

ANNEX

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07
Date: 7 December 2007

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single judge

Registrar: Mr Bruno Cathala

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

**URGENT
Public Redacted Version**

**First Decision on the Prosecution Request for Authorisation to Redact Witness
Statements**

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Eric MacDonald, Trial Lawyer

Counsel for the Defence
Mr David Hooper, Counsel

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

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

NOTING the "Decision Rejecting the Prosecution Urgent Request and Establishing a Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest against Germain Katanga",² issued by the Single Judge on 6 July 2007;

NOTING the "Decision Altering the Calendar for the Submission of Formatted Version of the Arrest Warrant Application and Redacted Witness Statements",³ issued by the Single Judge on 10 July 2007;

NOTING the "Decision on the Prosecution's Request for the Variation of the Calendar for Requesting Redactions to Statements or Interview Notes of Witnesses",⁴ issued by the Single Judge on 29 August 2007;

NOTING the "Prosecution's Amended Application Pursuant to Rule 81(2) and Rule 81(4)",⁵ filed by the Prosecution on 10 September 2007, in which the Prosecution requested the authorisation of the Single Judge to redact certain parts of the statements of Witnesses 7, 13 and 14;⁶

¹ ICC-01/04-01/07-1.

² ICC-01/04-01/07-5-US-Exp.

³ ICC-01/04-01/07-9-US-Exp. Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as public.

⁴ ICC-01/04-01/07-17-US-Exp.

⁵ ICC-01/04-01/07-18-US-Exp and ICC-01/04-01/07-17-US-Exp-Anx1-4. Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as confidential and "*ex parte* Prosecution only".

⁶ ICC-01/04-01/07-18-Conf-Exp and ICC-01/04-01/07-18-Conf-Exp-Anx1-4. Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential and "*ex parte* Prosecution only".

NOTING the “Information on the Status of the Referrals and on the Assessments”,⁷ filed by the Registry on 13 September 2007;

NOTING the *ex parte* and closed session hearing⁸ held with the Prosecution and the Victims and Witnesses Unit (“the VWU”) on 17 October 2007;

NOTING the “Decision Modifying the Calendar for the Disclosure of the Supporting Materials of the Prosecution Application for a Warrant of Arrest against Germain Katanga”,⁹ issued by the Single Judge on 18 October 2007;

NOTING the “Prosecution’s Application Pursuant to Rule 81(2) and Rule 81(4) to Statements of Witnesses 1 and 9, and Interview Notes of Witnesses 9 and 12”,¹⁰ filed by the Prosecution on 22 October 2007;

NOTING the “Prosecution’s Application Pursuant to Rule 81(2) and Rule 81(4) to Statements of Witnesses 3, 8 and 11”,¹¹ filed by the Prosecution on 24 October 2007;

NOTING the *ex parte* and closed session hearings with the Prosecution and VWU held on 25,¹² 30¹³ and 31¹⁴ October 2007;

⁷ ICC-01/04-01/07-19-US-Exp. Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential and “*ex parte* Prosecution only”.

⁸ ICC-01/04-01/07-T-3-US-Exp-ENG [17Oct2007Edited].

⁹ ICC-01/04-01/07-28-US-Exp. Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential.

¹⁰ ICC-01/04-01/07-42-Conf-Exp and ICC-01/04-01/07-42-Conf-Exp-Anx1-4. Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential and “*ex parte* Prosecution only”.

¹¹ ICC-01/04-01/07-43-Conf-Exp and ICC-01/04-01/07-43-Conf-Exp-Anx1-4. Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential and “*ex parte* Prosecution only”.

¹² ICC-01/04-01/07-T-06-Conf-Exp-ENG [25Oct2007Edited].

¹³ ICC-01/04-01/07-T-07-Conf-Exp-ENG[30Oct2007Edited].

¹⁴ ICC-01/04-01/07-T-08-Conf-Exp-ENG[31Oct2007Edited].

NOTING the “Prosecution’s Supplemental Brief in Respect of the Prosecution’s Applications Pursuant to Rule 81(2) and Rule 81(4)”,¹⁵ (“the Prosecution Supplemental Brief”), filed by the Prosecution on 5 November 2007;

NOTING the *ex parte* and closed session hearing with the Prosecution and VWU held on 20 November 2007;¹⁶

NOTING the “Prosecution’s Amended Application Pursuant to Rule 81(2) and Rule 81(4) to Statements of Witnesses 1, 7, 9, 11, 13 and 14, and Interview Notes of Witnesses 9 and 12”¹⁷ (“the Prosecution Amended Application”), filed by the Prosecution on 21 November 2007.

I. Introductory Remarks

1. The Prosecution, in its various applications,¹⁸ (“the Prosecution’s Applications”) requests the authorisation of the Single Judge for redactions, pursuant to rules 81(2) and (4) of the *Rules of Procedure and Evidence* (“the Rules”), in the statements of certain witnesses who have already been included in the witness protection program of the Court.¹⁹

2. At the outset, the Single Judge notes that the Prosecution’s Applications constitute a change in the approach adopted by the Prosecution during the

¹⁵ ICC-01/04-01/07-51-Conf-Exp.

¹⁶ ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007.

¹⁷ ICC-01/04-01/07-83-Conf-Exp and ICC-01/04-01/07-83-Conf-Exp-Anx1-7.

¹⁸ ICC-01/04-01/07-18-US-Exp and ICC-01/04-01/07-17-US-Exp-Anx1-4 (Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential and “*ex parte* Prosecution only”); ICC-01/04-01/07-42-Conf-Exp and ICC-01/04-01/07-42-Conf-Exp-Anx1-4 (Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential and “*ex parte* Prosecution only”); and ICC-01/04-01/07-43-Conf-Exp and ICC-01/04-01/07-43-Conf-Exp-Anx1-4 (Pursuant to Decision ICC-01/04-01/07-53 dated 5/11/2007, this document has been reclassified as Confidential and “*ex parte* Prosecution only”); ICC-01/04-01/07-51-Conf-Exp; ICC-01/04-01/07-T-07-Conf-Exp-ENG[30Oct2007Edited]; and ICC-01/04-01/07-T-08-Conf-Exp-ENG[31Oct2007Edited].

¹⁹ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 3, lines 19-22.

proceedings leading to the confirmation hearing in the case ICC-01/04-01/06. In those proceedings, the Prosecution did not request authorisation for any redaction in the statement of any of the six child soldiers who were accepted in VWU's protection program.²⁰ This new approach by the Prosecution was addressed by the Single Judge in the *ex parte* hearings held in closed session on 30 and 31 October 2007.²¹

3. Having heard the Prosecution's arguments, the Single Judge is of the view that the Prosecution's change of approach is for the most part unjustified. Only in a few instances where the Single Judge has found compelling reasons to depart from the practice in the case ICC-01/04-01/06 will the Single Judge authorise the requested redactions. Such redactions will be authorised after ensuring that the requirements set out by the Appeals Chamber in its two 14 December 2006 decisions are met.²²

4. Hence, in order for any redaction in any given statement to be authorised, the Single Judge must, first and foremost, have reached the conclusion that there is a risk that the disclosure to the Defence – at least at this stage of the proceedings – of the information sought to be redacted could (i) prejudice further or ongoing investigations by the Prosecution (rule 81(2) of the Rules); (ii) affect the confidential character of the information under articles 54, 72 and 93 of the Statute (rule 81(4) of the Rules); or (iii) affect the safety of witnesses, victims or members of their families (rule 81(4) of the Rules).²³ Moreover, after ascertaining the existence of such a risk, the Single Judge will analyse whether (i) the requested redactions are adequate to eliminate, or at least, reduce such a risk; (ii) there is no less intrusive alternative measure that can be taken to achieve the same goal at this stage; and (iii) the requested redactions are not prejudicial to or inconsistent with the rights of the arrested person and a fair and impartial trial.²⁴ Only when these three additional questions have been answered in the affirmative will the Single Judge authorise the redactions requested by the Prosecution.

²⁰ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 3, lines 4-18.

²¹ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 3, line 4 to p. 6, line 8, and p. 9, lines 3-6.

²² ICC-01/04-01/06-773 and ICC-01/04-01/06-774.

²³ ICC-01/04-01/06-773, para. 21 and ICC-01/04-01/06-774, paras. 31-33.

²⁴ ICC-01/04-01/06-773, paras. 21, 33 and 34.

5. In order to carry out her analysis, the Single Judge has classified the redactions requested by the Prosecution into the following six categories: (a) whereabouts of Prosecution witnesses; (b) names and identifying information of family members of Prosecution witnesses; (c) current whereabouts of family members of Prosecution witnesses; (d) potential Prosecution witnesses; (e) innocent third parties; and (f) further and ongoing investigations pursuant to rule 81(2) of the Rules. The last category includes the following two sub-categories: (i) information relating to the place where the interviews were conducted, and the names, initials and signatures of the persons present when the witness statements were taken; and (ii) other locations and incidents.

6. Due to the fact that the reasons for granting or rejecting the Prosecution's Applications in relation to those redactions included within the same category are very similar, the Single Judge – following the practice of this Chamber in Annex I to the *Decision on the confirmation of charges* in the case ICC-01/04-01/06 – has decided to provide a full explanation of her decision with respect to each category of redactions.

7. In Annex I to this decision, which is issued *ex parte* and available only to the Prosecution, the Single Judge, following the procedure set out by the Appeals Chamber,²⁵ specifies, statement by statement, to which of the six categories each of the redactions requested by the Prosecution belongs. Moreover, in those instances in which the specific nature of the redactions requested by the Prosecution so requires, the Single Judge has provided in Annex I to the present decision an additional explanation of her decision concerning specific redactions.

8. The Single Judge notes that on 27 November 2007, the Prosecution filed an amended application pursuant to rules 81(2) and (4) of the Rules in relation to the statements and interview notes of Witnesses 1, 7, 12, 13 and 14. The Prosecution Amended Application takes into consideration the redactions initially requested by

²⁵ ICC-01/04-01/06-773, para. 22.

the Prosecution,²⁶ the discussions which took place at the hearings held on 30 and 31 October 2007 and 20 November 2007 as well as the Prosecution Supplemental Brief.

9. As the Prosecution Amended Application did not alter the initial requests for redactions, pursuant to rule 81(2) and (4) of the Rules, to the statements of Witnesses 3 and 8, the Single Judge has decided that all references to the witnesses' statements and interview notes in the present decision and in its Annex I shall refer to the initial Prosecution's Applications for authorisation for redactions filed on 10 September 2007, 22 and 24 October 2007. Reference to the Prosecution Amended Application shall only be made when needed.

10. The Single Judge observes that the present decision only deals with the redactions requested by the Prosecution in relation to the statements and interviews of seven witnesses who have already been accepted in the protection program of the Victims and Witnesses Unit. In spite of that, the Single Judge notes that the present decision and its Annex I are particularly lengthy. In this regard, the Single Judge points out that this is the result of the efforts by the Single Judge to strictly comply with the standards set down by the Appeals Chamber in its two 14 December 2006 decisions.

11. The Single Judge will address the request for authorisation to redact certain information in the interview notes and statements of Witnesses [REDACTED] in a separate decision.²⁷ In this regard, the Single Judge notes that the Prosecution Amended Application considerably altered the scope of the redactions for which authorisation is requested by the Prosecution in relation to the interview notes and statement of Witness [REDACTED].²⁸ Moreover, Witness [REDACTED].²⁹

²⁶ ICC-01/04-01/07-18-Conf-Exp and ICC-01/04-01/07-18-Conf-Exp-Anx1-4; ICC-01/04-01/07-42-Conf-Exp and ICC-01/04-01/07-42-Conf-Exp-Anx1-4; ICC-01/04-01/07-43-Conf-Exp and ICC-01/04-01/07-43-Conf-Exp-Anx1-4.

²⁷ ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007], p. 44, lines 8-25 and p. 45, lines 1-12.

²⁸ [REDACTED]. See also ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 28, lines 15-25.

²⁹ ICC-01/04-01/07-T-8-Conf-exp-ENG[31Oct2007Edited], p. 26, lines 22-25 and p. 27, lines 1-23; ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 42, lines 23-25 and p. 43, lines 1-3.

12. Finally, the Single Judge takes note of the Prosecution statement that it has not yet decided whether to rely on the statement of Witness 12, who has recently died and who was never informed by the Prosecution that his evidence would be used in the case against Germain Katanga.³⁰ Nevertheless, as the statement of Witness 12 was included as supporting material in the Prosecution's Application for the issuance of a warrant of arrest for Germain Katanga, and was relied upon by the Chamber in issuing the relevant warrant of arrest, the Single Judge considers that such a statement is material for the Defence's preparation for the confirmation hearing within the meaning of rule 77 of the Rules. Therefore, the Single Judge is of the view that, once a decision is taken with respect to the Prosecution's request for authorisation to redact the statement of Witness 12, the statement must be made available to the Defence through the system of pre-inspection and inspection provided for in rule 77 of the Rules and followed in the case 01/04-01/06.³¹ Moreover, the Single Judge points out that the admissibility of the statement of Witness 12 as evidence for the purpose of the confirmation hearing will only be addressed at a later stage if any of the parties decides to rely on it.

II. Security Situation and Context in which the Prosecution's Applications are made

13. The Single Judge observes that, according to the last report of the Secretary-General of the United Nations on the United Nations Organisation Mission in the Democratic Republic of the Congo ("the MONUC"), "the security situation remains precarious in many areas; Equateur, Ituri, the Kivus, Katanga, the Kasais, Bas-Congo and Kinshasa are particular areas of concern."³²

14. According to the Prosecution, Germain Katanga, who, in 2004, was appointed Brigadier-General in the *Forces armées de la République démocratique du Congo* [Armed

³⁰ ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 7, lines 22-25 and p. 8, lines 1-16.

³¹ ICC-01/04-01/06-T-9-ENG[23JUN2006Edited], p. 49, lines 14-25; p. 50, lines 1-17 and p. 51, lines 1-3.

³² *Twenty-third report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo* (S/2007/156), p. 7, para. 29.

Forces of the Democratic Republic of the Congo] ("the FARDC"),³³ still maintains close contacts with a number of supporters in the district of Ituri, despite having been detained in Kinshasa since March 2005.³⁴

15. Furthermore, Colonel Mathieu Ngudjolo, who was allegedly the most senior commander of the FNI³⁵ – and for whom a warrant of arrest has been issued by this Chamber as a co-perpetrator of Germain Katanga for the crimes allegedly committed in the joint attack on Bogoro by the FNI/FRPI – was, until last month, one of the main advisers to the head of the FARDC in the district of Ituri.³⁶ Although Colonel Mathieu Ngudjolo left Ituri for Kinshasa, along with a number of his supporters sometime in the beginning of November 2007,³⁷ according to the Prosecution, he is still a powerful figure in the District of Ituri and has access to intelligence information not normally accessible to ordinary citizens.³⁸ In addition, the recent transfer of Colonel Mathieu Ngudjolo and his supporters to Kinshasa has notably increased his operational capabilities in that part of the DRC.

16. The Prosecution also asserts that a number of former FNI and FRPI commanders who, in the past, allegedly worked closely with Germain Katanga and/or Mathieu Ngudjolo, have joined the FARDC and are currently in Kinshasa, Kinsangani or Bunia³⁹ or their whereabouts remain unknown.⁴⁰

³³ ICC-01/04-01/07-T-8-Conf-Exp-ENG[31Oct2007Edited], p. 2, lines 11-14.

³⁴ ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 2, lines 18-25 and p. 3, line 1.

³⁵ ICC-01/04-02/07-1-US and ICC-01/04-02/07-3-US.

See also ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007Edited], p. 34, lines 21-24.

³⁶ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 35, lines 12-16; ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 3, lines 2-8.

³⁷ <http://www.monuc.org/News.aspx?newsId=15958>, <http://www.un.org/apps/news/story.asp?NewsID=24534>; <http://www.reuters.com/article/homepageCrisis/idUSL06582640.CH.2400>.

³⁸ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 31, lines 18-25, p. 32, lines 1-5; ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 2, lines 9-12 and p. 3, lines 9-12 where the Prosecution points out that "[i]n particular, Mathieu Ngudjolo is presently acting as advisor to the operational zone commander for the FARDC in Ituri District, and this position greatly enhances his ability to obstruct OTP investigations. In his position, Mathieu Ngudjolo is able to obtain information which ordinary citizens cannot obtain. He has also available to him resources, personnel of FNI and FRPI who were integrated into the FARDC to assist him with any plans to disrupt investigations."

³⁹ ICC-01/04-01/07-T-8-Conf-Exp-ENG[31Oct2007Edited], p. 5, lines 13-14; ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 67, lines 19-25; p. 68, lines 1-25 and p. 69, lines 1-19.

⁴⁰ ICC-01/04-01/07-T-8-Conf-Exp-ENG[31Oct2007Edited], p. 5, lines 3-25 and p. 6, lines 1-25.

17. According to the Prosecution, Germain Katanga and/or Mathieu Ngudjolo and their associates have interfered with Prosecution witnesses.⁴¹ In this respect, the Single Judge notes that, as explained by the Prosecution at the hearing of 31 October 2007, Mr [REDACTED]— who has already been referred by the Prosecution to the VWU for inclusion in the latter's protection program in relation to the present case - has reported [REDACTED].⁴² Those [REDACTED] explained that [REDACTED] they were trying to identify individuals close to the FNI and/or FRPI who may have cooperated or might cooperate in the future with the Office of the Prosecutor in relation to the investigation of crimes allegedly committed by FNI and/or FRPI members.⁴³

18. Moreover, in his statement, Witness [REDACTED] who is [REDACTED] and who has been [REDACTED] as part of VWU's protection program, mentions that he was threatened by a former militia leader in Bunia and that, subsequently to that, he was preventively [REDACTED] by the Office of the Prosecutor.⁴⁴ Furthermore, according to the Prosecution, between February and April, commander [REDACTED] (a former FRPI commander) [REDACTED] asked [REDACTED] about Witness [REDACTED].⁴⁵ The Prosecution also indicates that Witness [REDACTED] has recently expressed fear for his own security [REDACTED].⁴⁶

19. The Prosecution also states that Witness [REDACTED] was threatened by one of [REDACTED] officers, who told him that [REDACTED] was looking for him.⁴⁷ Witness [REDACTED] was [REDACTED] after reporting that event.⁴⁸ Moreover, the Prosecution also pointed out that Witness [REDACTED] has expressed fear for the lives of his close relatives if his name is disclosed to the general public or the media.⁴⁹

⁴¹ ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 3, lines 13-16.

⁴² ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 3, line 25 and p. 4, lines 1-15.

⁴³ ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 3, lines 13-24.

⁴⁴ [REDACTED]. See also ICC-01/04-01/07-T9-Conf-exp-ENG ET 20-11-2007, p. 35, lines 21-24.

⁴⁵ ICC-01/04-01/07-T-8-Conf-Exp-ENG[31Oct2007Edited], p. 4, lines 17-22.

⁴⁶ ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007Edited], p. 7, lines 17-22.

⁴⁷ ICC-01/04-01-07-T-8-Conf-Exp-ENG[31Oct2007Edited], p. 3, lines 17-24.

⁴⁸ ICC-01/04-01-07-T-8-Conf-Exp-ENG[31Oct2007Edited], p. 3, lines 20-21.

⁴⁹ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 43, lines 9-15.

20. Furthermore, the Prosecution explains that, after repeated delays, the assessment to determine whether Witnesses [REDACTED] can be accepted in the VWU's protection program has been finally scheduled [REDACTED]⁵⁰. In that respect, the Prosecution has emphasized several times to the Single Judge that it believes that Witnesses [REDACTED] have been making all types of excuses because they are afraid of [REDACTED] as well as to give evidence in the present case.⁵¹

21. Finally, the Prosecution submits that since the arrest and surrender of Germain Katanga, the Ngiti community has been trying to identify those whom they consider to be traitors and that they do so by tracking down people's movements.⁵²

22. The Single Judge is of the view that the risk of disclosing to the Defence the types of information for which authorisation for redactions have been requested must be assessed against the backdrop of the above-mentioned context. In particular, the Single Judge considers that particular weight should be given to (i) the current volatile situation in the Ituri and Kinshasa areas; (ii) the influence of Germain Katanga and Mathieu Ngudjolo in the Ituri and Kinshasa areas today, and their close connections to FNI and/or FRPI supporters currently living in these areas; (iii) the capabilities of the supporters of Germain Katanga and Mathieu Ngudjolo to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families; and (iv) the several precedents of interference with Prosecution witnesses by FNI and/or FRPI members [REDACTED].

III. Categories of Redactions

A. Whereabouts of Prosecution Witnesses

23. The Prosecution requests the authorisation for certain redactions relating to the current whereabouts of Prosecution witnesses who have been accepted in VWU's

⁵⁰ ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 42, lines 8-15.

⁵¹ ICC-01/04-01/07-T-6-Conf-Exp-ENG [25Oct2007Edited], p. 11, lines 10-21.

⁵² ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 5, lines 20-25, p. 6, lines 1-8 and p. 8, lines 13-24 and p. 9, lines 1-6.

protection program.⁵³ The Prosecution requests authorisation for these redactions pursuant to rule 81(4) of the Rules insofar as they aim at securing the effectiveness of the protective measures already granted and implemented vis-à-vis such witnesses.⁵⁴

24. The Single Judge points out that the Prosecution request extends, occasionally, to information that is not *per se* identifying of the current whereabouts of the Prosecution witnesses. For this reason, this section only applies to information that, in the view of the Single Judge, could identify the current whereabouts of the relevant Prosecution witnesses. As a result, the Single Judge will not grant the authorisation for redaction of information which, in her view, could not identify the current whereabouts of the Prosecution witnesses, unless there is some other reason, pursuant to rules 81(2) and/or (4) of the Rules, to authorise such redactions.

25. The Single Judge considers that, in light of the context described in section II of the present decision, the disclosure of the identities of the relevant Prosecution witnesses poses a risk to their safety and/or physical well-being. The Single Judge observes that in order to minimize this risk, protective measures other than redactions[REDACTED] have been granted and implemented by the VWU.

26. The Single Judge is of the view that in this scenario there is no need to authorise redactions of the names and identifying information of such witnesses as long as [REDACTED] is secure and remains unknown. [REDACTED].

27. For these reasons, the redaction of the information that could identify the current whereabouts of those Prosecution witnesses who have been accepted in VWU's protection program is not only an adequate measure, but also a necessary measure, to minimize the risk posed by the disclosure of their identities to the Defence. According to the Single Judge, at this stage, there is no less intrusive alternative measure that can be taken to achieve the same goal. Furthermore, in the

⁵³ ICC-01-04-01-07-T-7-Conf-Exp-ENG[30Oct2007Edited], p. 7, lines 17-25.

⁵⁴ ICC-01-04-01-07-T-7-Conf-Exp-ENG[30Oct2007Edited], p. 15, lines 16-20.

view of the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial, insofar as (i) the Defence will have access to the identities of the relevant Prosecution witnesses; and (ii) any contact with such witnesses is always subject to the restrictions and procedures established in the *Decision on General Protective Measures* issued by this Chamber in the case 01/04-01/06.⁵⁵

28. As a result, the Single Judge grants, pursuant to rule 81(4) of the Rules, authorisation for those redactions that, according to the Single Judge, could identify the current whereabouts of Prosecution witnesses.

B. Names and Identifying Information of Family Members of Prosecution Witnesses

29. The Prosecution requests redactions of the names and any identifying information of all family members of the relevant witnesses.⁵⁶

30. The Single Judge considers that, for the purpose of rule 81(4) of the Rules, the notion of “members of [the] family” of witnesses should be considered as including guardians. In this regard, the Single Judge points out that (i) guardians exercise parental powers and responsibilities over the minors under their guardianship and that consequently (ii) the risk to their safety and/or physical and psychological well-being as a result of disclosing to the Defence the identities of those Prosecution witnesses under guardianship is not less than the risk faced by close relatives of such witnesses.

31. In the context mentioned above in section II, the Single Judge is of the view that disclosing the names and identifying information of family members of Prosecution witnesses (including guardians), particularly of those currently located

⁵⁵ ICC-01/04-01/06-447.

⁵⁶ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 11, lines 16-20.

in the Ituri district and the Kinshasa area, could pose a risk to their safety and/or physical and psychological well-being.

32. Nevertheless, the Single Judge considers that some witnesses are very close to Germain Katanga and that if the names of the Prosecution witnesses are revealed to Germain Katanga, he will be in a position to immediately identify their family members. This is the case for Witness [REDACTED]⁵⁷ and of Witness [REDACTED].⁵⁸

33. Moreover, the Single Judge also considers that some Prosecution witnesses are public figures and that if their identities are revealed to Germain Katanga, he will be in a position to immediately identify their family members, save for those cases in which the relevant family members are minors and thus have no connection with the activities of their parents. This is particularly the case for [REDACTED]. The same applies to [REDACTED] (Witness [REDACTED]).

34. As a result, in the view of the Single Judge, the disclosure alone of the names and identifying information of the family members of Witnesses [REDACTED] and of [REDACTED] Witnesses [REDACTED] will increase the risk that they could be identified, and hence will pose an additional risk to their security and well-being. Moreover, the Single Judge considers that the redactions requested are adequate to minimize this risk and that, at this stage, there is no less intrusive alternative measure that can be taken to achieve the same goal. Furthermore, in the view of the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial insofar as (i) the Defence will have access to the identities of the witnesses who gave the statements; and (ii) the family members are not referred to as having any knowledge of the crimes set out in the warrant of arrest for Germain Katanga.

⁵⁷ [REDACTED] and ICC-01/04-01/07-T-7-Conf-Exp[30Oct2007Edited], p. 7, line 22.

⁵⁸ ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 36, lines 12-19.

35. For these reasons, the Single Judge grants authorisation for the redactions relating to the names and identifying information of the family members of Witnesses [REDACTED] and of [REDACTED] Witnesses [REDACTED] as detailed in Annex I to this decision.

C. Current Whereabouts of Family Members of Prosecution Witnesses

36. The Prosecution requests that information relating to the current whereabouts of family members of Prosecution witnesses be redacted. The Prosecution submits that the family members [REDACTED] thus, tracked down by members of the FNI/FRPI.⁵⁹ Considering the context mentioned above in section II, the Single Judge is of the view that disclosing to the Defence information that could lead to the identification of the current whereabouts of the family members of Prosecution witnesses, particularly those currently located in the Ituri district or in the Kinshasa area, could pose an additional risk to their safety and/or physical well-being. The Single Judge considers that this will be the case both in those situations where the identities of the Prosecution witnesses' family members are known to the Defence and in those other situations in which such identities are not known. In addition, in those instances where the identities of the family members are not known, the current whereabouts of the Prosecution witnesses' family members can also constitute identifying information.

37. Moreover, the Single Judge considers that the redactions requested by the Prosecution, which are limited to the current whereabouts of these individuals, or to information that could lead to the identification of such whereabouts, are adequate to minimize this risk and that, at this stage, there is no less intrusive alternative measure that can be taken to achieve the same goal. Furthermore, in the view of the Single Judge, the redaction of this information is not prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial insofar as (i) the Defence will have access to the identities of the witnesses who gave the statements; (ii) and

⁵⁹ ICC-01/04-01/07-T-7-Conf-Exp-ENG [30Oct2007Edited], p. 11, lines 16-20; p. 42, lines 21-25 and p. 43, lines 1-2.

the family members are not referred to as having any knowledge concerning the crimes included in the warrant of arrest for Germain Katanga.

38. For these reasons, the Single Judge grants the authorisation for the redactions relating to the current whereabouts of the family members of the witnesses 1, 3, 7, 8, 12, 13 and 14.

D. Potential Prosecution Witnesses

39. The Prosecution requests the redaction of any identifying information concerning individuals who have already been interviewed by the Prosecution or that the Prosecution intends to interview in the near future, and in relation to whom the Prosecution has not yet decided whether they will become Prosecution witnesses.⁶⁰ The Prosecution's request concerning this type of redactions was originally made under rule 81(4) of the Rules because the Prosecution considered that the term "witnesses" in the context of this provision also covers "prospective witnesses", that is to say, any individual contacted, or intended to be contacted by the Prosecution, and who may or may not become a Prosecution witness at a later stage.⁶¹ However, at the hearing held on 20 November 2007, the Prosecution also requested that the redactions falling within this category be authorised in the alternative pursuant to rule 81(2) of the Rules because the individuals affected could also be considered as Prosecution sources and ongoing and further investigations could be prejudiced if they were to be threatened, intimidated or interfered with.⁶²

40. The Single Judge considers that the Prosecution's interpretation of the term "witnesses" in rule 81(4) of the Rules will cover any individual who has been approached, or could be approached in the near future, by the Prosecution in relation to the case at hand. The Single Judge considers that this approach is too broad and

⁶⁰ ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007], p. 25, lines 9-25 and p. 26, lines 1-2. p. 27, lines 13-25 and p. 28, lines 1-4, p. 44, lines 8-25 and p. 45, lines 1-12. This is also referred to by the Prosecution as "screening", see ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007], p. 55, lines 19-25.

⁶¹ ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 7, lines 8-25 and p. 8, lines 1-11.

⁶² ICC-01/04-01/07-T9-Conf-Exp-ENG ET 20-11-2007, p. 22, lines 4-20.

not consistent with the literal interpretation of rule 81(4) of the Rules, which only refers to “witnesses”, and not to “prospective witnesses”.

41. In the view of the Single Judge, in the proceedings leading to the confirmation hearing, only those individuals on whose statements the Prosecution intends to rely at the confirmation hearing can be considered “witnesses” within the meaning of rule 81(4) of the Rules. Any other individual who has already been interviewed by the Prosecution, or whom the Prosecution intends to interview in the near future, in relation to the case at hand is more appropriately characterised as a “Prosecution source” rather than as a “Prosecution witness”. Hence, any redaction relating to their identities must be justified by the need to ensure the confidentiality of information pursuant to rule 81(4) of the Rules or to avoid any prejudice to further or ongoing investigations pursuant to rule 81(2) of the Rules.

42. The Single Judge observes that the Prosecution does not allege that the redactions falling under this category are needed to ensure the confidentiality of information under rule 81(4) of the Rules. Nevertheless, the Single Judge notes that, as opposed to the so-called “innocent third parties” dealt with in the next section, the individuals concerned by this category of redactions have been interviewed by the Prosecution, or are about to be interviewed by the Prosecution, in relation to the case against Germain Katanga or in relation to further Prosecution investigations. Therefore, the Prosecution’s further or ongoing investigations could be prejudiced if such individuals were to be threatened, intimidated or interfered with.

43. The Single Judge shall discuss each of the redactions included under this specific category separately in Annex I to the present decision insofar as the individuals concerned are currently located in different places and have been contacted by the Prosecution in relation to different incidents.

E. Innocent Third Parties

44. The Prosecution requests authorisation to redact all identifying information concerning a number of individuals referred to as “innocent third parties” by the Prosecution.⁶³

45. The Prosecution maintains that its request for authorisation for redactions relating to these individuals is not based on rule 81(2) of the Rules.⁶⁴ In this regard, the Prosecution points out that these individuals are not Prosecution sources and are in no way involved in the ongoing Prosecution investigation relating to the case against Germain Katanga or any further Prosecution investigation.⁶⁵ Hence, disclosing their identities to the Defence cannot prejudice in any way such investigations.

46. The Prosecution further maintains that the requested redactions are not sought, pursuant to rule 81(4) of the Rules read together with article 68 of the Statute, for the purpose of protecting the identities of Prosecution witnesses, victims or members of their families.⁶⁶

47. The Prosecution seeks authorisation to redact all identifying information concerning these individuals pursuant to rule 81(4) of the Rules read together with article 54(3)(f) of the Statute. The Prosecution submits that rule 81(4) of the Rules refers to article 54 of the Statute as a whole and, accordingly, permits redactions to ensure (i) “the confidentiality of information”; (ii) “the protection of any person”; and (iii) “the preservation of evidence”. Moreover, when asked by the Single Judge to elaborate on the legal basis for this specific type of redactions, the Prosecution stated:

⁶³ ICC-01-04-01-07-T-7-CONF-EXP-ENG[30Oct2007Edited], p. 6, lines 12-17 and p. 19, lines 15-21. “innocent third parties” are individuals that are neither Prosecution witnesses, victims, family members nor Prosecution sources, and they are not involved in the investigation of the Prosecution. [REDACTED]

⁶⁴ ICC-01-04-01-07-T-7-CONF-EXP-ENG[30Oct2007Edited], p. 6, lines 18-21, p. 11, lines 24-25 and p. 12, lines 1-5 and p. 20, lines 16-23; ICC-01/04-01/04-51-Conf-Exp, para. 11.

⁶⁵ ICC-01-04-01-07-T-7-CONF-EXP-ENG[30Oct2007Edited], p. 47, lines 3-11.

⁶⁶ ICC-01-04-01-07-T-7-CONF-EXP-ENG[30Oct2007Edited], p. 36, lines 18-24.

“[T]he plain reading of Article 54(3)(f) gives the Prosecution discretionary power of protective measures, and that – and that does include the protection of any person, and the use of “any person” extends to victims and witness identified by the Prosecutor. So that would – would cover people that are not under the sort of duty of care of the Prosecutor under Article 68(1)”.⁶⁷

48. The Single Judge notes that, according to article 54(3)(f) of the Statute, the Prosecution may take necessary measures to ensure the protection of any person where it is so empowered by the Statute and the Rules. Otherwise, article 54(3)(f) of the Statute directs the Prosecution to “request that necessary measures be taken” by the competent organ of the Court.

49. In the view of the Single Judge, rules 81 and 82 of the Rules establish the procedure for the redaction of information from material and evidence that the Prosecution must disclose to the Defence in accordance with its disclosure obligations under the Statute and the Rules.

50. The Single Judge notes that the procedure provided for in rule 82 of the Rules only applies to material protected under article 54(3)(e) of the Statute.

51. The Single Judge also considers that when the procedure provided for in rule 82 of the Rules is not applicable, the Prosecution can only redact information from material and evidence that it must disclose to the Defence after securing the authorisation of the competent Chamber in accordance with rule 81 of the Rules.

52. Therefore, when acting pursuant to article 54(3)(f) of the Statute, the Prosecution is not entitled to redact *proprio motu*, but can only request authorisation to do so from the competent Chamber pursuant to rule 81 of the Rules. This interpretation is consistent both with the role of the Prosecution as a party to the proceedings in any given case once a warrant of arrest has been issued, and with the role of the competent Chamber as ultimate guarantor of the rights of a suspect or an accused person under article 67 of the Statute.

⁶⁷ ICC-01-04-01-07-T-7-CONF-EXP-ENG[30Oct2007Edited], p. 36, lines 18-24.

53. In the view of the Single Judge, the literal interpretation of rule 81(4) of the Rules empowers the competent Chamber to authorise only two types of redactions. The first part of rule 81(4) of the Rules is limited to redactions which aim to “ensure the confidentiality of information, in accordance with articles 54, 72 and 93 of the Statute.” The second part of rule 81(4) of the Rules refers to redactions “in accordance with article 68, to protect the safety of witnesses and victims and members of their families.”

54. As a result, the Single Judge considers that rule 81(4) of the Rules does not empower the competent Chamber to authorise redactions whose sole purpose is to protect individuals other than Prosecution witnesses, victims or members of their families.

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

56. For these reasons, and given that the Prosecution explicitly states that none of the individuals referred to as “innocent third parties” is a Prosecution source or is in any way involved in any ongoing or further Prosecution investigation, and that the relevant redactions are requested solely for their protection because they could erroneously be perceived as Prosecution sources or witnesses, the Single Judge decides not to authorise any redaction under the category of “innocent third parties”.

F. Further and Ongoing Investigations pursuant to rule 81(2) of the Rules

57. As this Chamber has already stated in Annex I to the *Decision on the confirmation of charges* in the case 01/04-01/06:

At the outset, the Chamber recalls that rule 81(2) of the Rules seeks to protect both “ongoing” and “further” investigations of the Office of the Prosecutor. In this regard, in a previous decision, the Chamber held that contrary to “further investigations”, “ongoing investigations” must be understood as referring to the ongoing investigation against Thomas Lubanga Dyilo in relation to the current case against him as set out in the warrant of arrest issued against him”.⁶⁸

58. The Single Judge notes that the redactions requested by the Prosecution pursuant to rule 81(2) of the Rules can be classified into two main groups. The first group concerns those redactions requested in order not to prejudice the ongoing investigation against Germain Katanga and includes: (i) the places in which the statements of the witnesses were taken: (ii) the names, initials and signatures of current staff members of the Office of the Prosecutor and of the VWU who were present when the statements were taken as well as the names of the interpreters and psychotherapist who assisted in the process of taking the statement from the witnesses (“the persons present when the witness statements were taken”).⁶⁹ The second group concerns those other redactions requested by the Prosecution in order not to prejudice further investigations.⁷⁰ This second group includes certain locations and incidents, as well as the identity and identifying information of certain individuals who were directly or indirectly involved in such incidents. The Single Judge shall address each of the redactions included in this second group separately in Annex I to the present decision insofar as they refer to different locations and incidents.⁷¹

⁶⁸ ICC-01/04-01/06-796-Conf-Anx1-tENG, p. 1.

⁶⁹ ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007Edited], p. 5, lines 14-19; p. 15, lines 1-6 and lines 13-17; p. 28, lines 18-25 and p. 29, lines 1-6. See also ICC-01/04-01/07-T-8-Conf-Exp-ENG [31Oct2007Edited], p. 19, lines 22-24 and p. 22, lines 12-14.

⁷⁰ ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007Edited], p. 21, lines 19-25, p. 22, lines 1-21 and p. 23, lines 11-21.

⁷¹ ICC-01/04-01/07-T-7-Conf-Exp-ENG[30Oct2007Edited], p. 21, lines 19-25 and p. 22, lines 1-21.

G. The place where the interviews were conducted and the names, initials and signatures of the persons present when the witness statements were taken

59. Concerning the first group, the Single Judge considers that disclosing the place where the interviews with the witnesses were conducted, and the names, initials and signatures of current staff members of the Office of the Prosecutor and of the VWU as well as [REDACTED] who were present when the interviews were conducted could, in a few instances, prejudice to a certain extent the Prosecution's investigations. This can be particularly so if the interviews were conducted in small villages, when the staff members of the Office of the Prosecutor easily stand out from the local population or when the staff members of the Office of the Prosecutor repeatedly travel to small areas for lengthy periods of time. Logically, the risks increase in a context such as the one described above in section II.

60. The Single Judge is also of the view that the redactions requested by the Prosecution might, in certain circumstances, contribute to minimizing the above-mentioned risk. However, the Single Judge considers that there are less intrusive measures that can be taken in order to properly protect those staff members of the Office of the Prosecutor and the VWU present when the witness statements were taken and to avoid any prejudice to the Prosecution's investigations, such as (i) avoiding to take statements in small villages or cities; (ii) making sure that such persons do not easily stand out from the local population; or (iii) rotating such persons once there are indications that their identification with the Court may endanger their security as well as the Prosecution investigation.

61. Nevertheless, the Single Judge acknowledges that these measures are not applicable to [REDACTED] for the purpose of assisting in the process of interviewing witnesses and taking their statements. These individuals [REDACTED] cannot be easily rotated given the limited number of individuals who have the necessary qualifications to properly perform such a job.

62. Moreover, the Single Judge considers that the identification of, at least, the staff members of the Office of the Prosecutor and the VWU present when the witness statements were taken is a key guarantee of procedural propriety in the taking of the statements, as well as a formal requirement for their admissibility, and redacting this information would be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.

63. For these reasons, the Single Judge does not grant the authorisation requested by the Prosecution in relation to the names, initials, signatures and any other identifying information of those staff members of the Office of the Prosecutor and the VWU present when the witness statements were taken.

64. As a result, the Single Judge only grants authorisation for the redaction of the names, initials, signatures and any other identifying information of [REDACTED] for the purpose of assisting in the process of interviewing witnesses and taking their statements.

FOR THESE REASONS,

DECIDES to partially grant the Prosecution's requests for authorisation for redactions to the statements and interview notes of Witnesses 1, 3, 7, 8, 12, 13 and 14, as specified in Annex I to the present decision.

DECIDES that, pursuant to rule 76 of the Rules, the Prosecution shall, no later than Wednesday 12 December 2007, disclose to the Defence the statements and interview notes of Witnesses 1, 3, 7, 8, 13 and 14 with the redactions authorised by the Single Judge, as specified in Annex I to the present decision.

DECIDES that, pursuant to rule 121(2) of the Rules, the Prosecution shall, no later than Wednesday 12 December 2007, file an electronic version of the statements and interview notes of Witnesses 1, 3, 7, 8, 13 and 14 in the record of the case against Germain Katanga providing all details required by the Draft Protocol on the Presentation of Evidence followed in the case ICC-01/04-01/06. Prior to the filling of the Document containing the charges, the relevant fields shall be provisionally filled out by reference to the relevant parts of the warrant of arrest for Germain Katanga.

DECIDES that, pursuant to rule 77 of the Rules, the Prosecution shall, no later than Wednesday 12 December 2007, make available to the Defence the statement of Witness 12 through the system of pre-inspection and inspection provided for in rule 77 of the Rules and followed in the case 01/04-01/06 with the redactions authorised by the Single Judge, as specified in Annex I to the present decision, and that a pre-inspection report and, if need be, an inspection report, shall be filed by the Prosecution immediately afterwards in the record of the case against Germain Katanga.

(Signed)

Judge Sylvia Steiner
Single judge

Dated this Friday 7 December 2006

At The Hague, The Netherlands