



Original: **English**

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

Date: **3rd June 2008**

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

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

**Public
URGENT**

**Defence Application for Leave to Appeal the Single Judge's *Decision on the
"Decision on Prosecution's Urgent Application for the Admission of the Evidence of
Witnesses 132 and 287"***

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Mr Eric MacDonald, Trial Lawyer

Counsel for the Defence of Mr Katanga

Mr David Hooper
Ms Caroline Buisman
Mr Göran Sluiter

Consel for the Defence of Mr Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of Victims

[1 name per team maximum]

Legal Representatives of Applicants

[1 name per team maximum]

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

[2 names maximum]

The Office of Public Counsel for the Defence

[2 names maximum]

States Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Mr Germain Katanga (“Defence”) requests leave to appeal the Single Judge’s *Decision on Prosecution’s Urgent Application for the Admission of the Evidence of Witnesses 132 and 287* (“Impugned Decision”).¹ The impugned Decision reconsiders the Single Judge’s earlier decision to exclude the evidence of Witnesses 132 and 287 and allows its admission. The Defence submits that the Single Judge’s reconsideration was made on the basis of two errors invalidating the Decision and therefore warranting the Appeals Chamber’s consideration: (1) the Single Judge improperly reconsidered her earlier decision to exclude the evidence of Witnesses 132 and 287 on purported new circumstances that did not justify such reconsideration; (2) the Single Judge’s reconsideration, which has very prejudicial consequences for the Defence, without hearing any submissions from the Defence.

Procedural Background

2. On 21 April 2008, the Single Judge issued her “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” (“Decision on Preventive Relocation”).²
3. In the Decision on Preventive Relocation, the Single Judge excluded the statements, interview notes and interview transcripts of witnesses 132 and 287 for the purposes of the confirmation hearing. The circumstances that led the Single Judge to exclude this evidence were that the Prosecution had preventively relocated witnesses 132 and 287 notwithstanding that rendering decisions involving relocation of witnesses falls squarely within the domain of the Registrar’s Victims and Witnesses Unit (“VWU”), which had determined previously that witnesses 132 and 287 would not be taken into the International Criminal Court’s Protection Program (“ICCPP”).³ The Single Judge deemed the exclusion of this evidence to be the appropriate remedy for what she termed “the Prosecution’s unauthorised preventive relocations of witnesses 132 and 287”.⁴

¹ ICC-01/04-01/07-523.

² ICC-01/04-01/07-423-Conf. A Public Redacted version was issued on the 21 April 2008 – ICC-01/04-01/07-428.

³ ICC-01/04-01/07-25. See also ICC-01/04-01/07-482-Conf, para. 2.

⁴ Decision on Preventive Relocation, para. 39.

4. Following this Decision, which the Prosecution is appealing,⁵ the Prosecution withdrew the charges of sexual slavery as a war crime and a crime against humanity, the core evidence in support of those charges being now excluded.⁶
5. The Single Judge simultaneously ordered that witnesses 132 and 287 be immediately put under the Registrar's supervision, and that the Registrar decide upon the appropriate protective measures to be taken to them given that:⁷
 - (i) their identities will not be revealed to the Defence, and their statements, interview notes and interview transcripts are not admissible for the purpose of the confirmation hearing; and
 - (ii) according to the Prosecution, the witnesses have already left their places of residence and have been taken to a new location where they have been for a few weeks.
6. Pursuant to this order, the Registrar's VWU re-assessed the safety of witnesses 132 and 287 and produced an *ex parte* report,⁸ which has recently been re-classified as confidential and as such disclosed to the Defence,⁹ containing its findings. This report stated that the VWU had recommended that witnesses 132 and 287 should be accepted into the ICCPP, given the assessment of the Prosecution Office "that witnesses 132 and 287 had been exposed to a heightened level of risk, due to the fact that the witnesses had been preventively relocated by the Prosecution and taking into account the unknown result of the current legal proceedings before the Court."¹⁰
7. Following this report, the Prosecution filed the *Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287*¹¹ on which basis the Single Judge issued the impugned Decision.
8. The impugned Decision noted that witnesses 132 and 287 have been accepted into the ICCPP and have been relocated within the scope of the programme.¹² The Single Judge therefore admitted the evidence of witnesses 132 and 287 previously excluded on the ground that "the security concerns that led the Single Judge to exclude the evidence of

⁵ On 28 April 2008, the Prosecution filed the Prosecution's Application for Leave to Appeal the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation (ICC-01/04-01/07-453). On 20 May 2008, the Single Judge granted this Application (ICC-01/04-01/07-483-Conf). On 2 June 2008, the Prosecution filed the Prosecution's Document in Support of Appeal against the Decision on the Evidentiary Scope of the Confirmation Hearing and Preventive Relocation (ICC-01/04-01/07-540).

⁶ See ICC-01/04-01/07-422, p. 3, ICC-01/04-01/07-453, para. 27.

⁷ Decision on Preventive Relocation, para. 40.

⁸ ICC/01/04-01/07-482-Conf-Exp.

⁹ ICC/01/04-01/07-482-Conf.

¹⁰ Report, para. 3.

¹¹ ICC-01/04-01/07-516.

¹² Impugned Decision, page 6.

Witnesses 132 and 287 as a result of their unlawful preventive relocation by the Prosecution no longer exist”.¹³

Threshold Criteria for Leave to Appeal

9. The Defence files this *Defence Application for Leave to Appeal the Single Judge’s Decision on Prosecution’s Urgent Application for the Admission of the Evidence of Witnesses 132 and 287* (“Defence Application”) pursuant to article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
10. Pre-Trial Chambers I and II have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets the following two cumulative criteria:
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁴

Issues on Appeal

11. Two appealable issues arise from the impugned Decision:
 - (1) The Single Judge improperly reconsidered her earlier Decision to exclude the evidence of witnesses 132 and 287 on purported new circumstances that did not justify such reconsideration;
 - (2) The Single Judge’s reconsideration, had very prejudicial consequences for the Defence, without hearing any submissions from the Defence.

Issue 1:

¹³ Impugned Decision, page 7. See also page 8.

¹⁴ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4; ICC-01/04-01/07-431, p. 4.

12. In the Decision on Preventive Relocation, it was explicitly decided that ‘the appropriate remedy for the Prosecution’s unauthorised preventive relocations of witnesses 132 and 287 is the exclusion of their statements, interview notes and interview transcripts for the purpose of the confirmation hearing’.¹⁵
13. It follows there is an unambiguous causal link between the Prosecutor’s unauthorised and thus unlawful conduct, on the one hand, and the adopted remedy by the Single Judge. At no point in the decision was there any indication that the adopted remedy was a provisional one, depending upon conditions to be fulfilled in the future, such as an improvement in the security situation of witnesses 132 and 287.
14. The Defence points out that the remedy adopted in this case serves three vital functions: a) to protect individual rights, b) to sanction unlawful conduct by the Prosecutor, with a view to deterrence and c) to preserve the integrity of the proceedings, in the sense that the Pre-Trial Chamber should not wish to be associated with unlawful conduct.
15. Indeed, the Single Judge clearly disapproved of the Prosecution’s practice of preventive relocation. She pointed out that relocation of witnesses is a matter for the VWU to decide; a power which should not be extended to the Prosecution for the following reasons:¹⁶
 - (i) When the Prosecution carries out the preventive relocation of a witness before referring that witness to the Victims and Witnesses Unit of the Registry or before the Registrar takes a decision on his or her inclusion in the ICCPP, the power to decide on whether the relevant witness should be relocated shifts de facto from the Registrar to the Prosecution. In the view of the Single Judge, once a witness is taken to a new location (alone or with members of his or her family) where he or she remains for a certain period of time in this new environment, returning the witness to their former place of residence as a result of the Registrar’s decision not to include the witness in the ICCPP would be disruptive for the witness and his or her family and would also most likely put them at risk;
 - (ii) When, as is the case with Witnesses 132, 238 and 287, 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. In the view of the Single Judge, relocating a witness immediately after the Registrar has decided not

¹⁵ As quoted in the impugned Decision, ICC-01/04-01/07-523, p. 5.

¹⁶ Decision on Preventive Relocation, para. 25.

to relocate that witness cannot be qualified on its face as "preventive relocation." Quite the contrary, it should be qualified as a "reactive relocation", which aims at compelling the Registrar to review his decision by presenting the relocation of the relevant witness as a *fait accompli*;

- (iii) 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.

16. The remedy adopted –which the Defence underlines should be distinguished from measures adopted of a different nature, like temporary exclusion- is fully justified on the basis of the Prosecution's unlawful conduct and finds full support in case law and doctrine. The Defence submits, therefore, that the Decision was entirely reasonable.

17. In light of the Single Judge's own reasoning, the Defence reads with surprise the Single Judge's finding that

‘at present, the security concerns that led the Single Judge to exclude the evidence of Witness 132 and 287 as a result of their unlawful preventive relocation by the Prosecution no longer exist’¹⁷

The latter part of this sentence is crystal clear: the exclusion of evidence is the result of unlawful Prosecutorial conduct (‘as a result of’). This was also the gist of the original decision.¹⁸ Indeed, the Decision on Preventive Relocation does not make any reference to security concerns being a reason for the initial exclusion of the evidence concerned. It appears, therefore, that the Single Judge inserts a rational, namely ‘security concerns’, that did not lead her to –or at least was not the predominant basis for- the exclusion of evidence.

The Defence wishes to underline that at the same time as the Single Judge's excluded these witnesses for the purposes of the confirmation hearing, the Single Judge referred their

¹⁷ Impugned Decision, p. 7.

¹⁸ See Decision on Preventive Relocation para. 25.

cases to the Registry for the implementation of appropriate protective measures;¹⁹ the Single Judge was thus already aware of the possibility that the witnesses could be admitted into the Registry relocation scheme before the confirmation hearing; as such, their actual admission into this programme cannot be considered to constitute a new, unforeseen fact.

18. The Defence also notes with concern that admission of evidence under these circumstances, without any compelling reasons, sets a wrong and dangerous precedent. Parties appearing before the Court must comply with all relevant standards and unlawful conduct must be adequately addressed. Remedies for unlawful conduct lose much of their force when they are subsequently invoked with significant ease. This does not only send out a wrong message to the party conducting itself in violation of applicable law –as that party may not feel compelled to refrain from that conduct in the future-; it also carries the risk that the Court itself condones in some way the unlawful conduct and may be associated with it.
19. Indeed, as already predicted by the Single Judge in the Decision on Preventive Relocation, the Prosecution has forced the issue of relocation of witnesses 132 and 287 by its preventive, or better termed “reactive” relocation of those witnesses.²⁰ As a direct result of this preventive relocation, the VWU has now accepted the witnesses into the ICCPP.²¹ The Single Judge already foresaw this and expressed her disapproval but instead of penalising the Prosecution for such conduct, she effectively rewarded the Prosecution for its conduct with the effect that the evidence is back in and so are the charges of sexual slavery.
20. It is submitted that the Single Judge’s Decision to reconsider her earlier decision to exclude the evidence of witnesses 132 and 287 impacts on the fairness and expeditiousness of the proceedings and an immediate resolution of the Appeals Chamber may materially advance the proceedings.

¹⁹ At para 40.

²⁰ See Decision on Preventive Relocation, para. 25.

²¹ Indeed, as the Registrar’s Report, ICC-01/04-01/07-482-Conf makes clear, the VWU had good reasons not to accept witnesses 132 and 287 in the ICCPP, which should be the last resort measure in the adequate protection of witnesses of the Court. Thus, as the Report states, « ensuring that the disruption, inevitably caused to the family of a witness participating in the ICCPP, is avoided is possible (para. 2). However, « due to the fact that the witnesses had been preventively relocated by the Prosecution and taking into account the unknown result of the current legal proceedings before the Court » the Registry has accepted witnesses 132 and 287 should be accepted into the ICCPP (paras. 3 & 4).

21. The Defence submits also with concern that it is extremely difficult to prepare its case when Decisions which are final no longer appear to be so. It is inconsistent with the principle of legal certainty and the suspect's right to prepare his case effectively.

Impact on Fairness of the Proceedings

22. The Defence submits that the fairness of the proceedings is clearly affected by the impugned Decision. Not only does the Decision condone improper Prosecution practice, which undermines the equality of arms due to its failure to respect the Decisions of a neutral body,²² it also results in the charges of sexual slavery as a war crime and crime against humanity being re-introduced.
23. It has further been acknowledged by the Single Judge that the credibility of the witnesses may be affected if the Prosecution may, *proprio motu*, decide to preventively relocate witnesses.²³ This goes to the heart of fairness, given that the witnesses provide core evidence in support of the re-introduced charges of sexual slavery as a war crime and crime against humanity.
24. In the Single Judge's Decision granting the Prosecution's Application for Leave to Appeal the Decision on Preventive Prelocation, the Single Judge relied on the Chamber's view that "fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings)."²⁴ On that basis, the Single Judge accepted that the fairness and expeditiousness of the proceedings was impacted by this issue. This should also apply to this Defence Application. Particularly in light of the sensitive procedural history of this application, and the absence of concrete reasons which would justify the Single Judge's recourse to the remedy of reconsideration, the right of the Defence to a fair, transparent and impartial trial is at the heart of this matter.

The issue significantly impacts on the expeditiousness of the proceedings

25. In an earlier decision, the Single Judge granted the prosecutor leave to appeal in relation to issues concerning the status of these witnesses notwithstanding the fact that the Single Judge acknowledged that irrespective of the outcome of the Appeals Chamber's Judgment

²² See Decision on Preventive Relocation, in particular, para. 30.

²³ Decision on Preventive Relocation, para. 34.

²⁴ Page 8.

it still remains open to the Prosecution to seek amendment of the charging document at a later stage either if it was in possession of additional evidence or if the Appeals Chamber ruled that in principle the Prosecutor could rely on such statements for the purposes of the confirmation of the charges relating to sexual offences.

26. In contrast, if the charges of sexual offences are confirmed on the basis of these witnesses the only remedy for the Defence is to await the finalisation of the trial on these charges. The impact on the Defence is thus far more disproportionate in comparison to the mere inconvenience to the Prosecution. In assessing this element of Article 82(1)(d) it is necessary to assess the impact of the appealable issue on the proceedings as a whole. Investigating these witnesses will impact on the time and resources available for investigating other elements of the charging document and will increase the length of the proceedings by virtue of their additional testimony, and additional testimony of defence witnesses who will be called to refute their claims.

A Decision of the Appeals Chamber would materially advance the proceedings.

27. In her Decision granting leave to appeal the Evidentiary Scope of the Confirmation Hearing, the Single Judge recognised that it was unlikely that the Appeals Chamber would issue its decision prior to the date scheduled for the confirmation hearing.²⁵ The Single Judge nonetheless granted leave to appeal and in so doing held that the Decision of the Appeals Chamber would materially advance the proceedings. Having so held, it would be fundamentally unfair to deprive the Defence the opportunity of seeking an appellate resolution of this issue, simply because the Prosecutor has no withdraw their appeal on this issue.

28. Indeed, the Prosecution's Application for Leave to Appeal the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules was granted on the issue concerning "the remedy for the unlawful preventive relocation by the Prosecution of Witnesses 132 and 287 was the exclusion of their evidence for the purpose of the confirmation hearing".²⁶

Issue 2

²⁵ Decision of 20 May 2008, page. 11.

²⁶ ICC-01/04-01/07-484 20-05-2008 1/12 CB PT, page 9.

29. In issuing the impugned Decision, the Single Judge did not hear any submissions from the Defence. The Prosecution Application was submitted on 27 May 2008 on an *inter partes* basis. Pursuant to regulation 24 in conjunction with regulation 34(b) of the Regulations of the Court, the Defence was entitled to respond to this Application within 21 days of its receipt. However, the Decision was issued one day after the Prosecution Application was filed. Although the Chamber may modify the deadline for such a response, the Chamber did not do so in the present instance, nor did they signal their intention to issue a Decision prior to the expiration of the deadline to respond. Indeed, the Defence was in no position to adequately respond within one day.
30. In addition, in view of the Single Judge's reconsideration of this issue, the Prosecution has withdrawn its appeal on this issue which was pending before the Appeals Chamber. The right of the Defence to respond to this issue on appeal has also been eliminated.
31. The Defence concludes that its right to be heard on this issue was therefore completely denuded of substance; since it was not put in a position to voice its concerns and legal arguments in a timely manner, an appeal against the decision is the only remedy to correct this procedural fault.

Impact on Fairness of the Proceedings

32. It is submitted that a Decision of such importance, given that as a consequence the very serious charges of sexual slavery as a war crime and a crime against humanity were brought back, should not have been issued without given an opportunity to the Defence to make submissions. This is wholly in violation of Article 67 of the Rome Statute, the importance of which was fully endorsed in the Appeals Chamber's 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".²⁷ The fairness of the proceedings is thereby gravely undermined.
33. The scope of the right to be heard has been explored both before the *Ad Hoc* International Criminal Tribunals and the International Criminal Court. In a Decision of 31 March 2006, the DRC Pre-Trial Chamber held that the fairness of proceedings was predicated on *inter alia* the principle of adversarial proceedings.²⁸

²⁷ Appeals Chamber's Decision of 13 May 2008, ICC-01/04-01/07-475, para. 57.

²⁸ Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 31 March 2006, ICC-01/04-135.

34. The Chamber cited with approval the decision of the European Court of Human Rights (« ECHR ») to the effect that the right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision”.²⁹
35. In the current case, the Appeals Chamber, in its *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"* has made a reference to the Grand Chamber case of *Rowe and Davis v. the United Kingdom* before the ECHR:

"60. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 66-67).[...]

62. [...] Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.”³⁰

It thus underlined that:

- a) in balancing the various interests at stake, the Pre-Trial Chamber must make sure that adequate safeguards are in place to protect the interests of the suspect so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms;
- b) prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected; [...]³¹

36. The ICTY Appeals Chamber has held that “the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial. The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the Prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial

²⁹ *Ibid*, footnote 52 quoting *Morel v. France*, judgment of 6 June 2000, Application no. 34130/96, para. 27.

³⁰ ICC-01/04-01/07-475, para. 57, with reference to CEDH, *Brandstetter c. Autriche*, Requête no11170/84; 12876/87; 13468/87, Arrêt du 28 août 1991, para 60-62. (<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=4814&sessionId=8624706&skin=hudoc-fr&attachment=true>.)

³¹ ICC-01/04-01/07-475, para. 73

Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the Prosecution and from its argument on the applicable law.”³²

37. Thus, clearly, the denial of the right to be heard has an immediate impact on the fairness of the proceedings.

Impact on the Expeditionousness of the Proceedings

38. The denial of the right to be heard also impacts on the expeditionousness of the proceedings. Hearing both parties and providing them with the information necessary to adequately respond facilitates and thus also expedites the proceedings. In this context, the Honourable Single Judge in the *Thomas Lubanga Dyilo* case has held that an issue related to the regime under which the Defence “can get notice and participate as far as possible in the decision-making process” concerning Prosecution applications for protective measures, is “directly related to the expeditious conduct of the proceedings”.³³

An Immediate Resolution may materially advance the Proceedings

39. The issue at stake in relation to which the Defence was not heard is fundamental. At stake is the admission of evidence which is crucial for the confirmation of two charges against Mr Katanga, sexual slavery as war crime and crimes against humanity. Two further charges will slow the proceedings since they will require more time to lead investigations, examine witnesses, etc. Given the importance of the Decision, it is incredibly important to allow the Defence to be heard.

Conclusion

³² Prosecutor v. Jelusic Appeals judgement of 5 July 2001 at para 27:

<http://www.un.org/icty/jelusic/appeal/judgement/index.htm>

See also the opinion of ad hoc Judge Barwick in the Nuclear Tests (Australia v. France), ICJ Reports 1974, p. 442 “It is of course for the Court to resolve all questions which come before it: the Court is not bound by the views of one of the parties. But is this a sufficient or any reason for not notifying the parties of an additional question which the Court proposes to consider and for not affording the parties an opportunity to put before the Court their views as to how the Court should decide the question, whether it be one of fact or one of law? The Court’s procedure is built on the basis that the parties will be heard in connection with matters that are before it for decision and that the Court will follow what is commonly called the “adversary procedure” in its consideration of such matters. See, e.g., Articles 42, 43, 46, 48 and 54 of the Statute of the Court. The Rules of Court *passim* are redolent of that fact. Whilst it is true that it is for the Court to determine what the fact is and what the law is, there is to my mind, to say the least, a degree of judicial novelty in the proposition that, in deciding matters of fact, the Court can properly spurn the participation of the parties. Even as to matters of law, a claim to judicial omniscience which can derive no assistance from the submissions of learned counsel would be to my mind an unfamiliar, indeed, a quaint but unconvincing affectation.”

³³ Decision of 23 June 2006 at para 56.

33. On these grounds, the Defence requests the Single Judge to grant leave to appeal the *Decision on Prosecution's Urgent Application for the Admission of the Evidence of Witnesses 132 and 287*" pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.

Respectfully submitted,



David HOOPER

Dated this 3rd June 2008

At London/Amsterdam