



Original: English

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

Date: 6 October 2010

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 Document

Defence Response to the Prosecution's Observations on Rebuttal Evidence

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper Q.C.
Mr Andreas O'Shea

**Counsel for the Defence for Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Introduction

1. On the 1st September 2010, the Prosecutor has raised the issue of the possibility of the Prosecutor being permitted to call rebuttal evidence.¹ The Chamber invited the Prosecution to file its written observations on the subject, the defence and parties to respond. The Prosecution filed its observations on 20th September 2010² to which the Defence for Germain Katanga ('the Defence') now responds.
2. In effect, the Prosecutor is seeking a declaration as to general principles concerning the notion and admission of rebuttal evidence. The Defence queries the efficacy of such an exercise. The Defence reiterates its previously stated view that, absent a specific application to admit particular evidence, any discussion remains overly theoretical. The Prosecutor, it is submitted, remains free to file an application, in respect of specific material, at an appropriate time which can then be considered in context.

B. Provision for rebuttal evidence

3. The Prosecutor submits that the consideration of rebuttal evidence falls within the powers under Statute and Rules of Procedure and Evidence. However, he has failed to cite any provision of these documents which mentions the concept of rebuttal evidence. In support of his position he makes reference to Articles 64(6)(d), 64(8)(b) and 69(3) of the Statute, as well as Rules 79 and 80 of the Rules of Procedure and Evidence.
4. It is submitted that none of the above provisions addresses the question of rebuttal evidence. Article 64(6)(d) enables the Chamber to call additional evidence. This provision is not envisaged as a stop gap for the Prosecutor. It is premised upon the fact that the adversarial parties to the proceedings, that is the Prosecutor and the accused respectively, have ample opportunity to present their cases and that the Chamber can step in to call evidence where appropriate on the completion of the evidence of each of these parties. Far from relating to evidence designed by the Prosecutor to rebut evidence of the Defence, this provision concerns evidence which the Chamber itself deems appropriate to call. The Appeal Chamber's reliance on this provision to support

¹ ICC-01/04-01/07-T-182-CONF-ENG CT 01-09-2010, page 5.

² ICC-01/04-01/07-2398, Prosecution's Observations on Rebuttal Evidence.

the possibility of legal representatives bringing evidence before the Court falls within a very different and special context.³ The legal representatives are deemed to be participants and not parties to the proceedings as such. It is in this special capacity, and on the understanding that their role is not that of a Prosecutor *bis*, that it becomes appropriate to refer to the Chamber's own power to call evidence as a basis for granting them full participation.

5. Articles 69 (3) and (4) deal with the criteria for the admission of evidence by the Chamber. They do not address the stages in the proceedings when the Prosecutor may present its evidence.
6. Article 64(8)(b) does indeed afford the Chamber the power to give directions on the conduct of proceedings. This general power of course must be read in the context of the provisions of the Statute and Rules as a whole and cannot simply be read as a power to add freely to the regime established by the Statute and Rules.
7. In this case the Chamber has already employed the power under Article 64(8)(b) in its decision 1665.⁴ This decision, delivered at the commencement of the trial proceedings, elaborately and extensively addresses the stages and order of proceedings. This essentially lies at the heart of the current issue and it is somewhat surprising that it is not central to the Prosecutor's discussion on this matter.
8. In its decision 1665 of 1 December 2010, the Chamber states as follows:
B. Phases of the trial

3. The hearings will be organised in different phases. The Chamber may intervene at all times and order the production of all evidence that it considers necessary for the determination of the truth, in accordance with article 64(6)(d) and 69(3) of the Statute.

4. The first phase will consist of the presentation by the Office of the Prosecutor of its case against the accused ("Prosecution case").

³ ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008; ICC-01/04-01/07-2288, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010.

⁴ ICC-01/04-01/07-1665, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009. Cf its corrigendum dated 1 December 2009.

5. If there are any participating victims who wish to testify in person, they may petition the Chamber for permission to do so at this stage in accordance with the procedure outlined below.

6. The second phase will consist of the presentation by the Defence for both accused of their respective defence case ("Case for the Defence"). The Defence for Mr. Katanga will present its case first, followed by the Defence for Mr. Ngudjolo.

7. After both Defence teams have concluded the presentation of their case, *the Chamber may decide to call further witnesses. This may include the calling of witnesses at the suggestion of the Victims' Legal Representatives.*

[our emphasis]

9. It is apparent from this that the Chamber does not envisage an additional phase of the evidence known as rebuttal evidence. It does envisage calling further evidence itself, but this is on its own initiative with the express proviso that it may do so once the parties and the participants provide it with proposals of what evidence needs to be made clear, and if it considers this evidence necessary with regard to the manifestation of the truth.⁵
10. The Prosecutor tries to find support in the first exchange on abuse of process in 2006 in the *Lubanga* case.⁶ This is not however an authority for the admission of rebuttal evidence from the prosecution in response to defence evidence on the merits of the case, let alone an authority for the proposition of calling evidence to confront evidence admitted during the cross-examination of prosecution witnesses. This citation relates rather to what might be described as a *voir dire* on a discrete and interlocutory procedural issue, albeit one of some significance to the outcome of the proceedings.
11. Rules 79 and 80 address defence disclosure rather than the right to call rebuttal evidence and are confined to specific defences. In so far as the Prosecutor argues the contrary, this does not support but undermines his position by virtue of their nature as

⁵ ICC-01/04-01/07-T-182-Red-ENG CT WT, pp 19-20.

⁶ ICC-01/04-01/07-2398, para. 15.

lex specialis applicable to defined circumstances. In other words, in so far as these rules could be interpreted to refer to any right to respond, that right is enshrined within the framework of those specific defences, militating against a general right to respond, which is more generally reserved for the Defence in the Statute and Rules.

12. Not finding any real support for the notion of rebuttal evidence in the provisions or practice of the ICC, the Prosecutor then turns to the practice of the *ad hoc* tribunals. While the Defence accepts that the jurisprudence of these tribunals can be of significant assistance in certain instances, such reference must be treated with extreme caution where the statutory context is quite different.
13. It must not be forgotten that the Statutes of the *ad hoc* tribunals are skeletal in comparison to that of the ICC which was deliberately designed to give a far more comprehensive picture of the essentials of the criminal trial. Likewise with the Rules of Procedure and Evidence and Regulations of the Court. Yet one notes that the Statutes of the Special Court for Sierra Leone, and that for Rwanda, expressly deal with rebuttal evidence.⁷ Had the drafters of the ICC Statute and Rules envisaged the notion of rebuttal evidence one would have expected at least a mention of it.
14. The drafting history, as well as the provisions and interpretations of this Chamber of these very elaborate documents: that is the Statute, Rules and Regulations of the Court therefore militate against a general notion of rebuttal evidence being available to the Prosecutor.

C. Meaning of rebuttal evidence

15. To the extent that the Chamber considers it appropriate to use its discretionary powers to allow the Prosecutor to produce rebuttal evidence, notwithstanding the absence in the Statute and rules of a power to do so, this should be done on a case-by-case basis, rather than in the abstract. The only general principles are that the submission of such evidence ought to be exceptional and only in relation to matters which could not reasonably have been anticipated and addressed by the Prosecutor at the time of the presentation of its case. It is further submitted that in so far as such evidence is

⁷ Rule 85(A)(iii) ICTY/ICTR/SCSL Rules.

permitted that in line with the principle preserved by the Statute, the Defence should have the last word and be permitted to call evidence to refute such rebuttal evidence.⁸

16. In order to respect the defendant's right to a speedy trial, the Prosecutor has a duty of due diligence. He also has a duty to search for any information or evidence concerning the credibility of their witnesses. In line with their positive duty to search for exculpatory evidence during the investigations phase, they should have anticipated potential defence lines of inquiry, and thus investigated all relevant information concerning the credibility of their witnesses. They cannot therefore claim that they have been taken unawares by defence cross-examination of the witnesses. Nor does the Prosecutor have an automatic right to seek to rehabilitate a witness by tendering rebuttal evidence - the witnesses are not witnesses of the Prosecutor but witnesses of the Court.
17. The Defence submits that it is useful to define, as clearly as possible the phrase 'rebuttal evidence' and to distinguish it from any other evidence that might be adduced in addition to the anticipated prosecution case. According to the Prosecutor, it would appear from his pleading that 'rebuttal evidence' refers to any evidence called by the Prosecutor in response to any evidence tendered by the defence at any stage of the proceedings. The Defence submits that the term has gained a particular meaning and refers to evidence called to rebut issues raised in the Defence phase or case.
18. The provisions and jurisprudence of the *ad hoc* tribunals define rebuttal evidence not solely by reference to its nature as evidence in response to Defence evidence but also, and more particularly, by reference to the stage of the proceedings when the evidence is admitted. In other words the central tenet of this category of evidence is that it is brought after the conclusion of the defence case to respond to unanticipated evidential issues. It is clearly viewed as an exceptional procedure. The term is therefore defined not so much by its function, but by its timing.
19. The basic principle is that it is for the Prosecution to present all its evidence during the prosecution phase of the case. This may, exceptionally, include evidence in addition to

⁸ This proposition is consistent with the ICC regulatory framework which endorses the principle that the defence should always have the 'last word'. For example, rule 140(2)(d) provides that the "defence shall have the right to be the last to examine a witness". Rule 141(2) further provides in the context of closing statements that the "defence shall always have the opportunity to speak last".

the evidence that was originally proposed to be admitted. Rebuttal evidence on the other hand has been defined by the ICTY as evidence relating to “a significant issue arising directly out of defence evidence which could not reasonably have been anticipated.”⁹

20. Rebuttal evidence is therefore evidence that has become defined essentially by the stage of the procedure in which it is admitted. It is a response to some significant evidence produced in the course of the defence case itself, which the Prosecutor could not reasonably have anticipated and which is admissible because it is compellingly in the interests of justice to do so. It must be stressed that it is only to be adduced in the most exceptional and compelling circumstances. Rebuttal evidence can, for instance, not be admitted “where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it”.¹⁰ Indeed, the prosecution cannot call additional evidence after the close of its case “merely because its case has been met by certain evidence to contradict it,”¹¹ or to “re-open or perfect its case.”¹²

21. The Chamber will not grant rebuttal evidence “where the Prosecution seeks to use such evidence to challenge the credibility of a Defence witness or other collateral matters in the case”.¹³ The Chamber in the ICTR case of *Ndindiliyimana et al* denied the Prosecution request to reopen the case finding that it is not permissible to call rebuttal evidence solely to challenge the credibility of defence evidence.¹⁴

22. ‘Rebuttal evidence’ can be distinguished from general ‘additional evidence’ by the procedural timing of its admission rather than the nature or object of the evidence. Additional evidence may be admitted in the course of a party’s case if, exceptionally, granted leave to do so. Such evidence may be rebutting of some novel and unforeseen

⁹ *Prosecutor v. Delalic et al*, Appeals Chamber Judgment, 20 February 2001, para. 273.

¹⁰ *Ibid*, para. 275.

¹¹ *Ibid*, para. 275.

¹² *Prosecutor v. Ndindiliyimana et al*, Trial Chamber “Decision on the Prosecution Motion to Call Rebuttal Evidence”, 20 February 2009, para. 4; *Prosecutor v. Ntagerura et al*, Trial Chamber “Decision on the Prosecutor’s Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence”, 21 May 2003, para. 32;

¹³ *Prosecutor v. Ndindiliyimana et al*, Trial Chamber “Decision on the Prosecution Motion to Call Rebuttal Evidence”, 20 February 2009, para. 4, 8; *Prosecutor v. Ntagerura et al*, Trial Chamber “Decision on the Prosecutor’s Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence”, 21 May 2003, para. 33;

¹⁴ *Prosecutor v. Ndindiliyimana et al*, Trial Chamber “Decision on the Prosecution Motion to Call Rebuttal Evidence”, 20 February 2009, para. 8.

matter raised in the course of the prosecution phase by the Defence. The Prosecution, aware of the existence and relevance of such evidence being reasonably available to it must, it is submitted, apply to have it admitted during the prosecution phase. Such evidence may be in response to some unforeseen matter raised in the course of cross-examination of the incriminating witnesses by the Defence. It must be exceptional to add further incriminating evidence to the Prosecutor's list and in the interests of justice to do so. It is in the interests of the Defence and fair trial that such evidence, if it is to be admitted, be admitted before the Defence phase of the trial and as part of the prosecution phase of the trial. It should not be the position that, confronted with a significant issue that merits the admission of additional evidence, the Prosecution waits until after the defence phase has concluded before seeking or obtaining its admission.

23. Rebuttal evidence may also usefully be distinguished from additional evidence which comes to light late, or even very late in the day. While the Defence acknowledges the possibility of the Prosecutor being granted leave, most exceptionally, to add such evidence in the course of its case or phase, or even to reopen its case at a later stage to have it admitted, the circumstances when such a course would be open must be wholly exceptional, and as rare as frogs teeth after the commencement of the defence case.

24. The Prosecution is under a duty to adduce all evidence critical to the proving of the guilt of the accused by the close of its case.¹⁵ Only if a new unforeseen and unanticipated issue is raised in the course of the Defence case may the prosecution lead evidence in rebuttal.¹⁶ Even at the *ad hoc* tribunals, where this procedure is explicitly foreseen in the Rules, this exception of leading rebuttal evidence is "of limited scope, and must not be construed as a *carte blanche* for the Prosecution to

¹⁵ *Prosecutor v. Martić*, Trial Chamber "Decision on Prosecution's Motion to Admit Evidence in Rebuttal Pursuant to Rule 92bis With Annexes A, B and C", 28 November 2006, p. 2; *Prosecutor v. Halilović*, Trial Chamber, "Decision on Prosecution Motion to Call Rebuttal Evidence", 21 July 2005, p. 3; *Prosecutor v. Blagojević and Jokić*, Trial Chamber "Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92bis in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose", 13 September 2004, para. 6; *Prosecutor v. Delalić et al.*, Trial Chamber "Decision on Prosecution's Alternative Request to Reopen the Prosecution Case", 19 August 1998, para. 18;

¹⁶ *Prosecutor v. Limaj et al.*, Trial Chamber "Decision on Prosecution's Motion to Admit Rebuttal Statements via Rule 92bis", 7 July 2005, para. 6; *Prosecutor v. Oric*, Trial Chamber "Decision on the Prosecution Motion with Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii)", 9 February 2006, p. 4; SCSL, *Prosecutor v. Brima et al.*, Trial Chamber "Decision on Confidential Motion to Call Evidence in Rebuttal", 14 November 2006, para. 35;

adduce evidence at a later stage in the proceedings which should properly have been presented as part of its original case.”¹⁷

25. The Defence is aware of very few cases where new evidence, independent of unforeseen issues raised in the defence phase, was permitted to be adduced after the close of the prosecution phase. The Defence, by way of example, recalls a case at the ICTY where a video of the accused killing prisoners came to light at a very late stage, but was nonetheless admitted. Such a course is, in the defence submission, very rare indeed and should be taken only where the evidence is highly probative.¹⁸ Most of the requests to introduce rebuttal evidence before the ad hoc tribunals were denied.¹⁹ Evidence going merely to reinforce the credibility of a prosecution witness should, in principle, not be admitted in rebuttal.”²⁰

26. Where the Prosecutor wishes to call further evidence during the prosecution phase of the case, it is submitted that a distinction cannot be legitimately drawn between what is referred to as rebuttal evidence and fresh evidence in so far as the due diligence requirement is concerned. Any attempt to bring further evidence must be accompanied by just cause as to why the evidence could not have been brought before. This underlies the protection of the accused’s right to a trial without undue delay and to be informed fully and timely of the case against him.

27. So, if the Prosecutor wishes to call evidence in response to the defence case this should be allowed in the most exceptional cases only, if at all, given the absence of

¹⁷ *Prosecutor v. Delalic et al*, Trial Chamber “Decision on Prosecution’s Alternative Request to Reopen the Prosecution Case”, 19 August 1998, para. 22

¹⁸ *Prosecutor v. Limaj et al.*, Trial Chamber “Decision on Prosecution’s Motion to Admit Rebuttal Statements via Rule 92bis”, 7 July 2005, para. 6; *Prosecutor v. Martić*, Trial Chamber “Decision on Prosecution’s Motion to Admit Evidence in Rebuttal Pursuant to Rule 92bis With Annexes A, B and C”, 28 November 2006, p. 3; *Prosecutor v. Delalic et al*, Trial Chamber “Decision on Prosecution’s Alternative Request to Reopen the Prosecution Case”, 19 August 1998, para. 18; *Prosecutor v. Oric*, Trial Chamber “Decision on the Prosecution Motion with Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii)”, 9 February 2006, p. 5; *Prosecutor v. Blagojevic and Jokic*, Trial Chamber “Decision on Prosecution’s Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence Under Rule 92bis in its Case on Rebuttal and to Re-Open its Case for a Limited Purpose”, 13 September 2004, para. 6; *Prosecutor v. Ntagerura et al*, Trial Chamber “Decision on the Prosecutor’s Motion for Leave to Call Evidence in Rebuttal Pursuant to Rule 54, 73 and 85(A)(iii) of the Rules of Procedure and Evidence”, 21 May 2003, para. 32; *Prosecutor v. Nahimana et al*, Trial Chamber “Decision of 9 May 2003 on the Prosecutor’s Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003”, 13 May 2003, para. 46; SCSL, *Prosecutor v. Brima et al*, Trial Chamber “Decision on Confidential Motion to Call Evidence in Rebuttal”, 14 November 2006, para. 33

¹⁹ See, for instance, *Prosecutor v. Lukic and Lukic*, Trial Chamber “Decision on Motion for Reconsideration or Certification to Appeal the Decision on Rebuttal Witnesses”, 9 April 2009; *Prosecutor v. Nahimana et al*, Trial Chamber “Decision of 9 May 2003 on the Prosecutor’s Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003”, 13 May 2003; *Prosecutor v. Halilovic*, Trial Chamber “Decision on Prosecution Motion to Call Rebuttal Evidence”, 21 July 2005.

²⁰ *Prosecutor v. Kordic and Cerkez*, T 26649.

this option in the Statute and rules. Alternatively, the Prosecutor may propose to the Chamber to call rebuttal evidence in a highly exceptional situation. If the Prosecutor wishes to call further evidence now he has only to make the application and must be in a position to justify why the evidence could not have been called before or in a manner which does not prejudice the Defence. Prejudice might arise for example where the witness who was presented with the evidence by the Defence, and who is the subject of so-called rebuttal, is no longer available for questioning.

D. Admission of further evidence during the prosecution case to rebut defence exhibits

28. The Prosecutor, in his Observations at Paragraphs 6, 17 and 18, appears to suggest that there is something unique or unusual about the admission of evidence from the Defence, and more particularly the attribution of EVD numbers to such evidence during the prosecution case. The Defence submits, on the contrary, that it is common practice for evidence to be admitted which has been employed during the cross-examination of prosecution witnesses. This is true both in respect of our personal experience of domestic jurisdictions – where documents presented to a witness may be and are admitted into evidence, and also in the day to day practice of the *ad hoc* tribunals – that is to say the ICTY, ICTR, SCSL.

29. The Prosecutor appears to be disputing the giving of EVD numbers being assigned. The Chamber has held that challenges to the admissibility of evidence should be made prior to the admission of such evidence not afterwards.²¹ Thus, the Defence submits that the appropriate time to challenge criteria for the admissibility of evidence is at the time of its admission. It is further submitted that the appropriate time for making applications to admit further evidence where such evidence is necessary and known to be reasonably available, is at the time of the re-examination of the witness. Otherwise, the Defence will be prejudiced by the inability to address the totality of the evidence through the same witness. Permitting the Prosecutor to submit evidence concerning one of its own witnesses other than in examination-in-chief or re-examination is prejudicial to the Defence as the Defence will not have an opportunity to cross-examine the witness in relation to the additional evidence. Where matters only come

²¹ See Prosecutor v. Katanga and Ngudjolo, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 20 November 2009; ICC-01/04-01/07-1665; para 103; and Transcript of 25 November 2009 T. 1-3 [ICC-01/04-01/07-T-81-Red-ENG WT 25-11-2009]

to the attention of the Prosecutor at a later stage, but before the close of the prosecution phase, then the appropriate course it is submitted is that the Prosecutor should apply to call the evidence, and seek an adjournment to do so if necessary, subject to Regulation 35. It will be for the Chamber to decide whether the value of the proposed evidence justifies either admission or adjournment to do so.

E. Conclusion

The Defence therefore submits that

- (1) rebuttal evidence does not find its place in the ICC as it does before other tribunals;
- (2) further evidence may be called by the Chamber, or by the Prosecutor in highly exceptional circumstances; in the case of the Prosecutor he must fully justify any delay and overcome any prejudice to the defence, regardless of the purpose of the evidence, to rebut or otherwise;
- (3) if the Chamber finds it appropriate to allow the Prosecutor to call rebuttal evidence after the close of the prosecution case, notwithstanding the above submissions, this should be done on a highly exceptional case-by-case determination only.

Respectfully submitted,



David HOOPER Q.C.

Dated this 6 October 2010

At The Hague