld from the Defence prior to the hearing to confirm the charges, whether any such application will be granted will require a careful assessment on a case-by-case basis¹⁹

¹⁷ ICC-01/04-01/07-T-28-ENG ET

¹⁸ ICC-01/04-01/07-476, para.66.

¹⁹ ICC-01/04-01/07-476, para.65.

CONSIDERING that in the six decisions on redactions, the Single Judge has followed the procedure prescribed in the First and Second Appeals Chamber Judgments, and in those instances in which the specific nature of the redactions requested by the Prosecutor so required, the Single Judge has provided in Annexes to the aforementioned decisions an additional explanation of her decisions concerning those requests for any and each redactions; and that, therefore, the Single Judge need not re-assess, in light of the Second Appeals Chamber Decision, the Prosecution's requests for redactions related to "potential prosecution witnesses";

CONSIDERING however that the First Appeals Chamber Judgment:

(a) reverses the First Decision on Redactions in relation to:

(i) redactions for the protection of individuals, other than "victims, current or prospective Prosecution witnesses or sources, or members of their families", who are at risk on account of the Court's activities ("innocent third parties"); and

(ii) redactions relating to the locations of interviews of witnesses and identities of staff members of the Office of the Prosecutor and of the Victims and Witnesses Unit present at those interviews.

(b) remits to the Pre Trial Chamber the Prosecution requests for authorisation for redactions in respect of "innocent third parties", places of interviews of witnesses, and identities of staff members of the Office of the Prosecutor and of VWU present at those interviews;

CONSIDERING that, at paragraphs 71 to 73, 98, 99 and 111 of the First Appeals Chamber Judgment, the Appeals Chamber gives precise guidelines about the factors that the Single Judge must take into consideration in deciding on the Prosecution's request for authorisation for redactions pursuant to rule 81 (2) and (4) of the Rules;

CONSIDERING that 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 at paragraphs 71 to 73, 98, 99 and 111 of the First Appeals Chamber Judgment; and that, unless the Prosecution provides the relevant information in relation to each of the redactions requested by the Prosecution on the information related to items (a) (i) and (ii) referred to in the paragraph above, and remitted by the Appeals Chamber to the Pre Trial Chamber, the Single Judge will not authorise such redactions;

CONSIDERING that the commencement of the confirmation hearing is currently scheduled for 27 June 2008; and that, according to rule 121 (3) of the Rules, the Defence must have access 30 days prior to such a date to the evidence on which the Prosecution intends to rely at the confirmation hearing with the redactions authorised by the Single Judge;

CONSIDERING furthermore that the First Appeals Chamber Judgment ruled on issues of law that also affects the Second, Third, Fourth, Fifth and Sixth Decisions on Redactions, in which redactions to information related to "innocent third parties", places of interviews of witnesses, and identities of staff members of the Office of the Prosecutor and of VWU present at those interviews were provisionally granted; that, therefore, such requests must also be reviewed and resubmitted by the Prosecution, since, as said above, "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 at paragraphs 71 to 73, 98, 99 and 111 of the First Appeals Chamber Judgment; and that, unless the Prosecution provides the relevant information in relation to each of the redactions requested by the Prosecution on the information related to items (a) (i) and (ii) referred to in the paragraph above, and remitted by the Appeals Chamber to the Pre Trial Chamber, the Single Judge will not authorise such redactions";

CONSIDERING further that, at the status conference held on 14 May 2008, the Prosecution informed the Single Judge that:

- (i) it has in its possession a number of *procès-verbaux d'audition* and a report that the Prosecution intends to disclose to the Defence pursuant to article 67 (2) of the Statute and rule 77 of the Rules²⁰;
- (ii) that, according to the Decision on the Evidentiary Scope of the Confirmation Hearing, such *procès-verbaux d'audition* and report should be provided to the Defence on a summary format; and
- (iii) that, nevertheless, due to the limited redactions that are, in the Prosecution's view, necessary, it would be beneficial if the two Defences were provided with a redacted version following the procedure established in the Decision on the Evidentiary Scope of the Confirmation Hearing for the disclosure of documents, pursuant to article 67 (2) of the Statute and rule 77 of the Rules, on which the Prosecution does not intend to rely at the confirmation hearing;

CONSIDERING that, at the Status Conference held on 22 April 2008, the Single Judge granted a similar request made by the Prosecution in relation to three statements on which the Prosecution does not intend to rely at the confirmation hearing but are to be disclosed to the Defence pursuant to article 67 (2) of the Statute and rule 77 of the Rules;

²⁰ ICC-01/04-01/07-T-28-ENG ET, p. 21, lines 4-25 and p. 22, lines 1-19

FOR THESE REASONS

ORDER the Prosecution by no later than 21 May 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,

AUTHORISES the Prosecution to disclose to both Defences, no later than 21 May at 16h00, the *procès verbaux d'audition* and report referred to by the Prosecution at the Status Conference held on 14 May 2008, following the procedure established in the Decision on the Evidentiary Scope of the Confirmation Hearing, for disclosure of

documents, pursuant to article 67 (2) of the Statute and rule 77 of the Rules, on which the Prosecution does not intend to rely at the confirmation hearing.

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



Judge Sylvia Steiner
Single Judge

Dated this Friday 16 May 2008

At The Hague, The Netherlands