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Pénale
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**International
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Court**

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Date: 20 March 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr. Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR**

v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI

Public Redacted Version

**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**

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Pursuant to the Single Judge's decision of 10 March 2008,¹ the Office of the Prosecutor ("Prosecution" or "OTP") respectfully requests, on the basis of Articles 61 and 69 of the Rome Statute of the International Criminal Court ("Court" or "ICC"), that the Single Judge admit as evidence to be relied upon by the Prosecution at the hearing on the joint confirmation of charges against Germain KATANGA and Mathieu NGUDJOLO CHUI ("Confirmation Hearing"), the transcripts of interview of Witness 12 ("Interview Transcripts").²

Request for Confidentiality

The Prosecution requests that this submission be received by the Single Judge as "Confidential" since paragraph 22 details witness protection operative procedures.³

Background

1. Witness 12, one of the witnesses whose evidence was included in the Prosecution's application for an arrest warrant against Germain KATANGA ("KATANGA") and Mathieu NGUDJOLO CHUI ("NGUDJOLO")⁴ ("Arrest Warrant Application"), died in September 2007.⁵

¹ ICC-01/04-01/07-259, p. 14.

² ICC-01/04-01/07-145-Conf-Exp-Anx1, Annex I – Witness 12. Interview transcripts: (DRC-OTP-0173-0192), Annex I1; (DRC-OTP-0173-0560), Annex I2; (DRC-OTP-0173-0589), Annex I3; (DRC-OTP-0173-0616), Annex I4; (DRC-OTP-0173-0644), Annex I5; (DRC-OTP-0173-0683), Annex I6; (DRC-OTP-0173-0718), Annex I7; (DRC-OTP-0173-0755), Annex I8; (DRC-OTP-0173-0788), Annex I9; (DRC-OTP-0173-0813), Annex I10; (DRC-OTP-0173-0846), Annex I11; (DRC-OTP-0173-0953), Annex I12.

³ The Prosecution is filing a confidential *ex parte* and confidential redacted version together with the present submission.

⁴ ICC-01/04-01/07-129-Conf-AnxA, paras. 193-197.

⁵ ICC-01/04-01/07-19-Conf-Exp, para. 11. On 13 September 2007, the Registry informed the Court of Witness 12's death.

2. In her 3 December 2007 Decision, the Single Judge recalled that the Pre-Trial Chamber relied upon Witness 12's statement when it issued the arrest warrants against KATANGA and NGUDJOLO ("Arrest Warrants"). On this basis, the Single Judge decided that Witness 12's statement should be disclosed to the Defence under Rule 77 of the Rules of Procedure and Evidence ("Rules"). The Single Judge mentioned that the admissibility of Witness 12's evidence would be addressed at a later stage if a party decided to rely upon it.⁶
3. At an *ex parte* hearing on 20 November 2007, the Single Judge queried the impact if any on the admissibility of Witness 12's testimony, of the facts that (i) prior to his death, Witness 12 had not consented to have his evidence used specifically against [REDACTED] KATANGA;⁷ [REDACTED].⁸
4. [REDACTED] The Prosecution stated that in compliance with the Single Judge's request it would strive to obtain such consents, although it saw no legal requirement in the Statute that it do so.⁹
5. On 10 March 2008, Pre-Trial Chamber I ("PTC I") ordered the joinder of the proceedings against NGUDJOLO and KATANGA.¹⁰ Following this decision, the Single Judge requested that the Prosecution submit written observations on the admissibility of Witness 12's statement.¹¹

⁶ ICC-01/04-01-07-224 -Anx, para. 12.

⁷ ICC-01/04-01/07-249, paras. 4-5.

⁸ ICC-01/04-01-07-T9-CONF-EXP-ENG ET, p. 48, lines 3-12.

⁹ ICC-01/04-01/07-T-20-CONF-EXP-ENG ET, p. 17, lines 16-22.

¹⁰ ICC-01/04-01/07-257 and ICC-01/04-02/07-48.

¹¹ ICC-01/04-01/07-259, p. 14.

6. The Prosecution now respectfully requests that the Single Judge rule that Witness 12's Interview Transcripts are admissible evidence at the Confirmation Hearing.¹² The Prosecution submits that (i) it may properly rely on documentary or summary evidence at the Confirmation Hearing; (ii) the absence of explicit consent from Witness 12 concerning the use of his statement against KATANGA and NGUDJOLO does not render his statement inadmissible; (iii) Witness 12 did consent to have the Prosecution use his Interview Transcripts in Court proceedings; and (iv) disclosing the identity of potential suspects to witnesses before an arrest warrant is made public cannot be reconciled with the Prosecution's obligations under Article 54(1) of the Rome Statute of the Court ("Statute").

Application Pursuant to Article 61(5) of the Statute

I. The Prosecution may rely on documentary or summary evidence at the Confirmation Hearing and cannot be compelled to call live witnesses

7. Witness 12's Interview Transcripts should be admitted for the purpose of the Confirmation Hearing on the basis of Article 61(5) of the Statute. This provision enables the Prosecution to rely exclusively upon documentary

¹² Witness 12 was interviewed by the Prosecution pursuant to Article 55(2) of the Statute and Rule 112 of the Rules. The Prosecution relied on OTP investigators' interview notes of Witness 12's interview to support the Arrest Warrant Application against KATANGA and NGUDJOLO ("Interview Notes"), because the transcripts of his interview ("Interview Transcripts") were not available at the time of the submission of the Arrest Warrant Application. See ICC-01/04-01/07-170-Conf-Anx1D, paras. 1, 3, 4, 6, 7, 13, 14, 27, 31, 34, 39, 40, 42-44, 47, 57-60, 73, 74: Once the transcripts became available, they were disclosed to the Defence and were included in the Prosecution's list of evidence to be relied upon at the confirmation hearing against Germain KATANGA, prior to the joinder of the cases *The Prosecutor v. Germain KATANGA* and *The Prosecutor v. Mathieu NGUDJOLO*. On 14 January 2008, the Prosecution also confirmed its intention to rely upon Witness 12's Interview Transcripts in its *ex parte* application for redactions to witness evidence the OTP intended to rely upon at the Confirmation Hearing.

or summary evidence. Contrary to the situation at trial,¹³ the Prosecution is not obliged to call witnesses at the Confirmation Hearing. These provisions are designed to avoid turning the Confirmation Hearing into a 'trial before a trial'.¹⁴ As the Appeals Chamber has explained, the confirmation hearing is of a different character, and hence imposes more liberal evidentiary standards upon the Prosecutor, than the subsequent trial.¹⁵

8. Since filing the Arrest Warrant Application, the Prosecution has made clear its intent to rely upon the information provided by Witness 12.¹⁶ The Prosecution's intention has never been to call Witness 12 to testify at the Confirmation Hearing but rather to rely instead on his Interview Transcripts. It is immaterial that Witness 12 is now deceased and cannot be called to testify, since at the Confirmation Hearing stage the Prosecution need not call witnesses to testify pursuant to Article 61(5) of the Statute.¹⁷

¹³ See Article 69(2) of the Statute: "The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence".

¹⁴ See 'Article 61, 'Confirmation of the Charges before Trial', Kuniji Shibahara, in *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer (ed), Nomos Verlagsgesellschaft, Baden Baden, 1999, para. 7, p. 786:

It is not desirable that this confirmation procedure creates a 'trial before a trial'. In order to avoid such duplication of procedure between confirmation procedure and trial, the proceedings of confirmation should be of a summary character.

¹⁵ See ICC-01/04-01/06-774, para. 47:

The right to challenge the evidence, however, must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect. [...] As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested.

¹⁶ *Supra* footnote 8. The intention of the Prosecution to rely on the information provided by Witness 12 was also made clear when the Prosecution filed the Interview Notes of Witness 12 in support of the Arrest Warrant Application.

¹⁷ Article 61(5) of the Statute provides that "The Prosecutor may rely on documentary or summary evidence and *need not call the witnesses expected to testify at the trial.*" [Emphasis added]

9. In the instant case, the reliability of Witness 12's Interview Transcripts is bolstered by the fact that they precisely reflect – and may, if the Single Judge wishes, be checked for accuracy against – the audio-recording of the questioning of Witness 12 which took place as required under Article 55(2) of the Statute and Rule 112 of the Rules.¹⁸ As verbatim records of the audio-recording of Witness 12's interview, these transcripts are an accurate and reliable record of the statements made by Witness 12. For that reason, the Interview Transcripts offer all guarantees of reliability and should be admissible as evidence, as all the other elements in support of the charges against KATANGA and NGUDJOLO for the purposes of the Confirmation Hearing.

10. The Prosecution further submits that the Court is empowered to admit a deceased person's evidence at the Confirmation Hearing pursuant to Article 69(4) of the Statute and Rule 63(2) of the Rules, which give the Court the discretion to freely assess evidence submitted, when ruling on admissibility and weight of evidence.¹⁹ In the *Lubanga* case, PTC I

¹⁸ Rule 112 of the Rules provides that where a person to whom Article 55(2) applies is questioned, their questioning must be audio- or video-recorded in accordance with the procedure outlined. The OTP has also videotaped Witness 12's interview.

¹⁹ Rule 63(2) provides that: "A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69." Refer to Donald K. Piragoff, 'Evidence', in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee (ed.), Transnational Publishers, 2001, p. 351, citing Rule 63(2) and Article 69(4): "The compromise in the Rome Statute was to eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the Court has a discretion to "rule on the relevance or admissibility of any evidence." These articles provide for alternative approaches that allow a Chamber either to rule first on whether evidence possesses sufficient relevance to justify its admissibility or, alternatively, first to admit evidence and then to consider relevance and weight together as part of the evaluation of the evidence admitted. See also Rodrigues, A. and Tournaye C., "Hearsay Evidence," cited in May, R. and Wierda, M., *International Criminal Evidence*, Transnational Publishers, 2002, p. 110, in which the authors suggest that:

it is more appropriate to assess the evidence at the conclusion of the trial and at that point to consider what weight should be attributed to it. This solution would be consistent with the free system of evidence that the Tribunal has adopted in view, among others, of its specific task.

interpreted Article 69(4) as granting the Court “power to rule on the admissibility of any evidence”²⁰ On that basis, PTC I held that written statements of witnesses not called in person at the Confirmation Hearing could be used, pursuant to Article 61(5) of the Statute. PTC I expressly rejected Defence objections to the admissibility and probative value of the statements, on the basis of the inability to cross-examine the witnesses.²¹ PTC I also admitted anonymous evidence for the purposes of the Confirmation Hearing,²² a principle which the Appeals Chamber has also upheld.²³

²⁰ ICC-01/04-01/06-803-tEN, 29 January 2007, para. 96.

²¹ ICC-01/04-01/06-803-tEN, paras. 128 and 130. Para. 128, in particular, provides:

[T]he Defence argues that the mere presentation of a statement or written deposition does not entitle the opposing party to conduct a cross-examination, thus diminishing the probative value of the testimony. In this regard, the Chamber recalls that under article 61(5) of the Statute, the Prosecution ‘may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial’. Moreover, there is nothing in the Statute and the Rules to indicate that statements, transcripts of interviews or summaries of evidence must be considered as having a lower probative value.

See also ICC-01/04-01/06-774, para. 47. The Appeals Chamber said:

The right to challenge the evidence, however, must be understood in the context of the confirmation hearing, which does not amount to a determination of the guilt or innocence of the suspect. [...] As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested.

²² ICC-01/04-01/06-803-tEN, paras. 101, 103, 106: PTC I observed that there is no provision in the Statute or the Rules indicating that evidence, which can be considered hearsay from anonymous sources, is inadmissible per se. PTC I observed that the objections did not go to admissibility but to the probative value of the evidence.

²³ See ICC-01/04-01/06-773, para. 40: The Appeals Chamber determined that:

[T]he use of summaries of witness statements and other documents at the confirmation hearing in relation to witnesses of the Prosecutor whose identities have not been disclosed to the defence prior to the confirmation hearing is, in principle, permissible under the Statute and the [Rules], provided that such summaries are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

11. In sum, the Prosecution submits that the Court should admit Witness 12's Interview Transcripts because they are relevant, reliable and of probative value and contribute to the determination of the truth.

12. This interpretation is supported by other provisions of the Statute and the Rules. Rule 121(1) provides that any rights enjoyed by a suspect under Article 67, such as the Defence's right to obtain attendance of and cross-examine witnesses (Article 67(1)(e)), are subject to the provisions of Article 61. Thus the full exercise of the Defence's right to obtain the attendance of and cross-examine Prosecution witnesses pursuant to Article 67(1)(e) is not triggered until trial. Therefore the Defence cannot have witnesses compelled to appear as Prosecution witnesses.

II. The absence of explicit consent from Witness 12 concerning the use of his statement against KATANGA and NGUDJOLO does not render his statement inadmissible

13. The Prosecution submits that any failure to secure Witness 12's consent to use his information in legal proceedings against specifically-named accused persons does not render his evidence inadmissible.

14. The Statute and the Rules - in particular Articles 55, 61 and 69 of the Statute and Rule 112 of the Rules which cover evidentiary matters relevant for the Confirmation Hearing - nowhere provide that the admissibility of a witness's evidence depends on the witness's prior consent that his statement be used in legal proceedings against a specifically-named person.

15. Nor does the absence of explicit consent to use evidence against specifically-named accused persons render evidence inadmissible under the "exclusionary rule" reflected in Article 69(7), which was created to

capture different situations.²⁴ Further in the instant case, there is no suggestion that Witness 12's statement was obtained unlawfully or in violation of anyone's rights.

16. Rather, all that the Statute and Rules require is that the Court take into account "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness."²⁵

17. Requiring that a party obtain a witness's express consent to use his or her evidence against a specifically-named person would create an additional evidential hurdle to the consideration of a witness' evidence, which has not been envisaged by the drafters of the Statute and Rules. As this additional requirement would equally apply to evidence submitted by the person charged, this would prejudice both the Prosecution and Defence.

18. Accordingly, Witness 12 need not have specifically consented to have his Interview Transcripts used against KATANGA or NGUDJOLO as a pre-condition for the admissibility of his Interview Transcripts as evidence for the Confirmation Hearing.

III. Witness 12 consented to have the Prosecution use his Interview Transcripts in Court proceedings

19. Although a witness's consent to have his evidence used against specific persons is not a condition of admissibility, the Court, and the Prosecution, may properly assure themselves of the voluntariness of (i) a

²⁴ Article 69(7) of the Statute provides that: "evidence obtained by means of a violation of this Statute [...] shall not be admissible if the violation casts substantial doubt on the reliability of the evidence".

²⁵ Article 69(4) of the Statute.

witness's statement, in accordance with Article 55 of the Statute, and (ii) the witness's cooperation with the Court, in furtherance of their duties, under Article 68(1), to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." In addition, "[w]hen the disclosure of [...] information [in the possession or control of the Prosecutor] may create a risk to the safety of the witness, the Court shall take measures to inform the witness in advance."²⁶

20. In this instance, Witness 12 freely consented to be interviewed and consented for the information he provided to be used by the Prosecution in future Court proceedings.

21. Although neither the Statute nor Rules so require,²⁷ the Prosecution has adopted, and consistently applied, a policy of informing all persons questioned – including under Article 55(2) – that their evidence may be used in subsequent proceedings. During Witness 12's interview, the Prosecution ensured that the witness had voluntarily consented to give evidence in relation to the investigation²⁸ and that his taped interview might be used as evidence in court proceedings before the ICC.²⁹ Witness

²⁶ See Rule 81(3) of the Rules.

²⁷ See Christopher K. Hall, "Article 55: Rights of persons during an investigation", in *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 732. Common Rule 42(A)(iii) of the International Criminal Tribunal for former Yugoslavia ("ICTY") Rules and International Criminal Tribunal for Rwanda ("ICTR") Rules explicitly provide that a suspect who is to be questioned by the Prosecutor has the right to remain silent "and to be cautioned that any statement that he makes shall be recorded and *may be used in evidence*." (Emphasis added). Hall observed that this latter requirement to tell the witness his or her statement may be used in evidence in the ICTY and ICTR Rules was not included in Article 55(2) of the Statute and hoped this would instead be included in the Rules. However, Rule 112 of the Rules similarly does not contain any such requirement that the person interviewed under Article 55(2) of the Statute be informed that his or her evidence may be used in subsequent proceedings.

²⁸ DRC-OTP-0173-0912, 0915, lines 114-118; 0916, lines 147-155; 0917, lines 156-163; 0920, lines 276-282.

²⁹ DRC-OTP-0173-0912, 0921, lines 322-337:

12 verbally confirmed that he understood these facts and agreed to proceed with the interview on that basis.³⁰ At the conclusion of the interview, Witness 12 confirmed that he had responded to questions of his own free will.³¹

22. [REDACTED]

23. Furthermore, Witness 12's consent to further cooperate in any proceedings is not necessary because he is deceased. As Witness 12 is deceased and details of his family members' identities and locations remain undisclosed, no security concern arises from the use of his evidence. His identity has already been disclosed to the Defence on this basis and the Prosecution has not received reports of any threats to his family.

Interviewer: Alors, vous pouvez choisir de répondre à certaines de nos questions et de ne pas répondre à d'autres. Mais, une chose est certaine, tout ce que vous allez dire est enregistré.

Personne entendue : Oui, je sais. Je sais.

Interviewer : D'accord. Et également pourrait ou pourra servir de preuve à la Cour, comme témoin. Vous comprenez ça ? Vous comprenez cela ? *[La personne entendue fait un signe positif de la tête]*. Parce que les questions que nous vous posons et les réponses que vous y apportez sont enregistrées, n'est-ce pas ? Sur support audio et vidéo et à mesure que la déposition se déroule. Alors, l'enregistrement sonore et vidéo peut lui-même devenir un élément de preuve. Est-ce que vous comprenez cela ?

Personne entendue : Oui, je comprends.

Interviewer : Est-ce que vous avez des questions ?

Personne entendue : Non.

Interviewer : Alors, souhaitez-vous exercer votre droit à garder le silence ou êtes-vous disposé à poursuivre cette déposition, cet entretien ?

Personne entendue : Oui. Je peux garder le silence si je ne comprends pas ou bien si ça ne m'engage pas, moi. Et puis je peux répondre à ce que je peux répondre.

³⁰ DRC-OTP-0173-0912, 0921, lines 322-337. See also DRC-OTP-0173-0912, 0917, lines 166-194; 0918, lines 195-235; 0919, lines 236-275; 0920, lines 285-301: Because of his status as a suspect and his decision to waive his right to have counsel present, he was informed that he may interrupt the interview and seek legal advice at any time.

³¹ See DRC-OTP-0173-0953, 0962, lines 288-289. See also DRC-OTP-0173-0953, 0961, lines 282-286: At the end of his interview Witness 12 was also given an opportunity to add or correct the information provided.

IV. Disclosing the identity of potential suspects to witnesses before an arrest warrant is made public is contrary to the Prosecution's obligations under Article 54(1)

24. The Prosecution submits that it must not disclose the identity of potential suspects to witnesses before an arrest warrant is made public and cannot inform persons interviewed of the identity of the persons against whom the information may be used, for the following reasons. First, at the time of an interview, the Prosecution may simply not know the identity of the persons against whom the information may be used ultimately. Article 54(1) of the Statute requires that the Prosecutor assess evidence objectively, and evaluate the entirety of the evidence collected before focusing on a particular person. Second, in conformity with its duties under Articles 54(1) and 67(2), the Prosecution must conduct interviews in a manner which does not inappropriately influence the evidence provided by the witness. In cases where the Prosecution already knows the identity of one or more persons against whom the information may be used, sharing the identity(ies) with the witness may improperly taint the evidentiary value of that witness's evidence.³² Third, pursuant to Article 54(3)(f) and Article 68(1), the Prosecution must conduct its investigations confidentially, to safeguard its ability to collect evidence and to protect the witnesses interviewed from knowledge which could unnecessarily expose them to risk.

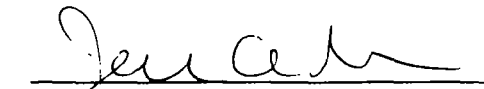
25. In the instant case, as Witness 12 was interviewed between 9 and 13 May 2007, and the arrest warrants for KATANGA and NGUDJOLO were made public only on, respectively, 18 October 2007, and 7 February 2008,

³² It may also lead to the criticism that the Prosecution is improperly raising allegations against persons who have not yet been formally charged with any crimes.

the Prosecution could not specifically inform Witness 12 of the identities of the persons against whom his statement would be used.

Request

26. For the foregoing reasons, The Office of the Prosecutor respectfully requests, pursuant to Articles 61 and 69 of the Statute, that the Single Judge apply to Witness 12's Interview Transcripts the same evidentiary standards that govern all other elements in the Prosecution's List of Evidence and consider such transcripts as evidence for the purposes of confirming the charges at the Confirmation Hearing.


Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of March 2008

At The Hague, The Netherlands