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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN DEMOCRATIC REPUBLIC OF CONGO

**IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI**

Public Document

**Prosecution's response to the request of Defence for Mathieu Ngudjolo to admit
into evidence extracts from the Statement of Witness DRC-D02-P-0148**

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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Other

1. On 14 June 2011, Trial Chamber II (“Chamber”)¹ requested that the parties submit their written observations by 21 June 2011 on the request made by the Defence of Mathieu Ngudjolo (“Defence”) to admit into evidence excerpts of the witness statement of Witness DRC-D02-P-0148 (from pages 13 to 15 of DRC-D02-0001-0750) (“Request”).²
2. The Prosecution submits that the Request should be rejected. It violates the principle of orality as enshrined in Article 69(2) of the Statute, the requirements of Rule 68(b), the recent decision of the Appeals Chamber on the admission of prior witness statements,³ a recent decision of this Chamber rejecting evidence offered by the Katanga Defence team,⁴ and the Chamber’s ‘*Directions for the conduct of the proceedings and testimony in accordance with Rule 140*’ (“Directions”).⁵
3. The Defence could have asked questions of Witness DRC-D02-P-0148 concerning those excerpts but did not do so. Having failed to comply with that obligation, it cannot now offer the excerpts as stand-alone evidence. It could also have filed an urgent request pursuant to Rule 68(b) or at the very least asked the witness at the outset if he consented to admission of the statement, which would have alerted the parties and the Chamber to inquire into the substance of the excerpt. Having failed to comply with the obligation to make the request at the start, it cannot now seek admission of the statement at the end of the examination. Admitting this evidence now will be prejudicial to the Prosecution’s interests. Finally, contrary to Defence’s contention, the

¹ ICC-01/04-01/07-T-281-CONF-ENG ET, p. 34, lines 3-8.

² ICC-01/04-01/07-T-281-CONF-ENG ET, p. 33, lines 18-24 ; ICC-01/04-01/07-3019. The Request also seeks an EVD number to be assigned to those excerpts.

³ ICC-01/05-01/08-1386, p. 3, para. 3. The Appeals Chamber held that the “*Trial Chamber’s admission into evidence of the witnesses’ written statements without a cautious item-by-item analysis and without satisfying rule 68 of the Rules of Procedure and Evidence was incompatible with the principle of orality established by article 69(2) of the Statute*”.

⁴ ICC-01/04-01/07-2954.

⁵ ICC-01/04-01/07-1665-Corr, para. 73.

previous admission of an investigator's report is not precedent for this request.

Submissions

4. The Defence for Mathieu Ngudjolo has not provided any exceptional basis for derogating from the principle of orality or the Chamber's Directions for cross-examining parties by admitting these excerpts from DRC-D02-P-0148's witness statement into the Court record.
5. On the contrary, as Defence for Mathieu Ngudjolo has emphasized,⁶ Witness DRC-D02-P-0148 was not their witness and they had the opportunity to cross-examine the Witness and to elicit or put to him those excerpts from his witness statement. Not only were they able, they were also obligated to do so: pursuant to the Chamber's Directions, it is "*incumbent upon the cross-examining party to put all questions it may have for the witness during this occasion*".⁷
6. During their cross-examination of Witness DRC-D02-P-0148, the Defence for Mathieu Ngudjolo questioned him in relation to some (but not all) aspects of the topics covered in pages 13 to 15 of his witness statement. They chose not to cross-examine him on any potential contradictions between his testimony and his prior written statement.⁸ During their re-examination of the Witness, the Defence was allowed to read out from the witness's statement and to question him on a part of the excerpt they are now seeking to introduce into the Court record.⁹ If the Defence had additional questions in relation to important issues arising from the excerpts on pages 13-15, they could have sought authorization from the Chamber during their re-examination to ask those additional questions. They failed to do so.
7. Having made an affirmative strategic decision to not explore those matters, the Defence cannot now complain that the Chamber will be deprived of

⁶ ICC-01/04-01/07-3019, p. 5, para. 12; p. 6, para. 21.

⁷ ICC-01/04-01/07-1665-Corr, p. 29, para. 73.

⁸ ICC-01/04-01/07-T-281-CONF-ENG, p. 33, line 15 – p. 38, line 7.

⁹ ICC-01/04-01/07-T-281-CONF-ENG, p. 29, l. 1-19. They also did not choose to question him on all aspects of the portion they read out to the witness.

essential evidence unless it admits the out-of-court statement. This claim is also factually unsupportable. As the Defence concedes, Witness DRC-D02-P-0148 “a donné l’essentiel de ces éléments lors de sa déposition devant la Chambre”.¹⁰ Witness DRC-D02-P-0148 was questioned at some length in relation to the topics appearing in these pages of his witness statement, not only by Defence for Mathieu Ngudjolo, but also by the other parties: during the examination-in-chief of Defence for Germain Katanga¹¹, in cross-examination by the Prosecution¹², in questions from the Legal Representatives for Victims¹³ and by the Chamber itself.¹⁴

8. Moreover, it would not be appropriate to admit these excerpts of DRC-D02-P-0148’s witness statement, where during the course of his testimony it was clear from his responses that the witness was not confirming the accuracy of everything in pages 13 to 15 of his statement (for example, when he confirmed that he had not actually heard of Blaise Koka).¹⁵
9. The request also does not comply with Rule 68(b). That rule requires, as a predicate for admitting an out-of-court statement by a trial witness, that the witness does not object to the admission of the statement and that the parties and the Chamber have an opportunity to examine the witness.
10. The Defence could have filed an urgent request pursuant to Rule 68(b) or asked the witness at the outset of their cross-examination, if he consented to admission of the statement, which would have alerted the parties and the Chamber to inquire into the substance of the excerpt. Having failed to comply with the obligation to make the request at the start, it cannot now seek admission of the statement at the end of the examination.

¹⁰ ICC-01/04-01/07-3019, p. 6, para. 18.

¹¹ ICC-01/04-01/07-T-279-CONF-ENG, p. 17, line 11 – p. 20, line 19.

¹² ICC-01/04-01/07-T-280, p. 20, line 24 – p. 25, line 14; p. 37, line 25-p. 42, line 3.

¹³ ICC-01/04-01/07-T-280, p. 59, line 24 – p. 62, line 15.

¹⁴ ICC-01/04-01/07-T-281, p. 21, line 7-p. 23, line 12.

¹⁵ ICC-01/04-01/07-T-279, p. 19, lines 5-8. See also ICC-01/04-01/07-T-281-CONF-ENG, p. 33, line 15 – p. 38, line 7.

11. The Chamber rejected a similar request for admission into evidence of the prior statement of Witness DRC-OTP-P-0250 on the ground that the request, made at the end of his testimony, was too late. The Chamber held that the *“implementation of Rule 68 may not be done at the end of the testimony of the witness”*.¹⁶
12. Finally, even if Defence had filed such a request prior to the testimony of the Witness, *“compliance with the requirements of rule 68(b) of the Rules does not automatically create a sufficient ground to deviate from the orality principle.”*¹⁷ In this instance, allowing for an exception to the principle of orality and Chamber’s Directions would prejudice the Prosecution and impact on the fairness of the trial generally.¹⁸

The admission of an investigator’s report is not precedent for the admission of these excerpts

13. The Defence argues that the Chamber has admitted other evidence, an investigator’s report (not a statement), under similar circumstances. This is incorrect. The report instead was admitted for the limited purpose of clarifying what Witness DRC-D02-P-0147 stated in relation to contacts with the Prosecution (and the Victims and Witnesses Unit).¹⁹

¹⁶ ICC-01/04-01/07-T-106-CONF-ENG, p. 48, lines 7-21:

The Chamber notes that Rule 68 of the Rules of Procedure and Evidence makes it possible to file into the proceedings under certain conditions audio or visual evidence or transcripts or other such testimony, but it considers that the implementation of Rule 68 may not be done at the end of the testimony of the witness. The proceedings took place orally, completely, with – subject to certain interventions with a concern to respect equality of arms to enable everyone to express themselves, to repeat questions, which isn’t always the rule, but it is important where it concerns the witness who is before us, to try to obtain additional clarifications. To have – at this stage of the testimony to have Rule 68 applied, in the Chamber’s view, does not meet the objective which was fixed – set by the drafters of the Rules of Procedure and Evidence when they inserted into this text the provisions which now constitute Rule 68.

¹⁷ ICC-01/04-01/07-2954, p. 5, para. 7.

¹⁸ ICC-01/05-01/08-1386, paras. 77-78. See ICC-01/04-01/07-2954, p. 4, para. 4, citing the Appeals Chamber, ICC-01/05-01/08-1386, paras. 77-78. At para. 77 the Appeals Chamber confirmed that Trial Chambers have the *“discretion to receive testimony of witnesses by means other than in-court personal testimony, as long as this does not violate the Statute and is in accordance with the Rules of Procedure and Evidence”*. At para. 78, the Appeals Chamber stated that: *“In deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In the view of the Appeals Chamber, this requires a cautious assessment.”*

¹⁹ ICC-01/04-01/07-T-263-CONF-ENG, p. 68, line 12 – p. 69, line 24.

14. The Chamber allowed the admission of the report taking into account first, that the report provided worthwhile information separate from the oral testimony of Witness DRC-D02-P-0147 (Defence of Germain Katanga argued the report was consistent with the account given by Witness DRC-D02-P-0147); and second, even though the report did not come from the witness, it was closely related to the witness as it referred to his contacts with the Prosecution. The Defence of Mathieu Ngudjolo submitted that the report did not add anything but both the Prosecution and Defence for Germain Katanga did not have objections and requested that it be admitted into evidence.²⁰
15. Finally, the report is not a prior statement, but is more akin to documentary evidence, admitted through a witness because of the inherent correlation between that item of documentary evidence and that witness.²¹

²⁰ ICC-01/04-01/07-T-264-CONF-ENG, p. 2, line 14 – p. 3, line 7:

“The Chamber understands the viewpoint of the Defence team for Mathieu Ngudjolo sent through an email yesterday. Their viewpoint is based on the fact that this investigator’s note does not add anything to the oral testimony of our witness, Witness 0147 and Witness 0236. The Chamber would like to point out, however, that the Defence team of Germain Katanga – and here I would refer you to transcript 263, page 62, line 22 – the Chamber notes that the Defence team of Germain Katanga sees consistency between the account given by the witness and this report, which according to the Defence team corroborates what was said. The Defence team of Mathieu Ngudjolo notes that this document has not come from the witness, but the Chamber notes that this document is closely related to this witness since it refers to contacts that the OTP allegedly had with him in the year 2010. The Chamber therefore does not see any obstacle to an EVD reference being given to this document.”

See also ICC-01/04-01/07-T-264-CONF-ENG, p. 3, lines 9-17.

²¹ ICC-01/04-01/07-1665-Corr, p. 37, para. 97.

Conclusion

16. For all the foregoing reasons, the Prosecution submits that the Request to admit into the Court record excerpts from the statement of Witness DRC-D02-P-0148 should be rejected.



Luis Moreno Ocampo, Prosecutor

Dated this 21st day of June 2011

At The Hague, The Netherlands