

1 International Criminal Court

2 Pre-Trial Chamber I

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/07

4 Confirmation of Charges Hearing - Open Session

5 Wednesday, 9 July 2008

6 The hearing starts at 9.16 a.m.

7 COURT USHER: All rise. Please be seated.

8 PRESIDING JUDGE KUENYEHIA: Good morning. Could the security
9 please bring in the suspects.

10 MS. BUISMAN: Your Honours, if I may. Good morning, everybody.
11 I regret to -- having to --

12 PRESIDING JUDGE KUENYEHIA: We have to call the case first.

13 MS. BUISMAN: Sorry.

14 PRESIDING JUDGE KUENYEHIA: Court officer, could you please call
15 the case.

16 COURT OFFICER (interpretation): Situation in the Democratic
17 Republic of the Congo, case of the Prosecutor versus Germain Katanga and
18 Mathieu Ngudjolo Chui, case number ICC-01/04-01/07.

19 PRESIDING JUDGE KUENYEHIA: I give the floor to ...

20 MS. BUISMAN: Thank you, Madam President. One more time, good
21 morning. I regret having to inform you that Mr. Katanga decided to stay
22 away today. He decided not to appear. He has instructed us to proceed
23 in his absence, and we have his authorisation to represent him. We have
24 nothing in writing at this moment, so I'm in your hands whether we should
25 adjourn and try to get something in writing as soon as possible or

1 whether we proceed. And from our part, we would be happy to continue.

2 I unfortunately do not know how long this will last, so I
3 apologise.

4 PRESIDING JUDGE KUENYEHIA: Is there a reason why he's not
5 coming?

6 MS. BUISMAN: In sum, Madam President, he told me he is tired.
7 There are a number of issues that concern him, and the main issue is his
8 family visit. He -- when I spoke to him a few times yesterday, his
9 morale was very low, and this is his main concern, that he really would
10 like to see his family. He's never seen his -- his latest born ever.
11 Well, you know the story. He has never seen his wife since 2005, when he
12 was arrested.

13 I'm only hoping that when we have on Friday the ex parte hearing
14 we could also in the presence of the Registrar see if we can find a
15 solution. We've seen, of course, the report. I just hope there must be
16 a way.

17 Having said that, I don't want to give the impression that
18 Mr. Katanga's boycott is a blackmail. He specifically stated not to make
19 any submissions.

20 Otherwise, I am not sure how long it will last. He said for now
21 until the end of confirmation, and there is a while before trial starts.
22 That's all I can say at the moment. And we do apologise on his behalf.

23 (The Pre-Trial Chamber confers)

24 MR. MacDONALD: With your permission, Madam President. It seems
25 that Rule 124 governs the waiver of a person to be present or not, and I

1 don't know if a strict interpretation of the rule requires that it has to
2 be done absolutely in writing, but that's what the -- sorry, Regulation
3 124 -- Rule, sorry, 124 indicates. It has to be put in writing and then
4 consultations are held between the parties in the presence, obviously, of
5 the Chamber.

6 MS. BUISMAN: Madam President, as I said before, we from the
7 Katanga Defence team are happy to proceed. However, if you would feel
8 more comfortable if you had something in writing, with your assistance we
9 may be able to get it very soon. Normally, as you probably know, if we
10 want to go to prison we have to book it in advance, which we haven't
11 done, and in addition, we do know that for this afternoon the prison is
12 full -- the consultation rooms are fully booked. I do think if you were
13 to order the Registrar to give us the assistance required, we should be
14 able to go there perhaps with a car provided by the ICC, go there
15 quickly, get his signature, and come back.

16 He told me he's happy to do so, but as I said, we are happy to
17 continue without it, and we could still give you something like that
18 retroactively as soon as we are able. Thank you.

19 (The Pre-Trial Chamber confers)

20 MR. MacDONALD: Your Honours, you also have Rule 125(4), and at
21 this stage maybe that would be the better option, is for this Chamber to
22 order that the suspect be brought over, and then he can say out loud, "I
23 don't want to be present for the remainder of the confirmation hearing,"
24 or whatever reason, and then we will have this on the record, but you
25 also have the power to order for the accused to be brought before you.

1 MR. SLUITER: If I may briefly react to that. I was also
2 planning to make an addition to my learned colleague in respect to the
3 options we have, and that's criminal practice. There's a standard waiver
4 form in relation to practice -- to presence that is sent -- can be sent
5 by fax to the prison authorities, can be signed and be sent back by fax.
6 I do not know if the ICC has such a form that we could use, but this
7 could be a very practical solution to this situation.

8 In relation to what the Prosecutor said, we object to that. We
9 can have very lengthy arguments because there's a fundamental issue on
10 the right to be present, which implies a right not to be present under
11 the case law of human rights bodies, and I think issuing an order now for
12 Mr. Katanga to appear, we would object to that, and this would require, I
13 think, more thorough analysis than issuing such an order right now.

14 (The Pre-Trial Chamber confers)

15 PRESIDING JUDGE KUENYEHIA: Rule 124 of the Rules of Procedure,
16 124(1) as you can see, requires a written request, and it is necessary
17 for the person, for Mr. Katanga, to understand clearly the implications
18 of not being present at the hearing, if it's for the rest of the
19 confirmation hearing. It is necessary for him to be clearly aware of the
20 implications, and therefore it will be necessary for the Defence team for
21 Mr. Katanga to get a written -- something written in which he requests
22 not only to be away -- to be absent from the rest of the hearing, but
23 also that he understands the implications of not being present in the
24 hearing because it is his right to be present, and if he doesn't want to
25 be present, he has to tell us in writing so that then we have followed

1 the rules properly.

2 The Chamber understands that you are not able to get to the
3 prison immediately without assistance, and to that extent the Chamber
4 would ask the director of Court Services to facilitate a visit by the
5 Defence team this morning to the court -- to the detention centre to
6 ensure that you are able to get the necessary consent, and the Chamber
7 will be grateful if this could be filed by 4.00 p.m. today to enable us
8 to proceed with the confirmation hearing.

9 This, of course, will mean that Mr. Kilenda, who is scheduled to
10 have his hearing -- his presentation this morning, will not be able to do
11 so, and Mr. Kilenda, the Chamber would like to apologise, but this is
12 something entirely not within the control of the Chamber. But since you
13 were scheduled to have your presentations for today and tomorrow, you
14 will still be able to have your full presentation without losing any
15 time.

16 Is that satisfactory to the Defence for Mr. Katanga?

17 MR. KILENDA (interpretation): Thank you, your Honours. This is
18 a procedural matter that our team cannot do anything about. If the
19 instruments governing proceedings before this Chamber require the
20 personal appearance of all suspects, we can only follow the decision that
21 you have issued so that the proceedings can be carried out legally.

22 PRESIDING JUDGE KUENYEHIA: Thank you very much, Mr. Kilenda.

23 MS. BUISMAN: Thank you, Madam President. I think that's the
24 best solution for all of us, so we are most grateful.

25 I -- just before we adjourn, I would like to raise one more

1 matter that's separate from this issue. I don't know if I can raise that
2 now.

3 MR. MacDONALD: Just before raising this other issue,
4 Madam President, if we could have put on record that the Prosecution
5 objects to the fact that no notice was provided of this before coming to
6 this hearing. The hearing is being hijacked at the very moment by
7 Mr. Katanga, and the Prosecution would be ready to proceed this afternoon
8 with a four-hour hearing, and after the Defence team of Mr. Katanga goes
9 to prison -- the detention centre, sorry, obtains the necessary
10 documents, and files the document in question, and then there's supposed
11 to be a hearing to be held on -- if Mr. Katanga should be present or not,
12 and then we could have this hearing this afternoon.

13 At the moment, the way -- if we're pushing back the hearings,
14 that means that tomorrow morning, technically, we're supposed to argue on
15 this request, because it's an application for Mr. Katanga not to be
16 present. If it's denied, then clearly Rule 125(4) indicates, contrary to
17 Mr. Sluiter's arguments of European Court of Human Rights, that the
18 suspect can be forced to be present during the confirmation hearing. So
19 at this very moment - and I'm not finished Mr. Sluiter - and at the very
20 moment right now what's been happening is that we're not following the
21 procedures. We're simply not following and no notice was given before.
22 If this was known yesterday it could have been -- parties could have been
23 called, the Chamber could have been informed, and we could have organised
24 ourselves appropriately.

25 MR. SLUITER: Very briefly, your Honour. First in relation to

1 notice. We are hoping still today that Mr. Katanga would be here at the
2 latest moment, but he decided otherwise. So we could not give notice
3 before.

4 In relation to the interpretation of Article 125(4), I
5 fundamentally disagree in relation to this provision and other
6 provisions. Article 21(3) of the Statute clearly stipulates the
7 fundamental and overriding importance of human rights law. Therefore,
8 Article 125(4) is a provision which sets out the procedure, but we always
9 have to carefully examine if this procedure is consistent with
10 internationally protected human rights law. Thank you.

11 PRESIDING JUDGE KUENYEHIA: Yes, we were not given any notice.
12 Having arrived here and seen that there is no Mr. Katanga, we have to
13 follow the procedure. We cannot simply go ahead with the confirmation
14 hearing, because the Rule requires clearly an application from the
15 suspect, that is from Mr. Katanga, to be absent.

16 Having said that, the Chamber has already asked the Registry to
17 facilitate the consultation by his Defence team with him, and the Chamber
18 has asked that this information -- this application be filed latest by
19 4.00. We could have a hearing starting at 5.00 if need be to hold the
20 necessary consultation and to rule on the matter.

21 MS. BUISMAN: Thank you, Madam President. We would also be happy
22 to get this written authorisation earlier than 4.00, and that will mean
23 we may be able to proceed this afternoon if that would be an alternative
24 solution.

25 PRESIDING JUDGE KUENYEHIA: Okay. The Chamber then proposes that

1 the team -- Defence team of Mr. Katanga, with the assistance of the
2 director of Court Management Services, produces the necessary
3 documentation under Rule 124(1), and there is a possibility that we could
4 actually resume at 2.00 in order to proceed with the hearing, to hold the
5 necessary consultation and then proceed with the hearing.

6 Is that acceptable to all parties? Yes. Thank you very much.
7 On that note, we will adjourn the hearing until 2.00, by which time we
8 will -- the Chamber will hold the necessary consultation and proceed with
9 the confirmation hearing. And, Mr. Kilenda, you may still have your day
10 in court today.

11 Thank you.

12 COURT USHER: All rise.

13 Recess taken at 9.36 a.m.

14 On resuming at 2.02 p.m.

15 COURT USHER: All rise. Please be seated.

16 PRESIDING JUDGE KUENYEHIA: Good afternoon, everybody. Could the
17 security officer please bring in Mr. Ngudjolo Chui.

18 Court Officer, could you please call the case.

19 COURT OFFICER (interpretation): Situation in the Democratic
20 Republic of the Congo, the case of Germain Katanga and Mathieu Ngudjolo
21 Chui, ICC-01/04-01/07.

22 PRESIDING JUDGE KUENYEHIA: Thank you. This is a continuation of
23 the hearing of this morning. The same parties and participants, but I
24 see a new face on the bench of the Legal Representatives for Victims, so
25 could you please introduce yourself.

1 MR. FALAY YUMA (interpretation): Thank you very much for the
2 floor. I am called Robert Falay Yuma and I am a lawyer at the
3 Kinshasa-Matete bar, and I am intervening as a case manager in the team
4 of Legal Representatives, Maitre Herve Diakiese.

5 PRESIDING JUDGE KUENYEHIA: You are welcome to the court.
6 Otherwise, the same parties and participants are present.

7 The Trial Chamber has received a request from Mr. Germain Katanga
8 to be absent from this hearing. The document is ICC-01/04-01/07-670, and
9 it's Annex A.

10 Mr. Germain Katanga has submitted a written request in French, a
11 handwritten request in French, waiving his right to be present at the
12 rest of the confirmation hearing and agreeing to his representation by
13 his present Defence team for the duration of the confirmation hearing.
14 The Chamber has therefore decided to hold a consultation in accordance
15 with Rule 124, specifically Rule 124(1), tomorrow morning at 9.00, July
16 10th at 9.00, in the presence of the parties and participants to this
17 case, including the Defence for Mr. Germain Katanga, especially
18 Mr. Hooper, who we believe will be back in the court tomorrow.

19 Specifically, Rule 124(1) reads that "if the person's consent is
20 available to the court and wishes to waive the right to be present at the
21 hearing on confirmation of charges, he or she shall submit a written
22 request to the Pre-Trial Chamber, which may then hold consultations with
23 the Prosecutor and the person concerned assisted or represented by his or
24 her counsel."

25 Mr. Kilenda, the Chamber would like to know whether you intoned

1 use the whole of the seven and a half hours, in which case the Chamber is
2 prepared to modify the agenda so that you don't lose any of your rights.

3 MR. KILENDA (interpretation): Thank you, your Honours. We do
4 not intend to use the seven hours scheduled. We hope that we will finish
5 in two hours at least.

6 PRESIDING JUDGE KUENYEHIA: Thank you. In which case the hearing
7 is adjourned until tomorrow morning at 9.00. Thank you very much.
8 Sorry. Please.

9 MR. SLUITER: Yes, your Honour. In respect to the hearing of
10 tomorrow, there may be a problem with the presence of Mr. Hooper. He's
11 apparently held up in -- in Arusha. So I hope you can give us some time
12 to confer on this. Can we have a minute to confer on this?

13 (The Pre-Trial Chamber confers)

14 PRESIDING JUDGE KUENYEHIA: Ms. Massidda stood up before I
15 realised that she was standing up. And do I understand, Mr. MacDonald,
16 you also want to say something? If so, after Ms. Massidda.

17 MS. MASSIDDA: Thank you, Madam President. I seek the
18 intervention of the Chamber with one request. In my understanding the
19 hearing tomorrow morning is in order to have consultation with the
20 Prosecution and the Defence. In this set of rights for victims,
21 non-anonymous victims, I refer to paragraph 141 of the decision of 13 of
22 May, 2006. It reads as follows: "The fifth group includes the right to
23 participate by way of oral motions, responses, and submissions in
24 relation to all matters other than those in which their intervention has
25 been excluded by the Statute and the Rules."

1 I respectfully submit that Rule 124(1) does not exclude the legal
2 Representative from Victims submitting arguments. So I would like to
3 request the Chamber to allow also submissions by the Legal Representative
4 of Non-Anonymous Victims. Thank you.

5 MR. MacDONALD: The only question, and I raise this for the
6 Chamber's consideration, if Mr. Hooper is not present tomorrow, can we
7 have this hearing on the issue of the waiver? Mr. Hooper is the counsel
8 of record. Ms. Buisman and Mr. Sluiter are not. In the absence of
9 Mr. Katanga himself, can they present such a request on the behalf of
10 Mr. Hooper? Initially Mr. Hooper was to be present. I understand that
11 you remanded for this hearing to be held tomorrow in the presence of
12 Mr. Hooper. Now, apparently, he has business elsewhere.

13 Now, in this context, I'm raising the issue for your
14 consideration, your Honours.

15 PRESIDING JUDGE KUENYEHIA: You asked for a minute to confer.
16 Inside or outside the courtroom?

17 MR. SLUITER: Your Honour, I think we can do it here. That's no
18 problem. Thank you.

19 (Defence counsel confer)

20 PRESIDING JUDGE KUENYEHIA: Okay, Mr. Sluiter.

21 MR. SLUITER: Yes. Thank you, your Honour. I apologise for this
22 moment.

23 At this stage we simply do not know if Mr. Hooper can be here
24 tomorrow. That is situation right now. But I have -- I have two points
25 I would like to make in addition. One of them concerns the hearing of

1 tomorrow. The position of the team of Mr. Katanga is that we read Rule
2 124 as giving this as an opportunity to hold consultations but not being
3 an obligation for the Pre-Trial Chamber to hold these consultations, and
4 as far as we would be concerned, we could easily continue this afternoon
5 with Mr. Kilenda's presentation.

6 The second point is in reaction to the Prosecutor. I see that
7 Rule 124 is a personal right to the person concerned, Mr. Katanga, to
8 issue such a request to waive his right to be present. I do not see how
9 it needs specific instruction given to lead counsel to address on this
10 issue.

11 In addition, there have been many instances where a lot of
12 precedence concerning the fact that assistant counsel have dealt with
13 similar matters, have been instructed to represent and act on behalf of
14 lead counsel as well.

15 Thank you.

16 PRESIDING JUDGE KUENYEHIA: Mr. MacDonald, did you want to say
17 something?

18 MR. MacDONALD: Yes, your Honour. It is true that the Chamber
19 may hold consultations, and you're not obliged to do so. That's point
20 number one.

21 Point number two, and if you look at the drafting history of Rule
22 124 and 125, you have ultimately the discretion to grant the waiver or
23 not. There is a right to request waiver, but this waiver has to be
24 granted. It's not automatic according to the Rules and the Statute.

25 Actually, there is a Rule, and the Rule is that the suspects or

1 accused, when it's a trial, have to be present, and that's Article 61(1).
2 Article 61(2) gives the possibility for a suspect at confirmation to
3 waive his right to be present. When holding consultations, you do so for
4 one question. Is it a fully informed, unequivocal and understood waiver
5 on the part of, in this case, Mr. Katanga? And that is Rule 124(2),
6 which is clear. Merely replicating the language in a waiver, we submit,
7 is not good enough as it is right now in this waiver.

8 Number two, Mr. Hooper is the counsel of this person, of
9 Mr. Germain Katanga, and this is a fundamental issue, fundamental issue
10 as to waive one's presence because he's demoralised. Now, maybe it would
11 be then an opportunity for the Chamber to request an order -- and or
12 order the presence of Mr. Katanga tomorrow, since Mr. Hooper will not be
13 there, for the Chamber to ascertain itself of the validity and the
14 underlying reasons for this waiver.

15 PRESIDING JUDGE KUENYEHIA: Thank you. The Chamber is -- sorry.

16 MR. SLUITER: Just a final point just to have this on the record,
17 your Honour. I think this is getting very repetitious, this exchange
18 between us and the Prosecutor. The interpretation of the Rules is just
19 one element of the applicable law. Human rights law pursuant to Article
20 21(3) has an overriding importance for the application and interpretation
21 of the law pursuant -- of the applicable law of the ICC. I think this is
22 a fundamental issue and we should carefully analyse applicable human
23 rights law regarding this matter before there would be any order to
24 appear.

25 Another point I wish to raise and emphasise is that the absence

1 of Mr. Katanga is just a symptom of what is going on. The cause of all
2 the problems is that the fact is that he has not seen his family for more
3 than three years now as he has been detained since early 2005. I think
4 we should not forget that.

5 Thank you, Your Honour.

6 PRESIDING JUDGE KUENYEHIA: Thank you. The Chamber is aware that
7 the language of Rule 124(1) is permissive. However, the Chamber has
8 decided to hold this consultation and will give Mr. Hooper the
9 opportunity to be present. As far as the Chamber is concerned, the
10 Chamber granted Mr. Hooper permission to be absent for three days. That
11 is Monday, Tuesday, and today, Wednesday day. The Chamber expects that
12 Mr. Hooper will be here tomorrow morning. If Mr. Hooper is not present,
13 then the Chamber will have to allow the team, the rest of his team, to be
14 part of the consultation, and -- because the Chamber has not given him
15 permission to be absent for Thursday.

16 And as far as Legal Representatives for victims are concern, the
17 Chamber will give them some time, a very short time, very short time, I
18 repeat, to make observations, but the Chamber will decide the time
19 tomorrow morning. Thank you.

20 MS. MASSIDDA: Thank you, Madam President.

21 PRESIDING JUDGE KUENYEHIA: The hearing is adjourned until
22 tomorrow morning at 9.00.

23 COURT USHER: All rise.

24 The hearing ends at 2.19 p.m.

25