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Pénale
Internationale**



**International
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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

**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**

Source: Office of the Prosecutor

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

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Introduction

1. 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" ("Prosecution's Observations"),¹ 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. On 31 March 2008, the Defence of Germain KATANGA ("KATANGA") filed the "Defence Response Concerning the Admission of the Statement of Witness 12",² and on 1 April 2008, the Defence of Mathieu NGUDJOLO CHUI ("NGUDJOLO") 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*".³ Both KATANGA and NGUDJOLO requested the Single Judge to decide that the statement of Witness 12 is inadmissible for the purpose of the confirmation hearing.
3. On 18 April 2008, the Single Judge issued the "Decision on the Admissibility for the Confirmation Hearing of the Transcripts of Interview of Deceased Witness 12" ("the Decision"),⁴ in which it found that "the transcripts of the interview of Witness 12 will be admissible for the purposes of the confirmation hearing".⁵
4. On 28 April 2008, both KATANGA and NGUDJOLO sought leave to appeal the Decision.⁶
5. The Prosecution hereby files a consolidated response to both of the Applications for Leave to Appeal, pursuant to Regulation 65(3).
6. The Prosecution considers that the Applications have, in part, met the requirements for leave to be granted under Article 82(1)(d). In relation to the First

¹ ICC-01/04-01/07-336.

² ICC-01/04-01/07-348.

³ ICC-01/04-01/07-351.

⁴ ICC-01/04-01/07-412.

⁵ Decision, p. 9.

⁶ ICC-01/04-01/07-450 ("KATANGA's Application"); ICC-01/04-01/07-454 ("NGUDJOLO's Application").

Issue, common to both Applications, the Prosecution does not oppose the Applications. However, the Prosecution opposes the Application in relation to the Second Issue referred to in NGUDOLO's Application, for which the Prosecution submits that the issue does not arise from the Decision and that requirements for leave to be granted under Article 82(1)(d) are not met.

The Issues for which Leave to Appeal is Sought

7. KATANGA sought leave to appeal a single issue of whether "the Single Judge erred in admitting the statement of a deceased witness which the Prosecutor considers to be core evidence" for the purposes of the confirmation hearing. NGUDOLO sought leave to appeal on a similar issue, namely the admissibility of testimony at the pre-trial stage of evidence that cannot be admitted at the trial stage. For the purposes of this consolidated response, these two issues will be dealt with jointly, as a question of whether the Pre-Trial Single Judge incorrectly admitted the statement of a deceased witness, taken under Article 55(2), for the purposes of the confirmation hearing ("First Issue").⁷
8. In addition, NGUDJOLO sought leave to appeal two issues, namely the alleged confusion between consent and security issues, and consideration of the right not to be self incriminated ("Second Issue").⁸

a) The First Issue – whether the Pre-Trial Single Judge incorrectly admitted the statement of a deceased witness, taken under Article 55(2), for the purposes of the confirmation hearing

9. The Prosecution agrees that the First Issue, common to both Applications, arises from the Decision,⁹ and submits that the First Issue meets the requirements of Article 82(1)(d), warranting examination by the Appeals Chamber.

⁷ KATANGA's Application, paras. 8-22, NGUDJOLO's Application, paras. 20-33.

⁸ NGUDJOLO's Application, paras. 20, 34-47.

⁹ See in particular Decision, p. 9.

10. However, the Prosecution does not agree with some of the arguments set out by KATANGA and NGUDJOLO in their respective Applications. Regardless of whether or not Witness 12 is regarded as a “core witness”,¹⁰ this does not mean that the admission of the statement of this witness for the purposes of the confirmation hearing is essential for the Prosecution to establish the test under Article 61(7) with respect any of the charges against KATANGA or NGUDJOLO.¹¹
11. In addition, the Prosecution submits that a Trial Chamber’s decisions pertaining to the admissibility or the weight to be given to the statement of Witness 12 are of no relevance for the determination of whether the issue at hand meets the criteria under Article 82(1)(d).¹² As the Single Judge has stated, “the competence to decide on the admissibility of the evidence given by a witness at trial lies with the Trial Chamber”.¹³ Hence, the Single Judge may not be required to speculate on how a Trial Chamber may deal with such statements in the future for the purposes of deciding on these Applications. In addition, any issue of whether or not such a statement would be admissible at trial does not arise out of the Decision.
12. Further, the Prosecution notes that a significant amount of the arguments advanced by KATANGA and NGUDJOLO in their respective Applications pertain to the merits of the issue.¹⁴ These arguments are not relevant to an application for leave to appeal, and the Prosecution does therefore not address these arguments in this consolidated response.

¹⁰ Decision, p. 4..

¹¹ See e.g. KATANGA’s Application, para. 14 and 20. NGUDJOLO’s Application, para. 29. The Prosecution refers to its previous submission that “even if the Prosecution would not be in a position to rely on either of these two statements [including the statement of Witness 12], the evidence it has so far provided easily establishes that there are reasonable grounds to believe that KATANGA has committed crimes within the jurisdiction of the Court.” (ICC-01/04-01/07-343, para. 12).

¹² KATANGA’s Application, paras. 15, 18, 20-21. NGUDJOLO’s Application, paras. 30, 33, 45, 47.

¹³ Decision, p. 6.

¹⁴ See for instance KATANGA’s Application, para. 13; NGUDJOLO’s Application, paras 21-27. The Prosecution notes that some of the arguments raised by KATANGA regarding the merits of the Decision appear to contradict arguments subsequently relied upon to demonstrate how the issue meets the criteria for leave to appeal: contrast “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 [...] is puzzling” with “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” (KATANGA Application, paras. 13(g) and 21 respectively, emphasis added).

b) *The Second Issue - confusion between consent and security issues, and consideration of the right not to be self incriminated*

13. The Second Issue, raised by NGUDJOLO, appears to be founded on assertions that Witness 12 was not properly informed of his rights in accordance with Article 55(2), and that as a result his statement may not have been fully voluntary and informed; or that these matters cannot be properly verified as the witness is deceased.¹⁵ The Prosecution submits that these assertions are baseless, and that the issue as characterised does not arise from the Decision.
14. The transcript of the interview of demonstrates that Witness 12 was fully informed of his rights, as required by Article 55(2) and Rule 112. This is recorded in the transcript of interview;¹⁶ and as the Prosecution stated in its initial observations, the audio-recording of the interview is available to confirm the veracity of this record.¹⁷ The Prosecution thus submits that there is no foundation for the allegations either that the witness was not fully informed of his rights prior to making his statement, or that the circumstances of the statement are unable to be verified. An issue cannot be created by unsubstantiated assertions, and the Prosecution therefore submits that this issue does not arise from the Decision and that leave to appeal should accordingly be denied.
15. Even if the Single Judge considers that the Second Issue does arise from the Decision, the Prosecution submits that NGUDJOLO has failed to demonstrate that it affects the fair and expeditious conduct of the proceeding, and that its immediate resolution would materially advance the proceedings.¹⁸

¹⁵ NGUDOLO's Application, paras. 36 and 38.

¹⁶ See DRC-OTP-0173-0912 at pages 5-10; DRC-OTP-0173-0953 at pages 8-9.

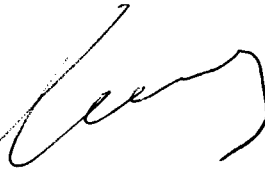
¹⁷ Prosecution's Observations, para. 9.

¹⁸ Contrary to the submissions of NGUDJOLO, the audio recording and transcript of the interview do permit the Defence to verify the circumstances under which the testimony was given (contrast NGUDJOLO's Application, para. 43). Furthermore, in contrast to the issue of whether potential witnesses could be considered "sources" for the purposes of Rule 81(2) (see ICC-01/04-01/07-116, 19 December 2007), the Prosecution submits that this issue does not have any significant impact on how the Prosecution will go about selecting its witnesses for the purposes of the confirmation hearing (contrast NGUDJOLO's Application, para. 45).

Relief Sought

16. For the reasons set out above, the Prosecution:

- a. does not oppose leave to appeal being granted for the First Issue, common to both Applications; but
- b. opposes leave to appeal being granted for the Second Issue identified by NGUDJOLO.



Luis Moreno-Ocampo, Prosecutor

Dated this 2nd day of May, 2008

At The Hague, The Netherlands