



Original: English

No.: ICC-01/04-01/07

Date: 25 May 2011

TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public

**Decision on Defence Request to Admit into Evidence Entirety of
Document DRC-OTP-1017-0572**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”), pursuant to Articles 64 and 69 of the Rome Statute (“the Statute”), Rule 68 of the Rules of Procedure and Evidence (“the Rules”) and Regulation 43 and 54(f) of the Regulations of the Court (“the Regulations”), decides as follows:

I. PROCEDURAL HISTORY

1. On 14 April 2011, the Prosecution presented witness P-236 with a prior recorded statement by that same witness (DRC-OTP-1017-0572) and asked him to read an extract from it during cross-examination.¹ The extract runs from page 10, line 341 until page 11, line 380. The witness read the passage in silence. After that, the Prosecution asked the witness a number of questions in relation to this passage, which were intended to expose a supposed inconsistency between the prior recorded statement and the testimony of the witness given in court.

2. The next day, the extract was admitted into evidence as EVD-OTP-00262.² However, the Defence for Mr. Katanga then moved to have the entire prior recorded statement admitted into evidence.³ In its written submissions, the Defence argued that the purpose of admitting the entire statement was to offer the Chamber an opportunity to evaluate for itself “whether the submissions made orally before it by witness DRC-D02-P-0236 concerning weapons deliveries contradict his submissions made to the Prosecution on 18 June 2007.”⁴

3. On 21 April 2011, the Office of the Prosecutor (“Prosecution”) responded.⁵ The Prosecution raised the following arguments against the admission into

¹ ICC-01/04-01/07-T-247-ENG-ET WT, p. 27

² ICC-01/04-01/07-T-248-ENG-ET WT, p. 9

³ ICC-01/04-01/07-T-248-ENG-ET WT, p. 46-50

⁴ “Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572”, 18 April 2011, ICC-01/04-01/07-2839-Corr, para. 4 (“Request”)

⁵ “Réponse de l’Accusation à la requête ICC-01/04-01/07-2839-Corr de l’équipe de défense de Germain Katanga ‘to Admit into Evidence Entirety of Document DRC-OTP-1017-0572’”, 21 April 2011, ICC-01/04-01/07-2850

evidence of the entire statement. First, the Prosecution argues that there is no legal basis for the admission into evidence of the entire written statement, as this would violate the principle of orality.⁶ The Prosecution submits, in this regard, that the criteria of rule 68(b) of the Rules are not fulfilled.⁷ Second, the Prosecution alleges that the Defence had the opportunity to question the witness on the points raised by the Prosecution during cross-examination in relation to the prior recorded statement.⁸ Finally, the Prosecution argues that it would disrupt the equality of arms between itself and the Defence if the written statement was to be admitted, because the statement contains many details on which the witness was not questioned by the Defence.⁹

II. ANALYSIS

4. The Chamber's starting point in analysing the Request is the principle of orality. This principle is enshrined in article 69(2) of the Statute and was recently confirmed by the Appeals Chamber to be one of the key principles of trials before the ICC.¹⁰ At the same time, the Appeals Chamber confirmed that Trial Chambers have *discretion* to receive testimony of witnesses by means other than in-court testimony, as long as this does not violate the Statute and is in accordance with the Rules of Procedure and Evidence.¹¹ However, the Appeals Chamber encourages Trial Chambers to exercise this discretion with caution so as not to prejudice the rights of the accused or the fairness of the trial generally.¹²

⁶ ICC-01/04-01/07-2850, para. 7

⁷ *Idem.*, paras 9-10

⁸ *Idem.*, paras 11-14

⁹ *Idem.*, paras 15-17

¹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'", 3 May 2011, ICC-01/05-01/08-1386

¹¹ ICC-01/05-01/08-1386, para. 77

¹² ICC-01/05-01/08-1386, para. 78

5. So far, this Chamber has taken a moderated approach towards admitting prior recorded testimony.¹³ Moreover, in his Directions for the conduct of the proceedings, the Presiding Judge has prescribed a specific procedure for the application of rule 68(b).¹⁴

6. The Chamber emphasises, in this regard, that the excerpt of the prior recorded statement of P-236 was only allowed into evidence because it was not read aloud. The normal practice before this Chamber is for the parties to read quotes from previous statements into the trial record. In this particular instance, witness P-236 was asked to read one page of his prior recorded statement in silence and was subsequently asked to comment. The Chamber therefore had no alternative but to admit the relevant excerpt into evidence, as otherwise it would not have been part of the trial record. The excerpt was therefore admitted as if it had been read out loud to the witness.

7. The Chamber is of the view that compliance with the requirements of rule 68(b) of the Rules does not automatically create a sufficient ground to deviate from the orality principle. The simple assertion that a written statement of a witness who has appeared for testimony provides the broader context in which a specific statement was made, or allegedly corroborates the oral testimony given at trial, does not qualify as a sufficient reason for admitting it into evidence. Consequently, the Chamber sees no reason in the present case to deviate from its established practice to not allow prior recorded statements of witnesses who appear before it into evidence. The Chamber notes, in this regard, that the

¹³ "Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts", 16 July 2010, ICC-01/04-01/07-2289-Conf; "Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts", 15 July 2010, ICC-01/04-01/07-2233-Corr; "Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219", 3 September 2010, ICC-01/04-01/07-2362; Oral decision of 26 March 2010, ICC-01/04-01/07-T-124-CONF-ENG ET, p. 2-4; Oral decision of 23 February 2010, ICC-01/04-01/07-T-106-CONF-ENG ET, p. 47-8

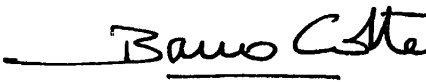
¹⁴ "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2010, ICC-01/04-01/07-1665-Corr, paras. 92-94

Defence had an opportunity to question P-236 directly in relation to the passage from his written statement.

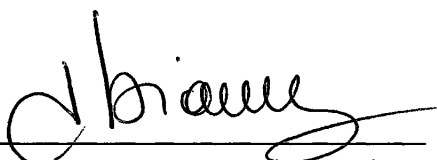
FOR THESE REASONS, THE CHAMBER

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge


Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

Dated this 25 May 2011

At The Hague, The Netherlands