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No.: ICC-01/04-01/07
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TRIAL CHAMBER II

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

SITUATION IN DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA & MATHIEU NGUDJOLO

Public Document

Prosecution's Observations on Rebuttal Evidence

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 1 September 2010, Trial Chamber II (“the Chamber”) requested that the parties and participants submit their questions, views and proposals regarding the issue of rebuttal evidence by 20 September 2010.¹
2. The Prosecution submits that consideration of rebuttal evidence is within the powers of the Chamber under the Rome Statute and the Rules of Procedure and Evidence; consistent with the practice of Trial Chamber I and with other international tribunals; accepted in adversary criminal trials; and essential to the discovery of the truth and the preservation of fairness. Thus, the Prosecution urges that the Chamber has the power to admit rebuttal evidence under appropriate circumstances.
3. In this case, there is also an unusual situation in which evidence that might ordinarily be regarded as rebuttal – and thus admissible after the Defence may conclude its case – might properly be admitted earlier, during the Prosecution’s presentation of its case. This unusual scenario arises because the Chamber admitted into evidence certain Defence documents that were obtained under circumstances that call into question their reliability and probative value. Had they been admitted during the Defence’s case, the Prosecution would have offered rebuttal evidence to impeach them; given the timing of their admission, the Prosecution submits that the Chamber can also accept rebuttal evidence concerning those documents during the Prosecution’s case-in-chief.

¹ ICC-01/04-01/07-T-182-CONF-ENG, p. 26.

Submissions

4. The Prosecution submits that the Rome Statute provides for broad powers which enable the Chamber to admit rebuttal evidence in certain circumstances, to refute, explain or counteract evidence from the Defence which the Prosecution could not reasonably anticipate and which is related to a significant issue.² The Court's ability to consider rebuttal evidence contributes to the determination of the truth and the fairness of the trial. As is the case with the admission of all evidence, pursuant to Article 69(4) the Chamber retains the discretion to admit such evidence based upon criteria such as probative value, trial fairness and the interest of justice, and prejudice to the parties (both the accused and the Prosecution).³
5. Rebuttal evidence is usually presented by the Prosecution after the Defence's case. However, in light of the fact that the Chamber has admitted certain Defence documents in the Court record/*dossier* (by way of EVD numbers),⁴ in order to maintain an orderly process the Chamber can also accept Prosecution evidence rebutting the Defence exhibits during or before the end of the Prosecution's case.

² *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Decision on Prosecution's Motion to Admit Rebuttal Statements via Rule 92bis, Case no. IT-03-66-T, Trial Chamber II, 7 July 2005, p. 2, para. 6 ("Limaj Decision").

³ For example, in a fraud prosecution the Accused was alleged to have attempted to forge the signature of a person on an essential document. He testified in his defence case that it was a one-time event and done without fraudulent intent. On rebuttal, to refute the defence of innocent intent, the Prosecution offered evidence that in fact the Accused had forged signatures and falsely notarized signatures on other documents and had asked his staff to perform similar fraudulent acts: *United States v. Wood*, 982 F.2d 1, 2-4 (1st Cir. (US), 1992). In another example, the Accused testified at trial that he had told another witness about his alibi; the Prosecution was allowed to elicit from that witness, in rebuttal, the truth that the Accused had not made the statement he claimed in his testimony, see *R. v. Lawes* [1997] 3 SCR 694 (Supreme Court of Canada).

⁴ See, *inter alia*, EVD-D02-00032 and EVD-D03-00007.

The nature of rebuttal evidence

6. In an adversarial criminal trial conducted under traditional rules, the Prosecution presents its evidence in the first phase of the case; the Defence may examine Prosecution witnesses but does not call witnesses on its behalf or offer its own evidence. As a general principle the Prosecution is obliged in its case in chief to adduce all the evidence that it relies upon to demonstrate the guilt of the Accused. Thereafter the Defence, if they so wish, can present evidence challenging the Prosecution's case theory. The Prosecution cannot "split" its case and call further substantive evidence to supplement its own case in chief, after the Defence has presented its case.
7. The ability to offer rebuttal evidence is consistent with this proposition. It is broadly accepted that the Prosecution can lead highly probative⁵ evidence in rebuttal after the Defence's case to refute, impeach, explain or counteract issues raised by the Defence, or to defuse the impact of evidence offered in the Defence case that (1) could not be anticipated by the Prosecution and (2) relate to a significant issue in the trial.⁶
8. The allowance of rebuttal evidence ensures that the Prosecution is able to address significant unanticipated issues raised by Defence and to respond to Defence evidence. This is particularly important since the Prosecution will generally not be aware of the anticipated Defence evidence at the time it

⁵ *Limaj Decision*, para. 6.

⁶ *R. v. Krause*, [1986] 2 S.C.R. 466, par. 16 (Supreme Court of Canada); *Peals v. Terre Haute Police Department*, 535 F.3d 621, 630 (7th Cir. (U.S.) 2008); *Prosecutor v Halilovic*, Decision on Prosecution Motion to Call Rebuttal Evidence, Case No. IT-01-48-T, 21 July 2005, p. 3.

presents its case in chief, the Chamber having declined to require the Defence to provide that information before the Prosecutions rests.⁷ Accordingly, the option of presenting rebuttal where appropriate contributes to a fair trial and the determination of the truth.

9. The Defence rights are also protected, since it may, with leave of the Court, respond to the rebuttal with “rejoinder” evidence;⁸ however this is strictly limited to matters raised in the Prosecution’s evidence in rebuttal. Therefore, the Defence always retains the possibility of arguing last on the matter.

The distinction between rebuttal and “fresh” evidence

10. The Prosecution submits that it is important to distinguish rebuttal evidence from “fresh” evidence since the Rules governing fresh evidence require a justification for late disclosure that is inapplicable to rebuttal evidence. Unlike rebuttal evidence, fresh evidence is not tendered to respond to issues raised by the Defence. “Rebuttal evidence is admissible solely to refute evidence adduced by the Defence, and may exclusively address ‘matters that arise directly and specifically out of defence evidence’. [...] ‘The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It

⁷ See ICC-01/04-01/07-2388, para. 49.

⁸ N.B. rejoinder evidence by the Defence is specifically provided for in Article 85(A)(iv) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (“ICTR”).

merely puts it into the category of fresh evidence, to which a different basis of admissibility applies’’.⁹

11. In contrast, “fresh” evidence is substantive evidence that is intended to be part of the Prosecution’s affirmative case, which was not known or available to the Prosecution at the start (or at the end of its case) but which is nonetheless probative of the accused’s guilt.

12. Because of the key distinction between fresh and rebuttal evidence, quite reasonably the Ad Hoc Tribunals apply different criteria regarding the admissibility of the two separate categories of evidence.¹⁰ In similar fashion, Regulation 35(2) of the Regulations of the Court (“RoC”) provides criteria reasonably applicable to fresh, but not rebuttal evidence. Under this provision the Chamber must consider (1) whether the material “is either significantly more compelling than other items of evidence already disclosed to the defence, or brings to light a previously unknown fact which has a significant bearing upon the case” and (2) whether the late disclosure and addition will prejudice the rights of the Defence under Article 67(1)(b).¹¹ These criteria, though well suited to cases of fresh evidence, are wholly inadequate for rebuttal evidence not intended to be admitted in the case in chief and whose

⁹ *Prosecutor v. Popovic et al.*, Case no. IT-05-88-T, Decision on Motion to Reopen the Prosecution Case, 9 May 2008, fn. 58 (citations omitted).

¹⁰ On this matter see distinction made in *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-A, App. Ch., 17 December 2004, paras. 210 - 223. While rebuttal evidence requires “highly probative evidence on a significant issue in response to Defence evidence which could not reasonably have been foreseen”, fresh evidence “is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application”.

¹¹ See Chamber’s « decision on the prosecution Motion for leave to disclose and add the investigator’s report concerning Witness P-268 to the List of Incriminating Evidence », ICC-10/04-01/07-2325-CONF, paras. 14-16. See also 01/04-01/07-T-182-CONF-ENG ET, p. 19, lines 6-10.

value lies solely in its ability to contradict, impeach, or explain in a way to defuse the impact of Defence evidence. In other words, rebuttal evidence is not newly-discovered evidence in chief, but evidence whose probative value only becomes apparent due to significant issues newly raised *ex-improviso* by the Defence in its case.

The Chamber has the power to admit rebuttal evidence under the Rome Statute

13. The Rome Statute provides the Chamber with the legal basis on which to permit rebuttal evidence. Article 64(8)(b) gives the Chamber broad powers to direct the conduct of the proceedings. The Prosecution submits that this encompasses the power to admit rebuttal evidence when the circumstances justify doing so. In addition to this, Articles 64(6)(d) and 69(3) authorize the Chamber (1) to order the production of evidence in addition to that which has already been collected or presented during the trial by the parties and (2) request the submission of all evidence that it considers necessary for the determination of the truth. In essence, the power to control the manner in which the proceedings will be held inherently includes the power to admit rebuttal evidence to ensure the fairness of the trial and to aid in the determination of the truth.

14. The Rules of Procedure and Evidence also allow for the presentation of rebuttal evidence in two specific instances: alibi defences and grounds for excluding criminal responsibility. In fact both Rules 79 and 80 provide that

the Prosecution has a right to address these issues when they are raised by the Defence.¹² This is so, remarkably, even while the Statute also requires the Defence to have given advance notice to the Prosecution of its intent to raise either of these issues as an affirmative defence. The principle that emanates from these articles is that the Prosecution is authorized to respond to important issues that are raised by the Defence (which will ordinarily happen during the Defence's case in chief) and that could be determinative of the trial; it is a question, ultimately, of the determination of the truth through a process that is fair to all parties. This same principle should also apply to other significant issues that are raised *ex improviso* by the Defence, whether they be raised through cross-examination of Prosecution witnesses or in the Defence's case.

Admission of rebuttal practice in the ICC

15. In the only other case as yet to proceed, *Prosecutor v. Thomas Lubanga*, Trial Chamber I allowed the Prosecution to call witnesses in response to the Defence's abuse of process application¹³ -- in other words, it has allowed rebuttal evidence which the Prosecution did not include in the presentation of its case, but which specifically responds to the Defence evidence.

¹² See Rule 79(2) and Rule 80(3) of the Rules of Procedure and Evidence.

¹³ See ICC-01/04-01/06-T-307-CONF-ENG ET, p. 3, lines 2-11. See also, ICC-01/04-01/06-T-299-CONF-ENG ET, p. 25, lines 3- 23. See also ICC-01/04-01/06-T-297-CONF-ENG, p. 45 lines 9-14 and ICC-01/04-01/06-T-298-ENG ET, p. 27, lines 17-24, where Judge Fulford mentions the term "rebuttal" evidence.

Admission of rebuttal evidence is common practice in international criminal tribunals

16. Other international criminal tribunals regularly allow the Prosecution to refute matters raised by the Defence through rebuttal. Article 85(a) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone provides for the presentation of rebuttal evidence by the Prosecution with leave of the Court.¹⁴ Art 85(2)(a)(iii) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) also provides expressly for additional “prosecution evidence in rebuttal” to be adduced after the Defence’s case. Affirming the principle, the Appeals Chamber of the ICTY has described the nature of rebuttal evidence as “evidence to refute a particular piece of evidence that has been adduced by the defence” which is limited to matters that arise directly and specifically out of defence evidence.¹⁵ In essence, according to ICTY jurisprudence, rebuttal evidence can be considered if it is highly probative and relate to a significant issue arising out of the defence evidence which could not have been reasonably anticipated by the Prosecution.¹⁶

¹⁴ See Rules of Procedure and Evidence of the Special Court of Sierra Leon; *See also* Article 84(A)(iii) of the Rules of Procedure and Evidence of the ICTR, which also provides for the possibility of rebuttal evidence.

¹⁵ *Prosecutor v. Delalic et al.*, Judgment, Case No. IT-96-21-A, App. Ch., 20 February 2001, para. 273. *See also* Limaj Decision, para. 6.

¹⁶ Limaj Decision, para. 6.

The Prosecution's presentation of rebuttal evidence

17. Generally, rebuttal evidence is tendered by the Prosecution after the Defence's case¹⁷ since its evidence (testimony and exhibits) are normally offered during the Defence case.¹⁸ Because of the distinction in adversary judicial proceedings between the two phases of the trial, it provides clarity to the process when evidence led by the Defence is *admitted* during its case-in-chief.¹⁹ The importance of the timing of admission cannot be understated since only exhibits which have been admitted into evidence can be relied upon by the Chamber in determining the guilt or innocence of the accused. Exhibits still marked for identification (MFI) at the end of the trial are not evidence.

18. As stated above, in this case the Chamber has allowed the Defence to tender several of its exhibits into evidence during the Prosecution's case,²⁰ and these are now part of the evidence since they received EVD numbers. One or more of the documents appear to have been created under circumstances that call for their reliability and probative value to be put into question.²¹ With respect to those specific documents, the Prosecution submits that, where applicable, it should be allowed, with leave of the Court and for the sake of judicial economy, to bring rebuttal evidence within its case-in-chief. Allowing the admission of rebuttal evidence now, in this unique circumstance, would

¹⁷ See Art 85(2)(a)(iii) of ICTY Rules of Procedure and Evidence. See also Limaj Decision, para. 6.

¹⁸ N.B. These are sometimes qualified as "Full exhibits".

¹⁹ N.B. This also includes pieces of evidence initially marked for identification (MFI) by the Defence during the Prosecution's case, but given EVD numbers when the evidence is admitted.

²⁰ See, *inter alia*, EVD-D02-00032 and EVD-D03-0001-0267.

²¹ See ICC-01/04-01/07-T-150-CONF-ENG ET, p. 24-30

expedite the conduct of the trial and potentially render unnecessary the subsequent presentation of rebuttal evidence by the Prosecution on these matters.

19. However, the Prosecution recalls that in respect to additional new issues that could be raised by the Defence during the presentation of its case, the Prosecution reserves itself the right to respond to these, with leave of the Chamber, in rebuttal.

Conclusion

20. The Prosecution submits that in its search for and determination of the truth, the Chamber has the discretion to admit rebuttal evidence that will respond to Defence evidence and to new and significant issues raised by the Defence.
21. While ordinarily rebuttal evidence will be admitted following the Defence case, there is no rule barring the admission of rebuttal evidence at an earlier point to respond to Defence evidence that the Chamber has already admitted. In this case, the Chamber has admitted certain Defence-proffered documents into evidence during the cross-examination of prosecution witnesses. In this unique situation, the Prosecution submits that it would be more expeditious and orderly to allow the admission of rebuttal evidence in the Prosecution's case in chief.



Luis Moreno-Ocampo

Prosecutor

Dated this 20th day of September 2010

At The Hague, The Netherlands