

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 3 July 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA**

Public

With confidential annexes *ex parte*, Prosecutor and VWU

**Redacted First Decision on the Prosecutor's Requests for Redactions and
Other Related Requests**

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence
Marc Desalliers

Legal Representatives of the Victims
Sarah Pellet
Dmytro Suprun

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

Other

REGISTRY

Registrar & Deputy Registrar
Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit
Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ hereby renders the first decision on the Prosecutor’s requests for redactions and other related requests.

I. PROCEDURAL HISTORY

1. On 22 August 2006, Pre-Trial Chamber I, to which this case had formerly been assigned, issued the “Decision on the Prosecution Application for a Warrant of Arrest”,² along with a warrant of arrest against Bosco Ntaganda (“Mr. Ntaganda”).³
2. On 15 March 2012, the Presidency re-assigned the situation in the Democratic Republic of the Congo (the “DRC”) to this Chamber.⁴
3. On 13 July 2012, the Chamber issued the “Decision on the Prosecutor’s Application under Article 58” with which a second warrant of arrest against Mr. Ntaganda was issued.⁵
4. On 26 March 2013, the suspect, who had voluntarily appeared before the Court, made his initial appearance before the Chamber and the confirmation of charges hearing was set to commence on 23 September 2013.⁶
5. On 15 April 2013, the Single Judge held a status conference on issues related to disclosure in which she requested, *inter alia*, that the Prosecutor’s article 58

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40.

² Pre-Trial Chamber I, “Decision on the Prosecution Application for a Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN; a redacted version was filed in the record of the case on 6 March 2007 and the decision was made public on 1 October 2010, ICC-01/04-02/06-1-Red-tENG.

³ Pre-Trial Chamber I, “Warrant of Arrest”, 22 August 2006, ICC-01/04-02/06-2-Anx-tENG; a corrigendum was filed into the record of the case on 7 March 2007, see ICC-01/04-02/06-2-Corr-tENG-Red.

⁴ Presidency, “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations”, 15 March 2012, ICC-01/04-02/06-32.

⁵ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application under Article 58”, 13 July 2012, ICC-01/04-02/06-36-Conf-Exp; and public redacted version, ICC-01/04-02/06-36-Red.

⁶ Pre-Trial Chamber II, Transcript of Hearing, 26 March 2013, ICC-01/04-02/06-T-2-ENG ET, p. 12, lines 2-3.

applications for the first and second warrants of arrest be made available to the Defence, including all supporting material in the annexes.⁷ The Single Judge also ruled that, should redactions to these applications be necessary, proposals for redactions should be submitted to the Chamber in advance.⁸

6. On 12 April 2013, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.⁹

7. On 7 May 2013, the Single Judge issued the “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest” (the “7 May 2013 Decision”),¹⁰ authorizing, *inter alia*, the proposed redactions in the article 58 applications and their annexes to the extent specified in the decision.

8. On 17 May 2013, the Single Judge issued the “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties” (the “Disclosure Decision”) with the purpose of providing the parties with a precise timetable for disclosure and related requests for redactions or translation of evidence.¹¹ It was also ruled that evidence, for which redactions have been authorized, be disclosed “no later than 5 days after the notification of the Chamber’s decision on said requests for redactions”.¹²

9. On 17 June 2013, the Single Judge issued the “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties” (the “Calendar

⁷ Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET, p. 13, lines 15-18.

⁸ Pre-Trial Chamber II, Transcript of Hearing, 15 April 2013, ICC-01/04-02/06-T-3-ENG ET, p. 13, lines 20-22.

⁹ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, 12 April 2013, ICC-01/04-02/06-47.

¹⁰ Pre-Trial Chamber II, ICC-01/04-02/06-58-Conf-Exp; a confidential redacted version was filed on 16 July 2013, ICC-01/04-02/06-58-Conf-Red.

¹¹ Pre-Trial Chamber II, “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”, 17 May 2013, ICC-01/04-02/06-64.

¹² *Ibid.*, pp. 11 and 12.

Decision”),¹³ in which the Single Judge, *inter alia*, postponed the commencement of the confirmation of charges hearing until Monday, 10 February 2014 and established a new calendar for the disclosure of evidence between the parties as well as the submission, if any, of requests for redactions.

10. On 15 July 2013, the Single Judge issued the “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’” (the “15 July 2013 Decision”).¹⁴

11. On 21 August 2013, the Single Judge issued the “Decision Ordering the Parties to Provide Risk Assessment with Respect of Witnesses and the Victims and Witnesses Unit to Submit Observations Thereupon”.¹⁵

12. On 2 September 2013, the Prosecutor submitted the “Prosecution’s First Application for Redactions”¹⁶ to which she submitted an addendum on 4 September 2013¹⁷ (collectively, the “Application”).

13. On 10 September 2013, the Victims and Witnesses Unit (the “VWU”) submitted the “Victims and Witnesses Unit’s Observations pursuant to Decision n° ICC-01/04-2/06-88” (the “VWU Observations”)¹⁸ on the Prosecutor’s risk assessment of witnesses, including other proposals for additional or alternative protective measures.

¹³ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing’ and Setting a New Calendar for the Disclosure of Evidence Between the Parties”, ICC-01/04-02/06-73.

¹⁴ Pre-Trial Chamber II, ICC-01/04-02/06-78-Conf-Exp; a confidential redacted version was filed on 16 July 2013, ICC-01/04-02/06-78-Conf-Red.

¹⁵ Pre-Trial Chamber II, ICC-01/04-02/06-88.

¹⁶ ICC-01/04-02/06-98-Conf-Exp and its confidential *ex parte* annexes A.1-A.21, B.1-B.5, C and D.

¹⁷ ICC-01/04-02/06-101-Conf-Exp with one confidential *ex parte* annex A.15.

¹⁸ ICC-01/04-02/06-104-Conf-Exp.

II. APPLICABLE LAW

14. The Single Judge notes articles 21(1) and (3), 57(3)(c), 61, 67 and 68(1) and (5) of the Rome Statute (the “Statute”), rules 76, 81 and 121 of the Rules of Procedure and Evidence (the “Rules”), regulation 35 of the Regulations of the Court (the “Regulations”), and article 8 of the Code of Professional Conduct for counsel.

15. The Single Judge refers to the Chamber’s previous jurisprudence, in particular, the 7 May 2013 Decision and 15 July 2013 Decision, where she set out the guiding principles with respect to the non-disclosure of information, including redactions pursuant to rule 81 of the Rules. Further guidance is given in the present decision in relation to specific aspects of redactions of information in the evidence to be disclosed between the parties in the present case.

16. It is recalled that the evidence, incriminating and/or exculpatory in nature, must be disclosed to the Defence so that it is properly informed thereof within a reasonable time before the confirmation of charges hearing in order to be able, *inter alia*, to object to the charges and challenge the evidence presented by the Prosecutor in accordance with article 61(6) of the Statute.¹⁹ The Single Judge recalls the overriding principle that *full* disclosure should be made and that non-disclosure is the *exception*, which requires *prior* authorization of the Chamber pursuant to rule 81 of the Rules.²⁰

¹⁹ See also Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 11; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 21; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 22.

²⁰ See also Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 21; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 23; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 24; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-215-CONF Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo”, 6 November 2008, ICC-01/05-01/08-215-Red, para. 27; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-

17. As already explained in the 7 May 2013 Decision, restrictions to disclosure may become necessary with a view to protect, *inter alia*, the safety and well-being of witnesses, victims and other persons at risk on account of the activities of the Court.²¹ In this respect, the Single Judge recalls her principal responsibility to balance the different interests at stake so as to ensure that the proceedings are fair and expeditious²² and that they are conducted with full respect to the rights of the Defence and with due regard to the protection of victims and witnesses.²³

18. As stated earlier, each proposed redaction is assessed on a case-by-case basis with due regard to the competing interests at stake.²⁴ To this end, it is imperative

01/05-01/08-135-Conf Second Decision on the Prosecutor's requests for redactions", 1 October 2008, ICC-01/05-01/08-135-Red, para. 24; as confirmed and highlighted in, for example, Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568, paras 36 and 39; Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-475, para. 70; Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-476, para. 64.

²¹ Pre-Trial Chamber II, "Decision on the Prosecutor's Request and Amended Request for Redactions to Applications for Warrants of Arrest", 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 12.

²² Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses'", 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 18.

²³ Pre-Trial Chamber II, "Decision on the Prosecutor's Request and Amended Request for Redactions to Applications for Warrants of Arrest", 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 12; See also Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 22; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 23; Pre-Trial Chamber III, "PUBLIC REDACTED VERSION OF ICC-01/05-01/08-215-CONF Third Decision on the Prosecutor's Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo", 6 November 2008, ICC-01/05-01/08-215-Red, para. 26; Pre-Trial Chamber III, "PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor's requests for redactions", 1 October 2008, ICC-01/05-01/08-135-Red, paras 23 and 44.

²⁴ Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses'", 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 16; See also Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 23; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 24.

that the Prosecutor provide for each proposed redaction proper justification.²⁵ Mindful of the particular stage of the proceedings, the Single Judge will assess the proposed redactions in view of the finding of the Appeals Chamber that it is “permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial”.²⁶

19. The Prosecutor requests redactions pursuant to rule 81(2) and (4) of the Rules. Following the principles enunciated in previous cases before this Chamber, the Single Judge will provide, to the extent necessary, brief clarifications with regard to rule 81(2) and (4) of the Rules which are, in part, already set forth in her previous findings in the 7 May 2013 Decision and 15 July 2013 Decision.

20. Rule 81(4) of the Rules provides the legal basis to seek redactions in order to “protect the safety of witnesses and victims and members of their families”, and has been interpreted to include also the words “[other] persons at risk on account of the activities of the Court”.²⁷ To this end, certain criteria must be applied when considering whether a particular redaction is authorized. These criteria are summarized below.

²⁵ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 15; see also Pre-Trial Chamber II, “Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties”, 17 May 2013, ICC-01/04-02/06-64, para. 18.

²⁶ Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-475, para. 68; see also Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 23; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 24; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-215-CONF Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo”, 6 November 2008, ICC-01/05-01/08-215-Red, para. 28; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor’s requests for redactions”, 1 October 2008, ICC-01/05-01/08-135-Red, para. 27.

²⁷ Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-475, para. 56.

21. As stated in the 7 May 2013 Decision, the Single Judge must ascertain first that “there is an objectively identifiable risk”²⁸ to the safety of the protected person concerned which must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large.²⁹ Second, the Single Judge must establish that the proposed redaction is “necessary”, namely that there is no alternative measure short of redaction which is available and feasible in the circumstances. If a less restrictive protective measure is available, it should be chosen instead of redaction.³⁰ Third, the Single Judge may only authorize the redaction of information if it is “proportionate”, *i.e.* in case the protective measure

²⁸ Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 14; Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 16.

²⁹ Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-475, paras 67 and 71; 15 July 2013 Decision, para. 16; see also Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 27; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 28; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-215-CONF Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo”, 6 November 2008, ICC-01/05-01/08-215-Red, para. 25; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor’s requests for redactions”, 1 October 2008, ICC-01/05-01/08-135-Red, para. 25.

³⁰ Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 14; Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 16; Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-475, paras 67 and 72; Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2006, ICC-01/04-01/06-773, para. 33; see also Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 28; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 29; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-215-CONF Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo”, 6 November 2008, ICC-01/05-01/08-215-Red, para. 25; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor’s requests for redactions”, 1 October 2008, ICC-01/05-01/08-135-Red, para. 25.

taken is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.³¹ In this context, the Single Judge will assess carefully the relevance of the particular information to the Defence. Should the information not be relevant to the Defence, this is likely to be considered in determining whether the interests of the person potentially placed at risk outweigh those of the Defence. Should the information be relevant, the Single Judge will take particular care when balancing the interests at stake.³²

22. Following the criteria set out above, the Single Judge may also, where necessary, order *proprio motu* the non-disclosure of information in the exercise of her statutory duties and powers under articles 57(3)(c) and 68(1) of the Statute.³³

23. Rule 81(2) of the Rules allows the Prosecutor to seek authorization *ex parte* from the Chamber to redact material and information if disclosure “prejudice[s] further or ongoing investigations”. The criteria applied in relation to rule 81(4) redactions are applied *mutatis mutandis* also to redactions sought in accordance with rule 81(2) of

³¹ Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 14; Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 16; Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-475, paras 67 and 72; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 29; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 30; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-215-CONF Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo”, 6 November 2008, ICC-01/05-01/08-215-Red, para. 25; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor’s requests for redactions”, 1 October 2008, ICC-01/05-01/08-135-Red, para. 25.

³² Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-475, para. 72.

³³ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 20; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 25; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 26.

the Rules.³⁴ Thus, for redactions to be granted, the Prosecutor will have to establish that disclosure to the Defence (as opposed to the general public) will prejudice her investigation and could only be overcome or reduced by redactions. It is emphasized that it is for the Prosecutor seeking redactions under rule 81(2) of the Rules to establish that such redactions are warranted.³⁵

24. Finally, the Single Judge highlights, consistent with the established jurisprudence of the Court, that information withheld from the Defence must be kept under review and may be subsequently disclosed, should circumstances change.³⁶ As the Appeals Chamber clarified, it is the obligation of the Prosecutor to promptly bring to the attention of the Chamber any new facts which may warrant a variation of the Single Judge's ruling on redactions.³⁷ As a result, in case evidence must be re-disclosed due to the lifting of redactions, the Single Judge cautions that this must be done in compliance with the Prosecutor's obligations under the Statute and the Rules. For

³⁴ Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-475, paras 97-99; Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-476, para. 59; see also Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 30; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 31; Pre-Trial Chamber III, "PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor's requests for redactions", 1 October 2008, ICC-01/05-01/08-135-Red, para. 30.

³⁵ Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-475, para. 97; Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-476, paras 49 and 52; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 30; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 31; Pre-Trial Chamber III, "PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor's requests for redactions", 1 October 2008, ICC-01/05-01/08-135-Red, para. 29.

³⁶ Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 31; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 32.

³⁷ Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-476, para. 64.

incriminating evidence this must be concluded *no later than 30 days* before the commencement of such hearing pursuant to rule 121(3) of the Rules. This means that all related steps, such as the Prosecutor's request for lifting the redactions, the Single Judge's related decision and the Prosecutor's implementation of the Single Judge's decision must take place sufficiently in advance to the 30-day deadline established by rule 121(3) of the Rules. The Single Judge holds that redactions may not be lifted thereafter so as to ensure fairness of the proceedings and meet the requisite that the Defence is put on sufficient notice for its preparation. As regards exculpatory evidence, the Single Judge recalls that the Prosecutor is under a continuous obligation to disclose it to the Defence "as soon as practicable" pursuant to article 67(2) of the Statute. The Single Judge held that the phrase "as soon as practicable" must be understood "as being the earliest opportunity".³⁸ Accordingly, as already explained in the Disclosure Decision, "disclosure must take place immediately after the evidence comes into the Prosecutor's possession unless there is a justifiable reason for not doing so".³⁹

III. DETERMINATION BY THE SINGLE JUDGE

1. *Introductory Remarks*

25. The present decision refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential, *ex parte* Prosecutor and VWU only. For reasons of fairness of proceedings *vis-à-vis* the Defence, this decision is shared with it, albeit in confidential redacted form. To this end, the Single Judge considers that the references made in the present decision are required by the principle of judicial reasoning. They have been kept to a minimum and are made without endangering the interests concerned and defeating the very purpose of redactions.

³⁸ Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 12 April 2013, ICC-01/04-02/06-47, para. 17.

³⁹ Pre-Trial Chamber II, Decision Establishing a Calendar for the Disclosure of Evidence Between the Parties", 17 May 2013, ICC-01/04-02/06-64,, para. 28; see also Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 12 April 2013, ICC-01/04-02/06-47, para. 17.

26. Before addressing the individual redaction requests, the Single Judge deems it important to provide the following clarifications and general comments.

27. The Prosecutor informs the Single Judge of “[r]ule 81(1) redactions that continue to apply to protect internal work product in several of [the] documents” to be disclosed.⁴⁰ Rule 81(1) of the Rules stipulates that internal documents prepared by either party “in connection with the investigation or preparation of the case are not subject to disclosure”. Therefore, the Prosecutor is not under an obligation to disclose any internal documents to the Defence. The “rule 81(1) redactions” applied by the Prosecutor in the documents pertain to such “internal” documentation within the meaning of rule 81(1) of the Rules. Therefore, the Single Judge, having reviewed the content of the information concerned, does not consider that “rule 81(1) redactions” require her approval and, accordingly, she will not rule upon this matter.

28. With regard to the redaction requests presented by the Prosecutor, the Single Judge clarifies at the outset that she bases her findings authorizing or rejecting the requested redactions on the information the Prosecutor provided in the Application and on the VWU Observations. A detailed individual security assessment of each witness treated in this decision is contained in Annex I filed confidential, *ex parte* Prosecutor and VWU only. It forms part of the Single Judge’s reasoning in this decision. Annex II, also filed confidential, *ex parte* Prosecutor and VWU only, contains the Single Judge’s analysis and conclusions with respect to each proposed redaction.

29. As noted in the 15 July 2013 Decision, the burden of providing necessary information and justifications to the Chamber for conducting the analysis required by the Appeals Chamber lies with the Prosecutor.⁴¹ In this context, the Single Judge notes with particular concern that the Prosecutor has, at times, either omitted to

⁴⁰ Application, para. 1. See also annexes A.15, A.16 and B.4 to the Application.

⁴¹ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 19.

request redaction of particular information while requesting the same piece of information in the same document to be redacted; and/or omitted to provide the justification for a request to redact a particular piece of information.⁴² In the view of the Single Judge this does not seem to indicate that the Prosecutor exercised due diligence and special care during the preparation and review of the requests for redactions *before* their submission to the Chamber. Actually, the Single Judge explicitly raised this issue in the 15 July 2013 Decision.⁴³ The Single Judge therefore calls upon the Prosecutor to cater for a comprehensive and careful review mechanism of all proposals for redactions *before* they are submitted to the Chamber. This will assist the Single Judge in taking a decision on an informed basis and as expeditiously as possible.

30. Lastly, the Single Judge wishes to inform the Prosecutor that two witness statements, in which redactions are sought, have been submitted twice.⁴⁴ The Single Judge has made her determination with regard to the redaction requests to these statements only once. Further, it is noted that redactions are sought in a confidential transcript of a hearing in the case of the *Prosecutor v Thomas Lubanga Dyilo*⁴⁵ which exceed the redactions applied in the public version of that same transcript, available on the website of the Court. The Single Judge reiterates her finding in the 15 July 2013 Decision in which she clarified that “in light of the overriding principle of full disclosure of information to the Defence, public information cannot be withheld from the Defence. If not, pertinent justification must be provided by the Prosecutor which will demonstrate that disclosure of this *public* information to the Defence will

⁴² In addition, the Single Judge notes that, at times, the Prosecutor failed to highlight the piece of information for which redaction is sought; provided divergent legal bases for the redaction of the exact same piece of information; and/or imprecisely categorized the piece of information for which redaction is sought.

⁴³ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 19.

⁴⁴ The statements contained in annexes A.20 (DRC.00150.287 to DRC.00150.291) and A.10 (DRC.00073.381 to DRC.00073.395) to the Application are submitted again to be decided upon in annex A.17 to the Application.

⁴⁵ See annex A.02 to the Application (DRC.OTP.2054.1793 and DRC.OTP.2054.1794).

entail a danger".⁴⁶ In the absence of such justification, requests to redact public information cannot be granted.

2. Redactions sought by the Prosecutor

31. In the Application, the Prosecutor proposes redactions to seven categories of information.⁴⁷ Having reviewed the Application and consistent with the jurisprudence of this Chamber,⁴⁸ the Single Judge grouped the information under four different categories due to the nature of the information to be redacted: (a) names and identifying information of witnesses (category A); (b) names, identifying information and location of family members of witnesses (category B); (c) names, identifying information or contact details of other persons at risk on account of the activities of the Court (category C); and (d) names and identifying information of staff working in and for the Office of the Prosecutor (the "OTP"), locations of witnesses' interviews, and names and identifying information of "potential prosecution witnesses" (category D). They are presented and discussed below.

32. The Prosecutor has presented the redaction requests following, in part, those categories identified above. The Single Judge, has, in principle, followed this categorization. However, in relation to categories A, B and C, she reserves the right to qualify a redaction under a different category than suggested by the Prosecutor, if she believes the Prosecutor's actual justification or the purpose of the redaction leads her to this conclusion.

⁴⁶ Pre-Trial Chamber II, "Decision on the 'Prosecution's Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses'", 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 24.

⁴⁷ Application, para. 12.

⁴⁸ Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 36; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 39. See also Pre-Trial Chamber III, "PUBLIC REDACTED VERSION OF ICC-01/05-01/08-135-Conf Second Decision on the Prosecutor's requests for redactions", 1 October 2008, ICC-01/05-01/08-135-Red.

A. Names and identifying information of witnesses (category A)

33. The Prosecutor requests, pursuant to rule 81(4) of the Rules, the non-disclosure of the identities of three out of the 36 witnesses she intends to rely on for the purposes of the confirmation of charges hearing, namely P-0018, P-0019 and P-0113, with a view to “[protecting] their safety, psychological well-being, dignity and privacy”.⁴⁹

34. The Single Judge recalls that the danger caused by the disclosure of the witness’ identity to the Defence must be assessed with regard to each individual witness taking into account his/her specific situation.⁵⁰ As held previously, weight should be given in particular to the following different factors: (i) the individual witness’ personal circumstances; (ii) whether there are currently protection or security measures in place for the witness concerned; (iii) the relevant security situation in the area where the witness or his/her family currently reside; (iv) whether the witness concerned or his/her family members have received any threats on account of his/her perceived involvement with the Court; and (v) whether the witness him-/herself has undertaken any activity to endanger his/her personal safety.⁵¹ An additional factor to be considered is whether the witness consented that his/her identity be disclosed to the Defence, without prejudice to the possible *proprio motu* assessment of the Single Judge not to disclose such identity.

35. As explained above, the security situation for each witness is assessed individually and separately in Annex I to this decision. However, as this basis for the

⁴⁹ Application, para. 13.

⁵⁰ Pre-Trial Chamber II, “Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 16 July 2013, ICC-01/04-02/06-58-Conf-Red, para. 22; see also Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 39; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 43.

⁵¹ See also Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 39; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 43; Pre-Trial Chamber III, “PUBLIC REDACTED VERSION OF ICC-01/05-01/08-215-Conf Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo”, 6 November 2008, ICC-01/05-01/08-215-Red, para. 51; Pre-Trial Chamber I, “Decision on the Prosecution’s applications for redactions pursuant to Rule 81(2) and Rule 81(4)”, ICC-01/04-01/10-167, para. 13.

Single Judge's assessment is confidential *ex parte* Prosecutor and VWU only, it is of importance that the following minimum information be shared with the Defence. The Prosecutor purports that the three witnesses concerned were interviewed in [REDACTED]. It is alleged that they recently revealed that they have been victims of sexual violence by members of the *Union des Patriotes Congolais* (the "UPC") during attacks in February 2003 in locations covered by the warrants of arrest. The Single Judge is further informed that two of those witnesses⁵² [REDACTED]

[REDACTED].⁵³ The Prosecutor is in the process of [REDACTED]

[REDACTED]⁵⁴ [REDACTED]

[REDACTED].⁵⁵ The Prosecutor contends that disclosing the identity of these three witnesses to the Defence bears the risk that [REDACTED]

[REDACTED].⁵⁶

For at least one of those witnesses, the Prosecutor contends that involuntary disclosure may lead to the witness' [REDACTED]

[REDACTED].⁵⁷ In this context, the Single Judge is informed of the Prosecutor's intent to disclose the identity of those witnesses prior to trial, should the charges be confirmed.⁵⁸

36. Upon careful review of all the information available, the Single Judge considers that the non-disclosure of the identity of P-0018, P-0019 and P-0113 is justified as disclosing their identity to the Defence, at this stage, may put them at risk. The

⁵² These witnesses are P-0018 and P-0019, Application, para. 13.

⁵³ Application, para. 13. [REDACTED]

[REDACTED] Application, para. 16.

⁵⁴ [REDACTED]

⁵⁵ Application, para. 13.

⁵⁶ Application, para. 16. The Single Judge is informed that a Joint Protocol between the Defence and the OTP is currently discussed "for the handling of confidential information disclosed by either party", [REDACTED]

[REDACTED] see Application, para. 17.

⁵⁷ Application, para. 16.

⁵⁸ Application, para. 17. The Prosecutor also indicates that anonymity of those witnesses may be lifted "until such time as this [Joint] Protocol is agreed to between the parties and adopted by the Chamber".

Single Judge furthermore believes that, in light of the limited scope of the confirmation hearing, the anonymity is necessary and not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial proceedings as the Defence will have access to the relevant information contained in the witness statements and have the possibility to challenge them. More detailed reasons are contained in Annex I to this decision. As stated above, the non-disclosure of information must be kept under review. It may be subsequently disclosed within reasonable time prior to the commencement of the confirmation of charges hearing, should circumstances change.

37. As a consequence of the non-disclosure of the identity of the witnesses concerned, the following type of information will typically be redacted: (i) witness' name, signature and initials; (ii) date and place of birth, (iii) names and number of children; (iv) parents' names; (v) witness' residence(s) and residence(s) of family members; (vi) current and prior occupations (and related dates); and (vii) education (and related dates). For ease of reference, this information is captured under category A.

38. In this context, the Single Judge specifies that she has taken note of the size of the location when assessing whether revealing the name of the location would lead to the identification of the witness concerned. More specifically, while it is obvious that disclosing the names of villages or smaller cities may be more conducive to put the safety of the witnesses at risk, it is less obvious for large cities, provinces or districts. Bearing in mind that the authorization of non-disclosure of information is the exception, the Single Judge has assessed each redaction proposal related to the location of the witness on a case-by-case basis.

39. In conclusion, the Single Judge authorizes, pursuant to rule 81(4) of the Rules, redactions of the name, identifying information and the locations of the three witnesses and their family members, as set out in Annex II to the present decision.

40. Within this category, the Prosecutor advances a particular request in relation to certain witnesses. Despite the fact that their identity is disclosed to the Defence, the Prosecutor nevertheless requests that personal contact details of these witnesses, such as telephone numbers and residential addresses, regardless of whether they are still valid,⁵⁹ be redacted in the relevant witness statements and/or screening notes in accordance with rule 81(4) of the Rules.⁶⁰ The Prosecutor submits that such information is “irrelevant to the known issues in the case” and that “although the identity of the witnesses will be disclosed, their personal information and/or contact details should not be unnecessarily disseminated without due cause”.⁶¹

41. As previously held,⁶² it is not sufficient to aver generally that the information concerned is “irrelevant to the known issues in the case” and that therefore information “should not be unnecessarily disseminated without due cause”.⁶³ In light of the overriding principle of *full* disclosure to the Defence, it is necessary to justify any restriction to this principle according to the criteria as set out above and confirmed by the Appeals Chamber.

42. It is noted that the Prosecutor in the tables accompanying the text to be redacted justifies her requests related to the telephone numbers (landline) and residential addresses by referring to the necessary protection of the family members. Accordingly, the Single Judge has treated these requests under category B (see below). In the event that the redaction is proposed with a view to protecting the witness whose identity will be disclosed to the Defence, the Single Judge bases her determination on the following considerations. While there may be agreement that there is no risk to the safety of the witness concerned, the Chamber is still duty-bound to protect the well-being and privacy of the witness in accordance with article

⁵⁹ Application, footnote 37.

⁶⁰ Application, para. 36.

⁶¹ Application, para. 37.

⁶² Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses’”, 16 July 2013, ICC-01/04-02/06-78-Conf-Red, para. 24.

⁶³ Application, para. 36.

68(1) of the Statute. The general security situation may warrant that identifying information other than the name of the witness concerned, which would normally fall under category A, is redacted. This may include, for example, the cell phone numbers or the current address of the witness. The Single Judge also observes that the redactions sought are strictly limited to what is necessary to ensure the protection of the well-being and privacy of the witness concerned. At this stage, there is no less intrusive measure that can be taken to achieve the goal of this protection. Most importantly, the proposed redactions are not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the relevant information contained in the witness statements and/or screening notes and have the possibility to challenge them. In sum, the Single Judge authorizes redactions to this type of information pursuant to rule 81(4) of the Rules after having assessed the different interests at stake and the relevance of the information concerned to the Defence on a case-by-case basis.⁶⁴

43. The Single Judge observes that the Prosecutor has also submitted redaction proposals to the metadata accompanying the evidence. In case the Single Judge authorizes redactions falling under category A, the authorization for redactions extends to the corresponding information in the metadata linked to the evidence concerned. In case information falling under category A is contained only in the metadata, the Single Judge also authorizes such redactions, when properly justified. The relevant authorization is separately set out in Annex II to the present decision.

B. Names, identifying information and locations of family members of witnesses (category B)

44. The Prosecutor requests, pursuant to rule 81(4) of the Rules, references in witness statements, transcripts and related documents to the names, identifying

⁶⁴ In the same vein, see Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 45.

information⁶⁵ and locations of family members of the witnesses to be redacted.⁶⁶ For ease of reference, this information is captured under category B.

45. The Single Judge recalls that non-disclosure of information relating to family members of witnesses is provided for explicitly in rule 81(4) of the Rules, and that for authorization to this effect to be granted, it is necessary to establish that disclosure to the Defence of the identity and other identifying information of the witness' family members would pose an objectively justifiable risk to them and that non-disclosure is a necessary and proportionate measure to reduce or overcome this risk.

46. The Single Judge accepts the Prosecutor's argument that these individuals are not involved in the Court's activities⁶⁷ [REDACTED]

[REDACTED]⁶⁸ [REDACTED]

[REDACTED]⁶⁹ [REDACTED]

[REDACTED]⁷⁰ Thus, disclosure of the names and other identifying information of family members of the witnesses would pose an objectively identifiable risk to their safety and well-being, even if the name of the witness is disclosed to the Defence. Additionally, the Single Judge considers that the requested redactions are strictly limited to what is necessary to ensure the safety of those family members of witnesses. The Single Judge considers that the authorized redactions are adequate to minimize the risk they might face and that, at this stage, there is no less intrusive alternative measure that can be taken to achieve the goal of

⁶⁵ This may include also the degree of kinship, residential address, telephone number and photograph(s) of the witness concerned.

⁶⁶ Application, para. 28.

⁶⁷ Application, para. 29.

⁶⁸ See also Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 49; Pre-Trial Chamber II, "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", 12 July 2011, ICC-01/09-02/11-165-Conf-Red, para. 57.

⁶⁹ Application, paras 30 and 31.

⁷⁰ Application, para. 31.

protection. Moreover, the Single Judge deems that the proposed redactions are not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the relevant information contained in the witness statements, transcripts and related documents and have the possibility to challenge them.

47. That said, the Single Judge wishes to clarify one point in relation to the information of residence of family members. While this type of information will regularly be captured by category B, the Single Judge takes into consideration the size of the location when assessing whether revealing the name of the location would lead to the identification of the family member concerned. More specifically, while it is obvious that disclosing the names of villages or smaller cities may be more conducive to put the safety of family members of the witnesses at risk, it is less obvious for large cities, provinces or districts. Bearing in mind that the authorization of non-disclosure of information is the exception, the Single Judge has assessed each redaction proposal related to the residence of family members on a case-by-case basis.

48. For these reasons, following a case-by-case assessment of each redaction by balancing the interests at stake and considering the relevance of the information to the Defence, the Single Judge authorizes pursuant to rule 81(4) of the Rules redactions of the name, identifying information and the locations of family members of witnesses, as set out in Annex II to the present decision.

49. The Single Judge observes that the Prosecutor has also submitted redaction proposals to the metadata accompanying the evidence. In case the Single Judge authorizes redactions falling under category B, the authorization for redactions extends to the corresponding information in the metadata linked to the evidence concerned. In case information falling under category B is contained only in the metadata, the Single Judge also authorizes such redactions, when properly justified. The relevant authorization is separately set out in Annex II to the present decision.

C. Names, identifying information or contact details of other persons at risk on account of the activities of the Court (category C)

50. The Prosecutor requests, pursuant to rule 81(4) of the Rules, references in witness statements, transcripts and related documents to the names and identifying information of persons who are not witnesses, victims or members of their families to be redacted. The Single Judge observes that the proposed redactions of this type include (i) non-governmental organizations (“NGOs”) and their members; or (ii) information about any other third person mentioned by the witness in the statement or any other document, as the case may be. For ease of reference, this information is captured under category C.

51. The Single Judge recalls that non-disclosure of information relating to third persons at risk on account of the activities of the Court is captured by rule 81(4) of the Rules, and that for authorization to this effect to be granted, it is necessary to establish that disclosure to the Defence of the identity and other identifying information of such persons would expose them to an objectively identifiable risk and that non-disclosure is a necessary and proportionate measure to reduce or overcome this danger.

52. The Single Judge clarifies that authorization is not granted simply because third persons are mentioned in the witness statements or transcripts. Rather, depending on the context, and the justification provided, redactions may be warranted as the persons concerned may be perceived to collaborate with the Court. The Single Judge also attaches particular weight to the Prosecutor’s argument that those individuals may not know that they are mentioned in witness statements, transcripts and related documents and do not benefit from any protection provided by the Court.⁷¹ That said, the Single Judge accepts, whenever adequately supported by facts, that disclosure of their names and identifying information in the witness statements, transcripts and related documents may expose them to an objectively identifiable

⁷¹ Application, para. 34.

risk. Moreover, the Single Judge makes sure that the requested redactions falling under category C are strictly limited to what is necessary to ensure the safety of those persons at risk on account of the activities of the Court. The Single Judge considers that those redactions are adequate to minimize the risk those individuals may face, and that at this stage of the proceedings, there is no less restrictive alternative measure that can be taken to achieve the goal of protection. Balancing the interests of the Defence and the prejudice that might be caused to it in case of non-disclosure of the said information against the rights of those individuals to be protected, the Single Judge concludes that, in light of the limited scope of the confirmation hearing, the few redactions which are strictly confined to the names and identifying information of such individuals, are not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the relevant information contained in the witness statements, transcripts and related documents and have the possibility to challenge them.

53. For these reasons, following a case-by-case assessment of each redaction by balancing the interests at stake and considering the relevance of the information to the Defence, the Single Judge authorizes pursuant to rule 81(4) of the Rules redactions of names and identifying information of third persons at risk on account of the activities of the Court, as set out in Annex II to the present decision.

54. The Single Judge observes that the Prosecutor has also submitted redaction proposals to the metadata accompanying the evidence. In case the Single Judge authorizes redactions falling under category C, the authorization for redactions extends to the corresponding information in the metadata linked to the evidence concerned. In case information falling under category C is contained only in the metadata, the Single Judge also authorizes such redactions, when properly justified. The relevant authorization is separately set out in Annex II to the present decision.

D. Names and identifying information of staff working in and for the OTP, locations of witnesses' interviews and names and identifying information of "potential prosecution witnesses" (category D)

55. The Prosecutor requests that a variety of information be redacted pursuant to rule 81(2) of the Rules to protect her further or ongoing investigation. This includes redactions of (i) locations of interviews;⁷² (ii) names and identifying information of intermediaries of the OTP and other "prosecution sources/leads";⁷³ (iii) names, signatures and initials of (field) interpreters who participated in the interview;⁷⁴ and (iv) names of psycho-social experts⁷⁵. Having reviewed the Application, the Single Judge observes that the Prosecutor also seeks the redaction of the names of ICC investigators in the metadata. For ease of reference, the abovementioned type of information is captured under category D.

56. The Single Judge recalls that non-disclosure of information contained in material in possession or control of the Prosecutor which must be disclosed but may prejudice further or ongoing investigations of the Prosecutor is provided for in rule 81(2) of the Rules. For authorization to be granted it is necessary that the Prosecutor establish that the potential prejudice to investigations is objectively justifiable, would result from disclosure to the Defence (as opposed to the public) and that non-disclosure is a necessary and proportionate measure to reduce or overcome this risk. In the following, the Single Judge will first address the individual types of requests falling under category D and conclude with a general assessment.

57. The Single Judge takes note of the Prosecutor's submission that the investigation is currently ongoing.⁷⁶ [REDACTED]

Given that situation, the Prosecutor requests that the names, signatures and initials of the investigators, intermediaries and interpreters who participated in the

⁷² Application, para. 39.

⁷³ Application, para. 41.

⁷⁴ Application, paras 48 and 49.

⁷⁵ Application, para. 49.

⁷⁶ Application, paras 39, 42, and 48.

interviews, and who “are based or often travel to the field”,⁷⁷ be redacted, including staff which left the OTP and are now employed by other sections of the Court.⁷⁸ In this context reference is made to the “difficulty in finding suitably qualified persons to provide quality interpretation services”.⁷⁹

58. The Single Judge accepts the submissions of the Prosecutor that disclosure of the identities of staff working in and for the OTP, such as investigators, intermediaries and interpreters, may prejudice their continuing work in the field. [REDACTED]

[REDACTED]⁸⁰

[REDACTED]

[REDACTED].

59. The Prosecutor also requests that the names of psycho-social experts be redacted from the evidence to be disclosed. She purports that there is “difficulty in finding (...) qualified psycho-social experts”.⁸¹ As is the case with the names and other identifying information of interpreters, the Single Judge accepts that names of psycho-social experts be redacted if information has been furnished that disclosure of their names may prejudice the ongoing investigation of the Prosecutor.

60. The Single Judge further notes the Prosecutor’s request for redactions of the locations of interviews in order to “preserve [her] ability to operate in the field, [REDACTED]

[REDACTED]

[REDACTED]⁸² [REDACTED]

[REDACTED]⁸³ [REDACTED]

[REDACTED]

[REDACTED]⁸⁴

⁷⁷ Application, para. 49.

⁷⁸ Application, para. 48.

⁷⁹ Application, para. 49.

⁸⁰ [REDACTED]

⁸¹ Application, para. 49.

⁸² Application, para. 39.

⁸³ Application, para. 39.

⁸⁴ Application, para. 39.

The Single Judge accepts that the difficulties in securing a safe location for interviews warrant the redaction of such location so as to protect the ongoing investigation. However, the Single Judge takes into consideration the size of the location when assessing whether revealing the name of the location would lead to the identification of the exact location of interview. In other words, while it is obvious that villages or smaller cities may not offer many safe locations to conduct interviews, it is less obvious for large cities, provinces or districts. Bearing in mind that the authorization of non-disclosure of information is the exception, the Single Judge has assessed each redaction proposal related to the location of interview on a case-by-case basis.

61. The Prosecutor also contends that she is “considering potential witnesses that relate to the incidents referenced in the [warrants of arrest]”.⁸⁵ To reveal the names, photographs and other identifying information about “potential prosecution witnesses” “whom the [Prosecutor] intends to investigate further” would endanger her ongoing investigation.⁸⁶ The Single Judge takes note of the Appeals Chamber’s jurisprudence which accepted that names and identifying information about “potential prosecution witnesses”⁸⁷ may, in principle, be redacted in the evidence to be disclosed.⁸⁸ The Single Judge accepts that disclosing the names and identifying information of persons, who may not even have been contacted, and will be interviewed may put them at risk by being perceived as “potential prosecution witnesses” or collaborators of the Court at a point in time when no cooperation with

⁸⁵ Application, para. 42.

⁸⁶ Application, para. 42.

⁸⁷ The Appeals Chamber clarifies that the term “prosecution source” “is not one that is used in rule 81(2) [of the Rules] or indeed elsewhere in the Statute or the Rules” and proposes the notion of “potential prosecution witnesses” whom it considers to be “individuals to whom reference is made in the statements of actual witnesses upon whom the Prosecutor wishes to rely at the confirmation hearing. They are individuals who have been interviewed by the Prosecutor or who the Prosecutor intends to interview in the near future, but in relation to whom the Prosecutor has not yet decided whether they will become prosecution witnesses”, see Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-476, paras 2 and 46.

⁸⁸ Appeals Chamber, “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’”, 13 May 2008, ICC-01/04-01/07-476, paras 1, 46 and 49.

the Court has yet taken place. Therefore, the Single Judge agrees to the fact that the Prosecutor's investigation may be prejudiced if "potential prosecution witnesses", who are not yet considered as witnesses of the Court, are interfered with in a manner that could lead them to being unable to cooperate further with the Prosecutor.⁸⁹ However, the Prosecutor is reminded of her obligation to justify adequately each request as the Single Judge will rule on a case-by-case basis and take into consideration "the potential relevance of the information to the Defence".⁹⁰

62. In light of the above, the Single Judge accepts that disclosure of the names, signatures and initials of investigators and other staff working for the OTP, such as intermediaries and interpreters, the names of interview locations and the names and identifying information of "potential prosecution witnesses" would pose an objectively identifiable risk to the further or ongoing investigation of the Prosecutor. Additionally, the Single Judge considers that the requested redactions are adequate to minimize this risk and are limited to what is strictly necessary to overcome any risk of prejudice to the further or ongoing investigation of the Prosecutor. The Single Judge is also of the view that, at this stage of the proceedings, there is no less intrusive alternative measure that can be taken to achieve the goal of protecting the further or ongoing investigation by the Prosecutor. Moreover, the proposed redactions are not prejudicial to or inconsistent with the rights of the suspect and fair and impartial proceedings as the Defence will have access to the relevant information contained in the witness statements and other related documents and have the possibility to challenge them.

⁸⁹ Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-476, para. 49.

⁹⁰ Appeals Chamber, "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'", 13 May 2008, ICC-01/04-01/07-476, para. 57. The Appeals Chamber also highlighted that "in principle, the Defence is entitled to contact persons who the Prosecutor either has interviewed or is about to interview prior to their becoming prosecution witnesses and recognises that such persons may have information which is potentially relevant to the Defence", see *ibid.*, para. 62.

63. For these reasons, following a case-by-case assessment of each redaction by balancing the interests at stake and considering the relevance of the information to the Defence, the Single Judge authorizes pursuant to rule 81(2) of the Rules redactions of the information mentioned above, as set out in Annex II to the present decision.

64. The Single Judge observes that the Prosecutor has also submitted redaction proposals to the metadata accompanying the evidence. In case the Single Judge authorizes redactions falling under category D, the authorization for redactions extends to the corresponding information in the metadata linked to the evidence concerned. In case information falling under category D is contained only in the metadata, the Single Judge also authorizes such redactions, when properly justified. The relevant authorization is separately set out in Annex II to the present decision.

3. *Proprio Motu Redactions Ordered by the Single Judge*

65. It is recalled that under rule 81(4) of the Rules, in conjunction with article 68(1) of the Statute, the Single Judge may order *proprio motu* redactions of information in the evidence to be disclosed with a view to protecting the safety of witnesses, members of their families and other persons at risk on account of the activities of the Court. It is understood that this can only be done if the criteria in respect of non-disclosure of information pursuant to rule 81(4) of the Rules have been met.

66. During the review of the evidence subject to this decision, the Single Judge noted that particular information was requested to be redacted inconsistently either throughout one and the same document or in different documents in relation to one and the same witness. If particular information is to be redacted at one juncture in a witness statement, but left unredacted at another, the purpose of redaction is lost and witnesses, members of their families or other persons may be put at risk. For these reasons, the Single Judge reiterates the importance of diligent review by the Prosecutor of the evidence.

67. The Single Judge also observes that text elements in witness statements may be highlighted for the sake of being redacted but that the corresponding justification is omitted at some instances in the annexed justification tables. As the required justification is provided by the Single Judge, these redactions are ordered *proprio motu*. That said, it should be emphasized that in the future proper justification for all redactions sought should be provided, as established by the jurisprudence of the Appeals Chamber, with which the Single Judge fully concurs.

68. Lastly, the Single Judge, in the exercise of her statutory duty to protect the safety, well-being and privacy of witnesses, orders the Prosecutor *proprio motu* to redact certain information that she deems necessary not to disclose to the Defence.

69. The *proprio motu* redactions ordered by the Single Judge in the present decision are individually identified and justified in Annex II to the present decision. They may concern information under categories A, B or C.

4. Other Requests Raised by the Prosecutor in the Application

A. Request for delayed disclosure of witness statements

70. In the Application, the Prosecutor also seeks, on an exceptional basis, the delayed disclosure of the statements of witness P-0290 until 1 November 2013.⁹¹ In relation to witness P-0027, the Prosecutor requests the “delayed disclosure of the witness’s identity until 1 November 2013”.⁹² In relation to this second witness, the Single Judge understands the Prosecutor’s submission to mean that she also seeks to withhold the statements of witness P-0027 until 1 November 2013 and does not seek the anonymity of the witness.⁹³ This is supported by the Prosecutor’s own submission

⁹¹ Application, para. 22.

⁹² Application, para. 25; see also ICC-01/04-02/06-98-Conf-Exp-AnxA.21, p. 18.

⁹³ This is also evident from the extent of the redaction proposals submitted in relation to the witness statements concerned, see annexes A.6 and A.19 to the Application. See also the wording of the Prosecutor’s request in Application, para. 52.

that the Defence “will get the *full identity* of the two witnesses within a delay of only two months (emphasis added)”.⁹⁴

71. That said, the Single Judge finds that in relation to the statements of witnesses P-0290 and P-0027 the Prosecutor’s request is not one of granting anonymity but essentially a request for extension of time pursuant to regulation 35(1) of the Regulations in order to comply with her obligations arising from the Calendar Decision which instructs her to disclose those statements to the Defence within five days after the notification of the Chamber’s decision on said requests for redactions. In other words, the Chamber’s authorization is sought to delay the disclosure of the evidence concerned to 1 November 2013.

72. Regulation 35(2), first sentence, of the Regulations reads: “The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the parties an opportunity to be heard”. It is therefore to be assessed by the Single Judge whether the Prosecutor has shown ‘good cause’ which justifies that she discloses the evidence later than 5 days after the notification of the present decision. To this end, the Single Judge accepts the Prosecutor’s justification that [REDACTED]

[REDACTED]. A more detailed assessment of the current security situation is contained in Annex I to this decision.

73. Moreover, the Single Judge observes that this delay in disclosure complies still with the minimum requirement of rule 121(3) of the Rules, namely the Prosecutor’s obligation to disclose all evidence she intends to present at the hearing no later than 30 days before the commencement of the confirmation hearing and, thus, does not infringe on the rights of the Defence. Additionally, it will not affect the disclosure of other pieces of evidence in accordance with the Calendar Decision. Consequently, mindful of the above, the Single Judge considers that ‘good cause’ is shown and

⁹⁴ Application, para. 26.

authorizes the Prosecutor to disclose the witness statements concerned on 1 November 2013.

74. In this context, it is also noted that the Prosecutor, with a view to expediting the implementation process of redactions of other information in those witness statements, submitted such requests to the Chamber in the Application. The Single Judge informs the parties that all redaction proposals have been assessed in accordance with the principles enunciated above. Thus, it is ensured that the Defence will receive effectively the redacted version of the witness statements on 1 November 2013. The Prosecutor is requested to inform immediately the Chamber of any impediments in the implementation of the protective measures of those witnesses ahead of 1 November 2013 as this may have repercussions on the new disclosure date of the evidence concerned.

B. Redactions to Swahili-language parts in witness statements

75. In reviewing the Prosecutor's redaction proposals, the Single Judges came across certain requests to redact a witness' utterances in Swahili contained in the statement.⁹⁵ While the statements of the witness are, in principle, translated into French by an interpreter, this is not always the case. The Single Judge is therefore left to decide upon redaction proposals to text elements which are not reflected in one of the working languages of the Court⁹⁶, namely either English or French.

76. As stated above, redactions can only be authorized after a genuine case-by-case assessment of proposals in light of the competing interests at stake. That said, in case there is a translation of the Swahili text excerpt, the Single Judge rules on the French translation of the text element concerned. This authorization extends, consequently, to the text element in the Swahili language.

77. In case no translation to the statement of the witness is offered, the Single Judge, in principle, will not be in a position to rule on the requests. However, in this

⁹⁵ See annex A.01 to the Application.

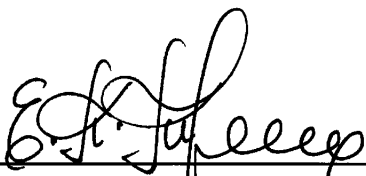
⁹⁶ Article 50(2) of the Statute.

particular case, the requests are very limited and can be understood from the general context of the statements and other redaction proposals. Therefore, the Single Judge authorizes the redaction requests for which no translation into French has been provided, as set out in Annex II to the present decision.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **PARTLY GANTS** the Prosecutor's requests for redactions to the witness statements, transcripts and related documents, as specified in Annex II to the present decision;
- b) **GRANTS** the non-disclosure of the identity of witnesses P-0018, P-0019 and P-0113;
- c) **GRANTS** the Prosecutor's request for variation of the five-day time limit as ordered in the Calendar Decision and authorizes her to disclose the witness statements of witnesses P-0290 and P-0027 no later than 1 November 2013; and **ORDERS** the Prosecutor to inform the Single Judge of any impediments
sufficiently in advance of the 1 November 2013 deadline;
- d) **ORDERS** *proprio motu* redactions to the witness statements, transcripts of witness interviews and related documents, as specified in Annex II to the present decision;
- e) **ORDERS** the Prosecutor to disclose to the Defence the redacted version of the material within five days as of the notification of the present decision;
- f) **ORDERS** the Prosecutor to continuously assess the risk to the safety and well-being of witnesses and to immediately inform the Chamber of any changes in the current situation of these witnesses;
- g) **ORDERS** the Defence to keep the information disclosed confidential and to ensure that it is not passed on to third parties and the public.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 3 July 2014

At The Hague, The Netherlands