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Pénale
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**International
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Date: 9 June 2008

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***

Confidential

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**Prosecution's Consolidated Response to Defence Applications for Leave to
Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287**

Source: Office of the Prosecutor

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

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Introduction

In mid-April, the Single Judge ruled that the evidence from two witnesses was excluded for the purposes of the confirmation hearing.¹ In subsequent decisions, the Single Judge has made clear that this was based on “security concerns”,² namely the fact that the witnesses were “at that time [...] unprotected”,³ and the timetable for the disclosure of evidence for the confirmation hearing.⁴ Since then, the confirmation hearing has been postponed, and the witnesses have been provided with protection.

Thus on 28 May 2008, the Single Judge observed that the reasons underpinning a prior exclusion of the evidence of two witnesses for the purposes of the confirmation hearing no longer existed, and held “that therefore there is currently no impediment [...] for the inclusion in the Prosecution List of Additional Evidence of the statements, interview notes and interview transcripts of Witnesses 132 and 287”.⁵ The Defences of both Mathieu NGUDJOLO CHUI (“NGUDJOLO”) and Germain KATANGA (“KATANGA”) have applied for leave to appeal against the Decision.

The Prosecution submits that the Applications have misinterpreted aspects of the Decision, and that some of the issues portrayed, and the arguments made in support, do not arise out of the Decision at hand. Further, the Prosecution submits that the inclusion of evidence on the Prosecution’s list for the purposes of the confirmation hearing, once the protection of a witness has been secured and within the terms of Rule 121(4) and (5), does not affect the fair and expeditious conduct of the proceedings as asserted by the Defence. The Prosecution accordingly submits that the Applications for Leave to Appeal should be denied.

¹ ICC-01/04-01/07-423-Conf, para. 39.

² ICC-01/04-01/07-523, 28 May 2008, pp. 7, 8.

³ ICC-01/04-01/07-483-Conf, 20 May 2008, p. 10.

⁴ ICC-01/04-01/07-523, 28 May 2008, p. 6.

⁵ ICC-01/04-01/07-523, 28 May 2008, p. 8.

Procedural background

1. On 18 April 2008, the Single Judge issued 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".⁶ In that decision, the Single Judge ruled that the Prosecution had no authority to preventively relocate witnesses; and also ruled *proprio motu* that as a result of the unauthorized nature of their relocation, the statements, interview notes and transcripts of witnesses 132 and 287 were to be excluded for the purposes of the confirmation hearing.⁷
2. The Prosecution sought leave to appeal the 18 April 2008 Decision, including in relation to the exclusion of the evidence of witnesses 132 and 287.⁸ In granting leave to appeal that decision,⁹ the Single Judge clarified that their evidence had been excluded because:

"the type of protection provided for Witnesses 132 and 287 was only their unlawful relocation by the Prosecution; that therefore they were to be considered at the time the Decision was issued as being unprotected; and that, as Witnesses 132 and 287 were unprotected, even redacted or summary versions of their evidence could not be admitted for the purpose of the confirmation hearing in order to ensure their protection since the content of their statements would inevitably disclose their identities"¹⁰

and, as a result, statements of the two witnesses and associated documents could not be disclosed to the Defence within the time limits prescribed in Rule 121.¹¹

3. At the time of the 18 April 2008 Decision, excluding the evidence of witnesses 132 and 287, the confirmation hearing was scheduled for 21 May 2008.¹² On 25 April 2008, the confirmation hearing was postponed until 27 June 2008.¹³

⁶ ICC-01/04-01/07-411-Conf-Exp (the "18 April 2008 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). The Prosecution refers to the detailed account of the procedural background set out in that Decision, pp. 4-9.

⁷ Decision on Preventive Relocation, paras. 22-34, 39.

⁸ ICC-01/04-01/07-453, 28 April 2008.

⁹ ICC-01/04-01/07-483-Conf, 20 May 2008 ("Decision Granting Prosecution Leave to Appeal").

¹⁰ *Ibid*, p. 10.

¹¹ see ICC-01/04-01/07-523, 28 May 2008, pp. 5-6.

¹² Decision, para. 9.

¹³ ICC-01/04-01/07-446.

4. After the 18 April 2008 Decision, the Registrar admitted the two witnesses into the Court's Protection Program ("ICCPP").¹⁴
5. As a result, the witnesses were adequately protected; and due to the postponement of the confirmation hearing, the Prosecution was in a position to disclose their evidence and include it in an amended list of evidence within the time limits prescribed in Rule 121(4) and (5).
6. The Prosecution therefore filed an urgent application on 27 May 2008, requesting that "the Chamber make an order that the statements, interview notes and interview transcripts of witnesses 132 and 287 are in the present circumstances admissible for the purposes of the confirmation hearing."¹⁵
7. On 28 May 2008 the Single Judge ruled that "the security concerns that led to the finding of inadmissibility of the evidence of Witnesses 132 and 287 no longer exist, and that therefore there is currently no impediment based on such security concerns for the inclusion in the Prosecution List of Additional Evidence of the statements, interview notes and interview transcripts of Witnesses 132 and 287".¹⁶
8. On 3 June 2008, the Defences of both NGUDJOLO and KATANGA applied for leave to appeal against the Decision.¹⁷
9. The Prosecution hereby files a consolidated response to both Applications for Leave to Appeal, pursuant to Regulation 65(3).

The issues for which leave is sought

10. NGUDJOLO sought leave to appeal a single issue of whether the Single Judge reviewed inappropriately, and in violation of the rights of the defence to a fair

¹⁴ ICC-01/04-01/07-482-Conf, 19 May 2008; referred to in ICC-01/04-01/07-523, 28 May 2008, p 6.

¹⁵ ICC-01/04-01/07-516-Conf.

¹⁶ ICC-01/04-01/07-523, 28 May 2008, p. 8 ("the Decision").

¹⁷ ICC-01/04-01/07-544-Conf-Exp ("Ngudjolo's Application for Leave to Appeal"); ICC-01/04-01/07-545 ("Katanga's Application for Leave to Appeal").

and impartial trial, the 18 April 2008 Decision, in which it had excluded the evidence of witnesses 132 and 287 for the purposes of the confirmation hearing.¹⁸

11. KATANGA sought leave to appeal two issues,¹⁹ namely:

- “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;”
- “The Single Judge’s reconsideration, had [*sic*] very prejudicial consequences for the Defence, without hearing any submissions from the Defence.”

12. The Prosecution notes that the issues, and the arguments raised in support, substantially overlap. Many arguments also appear to be based, in large part, on a misunderstanding or misinterpretation of the Single Judge’s reasons for excluding the witnesses. For the reasons set out below, the Prosecution submits that none of the issues identified in the two Applications fulfil the requirements of Article 82(1)(d), and therefore opposes granting leave to appeal.

**None of the issues raised in the Applications for Leave to Appeal
meets the requirements for granting leave to appeal**

13. In responding to the Applications, the Prosecution recalls that submissions regarding the merits of the impugned decision are not relevant for the determination of whether an issue fulfils the criteria prescribed in Article 82(1)(d).²⁰ In particular, the Prosecution notes that the third set of arguments raised by NGUDJOLO regarding fairness, concerning the alleged consideration by the Single Judge of irrelevant factors,²¹ goes directly to the merits of the

¹⁸ Ngudjolo’s Application for Leave to Appeal, para. 15: “l’Honorable Juge unique a revu de manière inadéquate et en violation des droits de la Défense à un procès équitable et impartial, sa décision du 21 avril 2008 intitulée ‘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’, décision dans laquelle elle excluait les témoins 132 et 287 pour la confirmation des charges.”

¹⁹ Katanga’s Application for Leave to Appeal, para. 11.

²⁰ Contrast, for example, Ngudjolo’s Application for Leave to Appeal, paras. 16-24; Katanga’s Application for Leave to Appeal, paras. 13-21

²¹ Ngudjolo’s Application for Leave to Appeal, paras. 33-38.

Decision rather than its impact on the fair conduct of the proceedings.²² The Prosecution submits that such arguments do not demonstrate how the issue at hand affects the fair conduct of the proceedings.²³

Many of the arguments raised in the Applications misrepresent the reasons for the original exclusion of the witnesses and the basis for the impugned Decision, and are thus irrelevant

14. A range of arguments presented in both Applications are based on the assertion that the 18 April 2008 Decision ruled that the evidence of witnesses 132 and 287 were excluded from the Prosecution's List of Evidence in order to sanction the Prosecution's preventive relocation of those witnesses, or to protect the rights of the defence or the integrity of the proceedings.²⁴ Such arguments are based on a false premise.

15. While the 18 April 2008 Decision did not expressly set out the basis for the initial exclusion of the evidence,²⁵ the Single Judge made it clear in the Decision Granting Leave to Appeal that the exclusion was based on the question of the protection of the witnesses. The only protection which was provided at that stage was the preventive relocation by the Prosecution, and the Single Judge had ruled that this could not be maintained. The witnesses were therefore unprotected, and as a result their evidence could not be disclosed to the Defences and therefore could not be relied upon at the confirmation hearing.²⁶

²² See further Prosecution's submissions in ICC-01/04-01/07-215-Anx OA, 20 February 2008, para. 30.

²³ In any event, the inclusion of the witnesses in the ICCPP (along with the change of date of the confirmation hearing) clearly does constitute new circumstances (contrast Ngudjolo's Application for Leave to Appeal, para. 34) – these changes fundamentally altered the two key elements upon which the exclusion of the evidence was based. Furthermore, as argued above, the mere fact that the Single Judge recognised that preventive relocation may impact on the credibility of a witness does not mean that the admission of that witness's evidence necessarily impacts on the fair conduct of the proceedings or warrants leave to appeal (contrast Ngudjolo's Application for Leave to Appeal, para. 35); rather, such issues go to the weight to be accorded to the evidence and must be argued before the Pre-Trial Chamber (see paras. 27-28, below). Finally, the Prosecution submits that there is no basis for the assertion that the Single Judge was unduly influenced by public or media statements (contrast Ngudjolo's Application for Leave to Appeal, para. 38).

²⁴ See e.g. Katanga's Application for Leave to Appeal, paras. 13-14, 16-18, 22; Ngudjolo's Application for Leave to Appeal, paras. 18, 24.

²⁵ Decision on Preventive Relocation, para. 39.

²⁶ Decision Granting Prosecution Leave to Appeal, p. 10.

16. The impugned Decision further confirms that the reason for the initial exclusion of the evidence were concerns over the security of the witnesses, twice referring to “the security concerns what led the Single Judge to exclude the evidence of Witnesses 132 and 287”.²⁷ The fact that the exclusion of the evidence of witnesses 132 and 287 was exclusively based on the security concerns and protection of those witnesses is further underlined by the way in which the 18 April 2008 Decision addressed the situation of witness 238.²⁸

17. Thus, the arguments raised in the Applications which are based on other alleged or purported rationales for the initial exclusion of the evidence – such as sanctioning the Prosecution, deterring future conduct, or preserving the integrity of the proceedings²⁹ – have no relevance to the Decision at hand.³⁰ The initial exclusion, and subsequent reintroduction, of the evidence of the witnesses was based solely on whether they were able to be protected. The Decision did not, and cannot on any fair reading be interpreted to, “condone” any improper practices of the Prosecution.³¹

²⁷ Decision, p. 7; see also p. 8 (dispositif), “the security concerns what led to the finding of inadmissibility of the evidence of Witnesses 132 and 287”.

The inability to protect the witnesses was taken into consideration in combination with the time-limits imposed by the date of the confirmation hearing at that stage rendering it impossible to comply with the disclosure obligations under Rule 121, Decision, pp. 5-6:

“CONSIDERING that at the time the Decision was issued on 18 April 2008, (i) the confirmation hearing was scheduled for 21 May 2008 and (ii) the Prosecution had to make available to the Defence the evidence on which it intended to rely at the confirmation hearing with the redactions authorised by the Single Judge by 21 April 2008;

CONSIDERING that, under these circumstances, and due to the Prosecution's unlawful preventive relocation of Witnesses 132 and 287, no adequate protection for Witnesses 132 and 287 could have been provided prior to 21 April 2008 that would have permitted the use of their evidence at the confirmation hearing scheduled for 21 May 2008;” (emphasis added).

²⁸ Witness 238 had also been preventively relocated by the Prosecution. In contrast to witnesses 132 and 287, the Decision on Preventive Relocation ordered the immediate protection of witness 238 through the ICCPP. Given that witness 238 was now protected, there was no impediment to the inclusion of the evidence of this witness for the purposes of the confirmation hearing, despite their prior preventive relocation (see Decision on Preventive Relocation, paras. 39, 52). Neither Defence team sought leave to appeal the non-exclusion of the evidence of witness 238.

²⁹ See e.g. Katanga's Application for Leave to Appeal, para. 14; see further footnote 24, above.

³⁰ The Prosecution also recalls that the Decision against which the Defences are seeking leave to appeal does not address the issue of whether the Prosecution may relocate witnesses. That was the object of the Decision on Preventive Relocation, and is the subject of an appeal presently pending before the Appeals Chamber (ICC-01/04-01/07-541 OA7, 2 June 2008). Thus arguments based on the permissibility or not of such relocations in themselves are also irrelevant for the present applications (see e.g. Ngudjolo's Application for Leave to Appeal, paras. 24, 35; Katanga's Application for Leave to Appeal, paras. 15, 19).

³¹ Katanga's Application for Leave to Appeal, para. 22; see also Katanga's Application for Leave to Appeal, paras. 14, 17-18; Ngudjolo's Application for Leave to Appeal, paras. 18 and 36-38.

None of the issues raised in the Applications for Leave to Appeal significantly affect the fair conduct of the proceedings

(a) *The Decision did not affect the fairness of the proceedings by reconsidering a prior ruling*

18. Both Applications for Leave to Appeal argue that the Decision impacts on the fairness of the proceedings because it constituted a reconsideration of the 18 April 2008 Decision, a remedy which they assert the Single Judge had previously denied the existence of.³² The Prosecution submits that regardless of whether or not a Chamber may or may not reconsider a prior decision, or the circumstances in which such reconsideration may occur,³³ the impugned Decision did not “reconsider” the previous ruling in this sense: rather, it merely clarified the basis for the original exclusion and confirmed that this basis no longer applied to the present circumstances.

19. Further, the initial exclusion of the evidence of the witnesses was ordered by the Single Judge with a view to ensure the protection of those witnesses.³⁴ Thus, regardless of the existence or scope of any broader power to reconsider a prior

³² Ngudjolo’s Application for Leave to Appeal, para. 25, 30-32; see also Katanga’s Application for Leave to Appeal, paras. 11(1), 24. In relation to the argument raised by Ngudjolo regarding the denial of a recent motion on the basis that it amounted to a request for reconsideration, the Prosecution submits that any alleged unfairness that Ngudjolo may have suffered in relation to that motion is not relevant to an application for leave to appeal against this, unrelated, Decision. Further, the Prosecution notes that the Decision in issue is the decision of the Single Judge to permit the Prosecution to include the statements, interview notes and transcripts of witnesses 132 and 287 in its amended List of Evidence for the purposes of the confirmation hearing. It is not the determination of the Registrar to include the witnesses in the ICCPP, and the reasons for this determination of the Registrar are not relevant for the present Applications for Leave to Appeal (see Ngudjolo’s Application for Leave to Appeal, paras. 21-22, 35-36.)

³³ Pre-Trial Chamber I has held that “in principle, the statutory framework set out by the Statute and the Rules does not provide for a motion of reconsideration as a procedural remedy against any decision taken by the Chamber or the single judge” (see e.g. ICC-01/04-01/07-477, 15 May 2008, p. 5, emphasis added); and Pre-Trial Chamber II has also ruled that “[t]he instruments governing the Court’s procedure make no provision for such a broad remedy as an unqualified ‘motion for reconsideration’” (ICC-02/04-01/05-60, 28 October 2005, para. 18; emphasis added).

In applying these principles, the Single Judge of Pre-Trial Chamber I has recognized that requests for reconsideration may be made, but that “such requests are to be confined to exceptional circumstances” (ICC-01/04-01/07-259, 10 March 2008, p. 5). The Prosecution thus maintains its position that a Chamber has the power to reconsider a prior decision if there has been a change in circumstances, or where the previous decision was erroneous or has caused an injustice, consistent with the practice of the ad hoc tribunals and national court practices (see e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-120, 22 May 2006, paras. 5-9, in particular para. 8; *Prosecutor v Kony et al*, ICC-02/04-01/05-58, 18 October 2005, para. 8;).

³⁴ See paras. 15-17, above.

decision, Regulation 42(3) provides an explicit legislative basis for such a variation of what was essentially a protective order.

(b) The Decision does not raise the issue of the right to be heard or in this regard significantly affect the fair conduct of the proceedings

20. The Applications also raise the fact that the Decision was issued before the Defences were able to file a response to the Prosecution's Application: either as a separate issue,³⁵ or as an argument regarding the impact on the fairness of the proceedings.³⁶ The Prosecution submits that the impact of any denial of the right to be heard on the fairness of the proceedings can only be assessed in the context of the underlying substantive issue, and the interest of the party in that issue: that underlying issue, and its impact on the party, must itself affect the fair conduct of the proceedings.

21. While the right to be heard is an important right of the parties, the fact that a party was not heard in relation to a given issue does not necessarily, and in itself, significantly affect the fair conduct of the proceedings, within the meaning of Article 82(1)(d), or mean that immediate resolution of that issue would materially advance the proceedings.³⁷

22. In the present instance, the Defences had not requested the exclusion of the evidence, nor made any submissions in this regard. The basis on which the

³⁵ Katanga's Application for Leave to Appeal, Issue 2, paras. 29-39. The Prosecution recalls its prior submissions that in general a denial of the right to be heard, in itself, does not constitute an "issue" for the purposes of granting leave to appeal; rather, it is merely a procedural step which was taken towards the resolution of the substantive issues in the Decision. (see further *Prosecutor v Katanga*, ICC-01/04-01/07-110, 17 December 2007, paras. 10-12; in that instance, the Single Judge denied the Defence the right to appeal that alleged issue, holding that "in the view of the Single Judge, the second issue, as opposed to the first issue, constitutes an issue arising from the Decision" - ICC-01/04-01/07-116, 19 December 2007, pp. 5-6.) An alleged error in the procedure leading to a decision, such as a denial of a right to be heard, may be properly raised as a procedural error on appeal if the substantive issue in the decision, in relation to which this procedural irregularity occurred, itself qualifies for leave to appeal. KATANGA appears to recognise that it is the underlying substantive issue, rather than the procedural aspect of the right to be heard, which is critical for the application for leave to appeal: "The issue at stake in relation to which the Defence was not heard is fundamental", Katanga's Application for Leave to Appeal, para. 39.

³⁶ Ngudjolo's Application for Leave to Appeal, paras. 27-29.

³⁷ Absent a systemic aspect or implications, the issue would be limited to the denial of the right to be heard on one isolated occasion - see further *Prosecutor v Katanga*, ICC-01/04-01/07-110, 17 December 2007, paras. 13-15.

Prosecution was not permitted to include the evidence of witnesses 132 and 287 was, as outlined above, limited to the adequacy of their protection and ensuring their security – as was their re-inclusion.

23. The Prosecution recalls that the substance of this Decision was limited to the inclusion of the material on the List of Evidence which the Prosecution intends to bring in support of the charges. In the present context, the Defences have no identifiable interest in the nature of the material included on the Prosecution List of Evidence. Rather, they have a right to be heard on the admission of such material into evidence, and the weight accorded to it, at the confirmation hearing. The Defences will have a full opportunity to make submissions, and be heard, on the admissibility and probative value of the evidence of these two witnesses before the Pre-Trial Chamber during the confirmation hearing.

24. The Prosecution thus submits that in the context of authorising the Prosecution to include the evidence of two witnesses in its List of Evidence for the purposes of the confirmation hearing, after their protection had been secured and subject to the Prosecution disclosing that evidence within the timeframe prescribed in Rules 121(4) and (5), the fact that the Single Judge did not wait for submissions from the Defence does not significantly affect the fair conduct of the proceedings.

(c) The inclusion of the evidence of witnesses 132 and 287 for the purposes of the confirmation hearing does not in itself affect the fairness of the proceedings

25. The Prosecution submits that the additional arguments raised in the Applications for Leave to Appeal regarding the alleged impact of the inclusion of witnesses 132 and 287 for the purposes of the confirmation hearing also do not demonstrate any significant impact on the fair conduct of the proceedings.

The bringing of additional charges

26. The mere fact that at this early stage additional charges will be included in an amended Document Containing the Charges, and that additional evidence will be

included in the List of Evidence to support these charges,³⁸ as expressly contemplated by Article 61(4) and Rule 121(4), cannot demonstrate that the issue affects the fair conduct of the proceedings. The bringing of charges and evidence against a person is at the core of the Court's function. In this case, the additional charges are consistent with the original arrest warrants issued against the suspects, and notice was given of the proposal to add the charges and items of evidence when the Document Containing the Charges was filed.³⁹ Thus any addition of such charges, and of the statements of these two witnesses, does not adversely affect the fairness of the proceedings.

The alleged impact on the credibility of the witnesses

27. The fact that the Single Judge recognised that a general practice of preventive relocation may have an impact on the credibility of witnesses⁴⁰ does not demonstrate that the inclusion of the evidence of these two witnesses, who are now under the protection of the ICCPP administered by the Registry, significantly affects the fair conduct of the proceedings. The comments of the Single Judge in the 18 April 2008 Decision were limited to noting, in the context of the overall system of protection, that the central role of the Registry provides a further safeguard to the credibility of the witnesses. The credibility of witnesses 132 and 287 was never in issue.

28. Further, the fact that an issue may impact on the credibility of a given piece of evidence, without more, will not generally affect the fairness of the proceedings within the meaning of Article 82(1)(d). The lack of such impact on the fairness of the proceedings is particularly evident in the present case. The evidence in question is the written statements of two witnesses, who will not be called to testify at the hearing, which were taken before their preventive relocation by the Prosecution. Regardless of any hypothetical impact of preventive relocation on the evidence of a witness in general, it could have had no such impact on the

³⁸ Katanga's Application for Leave to Appeal, para. 22.

³⁹ ICC-01/04-01/07-422, 21 April 2008, paras. 5-6.

⁴⁰ See Katanga's Application for Leave to Appeal, para. 23; Ngudjolo's Application for Leave to Appeal, paras. 18, 24, 35.

evidence in question in this instance. Furthermore, this Decision has been taken for the purposes of the confirmation hearing, and: “the evidentiary debate at the confirmation hearing is limited”;⁴¹ the confirmation hearing does not necessarily require a full testing of the reliability of the witnesses or other evidence;⁴² and the “Pre-Trial Chamber’s rulings on the admissibility and probative value of evidence are not binding on a Trial Chamber.”⁴³

29. In any event, even to the extent that the credibility of a piece of evidence, and the weight that should be accorded to it, is relevant at a given stage, this is an issue which should be debated before the Pre-Trial or Trial Chamber. The Defences will have such an opportunity to make submissions on the probative value of the relevant material during the confirmation hearing.

The arguments based on the prior grant of leave to appeal to the Prosecution

30. Finally, the analogy drawn⁴⁴ between the impact of the Single Judge’s exclusion of this evidence in the 18 April 2008 Decision, and the impact of the subsequent recognition that the reasons for that exclusion no longer applied, is a false one. The initial exclusion directly impacted on the Prosecution’s right and obligation to bring a case against the suspects. The suspects, on the other hand, have no procedural right at this stage not to be prosecuted for certain charges.⁴⁵ The fact that the Single Judge permitted the Prosecution to include certain evidence in its amended List of Evidence, within the timetable prescribed in Rule 121(4) and (5),

⁴¹ ICC-01/04-01/07-412, 18 April 2008, p. 4; see also p. 5.

⁴² *Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 47.

⁴³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-915, 24 May 2007, para 75; see also *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-412, 18 April 2008, p.5.

⁴⁴ The Applications for Leave to Appeal include arguments that because the Single Judge granted the Prosecution leave to appeal the exclusion of the evidence of the two witnesses, the impugned Decision (which recognised that the reasons for that exclusion no longer existed and thus ruled that there was no longer any such impediment to the inclusion of the evidence in the amended list) must also qualify for leave to appeal: see Katanga’s Application for Leave to Appeal, para. 24; Ngudjolo’s Application for Leave to Appeal, para. 30.

⁴⁵ The Prosecution notes that KATANGA is not raising a claim of *ne bis in idem*, or that the additional charges are outside of the jurisdiction of the Court or inadmissible; rather, he simply claims that fairness is affected by the additional of particular charges (see Katanga’s Application for Leave to Appeal, para. 22).

thus does not fail to “respect [...] the procedural rights of [...] the Defence”⁴⁶ or otherwise affect the fair conduct of the proceedings.

The issues identified also do not significantly affect the expeditious conduct of the proceedings

31. The Prosecution also submits that the arguments raised by the Defences fail to demonstrate that this issue would affect the expeditious conduct of the proceedings.⁴⁷ The additional charges which can now be included in an amended Document Containing the Charges at this stage will not substantially increase the length of the confirmation hearing, and will prevent a further delay which would be caused by the need to conduct a second confirmation hearing on the additional charges at a later date under Article 61(9).⁴⁸
32. Under the arguments put forward by the Defences, any decision to include or admit evidence would affect the expeditious conduct of the proceedings as it would increase their length and may require the calling of additional evidence in response. This cannot be the case. Firstly, the evidence in question is limited to the written statements of two witnesses. Secondly, the inclusion of this evidence does not substantially alter the nature of the case against the suspects; rather, it relates to factual allegations which have already been included in the Document Containing the Charges. Where a limited range of material will be provided to the Defences in a timely manner, in accordance with Rules 121(4) and (5), its inclusion in the List of Evidence for the purposes of the confirmation hearing does not significantly affect the expeditious conduct of the proceedings.

⁴⁶ Katanga’s Application for Leave to Appeal, para. 24, quoting Decision Granting Prosecution Leave to Appeal, p. 8.

⁴⁷ Ngudjolo’s Application for Leave to Appeal, paras. 39-40; Katanga’s Application for Leave to Appeal, paras. 25-26. In relation to the additional argument raised in Katanga’s Application for Leave to Appeal regarding the impact of the denial of the right to be heard on the expeditious conduct of the proceedings (para. 38), the Prosecution submits that the analogy which the Defence seeks to draw is again a false one. Unlike the prior decision cited, this Decision does not govern the ongoing regime for notice of applications and the right to be heard. The fact that this Decision was taken without waiting for responses from the Defences does not affect the expeditious conduct of the proceedings.

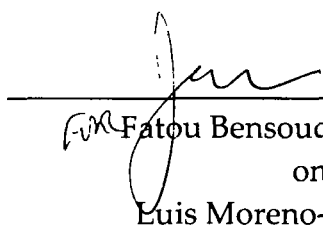
⁴⁸ In the Decision Granting Prosecution Leave to Appeal, the Single Judge explicitly referred to the possibility of the Prosecution adding charges pursuant to Article 61(9), resulting in a further confirmation hearing – see p. 11.

The immediate resolution of the issues further would not materially advance the proceedings

33. Finally, the Prosecution submits that the immediate resolution of this issue, which is limited to the inclusion of material relating to two witnesses on the List of Evidence for the confirmation hearing in this case, would not materially advance the proceedings. The Defences have failed to raise any arguments which could support such a proposition. They largely rely on references to the Single Judge's grant of leave to the Prosecution in respect of different issues, namely the original exclusion of the evidence of the two witnesses⁴⁹ or the broader issue of preventive relocation.⁵⁰ Preventive relocation is not at issue in this Decision. Further, while the initial exclusion of the two witnesses precluded any further debate over their evidence (thus requiring immediate intervention of the Appeals Chamber), the inclusion of their statements in the List of Evidence does not preclude the Defences from making submissions before the Pre-Trial Chamber regarding the admissibility of and weight to be attributed this evidence for the purposes of the confirmation of charges. The resolution of the issue by the Appeals Chamber at this stage is therefore not required.

Relief sought

34. For the reasons set out above, the Prosecution requests that the Single Judge deny the Applications for Leave to Appeal.



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

Dated this 9th day of June, 2008
At The Hague, The Netherlands

⁴⁹ Katanga's Application for Leave to Appeal, paras. 27-28; Ngudjolo's Application for Leave to Appeal, para.

41. See further para. 30, above.

⁵⁰ Ngudjolo's Application for Leave to Appeal, para. 42.