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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

Defence Motion for Leave to Appeal the *Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12*

Source: Defence for Mr Germain Katanga

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

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Introduction

1. The Defence for Mr Germain Katanga (“Defence”) requests leave to appeal the Single Judge’s *Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12* (“impugned Decision”).¹ The Defence submits that this Decision contains one error warranting the Appeals Chamber’s consideration: the Single Judge incorrectly interpreted Articles 61, 67 and 69 of the Rome Statute and Rules 63 and 68 of the Rules of Procedure and Evidence (“Rules”) to admit the statement of deceased Witness 12 for the purpose of the confirmation hearing.

Procedural background

2. On 20 March 2008, the Prosecution filed 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*, in which the Prosecution requested Pre-Trial Chamber I to admit the transcripts of the interview with the deceased Witness 12 as evidence for the purposes of the confirmation hearing.²
3. On 31 March 2008, the Defence filed the *Defence Response Concerning the Admission of the Statement of Witness 12*³, in which it submitted that the statements of a deceased witness cannot be admitted for the purpose of confirmation.⁴
4. On 1 April 2008, the Defence for Mr Ngudjolo Chui filed 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*, in which it requested the Single Judge to decide that the statement of Witness 12 is inadmissible for the purpose of the confirmation hearing.⁵
5. On 18 April 2008, the Single Judge of Pre-Trial Chamber I rendered the impugned Decision. The Decision stated that the transcripts of interview of Witness 12 are admissible for the purpose of the confirmation hearing on the following grounds:
 - 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.

¹ ICC-01/04-01/07-412.

² ICC-01/04-01/07-336, para. 26.

³ ICC-01/04-01/07-348.

⁴ ICC-01/04-01/07-336, para. 7.

⁵ ICC-01/04-01/07-351, para. 53.

- The confirmation hearing is neither a 'trial before the trial' nor a 'mini-trial'; 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"; and 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;
- The Prosecution alleges that Witness 12 is a core witness in the present case;
- Article 61(5) is only applicable for the purpose of the confirmation hearing; and 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; 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;
- 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;
- However the competence to decide on the admissibility of the evidence given by a witness at trial lies with the Trial Chamber; 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 the case law referred to 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;
- 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;

Threshold Criteria for Leave to Appeal

6. The Defence files this *Defence Motion for Leave to Appeal the Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12* ("Defence Motion") pursuant to article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
7. Pre-Trial Chambers I and II have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets the following two cumulative criteria:
 - 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.⁶

Issue of Appeal

8. It is respectfully submitted that the Single Judge of Pre-trial Chamber I erred in admitting the statement of a deceased witness which the Prosecutor considers to be core evidence. The Defence submit that this witness cannot be relied upon by the Prosecutor at the trial. It would be wrong in principle to admit it as core evidence at the confirmation hearing.

9. The relevant rules are the following:

Article 61(5): At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

Article 67(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;

Article 69:

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. 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. [...]

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, 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, in accordance with the Rules of Procedure and Evidence.

Rule 63:

⁶ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

1. The rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers.

2. 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. [...]

Rule 68: When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

10. The Pre-Trial Chamber 1 based its decision, in part, on the fact that article 61 (5) of the Statute constitutes a *lex specialis*, and that 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.⁷

11. The Defence agrees that there are different evidentiary stages: arrest warrant, confirmation hearing and trial. Nevertheless, while each may have different evidentiary rules, all of them have admissibility standards, which may be more flexible for different stages.

12. The Pre-Trial Chamber 1 held first that:

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;⁸

but then it considered that:

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 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;⁹

⁷ Impugned Decision, p. 5.

⁸ Impugned Decision, p. 6.

⁹ Impugned Decision, p. 6-7.

Finally it concluded that the transcripts of the interview of Witness 12 are admissible for the purpose of the confirmation hearing.¹⁰

13. The Defence submits that the Pre-Trial Chamber's reasoning is flawed, for the following reasons.

- a. It appears that the Pre-Trial Chamber is pronouncing a non-liquet, meaning that as a result of 'gaps' in the law it deems it is not in a position to resolve this matter. The Defence infers the situation of a non-liquet from the reference of the Pre-Trial Chamber to the lack of precedent and the conclusion drawn by the Pre-Trial Chamber that case law referred to in submissions 'does not provide, on its face, a manifestly clear answer to this question'. This is unsatisfactory. The Defence points out that international courts have a duty to avoid a non-liquet. Judge Higgins of the International Court of Justice has pointed out in relation to non-liquet that '[i]t is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations.'¹¹ And: 'It is the role of the judge to resolve, in context, and on grounds that should be articulated, why the application of one norm rather than another is to be preferred in the particular case.'¹²
- b. It must also be borne in mind that the very purpose of Article 21 is also to avoid a non-liquet, and it befalls to the Judge to pronounce himself clearly on each situation submitted to him, on the basis of the applicable law. In this context, it would mean, in the view of the Defence, that the Single Judge develops a legal regime governing the admissibility of evidence at the confirmation hearing stage, on the basis of a variety of gap-filling sources set out in Article 21 of the Statute and bearing in mind the specific context of a criminal trial.
- c. That specific context entails a number of general rights and principles which should have guided the Single Judge in her approach of this matter. The Defence points out that the right to a reasoned judgement, as elaborated on by the Appeals Chamber in Lubanga,¹³ is by definition not respected when a non-liquet is pronounced. Furthermore, it is submitted that when the Pre-Trial Chamber was in serious doubt as to the content of the law governing admissibility of evidence in the context of the confirmation hearing the principle of *in dubio pro reo*, which ultimately has its basis in the presumption of innocence, would have offered useful guidance.

¹⁰ Impugned Decision, P. 9.

¹¹ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, Dissenting Opinion of Judge Higgins, para. 32 (available at <http://www.icj-cij.org/docket/files/95/7525.pdf>)

¹² Id., para. 39

¹³ ICC-01/04-01/06-773, para. 20.

- d. For the Decision to have been properly reasoned, the Pre-Trial Chamber should have first offered the basic tenets of the law governing admissibility of evidence with a view to determining the charges against the arrested person, and, second, assess whether this particular evidentiary item would be capable of meeting the required standards. The approach adopted by the Pre-Trial Chamber in the impugned decision, appears to be that the law of evidence governing the confirmation hearing depends very much on what Trial Chambers have to say on the law of evidence applicable to the trial phase; this creates at the present stage an unacceptable legal vacuum. At this stage, seemingly no rules apply governing admissibility of evidence at the confirmation stage. The Defence submits that it is entitled for such a regime to be in place from the very beginning and that the statement of a deceased witness cannot meet the admissibility-standard to be imposed by this regime.
- e. The Defence submits that the applicable regime governing the admissibility of evidence should at least exclude evidence which cannot be relied upon at trial. The Defence submits that it is not appropriate, and poor judicial economy, to admit at the confirmation a statement which is inadmissible at trial. More importantly, the admission of such a statement at confirmation could lead to charges being confirmed unsupported, by inadmissible evidence. It will create a false picture as to the strength of the case and be prejudicial to the suspect. It will lead to unnecessary time and expenditure being exerted by the Defence. The Pre-Trial Chamber does not seem to disagree with this proposition:

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;¹⁴

- f. The Defence take this opportunity to underline that the Single Judge of the Pre-Trial Chamber I has itself confirmed that:

5. The confirmation hearing is one stage of the criminal procedure before the Court which aims at ensuring 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.

6. 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.

7. Furthermore, there must be *consistency* between the proceedings leading to the confirmation hearing, the hearing itself and, in the eventuality of the confirmation of the charges, the proceedings held before the Trial Chamber. Hence, the procedural activities carried out for the

¹⁴ Impugned Decision, p. 6.

purpose of the confirmation hearing must also aim at facilitating the preparation for trial in the event that the charges are confirmed.¹⁵*[Italic added]*

The Defence submit that there would be no consistency between the pre-trial proceedings and the trial if the Pre-Trial Chamber rely on core material that is not intended to be used at trial.

- g. There can be no doubt that the statement of a deceased witness, who has not been examined by one of the parties, can never meet the test imposed by Rule 68. The uncertainty expressed by the Pre-Trial Chamber, resulting in the non-liquet referred to above, is puzzling. The primary means of interpretation pursuant to Article 31 of the Vienna Convention on the Law of Treaties allows for no other conclusion to be drawn than that Rule 68 establishes a firm exclusionary rule for unchallenged recorded testimony. To the extent that the Pre-Trial Chamber would have any doubts on this point, these doubts should have been clearly expressed and be of sufficient quality so as to serve as a reasoned basis for the decision. The fact that this has not been done is inconsistent with the defendant's right to a reasoned decision. Equally important, this lack of reasoning suggests that also the Pre-Trial Chamber itself could not conceive of any legally acceptable scenario where this statement is admitted at trial. At least, the Pre-Trial Chamber has not offered any example or situation in which it would be conceivable that the statement of a deceased witness is admitted as evidence at trial.

13. The Defence therefore submit that the Single Judge's interpretation in the impugned Decision was erroneous, significantly affecting the fair trial and expeditious conduct of the proceedings and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Impact on Fairness

14. The Prosecution has stated that Witness 12 is a core Witness. In consequence, the Single Judge's decision to admit his statement for the purpose of the confirmation hearing could have a significant impact on the confirmation of some charges against Mr Katanga. It would clearly be prejudicial to Mr Katanga.
15. Even if the Trial Chamber excludes the statement of deceased Witness 12, it does not have the power to reverse the decision of the Pre-Trial Chamber to confirm the charges. The Trial Chamber must proceed to final adjudication even if it is clear that the evidence

¹⁵ ICC-01/04-01/07-423-Conf.

is not sufficient to convict. In contrast, even if the statement is excluded for the purposes of the confirmation hearing, the Prosecution can still seek its admission before the Trial Chamber; even if its exclusion leads to the exclusion of a component of the charges, the Prosecution can present additional evidence and request the Trial Chamber to confirm this component on the basis of this additional evidence.

16. The Appeals Chamber itself has underlined that the Pre-Trial Chamber should take “sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial.”¹⁶ In the present case, the use of the statement of Witness 12 could be highly prejudicial to Germain Katanga. The Defence will not have the opportunity to cross-examine him and address his credibility effectively. It is not disputed that the witness was suspected of committing crimes within the jurisdiction of the Court. The admission of his statement impacts on the protection of the defendant from unwarranted allegations.
17. The admissibility of the statement of a deceased witness therefore clearly impacts on the fairness of the proceedings.

Impact on the Expeditionness of the proceedings

18. The Defence submits that this issue is also directly related to the expeditious conduct of the proceedings given that the admission of the statement of Witness 12 for the purpose of the confirmation hearing can lengthen the proceedings by unnecessary committing a case to trial based on evidence which is inadmissible at trial, and by deferring problematic disclosure issues to the trial stage.
19. Moreover, exclusion of the statement at the current stage would assist the Prosecution and Defence to focus on the evidence and charges admissible for trial. A clear focus will undoubtedly expedite the proceedings. It will also be of assistance to the Court and the victims to appreciate the real issues.

An Immediate Resolution may materially advance the Proceedings

20. The admission or exclusion of the statement of Witness 12, “a core Witness”, could clearly have an impact on the confirmation of charges against Mr. Katanga, and on the

¹⁶ICC-01/04-01/06-773, para. 51.

length of the proceedings. There is no reason to wait until trial for a final exclusion of the statement of Witness 12.

21. There is no precedent of the Trial or Appeals Chamber on the issue of the admissibility at trial of statements, or transcripts of interviews, of deceased witnesses. The issue is not necessarily a straightforward matter. The case law of the International Criminal Tribunals for Rwanda and for the Former Yugoslavia is of limited assistance insofar as their Statutes do not provide for the holding of a confirmation of the charges hearing. Further they do not share the same evidentiary rule as is found in Article 61(5). A decision of the Appeals Chamber would be helpful and remove any uncertainty. As held by the Appeals Chamber:

“removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings”.¹⁷

Moreover, the interpretation of Article 61(5) and Rule 68 regarding the admissibility, for the purpose of the confirmation hearing, of a statement of a witness unavailable to testify at trial, will most likely provide a guideline for future cases brought before the Court.

22. The International Criminal Tribunal for Rwanda has held that the enumeration of a legal principle, which is likely to be applied through the proceedings, constitutes an issue, the resolution of which, would materially advance the proceedings.¹⁸

Conclusion

23. On these grounds, the Defence requests the Single Judge to grant leave to appeal the *Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12* pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.

¹⁷ ICC-01/04-168, para. 15.

¹⁸ ICTR, Decision on Joseph Nzirorera’s Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, *Prosecutor v. Nzirorera*, 9 October 2007 (available at <http://69.94.11.53/ENGLISH/cases/Karemwa/decisions/071009.pdf>).



David HOOPER

Dated this 28th April 2008

At London