

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 22 May 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***

**Public Document  
URGENT**

**Decision on the Defences' Applications for Leave to Appeal the "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, Senior Trial Lawyer

**Counsel for the Defence  
of Germain Katanga**  
Mr David Hooper  
Ms Caroline Buisman

**Counsel for the Defence of Mathieu  
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 by the Single Judge on 10 March 2008;

**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 by the Prosecution on 20 March 2008;

**NOTING** the “Defence Response Concerning the Admission of the Statement of Witness 12”<sup>3</sup> filed by the Defence for Germain Katanga on 31 March 2008, 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 for Mathieu Ngudjolo Chui on 1 April 2008 (“the Defences’ Responses”);

**NOTING** the “Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased witness 12” (“the Decision”)<sup>5</sup> issued by the Single Judge on 18 April 2008, in which the Single Judge decided that the transcripts of the interview of Witness 12 will be admissible for the purpose of the confirmation hearing;

**NOTING** the “Defence Motion for Leave to Appeal to the Decision on the admissibility for the confirmation hearing of the transcripts of the interview of

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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

<sup>5</sup> ICC-01/04-01/07-412

deceased witness 12”<sup>6</sup> (“the Application of the Defence for Germain Katanga”) filed by the Defence for Germain Katanga on 28 April 2008;

**NOTING** the “*Demande d’autorisation d’interjeter appel contre la Décision du 18 Avril 2008 relative à l’admissibilité des transcrits d’audition du témoin 12 décédé pour la confirmation des charges*” (“the Application of the Defence for Mathieu Ngudjolo Chui”) filed by the Defence for Mathieu Ngudjolo Chui on 28 April 2008;

**NOTING** the “Prosecution’s Consolidated Response to Two Defence Applications for Leave to Appeal Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12”<sup>8</sup> (“Prosecution’s Consolidated Response”) filed by the Prosecution on 2 May 2008;

**NOTING** articles 61, 67, 69 and 82(1)(d) of the *Rome Statute* (“the Statute”), rules 63, 68, 121 and 155 of the *Rules of Procedure and Evidence* (“the Rules”), and regulation 65 of the *Regulations of the Court* (“the Regulations”);

**CONSIDERING** that, as Pre-Trial Chambers I and II have repeatedly stated,<sup>9</sup> for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

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<sup>6</sup> ICC-01/04-01/07-450

<sup>7</sup> ICC-01/04-01/07-454.

<sup>8</sup> ICC-01/04-01/07-463

<sup>9</sup> See, *inter alia*, “*Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal*”, issued by Pre-Trial Chamber I on 23 June 2006 (ICC-01/04-01/06-165-Conf-Exp), “*Decision on Defence Motion for Leave to Appeal*”, issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338), “*Decision on Second Defence Motion for Leave to Appeal*”, issued by Pre-Trial Chamber I on 28 September 2006 (ICC-01/04-01/06-489), “*Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*”, issued by Pre-Trial Chamber I on 14 December 2007 (ICC-01/04-01/07-108) and “*Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58*”, issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular para. 20

- 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;

**CONSIDERING** that, according to the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”,<sup>10</sup> issued by the Appeals Chamber on 13 July 2006 (“the Appeals Chamber Judgment”):

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;<sup>11</sup>
- (ii) “[a]n issue is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;<sup>12</sup>
- (iii) “[n]ot every issue may constitute the subject of an appeal”,<sup>13</sup> but “it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”;<sup>14</sup> and
- (iv) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an

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<sup>10</sup> ICC-01/04-168

<sup>11</sup> Appeals Chamber Judgment, para. 9

<sup>12</sup> Appeals Chamber Judgment, para. 9

<sup>13</sup> Appeals Chamber Judgment, para. 9

<sup>14</sup> Appeals Chamber Judgment, para. 10

immediate resolution by the Appeals Chamber may materially advance the proceedings”;<sup>15</sup>

**CONSIDERING** that the Defence for Germain Katanga seeks leave to appeal the Decision but does not define with sufficient precision the specific issue or issues for which leave to appeal is requested; and that, from an overall reading of the Application of the Defence for Germain Katanga,<sup>16</sup> it seems that the Defence for Germain Katanga raises the issue of whether the Single Judge pronounced a non-liquet, in the sense that she declared that, as a result of the *lacunae* in the relevant provisions of the Statute and the Rules, she was not in a position to resolve the matter before her;

**CONSIDERING** that the Defence for Mathieu Ngudjolo Chui seeks leave to appeal in relation to the following two issues:

- (i) whether the Single Judge erred in admitting a statement, for the purposes of the confirmation of charges, which cannot be admitted at trial (“the First Issue raised by the Defence for Mathieu Ngudjolo Chui”); and
- (ii) whether the Single Judge erred in examining the question of consent and the security issue, in relation to the right of the suspect not to incriminate himself (“the Second Issue raised by the Defence for Mathieu Ngudjolo Chui”);<sup>17</sup>

**CONSIDERING** that the issue of non-liquet raised by the Defence for Germain Katanga is not an issue arising out of the Decision because the Single Judge resolved the matter before her and elaborated on the following reasons for the Decision:

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<sup>15</sup> Appeals Chamber Judgment, para 14

<sup>16</sup> ICC-01/04-01/07-450, in particular, pp 7 to 9

<sup>17</sup> ICC-01/04-01/07-454, para 20

- (i) article 61 (5) of the Statute constitutes *lex specialis* vis-à-vis article 69 of the Statute for the purpose of the confirmation hearing, and the differences in terms of applicable rules of evidence between the confirmation hearing and the trial have already been highlighted by the Appeals Chamber;
- (ii) article 61 (5) of the Statute makes clear that the evidentiary debate at the confirmation hearing can be solely based on written, audio and video recorded evidence; and that, as a result:
  - a. oral examination of those witnesses on whose evidence the parties intend to rely is not the general rule at the confirmation hearing;
  - b. the parties must therefore challenge the credibility of such evidence by means other than the oral examination of the relevant witnesses;
- (iii) the literal interpretation of article 61 (5) of the Statute does not make inadmissible *per se* the transcript of the interview of a deceased witness, which - despite not having been carried out according to the procedure provided for in article 56 of the Statute - has been audio-taped pursuant to article 55 (2) of the Statute;
- (iv) the contextual and teleological interpretation of article 61 (5) of the Statute in light of the limited scope of the confirmation hearing and of the fact that the hearing aims, *inter alia*, to facilitate the preparation for trial, leads to the conclusion that in principle evidence which would otherwise be admissible for the purpose of the confirmation hearing, becomes inadmissible if the Prosecution cannot subsequently rely on the said evidence for the purpose of the trial;
- (v) the Pre-Trial Chamber neither has the competence to decide upon the admissibility of evidence at trial nor is the confirmation hearing the appropriate stage to debate the admissibility at trial of the evidence on

which the parties intend to rely at the confirmation hearing. As a result:

- a. only if there is a clear precedent from the Trial or the Appeals Chamber on the fact that a given type of evidence is not admissible at trial (or when absent an express ruling on the matter, the inadmissibility is manifestly clear from other case law referred to in article 21 of the Statute), would such evidence not be admitted for the purpose of the confirmation hearing pursuant to the contextual and teleological interpretation of article 61 (5) of the Statute; and
- b. this is currently not the case with the transcript of the interview of a deceased witness, which - despite not having been carried out according to the procedure provided for in article 56 of the Statute - has been audio-taped pursuant to article 55 (2) of the Statute;<sup>18</sup>

**CONSIDERING** that, with regard to the First Issue raised by the Defence for Mathieu Ngudjolo Chui, the Defence simply elaborates on those arguments that support its view that the transcript of the interview of deceased Witness 12 should not be admissible at trial;<sup>19</sup>

**CONSIDERING** that, in the Decision, the Single Judge does not address such arguments insofar as she is neither competent to decide on the admissibility of the evidence at trial nor is the confirmation hearing the appropriate stage of proceedings to hold a debate on the admissibility of evidence at trial;

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<sup>18</sup> The Decision, pp 4 to 7

<sup>19</sup> The Application of the Defence for Mathieu Ngudjolo Chui, pp 7 to 11

**CONSIDERING** therefore that, the First Issue raised by the Defence for Mathieu Ngudjolo Chui does not arise out of the Decision;

**CONSIDERING** that, with regard to the Second Issue raised by the Defence for Mathieu Ngudjolo Chui, the Single Judge considers that its Application does not define with sufficient precision the specific issue for which leave to appeal is requested; and that, from an overall reading of the Application,<sup>20</sup> it seems that the Defence for Mathieu Ngudjolo Chui raises the issue of whether the Single Judge erred in not addressing the relationship between (a) Witness 12's lack of consent, as a result of his death, for the Prosecution's use of his statement at the confirmation hearing in the present case; and (b) the effective protection of the rights against self-incrimination and to be assisted by counsel granted by article 55 (2) of the Statute to Witness 12;

**CONSIDERING** that the rights provided for in article 55 (2) of the Statute must be made effective immediately prior to, and during, the interview of the relevant witness; and that therefore, the exercise of such rights is unrelated to the fact that the witness is not in a position, as a result of his or her death, to consent to the use of his or her statement in a case that arises or is unsealed after the interview;

**CONSIDERING** that this is the reason why the Decision does not specifically address this argument of the Defence for Mathieu Ngudjolo Chui; and that this approach is consistent with the case law of the Appeals Chamber in that a decision need not address every single argument put forward by the parties in support of their positions;<sup>21</sup>

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<sup>20</sup> ICC-01/04-01/07-454, in particular, pp 13 to 15

<sup>21</sup> ICC-01/04-01/06-773, para 20, ICC-01/04-01/06-774, para 30

**CONSIDERING** further that, in the view of the Single Judge, the transcript of the interview of Witness 12 shows that the Prosecution informed Witness 12, prior to the initiation of the interview, of his rights pursuant to article 55 (2) of the Statute;

**CONSIDERING** nevertheless that the Single Judge would like to emphasise that in the future, the Prosecution, when informing a suspect pursuant to article 55 (2) of the Statute, it must use the most unequivocal language to explain to the person being interviewed of his or her status as a suspect and of his or her rights pursuant to article 55 (2) of the Statute, in particular the rights to remain silent and to be assisted by counsel;

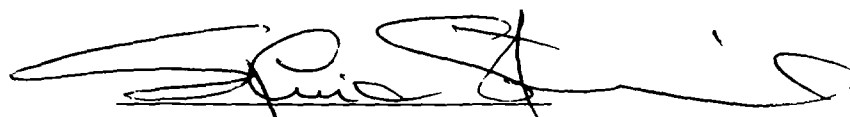
**CONSIDERING**, therefore, that the First and Second Issues raised by the Defence for Mathieu Ngudjolo Chui are issues which do not arise out of the Decision;

**FOR THESE REASONS,**

**REJECT** the Application of the Defence for Germain Katanga;

**REJECT** the Application of the Defence for Mathieu Ngudjolo Chui;

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



**Judge Sylvia Steiner**  
**Single Judge**

Dated this Thursday 22 May 2008

At The Hague, the Netherlands