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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Application for Leave to Appeal the Decision on the Evidentiary
Scope of the Confirmation Hearing and Preventive Relocation**

Source: Office of the Prosecutor

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Introduction

The Prosecution hereby seeks leave to appeal the Single Judge's 18 April 2008 "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" (hereinafter, the "Decision").

The Decision misinterprets the system of witness protection established by the Statute, thereby compromising the Court's ability to effectively discharge its protective duties, exposing the safety of witnesses and undermining the Prosecution's duties and power to conduct investigations and bring cases before Chambers of this Court.

In its original submissions, the Prosecution stated that, in accordance with the Statute, it relied on the VWU to implement the measures required for the protection of its witnesses. While the Prosecution informed the Single Judge that it had provided for the provisional relocation of four witnesses (132, 163, 238 and 287), the Prosecution insisted that it could neither replace nor duplicate the mandate and responsibility of the VWU to protect witnesses. On this basis, the Prosecution requested that the Single Judge direct the VWU to include witnesses 238 and 163 in the ICCPP¹ so that their statements could be disclosed to the Defence.

The Decision considers that Article 68(1) of the Statute should be interpreted as attributing to the Registrar the exclusive power to decide which witnesses of the Court can be included in the ICCPP and to implement their protection. According to the Decision, the Statute does not provide the Prosecution with the authority to decide on the need for protection of a witness, or to take provisional measures. In this regard, the Decision states that "the Prosecution's mandate pursuant to article 68(1) of the Statute, is limited to, *inter alia*, (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different

¹ "International Criminal Court Protection Program".

protective measures; (ii) requesting the inclusion of witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber.”²

Furthermore, the Decision went on to rule inadmissible for the purposes of the confirmation hearing all statements, interview notes and interview transcripts – whether in unredacted, redacted, or summary format – relating to two witnesses (132 and 287) whom the Prosecution had preventively relocated.³ There are no specific reasons provided in the Decision for such exclusion.

The Prosecution submits that the Decision has misinterpreted the system of witnesses protection established *inter alia* by articles 68 (1), 54 (3) (f) and 43 (6), and Regulation 96 of the Registry. In particular, the Decision has not interpreted the system correctly in that it: i) limits the authority of the Prosecution to determine the standard of risk which would be applied in assessments of the witnesses on which it intends to rely; ii) limits the authority of the Prosecution to determine the need for protection measures of such witnesses; and iii) denies the Prosecution any ability to implement provisional protective measures.

The Decision, by conferring upon the Registry the exclusive assessment of both the standards applicable and the factual existence of circumstances on the ground affecting the witnesses, undermines the ability of the Prosecution to rely on witnesses and thus effectively and directly affects the Prosecution ability to carry out its duties and powers to investigate under article 54, and to lead cases at trial.

Finally, the Decision undercuts the Prosecution’s ability to present charges which reflect the types of victimization and the totality of the criminal conduct it has selected for prosecution both generally (by infringing on the Prosecutor’s right to select evidence) and in this specific instance (by excluding from the Prosecution’s list of evidence two important witnesses whose evidence supports the sexual

² Decision, para. 25(iii).

³ Decision, para. 39 and p. 55 of the *dispositif*.

violence charges that the Prosecution intended to bring before the Pre-Trial Chamber).

These aspects of the Decision as discussed above affect the fair and expeditious conduct of the current proceedings leading to the confirmation hearing, and also of any subsequent proceedings. There is a serious risk of losing other witnesses, who could refuse to appear in Court, as they learn of the lack of effective measures to protect them. The Decision can also affect the outcome of trial by effectively re-shaping the case that the Prosecution intended to present.

Immediate intervention by the Appeals Chamber is needed to correct the interpretation of articles 68, 54 and 43, and the relevant Regulation of the Registry. Such intervention is required at this stage to allow the Prosecution to continue conducting its investigations and lead its cases at trial efficiently; and by providing guidance and certainty as to the Court's protective scheme, allowing efficient implementation in this case and consistent application in all situations and cases before the Court. Immediate resolution will also prevent unfairness to witnesses at risk as a consequence of their interaction with the Court: such witnesses in the present case are excluded from any provisional protection measures, while other witnesses in the same case and in other cases in the DRC situation have benefited or benefit from such measures.

Procedural background

1. On 10 of March 2008 the Prosecution filed a "Request for the Issuance of an Order to Protect Witnesses 238 and 163".⁴
2. On 18 April 2008, the Single Judge issued the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article

⁴ ICC-01/04-01/07-255-Conf-Exp.

67(2) of the Statute and Rule 77 of the Rules”.⁵ The Prosecution refers to the detailed account of the procedural background set out in that Decision.⁶

3. The Prosecution hereby seeks leave to appeal the Decision pursuant to Article 82(1)(d) and Rule 155.

The issues for which leave is sought

4. Consistent with the specific requirements of Article 82(1)(d) and with applicable jurisprudence of this Court, the Prosecution refrains from making any arguments pertaining to the correctness of the Decision, which should be reserved for discussion before the Appeals Chamber.⁷ The relevant question in this application is whether the issues identified impact on the fair and expeditious conduct of the proceedings or the outcome of trial, not whether such impact is appropriate or justified.⁸
5. This application is confined to two issues arising from the Decision:
 - The interpretation of the system of witness protection established *inter alia* by articles 68 (1), 54 (3) (f) and 43 (6), and Regulation 96 of the Registry, and in particular the authority of the Prosecutor to assess and determine the need for witness protection in order to conduct efficiently its investigations and Prosecutions and to provide for alternative measures, where required (“the First Issue”);
 - The exclusion of the evidence of witnesses 132 and 287 for the purposes of the confirmation hearing (“the Second Issue”).

⁵ ICC-01/04-01/07-411-Conf-Exp (the “Decision”). Confidential redacted and public redacted versions of the Decision were issued on 21 April 2008 (ICC-01/04-01/07-423-Conf; ICC-01/04-01/07-428-Corr).

⁶ Decision, pp. 4-9.

⁷ See e.g. *Prosecutor v Kony et al*, “Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58”, ICC-02/04-01/05-20, 19 August 2005, paras. 22-23.

⁸ The Prosecution further notes that under the Appeals Chamber’s jurisprudence, a Chamber may certify an issue for appeal on its own volition (Judgment on Extraordinary review, para. 20). Thus, if the Chamber disagrees with the reasons advanced by the Prosecution supporting its application for leave, but is nonetheless of the view that issues in question should be examined by the Appeals Chamber for different reasons, the Chamber should certify the issues on its own initiative.

6. The Prosecution submits that both issues directly arise from the Decision. The First issue arises, *inter alia*, from the following findings:

- "the role to be played by the Prosecution and the Defence within the framework of the programme [...] is limited to making applications to the Registrar for the inclusion of witnesses into the [ICCPP]";⁹
- "Article 68(1) of the Statute should be interpreted in a manner which is fully consistent with the attribution to the Registrar of the power to decide which witnesses of the Court can be included in the ICCPP and to implement their relocation. In this regard, the Prosecution's mandate, pursuant to article 68(1) of the Statute, is limited to, *inter alia*, (i) advising the witnesses as to what they can expect from the Court in terms of protection, as well as the competent organ of the Court for the adoption and implementation of the different protective measures; (ii) requesting the inclusion of witnesses in the ICCPP, as well as providing the Registrar with the necessary information to facilitate the assessment process; and (iii) requesting procedural protective measures such as redactions of identifying information from the Chamber";¹⁰ and
- "[t]he decision of the drafters to create a single Victims and Witnesses Unit within the Registry constitutes a clear endorsement of a system of witness protection in which the core role is played by the Registry and a limited mandate is given to the Prosecution which, in the view of the Single Judge, is consistent with the attribution to the Registrar of the overall competence for the operation of the ICCPP".¹¹
- "in implementing the practice of preventive relocation, as defined by the Prosecution, the latter is not only exceeding its mandate under the Statute and the Rules but it is also misusing its mandate in order to *de facto* shift the power to decide on the relocation of a given witness from the Registry to the Prosecution."¹²
- "When, ... the Prosecution *proprio motu* carries out the preventive relocation of the Witnesses after the Registrar has formally rejected the Prosecution's application for the inclusion of the relevant witnesses in ICCPP, the Prosecution is infringing the decision of the competent organ of the Court to decide upon the relocation of a witness."¹³

7. The Second Issue arises from the Decision's considering inadmissible for the purposes of the confirmation hearing all statements, interview notes and interview transcripts – whether in unredacted, redacted, or summary format –

⁹ Decision, para. 22.

¹⁰ Decision, para. 25(iii).

¹¹ Decision, para. 28.

¹² Decision, para. 32.

¹³ Decision, para. 25(ii).

relating to two witnesses (132 and 287) whom the Prosecution had preventively relocated.¹⁴ There are no specific reasons provided in the Decision for such exclusion.

Both issues satisfy the test for leave to appeal being granted under Article 82 (1) (d)

8. The Prosecution submits that the issues identified above satisfy all applicable limbs of Article 82 (1) (d), and that leave to appeal should accordingly be granted.

(a) The First Issue affects the fair and expeditious conduct of the proceedings

Fairness

9. "Fairness", within the terms of Article 82 (1) (d), incorporates fairness towards the accused, victims and the Prosecution, and includes the Prosecution's ability to exercise the powers and duties listed in article 54.¹⁵
10. The Decision limits the Prosecution's role to (i) advising witnesses what protection the Court can provide, (ii) requesting inclusion of witnesses in the ICCPP, and (iii) requesting redactions from the Court.¹⁶ The Prosecution will thus be obliged to inform the witnesses that it does not know if they will be protected and can not take decisions on this matter. As a result, the power to make determinations which are crucial to the effective conduct of investigation and subsequent judicial proceedings has been shifted from the Prosecution to VWU. Such a shift has taken place in relation to activities where the Statute places the obligation on protection of witnesses on the Prosecution "particularly",¹⁷ and specifically provides for the Prosecution authority to "take measures"¹⁸ to protect any person.

¹⁴ Decision, para. 39 and p. 55 of the *dispositif*.

¹⁵ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39.

¹⁶ Decision, para. 25.

¹⁷ Article 68(1) – "The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes."

¹⁸ Article 54 (3) (f).

11. The best practices for the assessment of risk and the need for protection traditionally require the input from those closest to the relevant witnesses and their individual circumstances. However in the Decision's scheme, the assessment of the investigators based on their contacts with witnesses and others is ignored, and the implementation of provisional in-country relocations and other measures by the Prosecution, excluded. By stripping the Prosecution of any powers of protection, the Decision significantly impairs the Prosecution's ability to adequately discharge its duties of protection under Article 68, its duty to conduct its investigation respecting the interests of victims and witnesses under Article 54(1)(b), its capacity to exercise its powers under Article 54(3)(f), and its ability to lead cases at trial. The Prosecution has always endeavored to implement its key obligations of protection *through* VWU. But the Prosecution submits that it cannot be relegated to requesting that others make assessments and take measures if *they* deem it necessary. Fairness towards the Prosecution is consequently adversely affected.
12. The Prosecution's ability to conduct investigations and collect evidence, and thus the fair conduct of the proceedings themselves, are directly affected by the Decision. Under the terms of the Decision, the Prosecution is barred from making decisions on matters that are essential to the effective investigation and prosecution of crimes within the jurisdiction of the Court. Should a witness that the Prosecution intended to call be harmed in any way in the context of the case, the ability of the Prosecution to rely on witnesses as evidence will be impacted throughout the proceedings. The strictures that the Decision imposes on the Prosecution fail to take account of the unique context in which the Court operates, where investigation and protection go hand-in-hand, and the success of the former is dependent on the ability to provide the latter. In this context, the Prosecution has to decide whether to protect each witness who is interviewed. Unless the Court, including all its constituent organs, is in a position to efficiently

discharge its duties of protection under Article 68(1), its ability to prosecute cases and hold meaningful trials will be seriously affected.¹⁹

13. For the investigations of crimes within the jurisdiction of this Court, the Prosecution must have at its disposal, and be able to rapidly deploy, appropriate reactive tools to address a wide variety of problems that may arise, including direct and indirect threats, impediments to witness cooperation, and disruptions to communication over great distances.
14. For instance, there may be cases where the Prosecution will want to rely at the confirmation hearing on witnesses who may not qualify as “core witnesses” for the purposes of the confirmation hearing, but are nonetheless essential to the case at trial. It may be in the interest of the Prosecution to have witnesses protected from the outset in order to remove all possible obstacles that could impede the witnesses’ ability to provide testimony at trial free from any intimidation, physical or psychological. If a witness is unprotected in Ituri, and hears about militia groups trying to find out who is cooperating or has cooperated with the ICC once the case becomes public, then in the long run they have doubts about their cooperation.²⁰
15. Similarly, and because of the uncertainty of the referral criteria and their interpretation by the VWU, it is currently impossible for the Prosecution to inform witnesses, when taking a statement, that the Court could be in a position to ensure their protection, since admission into the ICCPP may only be granted by VWU’s independent assessment.²¹ Further, under the terms of the Decision,

¹⁹ This concern is not unique to the ICC, but has also been recognised by other similar jurisdictions: see e.g. the ICTY Trial Judgment in *Prosecutor v. Haradinaj, Balaj and Brahimaj*, 3 April 2008, para. 6: “As will be discussed in section 2.2, below, throughout the trial the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe. This was due to a number of factors specific to Kosovo/Kosova, for example Kosovo/Kosova’s small communities and tight family and community networks which made guaranteeing anonymity difficult. The parties themselves agreed that an unstable security situation existed in Kosovo/Kosova that was particularly unfavourable to witnesses”. In these circumstances the Chamber referred to the difficulty to obtain evidence as a “prominent feature” of the trial (para. 28).

²⁰ The Prosecution notes that at there is at least one precedent of this kind in this case.

²¹ This assessment appears to be based on a requirement of a serious threat (see Decision, paras. 46-50), rather than on a standard of risk that can be evaluated ahead of time.

the Prosecution is effectively not in a position to rely on a witness if the security of that witness is compromised and the VWU does not accept him or her in the ICCPP.

16. The impracticability of placing exclusive reliance on the Registrar to undertake protective measures, and, where necessary, to do so “urgently” and “immediately,” is made clear by the Decision’s own findings concerning the Prosecution’s application for protection of Witness 238. As the Decision notes, in addressing that application, the Registrar (i) “departed from all previous criteria he has previously set out to assess [witness protection] applications” (para 49), (ii) “completely disregard[ed] the findings of the Single Judge” concerning security risks, and, in so doing, (iii) “creat[ed] a serious risk for the witness’s safety and ... a further delay in the proceedings” (para 51).²² The Prosecution recalls that, in the face of the Registry’s decisions, the Prosecution preventively relocated the witness 238 to Kinshasa on 29 March 2008, a measure that the Decision does not challenge in this particular case.
17. The Prosecution further submits that both its ability to “establish the truth” within the terms of Article 54 (1) (a), as well as its right and obligation to present what it believes to be its best possible case,²³ suffers to the extent that the Prosecution will lack the tools to secure what it considers to be the best, and in some cases the only, available evidence. Under the terms of the Decision, the Prosecution’s ability to investigate and present its case, within its mandate, will be subjected to the decisions (and resource constraints) of another organ, which can effectively exercise a decisive influence. In this manner, not only is the Prosecution’s ability to conduct the best possible investigation and prosecution in the instance case affected; ultimately, prosecutorial independence could be

²² The workability of the system is further placed in doubt by the Decision’s suggestion that it does not “intend to address the effectiveness of the system of witness protection” it promulgates. (para 38). But the very ineffectiveness of such a system in practice is the source of its unfairness.

²³ While in this instance, the primary impact has been on the Prosecution’s ability to present its case at the confirmation hearing, there may also be situations which impact on the Prosecution’s ability to secure protection for witnesses who have significant potentially exculpatory evidence.

compromised.²⁴ The problems, in part identified in the Decision, arising from the manner in which the Registry is carrying out its tasks²⁵ make this subordination of the Prosecution's protective role to the VWU's independent authority particularly serious.

18. Moreover, the Decision, by establishing a general ban on the Prosecution to conduct its protective activities, has consequences that go beyond the confirmation hearing and extend to subsequent proceedings, including preparation of the case for trial and trial itself, all areas where supplementary investigative activities may be undertaken,²⁶ and, more importantly, where disclosure duties reach their peak.
19. Finally, since the Decision reduces the range of protective options open to the Court, the fairness towards witnesses is also affected: their protection will now be entirely dependent on the decisions of a single unit of the Court as to whether their situation warrants protection.²⁷ Witnesses who have trusted the Court and have assumed risks in order to cooperate with its investigations and prosecutions may be left to their own devices, despite the fact that under the Prosecution's judgment they are at risk, if Registry decides that inclusion in the ICCPP is not justified or the risk does not amount to a situation of "urgency".²⁸
20. In this sense, the system of witness protection that the Decision envisions appears to be, as a practical matter, unworkable and thus unfair to the Prosecution, victims and witnesses and the Court as a whole. To take one example, in lieu of protective measures by the Prosecution, the Decision proposes that, upon a request for implementation of provisional measures pending decision on an

²⁴ In this sense, the Prosecution stresses that its independence as an organ operates not only vis-à-vis any external influence, but also vis-à-vis other organs of the Court.

²⁵ See, for instance, Decision, paras. 45-51.

²⁶ See *Prosecutor v Lubanga*, ICC-01/04-01/06-568 OA3, 13 October 2006, paras. 49-57.

²⁷ *Prosecutor v Tadic*, IT-94-I, 10 August 1995, paras. 55, 72, in relation to the equivalent provision, Rule 73B, in the ICTY Rules of Procedure and Evidence. See also D.K. Piragoff, 'Article 69 : Evidence', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 907 – "Therefore, a fair trial, and prejudice thereto, may also incorporate or be counter-balanced by some aspects of the fair treatment of victims and witnesses, and not merely fair treatment of an accused, provided that these aspects are not 'prejudicial to or inconsistent with the rights of the accused or a fair and impartial trial'".

²⁸ As explained at paras. 35-37 of the Decision (exceptional situations of imminent harm)

application for the ICCPP, the Registrar “must consider as an *urgent priority* the setting up of an extended initial response system,” and “shall *decide immediately* on the necessary provisional measures...”.²⁹ However, and as already explained, the same Decision shows the impracticability of placing exclusive reliance on the Registrar to undertake protective measures, let alone to do so “urgently” and “immediately”.³⁰ This demonstrates that the concerns identified regarding the impact of this issue on the fairness (above) and expeditiousness (below) of the proceedings are very real.

Expeditionessness

21. The discussions between the Single Judge, Registry and Prosecution on matters of protection in this case and the impact that they have had in terms of time and the progress of the proceedings illustrates the impact that a decision regulating the manner and scope of protection has for the expeditious conduct of proceedings.³¹
22. The Prosecution also submits that resorting to provisional relocations pending further discussions with the VWU allows the Prosecution to comply with its disclosure obligations in a timely manner, thus impacting on the expeditiousness of proceedings.
23. The Prosecution’s inability to secure a satisfactory level of protection may lead to an increased use of alternative measures such as redactions or use of summaries in relation to statements which, had the Prosecution been satisfied that the witnesses were adequately protected, would have been disclosed in full. This has consequences for the expeditious conduct of the proceedings since, as the experience accumulated so far by the Court demonstrates, the use of redactions or summaries of evidence can involve a component of litigation, even with the more simplified system enshrined in the Decision.³²

²⁹ Decision, para. 36(emphasis added)

³⁰ See para. 16 above.

³¹ As noticed by the Single Judge herself: see paras. 51 and 53-54 of the Decision.

³² See e.g. the judgements of the Appeals Chamber in *Prosecutor v Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006 and ICC-01/04-01/06-774 OA6, 14 December 2006, in which six different applications were

24. Further, to the extent that, under the terms of the Decision, the Prosecution is not in a position to ensure protection to its satisfaction, it will have to devote resources to seek alternative means of evidence for the purposes of the presentation of its case, if it concludes that the possible risks to a person or group of persons stemming from their interaction with the Prosecution are not acceptable. Thus, the Decision affects the expeditious conduct of the proceedings, since it may “impact on how the Prosecution goes about selecting its witnesses for the purposes of the confirmation hearing”.³³

(b) The Second Issue affects the fair and expeditious conduct of the proceedings and the outcome of trial

Fairness

25. This aspect of the Decision causes unfairness to the Prosecution, whose right and ability to present its best case before the Pre-Trial Chamber has been affected. As a result of the exclusion of two crucial witnesses, charges of sexual violence which, in the Prosecution’s view, became insufficiently substantiated for the purposes of the confirmation hearing and any subsequent trial phase, could not be led.³⁴ The Prosecution stresses that it is the sole prerogative of the Prosecution to assess what it believes to be the best evidence for the purposes of its presentation to Chambers of this Court, and to determine what presentation of evidence is sufficient to meet the relevant evidentiary test.³⁵

26. In the instant case, the Prosecution intended to substantiate the charges of sexual slavery, rape and outrages upon personal dignity with the evidence of three witnesses, namely witnesses 249, 287 and 132; the Decision excluded two of them: i.e. the main bulk of the Prosecution evidence pertaining to the sexual crimes

dealt with in separated decisions by the Pre-Trial Chamber I and the Appeals Chamber. See also the procedural history as detailed in ICC-01/04-01/07-427, pp. 4-11.

³³ See Single Judge’s 19 December 2007 Decision on Defence Motion for Leave to Appeal the First Decision on Redactions (ICC-01/04-01/07-116), p. 6.

³⁴ ICC-01/04-01/07-422, pp. 3, 5-6.

³⁵ Pursuant to Article 61(7), the distinct role of the Pre-Trial Chamber is to determine whether the evidence that has been presented meets that test.

investigated has been excluded for the purposes of the confirmation hearing; and the Prosecution has been left with a minimum which, in its assessment, is insufficient to substantiate those charges. A decision negatively impacting in this manner and to this extent on the presentation of the Prosecution's case, and the very nature of the case which it is able to present, must necessarily affect the fairness of the proceedings.³⁶

27. The Prosecution further notes that this is not an ordinary decision on admissibility of evidence, but a *proprio motu* ruling that the Prosecution cannot present two core witnesses for the purposes of the confirmation hearing. The reasons underpinning such an extraordinary step, which damages the Prosecution's case, have not been explained in the Decision, which merely states that exclusion is the "appropriate remedy for the Prosecution's unauthorised preventive relocation" of the two witnesses.³⁷ In this manner, the Prosecution is penalized without any clear explanation of the rationale and scope of such penalization. This lack of adequate reasoning in a Decision causing such a level of prejudice to a party in and of itself justifies leave to appeal being granted.³⁸

Expeditionousness

28. This aspect of the Decision affects the expeditionousness of the proceedings in different ways. First, the Prosecution is effectively precluded from pursuing the charges of sexual violence against the suspects together with the other charges for the confirmation hearing due to the exclusion of the majority of its core evidence. This means that if the Prosecution wished to maintain those charges, they will have to be re-introduced by means of an amendment to the charges, which is in turn dependent on the Prosecution's ability to identify and collect alternative

³⁶ *Prosecutor v Milutinovic et. al*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 Ter List, 14 March 2007, para. 14; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against decisions of the Trial Chamber, 6 May 2003, para. 2; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecutor's Application for Certification under Rule 73(B) Concerning the Evidence of an Investigator, 20 June 2002.

³⁷ Decision, para. 39.

³⁸ See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-489, pp. 6, 8, 12-13.

evidence. Thus, the Decision unnecessarily complicates proceedings by possibly extending the Prosecution's investigative activities, on the one hand, and possibly leading to future requests for amendment of the charges, even after the confirmation hearing, on the other.

29. In addition, the exclusion of both witnesses implies that there is now a need to readjust and reshape the existing protective scheme in relation to these witnesses, which requires time and resources, as reflected by the ongoing discussions with VWU as to how to proceed in relation to them.

(c) The Issues also affect the outcome of trial

30. Finally, if not corrected, the Decision's consequences will extend beyond the confirmation hearing and impact on the trial, since an entire section of the charges which the Prosecution considered had been established by its investigation and wished to present before Chambers of this Court has been severely affected, and consequently removed from the document containing the charges. Thus, the possibility of the crimes of sexual slavery, rape and outrages upon personal dignity forming part of the proper scope of trial is undermined. Even if the Prosecution is able to find alternative evidence which it considers sufficient to substantiate those charges, they will have been artificially separated from the overall context of the attack.³⁹

31. The Prosecution respectfully submits that the exclusion of evidence of "a highly relevant and probative value", such as the statements of the witnesses in question, has a direct impact on the outcome of trial, and that leave to appeal such exclusion should accordingly be granted.⁴⁰

³⁹ Under the clear terms of Article 74 (2), the Trial Chamber is bound by the facts and circumstances described in the charges. The Prosecution would be required to obtain this evidence in time to amend the charges and hold a supplementary confirmation hearing prior to the commencement of the trial, after which time Article 61(9) appears to provide only for the withdrawal of charges. The Prosecution notes that the separation of these charges from the other charges confirmed, even if they are later able to be added, would appear to be at odds with the Decision's stated need for consistency between the proceedings leading to the confirmation hearing and proceedings before the Trial Chamber (Decision, para 7).

⁴⁰ See e.g. *Prosecutor v Milutinovic et. al*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 Ter List, 14 March 2007, para.

(d) Immediate resolution of the issues by the Appeals Chamber will materially advance the proceedings

32. The Prosecution submits that immediate resolution of these issues will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “move forward”; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”⁴¹ The Appeals Chamber has also confirmed that proceedings are “not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto.”⁴²

Resolution of the First Issue will materially advance the proceedings

33. Immediate resolution of the First Issue by the Appeals Chamber will advance these proceedings by ensuring that the protection of witnesses are dealt with correctly on an ongoing basis throughout this case.

34. In particular, immediate resolution of the first issue by the Appeals Chamber will prevent any detrimental consequences to witnesses emerging from a variation of the current protective scheme. Under the present terms of the Decision, witnesses who face risks, albeit insufficient risk to warrant protection in the eyes of VWU or the Registrar, will be left without any identifiable effective protective options.⁴³ This could lead to significant detrimental consequences for those witnesses. Such consequences could manifestly impact on the integrity of the proceedings, both through their direct impact on the witness and on the evidence available to the

14; *Prosecutor v Halilovic*, IT-01-48-T, Decision on Motion for Certification, 30 June 2005: “Considering that the issue of the admission into evidence of the Accused’s interview is an important one . . . and may have consequences for the outcome of the trial that could be significant” (in finding the first criteria of Rule 73(B) was satisfied)

⁴¹ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

⁴² *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 12, see also para. 17.

⁴³ Beyond their purported protection through the Initial Response System in some cases.

Prosecution, and should therefore be resolved by the Appeals Chamber at this stage.

35. In this context, the Prosecution notes that this is not an issue which can be left for resolution as part of a subsequent or final appeal. The risks to witnesses and victims are real, as the Single Judge has noted in the Decision.⁴⁴ If protection is not effectively provided at this stage, then a later determination that the Prosecution did have the power, or indeed the obligation, to provide effective alternative protective measures cannot remedy the fact that witnesses have been exposed to significant risk for a period of time and may have suffered harm or trauma as a result, and that the Prosecution will have lost the ability to establish a relation of trust with its witnesses in the context of ongoing or future investigations.

36. These considerations extend beyond the present preparations for the confirmation hearing, to future proceedings both in this case⁴⁵ and others.⁴⁶ It is critical that the proper process for, and full range of, protective options are clarified and made available, so that the Prosecution is put in a position to effectively conduct its investigations and not lose witnesses for trial. This will facilitate the efficient resolution of these issues, throughout these proceedings and in all future cases.

37. In the Decision, the Single Judge held that the Prosecution is strictly prohibited from providing any protective function after a referral to the VWU, and this appears to have played a role in the Prosecution being prohibited from relying on the evidence of two witnesses at the confirmation hearing. However other Chambers may well take, and in one case have already taken,⁴⁷ different

⁴⁴ See, inter alia, paras. 56 and 51-52.

⁴⁵ The number of witnesses involved in this case will only grow if charges are confirmed and the case moves towards trial.

⁴⁶ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor which can be weighed in deciding whether to grant leave - see *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v. Mrkšić*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

⁴⁷ The Prosecution is aware of one decision in which another Chamber has taken a significantly divergent approach. The Prosecution understands that a public version of that decision will be issued in the near future,

approaches to the responsibilities and competences of the Prosecutor on matters of protection. While different cases may require tailored solutions to certain problems, it is critical to both the effectiveness and the credibility of the Court that *this* issue be resolved and applied consistently across the Court – it cannot be that the witnesses do not benefit from similar protection by the Prosecution and other organs of the Court in different cases.

Resolution of the Second Issue will materially advance the proceedings

38. Immediate resolution of the Second Issue by the Appeals Chamber may materially advance these proceedings by ensuring that the best evidence is placed before the Pre-Trial Chamber for the purposes of the confirmation hearing pursuant Article 61(7).
39. In particular, an immediate resolution of the issue by the Appeals Chamber will ensure that at the confirmation stage, but also at the subsequent trial, charges of sexual violence will not be excluded from the proceedings. The Decision states that “there must be consistency between the proceedings leading to the confirmation hearing, the hearing itself and, in the eventuality of the confirmation of the charges, the proceedings held before the Trial Chamber”.⁴⁸ The Prosecution has in its possession evidence which it believes is sufficient to establish such charges, therefore covering the wide range of criminalization. However, the exclusion of the evidence of witnesses 132 and 287 makes it impossible for the Prosecution to adequately substantiate these charges at the confirmation hearing or any subsequent trial phase.
40. Finally, immediate resolution of the Second Issue by the Appeals Chamber will prevent any detrimental consequences to witnesses 132 and 287 emerging from the variation of the current protective regime. These witnesses have been preventively relocated due to the concrete risk that they are exposed to as a

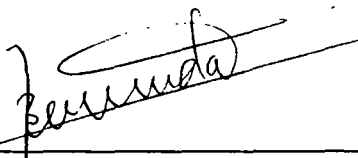
however due to the level of confidentiality presently attached to that decision the Prosecution is unable to provide further details at this stage.

⁴⁸ Decision, para. 7.

consequence of their cooperation with the Prosecution. Under the Decision, these witnesses have been put under the supervision of the Registrar, who will decide upon the appropriate protective measures to be taken in relation to them.⁴⁹ There remains a possibility that the Registrar will identify and implement a lower degree of protection than the one currently in place,⁵⁰ which could lead to detrimental consequences for those witnesses. Such consequences could manifestly impact on the integrity of the proceedings.

Relief sought

41. For the reasons set out above, the Prosecution requests that the Single Judge grant leave to appeal the two issues in this Decision pursuant to Article 82(1)(d).



Fatou Bensouda, Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 28th day of April, 2008

At The Hague, The Netherlands

⁴⁹ Decision, para. 40.

⁵⁰ The Prosecution recalls that the Registrar previously rejected the request for protective measures for these witnesses.