

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 18 April 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 Document  
URGENT**

**Decision on the admissibility for the confirmation  
hearing of the transcripts of interview of deceased Witness 12**

**Decision 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

**Counsel for the Defence of Mr Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila  
Ms Maryse Alié

**Legal Representatives of the Victims**

Ms Carine Bapita Buyagandu  
Mr Joseph Keta  
Mr J.L. Gilissen

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

**I, Judge Sylvia Steiner, judge at the International Criminal Court (“the Court”);**

**NOTING** the “Decision Establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui”<sup>1</sup> (“the Decision Establishing a Calendar”) issued on 10 March 2008, in which the Single Judge decided that:

- (i) the Prosecution would have until 20 March 2008 to file written submissions concerning the admissibility of the statement of witness 12, who, according to the Prosecution, died in September 2007; and that
- (ii) the Defences of Germain Katanga and Mathieu Ngudjolo Chui would have until 1 April 2008 to file their responses to the submissions of the Prosecution;

**NOTING** the “Prosecution's Observations regarding Admission for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12 pursuant to Articles 61 and 69 of the Statute”<sup>2</sup> (“the Prosecution’s Observations”) filed on 20 March 2008, in which the Prosecution requested Pre-Trial Chamber I (“the Chamber”) to admit the transcripts of the interview with the deceased Witness 12 as evidence for the purposes of the confirmation hearing;

**NOTING** the “Defence Response Concerning the Admission of the Statement of Witness 12”<sup>3</sup>, filed on 31 March 2008 by the Defence of Germain Katanga, and the “*Observations de la Défense ayant trait au Témoin 12 décédé en réponse à celles du Procureur en prévision de l’audience de confirmation des charges*”<sup>4</sup> filed by the Defence of Mathieu Ngudjolo Chui on 1 April 2008, in which both Defences requested the Single Judge to decide that the statement of Witness 12 is inadmissible for the purpose of the confirmation hearing;

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<sup>1</sup> ICC-01/04-01/07-259

<sup>2</sup> ICC-01/04-01/07-336

<sup>3</sup> ICC-01/04-01/07-348

<sup>4</sup> ICC-01/04-01/07-351

**NOTING** articles 61, 67 and 69 of the *Rome Statute* (“the Statute”), and rules 63 and 68 of the *Rules of Procedure and Evidence* (“the Rules”);

**CONSIDERING** that, as the Single Judge, has recently stated:

The confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial.<sup>5</sup>

**CONSIDERING** therefore, that the confirmation hearing is neither a ‘trial before the trial’ nor a “mini-trial”; that the main goal is to ensure “that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she has been charged”;<sup>6</sup> and that, accordingly, the evidentiary debate at the confirmation hearing is limited, which imposes upon the Prosecution the duty to limit the number of witnesses on whom it intends to rely at the confirmation hearing to the “core witnesses” of the case;<sup>7</sup>

**CONSIDERING** that the Prosecution alleges that Witness 12 is a core witness in the present case;

**CONSIDERING** that article 61(5) of the Statute expressly states that, for the purpose of the confirmation hearing, “the Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at trial;” that according to this provision, although oral testimony is permissible as evidence at the confirmation hearing, the evidentiary debate at the confirmation hearing can be based on written, audio or video evidence; and that therefore, as shown by the case

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<sup>5</sup> ICC-01/04-01/07-411, para 6

<sup>6</sup> ICC-01/04-01/07-411, para. 5.

<sup>7</sup> ICC-01/04-01/07-411, para 78

of *The Prosecutor v. Thomas Lubanga Dyilo*,<sup>8</sup> when the Prosecution intends to rely on witnesses for the purpose of the confirmation hearing, it will normally do so through the use of their statements or the transcripts of their audio or video recorded interviews;

**CONSIDERING** that the evidentiary rule contained in article 61(5) of the Statute is consistent with the limited scope of the confirmation hearing and of the limited evidentiary debate therein; that the rule is only applicable for the purpose of the confirmation hearing; and that as article 61 (5) of the Statute constitutes a *lex specialis*, the evidentiary rule contained therein prevails in the context of the confirmation hearing over the general evidentiary rules provided for in article 69 of the Statute;

**CONSIDERING** that the different nature of the confirmation hearing and the trial and the differences in terms of the applicable rules of evidence, have already been highlighted by the Appeals Chamber;<sup>9</sup> and that it is for this reason that Pre-Trial Chamber I has previously stated that “the admission of evidence at [the pre-trial] stage is without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as to the admissibility and probative value”<sup>10</sup> of any evidence, including, *inter alia*, (i) any ruling on evidence gathered under article 56 of the Statute as a result of a unique investigative opportunity; or (ii) any prior recorded testimony pursuant to rule 68 of the Rules;

**CONSIDERING** that the case law of the International Criminal Tribunals for the Former Yugoslavia and Rwanda referred to by the Defences of Germain Katanga and Mathieu Ngudjolo Chui is of little relevance, insofar as the Statutes of those Tribunals (i) do not provide for the holding of a confirmation of the charges hearing

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<sup>8</sup> In that case, the Prosecution relied at the confirmation hearing on the live testimony of one witness, and on the statements of twelve additional witnesses

<sup>9</sup> ICC-01/04-01/06-774 para 47

<sup>10</sup> *Idem*, para 90

in the presence of both the Prosecution and the Defence, and (ii) do not contain an evidentiary rule that is as clear as rule 61 (5) of the Statute on the admission for the purpose of the confirmation hearing of evidence given by witnesses in a format other than oral testimony;

**CONSIDERING** further that the jurisprudence of the European Court of Human Rights referred to by the Defence of Mathieu Ngudjolo Chui is also of little relevance, insofar as it refers to the admission at trial, and not just in relation to a confirmation of the charges hearing, of evidence given by witnesses in a format other than oral testimony;

**CONSIDERING** that the Single Judge agrees with the Defence of Germain Katanga that the confirmation hearing must also aim at facilitating the preparation for trial in the event that the charges are confirmed;<sup>11</sup>

**CONSIDERING** that in principle, the Prosecution should not be allowed to rely at the confirmation hearing on the evidence given by a witness (be it in a written format or through oral testimony), if the Prosecution cannot subsequently rely on the evidence of the said witness for the purpose of the trial;

**CONSIDERING** however that the competence to decide on the admissibility of the evidence given by a witness at trial lies with the Trial Chamber; that there is no precedent of the Trial or of the Appeals Chamber of this Court on the issue of the admissibility at trial of statements or transcripts of interviews of deceased witnesses that have not been carried out pursuant to article 56 of the Statute, but have been audio taped pursuant to article 55(2) of the Statute; and that the case law referred to

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<sup>11</sup> ICC-01/04-01/07-411, para 79

by the Prosecution and the Defences of Germain Katanga or Mathieu Ngudjolo Chui does not provide, on its face, a manifestly clear answer to this question;

**CONSIDERING** further that the Prosecution alleges that the Statute and the Rules do not expressly establish that the admissibility of the evidence of a witness depends on the prior consent of the witness that his or her statement be used in legal proceedings against a specifically-named person;

**CONSIDERING**, nevertheless, that the Prosecution has confirmed to the Single Judge that, save for Witness 12 - who died before he could consent to the use of his statement in the present case, all other witnesses on whom it intends to rely at the confirmation hearing have given their oral or written consent for their statements, interview notes or interview transcripts to be used in the present case;

**CONSIDERING** further, that throughout the proceedings leading to the confirmation hearing in the present case, the Prosecution has been highlighting the importance of fully complying with its mandate in terms of the protection of witnesses pursuant to article 68(1) of the Statute;

**CONSIDERING** further that, in the view of the Single Judge, requiring that a witness give an informed consent to the Prosecution's use of his or her statement, interview notes and/or interview transcripts in the proceedings of a given case prior to their admission for the purpose of the confirmation hearing is the first and foremost measure of protection;

**CONSIDERING** that, according to article 68(1) of the Statute, the adoption of this measure is not discretionary, but is an obligation of the Court, particularly in light of

the fact that in a situation as volatile as the one described in the First Decision on Redactions:<sup>12</sup>

when a witness decides to authorise the use of his or her statement for the purpose of the confirmation hearing in the knowledge that his or her identity might have to be disclosed to the Defence, the witness is inevitably undertaking a certain amount of risk. It is for this reason that in the “Decision on Written Consent of Witness 271”, issued on 12 March 2008, the Single Judge, after highlighting that the Prosecution cannot give any witness on whom it intends to rely at the confirmation hearing any assurance of anonymity, stated that:

- i. The first and foremost protective measure is to give the witnesses a clear idea of what they can expect from the Court in terms of protection, which requires that it be explained to the witness upfront and in detail the type of operational and procedural measures that may be available to them, as well as the basic features of the procedure for the granting of such measures; and that
- ii. The consent given by witnesses for the use of their statements for the purpose of the confirmation hearing will only be valid after the Prosecution has given them a clear idea of what they can expect from the Court in terms of protection, and in particular in terms of non-disclosure of their identities.<sup>13</sup>

**CONSIDERING** that Witness 12 expressly consented to the use of the transcript of his interview in proceedings before the Court when he was interviewed before the initiation of the present case in May 2007;<sup>14</sup>

**CONSIDERING** that Witness 12 died before the execution of the warrant of arrest against Germain Katanga and Mathieu Ngudjolo Chui,<sup>15</sup> which were under seal at the time; and that, therefore, he could not consent to the use of the transcript of his interview in the present case;

**CONSIDERING** further that the details of the identities and whereabouts of his family members have been redacted from the transcripts of his interview pursuant to the First Decision on Redactions;<sup>16</sup>

<sup>12</sup> ICC-01/04-01/07-88-Conf-Exp, paras 13-22, ICC-01/04-01/07-123-onf-Exp, para 10, ICC-01/04-01/07-247-Conf-Exp, para 9, ICC-01/04-01/07-358-Conf-Exp, para 8, and ICC-01/04-01/07-405-Conf-Exp, para 10

<sup>13</sup> ICC-01/04-01/07-411, para 17. Also see ICC-01/04-01/07-316, pp 4-5

<sup>14</sup> ICC-01/04-01/07-334-Conf-Exp, paras 20 and 25

<sup>15</sup> Witness 12 allegedly died on 5 September 2007 - ICC-01/04-01/07-19-Conf-Exp, para.11.

<sup>16</sup> ICC-01/04-01/07-88-Conf-Exp



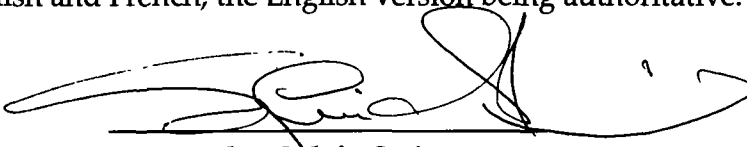
**CONSIDERING**, therefore, that in these exceptional circumstances, the Single Judge considers that the proper remedy for the lack of consent of Witness 12 cannot be to rule that the transcripts of his interview are inadmissible for the purpose of the confirmation hearing because, due to his death, such consent was neither necessary in terms of protection nor possible;

**CONSIDERING** further that, despite the fact that Witness 12 had family ties with one of the suspects, such ties are not so close as to trigger the privilege against incrimination of family members as provided for in rule 75 of the Rules;

**FOR THESE REASONS**

**DECIDE** that the transcripts of interview of Witness 12 will be admissible for the purpose of the confirmation hearing.

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



Judge Sylvia Steiner  
Single Judge

Dated this Friday 18 April 2008

At The Hague, The Netherlands