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N° : ICC-01/04-01/07
Date : 31st March 2008

PRE-TRIAL CHAMBER I

Before : Judge Sylvia Steiner, Single Judge

Registrar : Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO

Public

**DEFENCE RESPONSE CONCERNING THE ADMISSION OF THE
STATEMENT OF WITNESS 12**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Eric MacDonald, Trial Lawyer
Mrs. Florence Darques-Lane, Legal Adviser

Defence

Mr David Hooper
Ms Caroline Buisman
Mr Göran Sluiter
Ms Sophie Menegon

1. The defence for Germain Katanga hereby respond to the submissions of the Prosecutor concerning the admission of the statement of witness 12 who is understood to be deceased ('the deceased').
2. The defence observe that the Prosecutor has at no time in his submissions asserted that the statement of the deceased would or could be admissible at trial. The defence submit that the statements of the deceased are inadmissible at trial.
3. The defence appreciate that at the stage of confirmation the rules relating to evidence are of a more flexible nature, but submit that there should be no disproportionate prejudice to the accused and some minimum indicia of probative value. Neither element has, we submit, been met in respect of the deceased's statement..
4. Article 67 1. (e) of the Statute¹ provides, as a minimum guarantee, the right of the accused 'to examine, or have examined, witnesses against him'.
Rule 140 2. (b) of the Rules provides that 'the prosecution and the defence have the right to question a witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters;'
Article 69(2) of the Statute provides:

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. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be

prejudicial to or inconsistent with the rights of the accused.

5. Rule 68 of the Rules of the Court permits the admission of previously recorded testimony, but does so in limited circumstances that would not apply in respect of the deceased's statement.

¹ Article 67, Rights of the accused, of the Statute of the Court:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

Such statements are admissible only by consent or when ‘both the Prosecutor and the defence had the opportunity to examine the witness during the recording’.

In the case of the deceased the defence have had no such opportunity.

Such exceptions as may exist for the submission of non oral testimony at trial could not, it is submitted, apply to the admission of the statement of the deceased as part of the Prosecutor’s case at trial, except by defence consent.

6. The absence of a provision allowing the admission of such a statement at trial places the ICC in a wholly different position to that of the ICTY where such powers do exist.² For that reason the defence do not review the ad hoc Tribunal decisions relating to the issue.
7. The defence submit that, as the statements of the deceased are inadmissible at trial, they cannot be admitted for the purposes of confirmation. The object of a confirmation hearing is to protect the person from wrongful and unfounded charges³. It would be perverse to permit reliance on material at the confirmation hearing that could never be admitted into evidence. Such statements, or the statements upon which summaries are made, must *a priori* be eligible for use at trial;

- (i) At the confirmation hearing the Prosecutor is required ‘to support each charge with sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged’(Article 61 (5)).

The defence submit that the use of the word ‘evidence’ in Article 61 must be interpreted to mean ‘evidence that is likely to be, at least potentially admissible’. To do otherwise would lead to material being placed before the pre trial chamber that is

² The ICTY has nevertheless shown considerable reluctance to admit such statements and has generally not done so where the statements directly allege the responsibility of the accused. see for example - *The Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-T, Redacted version of the “Decision on the prosecution’s Consolidated Motion Pursuant to Rules 89 (F), 92 Bis, 92 Ter and 92 Quarter of the Rules of Procedure and Evidence” Filed Confidentially on 7 January 2008, 21 February 2008 at paragraph 41 – 41(<http://secint50.un.org/icty/seselj/trialc/decision-e/080221.pdf>). Concerning deceased witnesses whose statements directly allege the responsibility of the Accused, the Chamber considers that it is in the interests of justice not to grant the Prosecution’s request, all the more since the Accused would be deprived of the right to cross-examine these witnesses. Furthermore, in *Kordić* the ICTY Appeals Chamber ruled that a statement of a deceased witness, who was not heard under oath and not subjected to cross examination, was so ‘lacking in reliability that it should have been excluded as without probative value under Rule 89(C).’ (ICTY, Decision on Appeal regarding Statement of a Deceased Witness, Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, A. Ch., 21 July 2000, available at <http://www.un.org/icty/kordic/appeal/decision-e/00721EV313608.htm>). The Defence is also aware of case law of Trial Chambers where statements of deceased witnesses were admitted at the ICTY (for example, in the *Blaskić* case), but emphasises two important factors in this respect: a. The ruling given by the ICTY Appeals Chamber in *Kordić* carries more weight than Trial Chambers’ findings; b. The law of the ICC, in particular Rule 68, represents a marked deviation from ICTY law on this point.

³ ICC-01/04-01/06-803-tEN, para. 37

wholly irrelevant and inadmissible in the longer term. It would lead to a waste of time and resources and judicial economy.

- (ii) At the confirmation hearing the Prosecutor ‘may rely on documentary or summary evidence and need not call the witnesses expected to give evidence at the trial’. Article 61(5).

It is submitted that the phrase ‘need not call the witnesses expected to give evidence at the trial’ can only be read as meaning that, at the time such witness material is to be relied upon at the confirmation hearing, there exists a reasonable expectation that the witness will give evidence. While the prosecutor is not obliged to call his witnesses at confirmation, though he may do so, the witness must still be ‘expected to give evidence at the trial’. That clearly cannot be the situation here.

- (iii) To admit such a statement solely for the confirmation hearing would be an unfairness to the person accused. The statement would become part of the record and form part of the material to be read and considered by the trial chamber. It could only be prejudicial. The person will never have the opportunity to address the maker of the statement.

8. Witness 12 did not consent to be a witness in the case, nor to be used for confirmation. He consented only to have his interview transcripts used in Court.. In the *Lubanga* case, in its *Decision on the confirmation of charges*, the Pre-Trial Chamber held that:

“In the view of the Chamber, *the first and foremost measure required under Article 68(1) and Rule 86 is to inform each prospective witness of the fact that a party intends to rely on his or her statement, or the report or transcript of his or her interview for the purpose of the confirmation hearing in a specific case. Hence, as was the case before the Chamber, with respect to witnesses ... the information was not provided to the said witnesses in order to protect them appropriately, the Chamber considers that their statements and transcripts or reports of their interviews must be ruled inadmissible for the purpose of the confirmation hearing.*”⁴

⁴ ICC-01/04-01/06-803-tEN, para. 59.

The combined effect of Articles 93 (1) (e) and 93 (7) appears to be that consent is required for a witness to testify at trial.

Submitted with respect,



Mr David Hooper, Lead Counsel

March 31st 2008
The Hague, The Netherlands