

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 30 June 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 the Request of Defence for Mathieu Ngudjolo to admit into
evidence extracts from the statement DRC-D02-0001-0750 of Witness
DRC-D02-P-0148**

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

Counsel Support Section

Deputy Registrar

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" respectively), pursuant to Articles 64 and 69 of the Rome Statute ("the Statute") and Rule 68 of the Rules of Procedure and Evidence ("the Rules"), decides as follows:

I. PROCEDURAL HISTORY

1. On 14 June 2011, during re-examination of witness DRC-D02-P-0148, who was testifying on behalf of Mr. Katanga, the Defence for Mr. Ngudjolo ("Defence") intended to read to the witness the penultimate paragraph of page 14 from his prior recorded testimony (document DRC-D02-0001-0750).¹ The Office of the Prosecutor ("Prosecution") raised an objection but was overruled.² The Defence then read only a small section of the aforementioned excerpt and proceeded to ask the witness a number of questions in relation to the passage.³

2. The following day, the Defence for Mr. Ngudjolo filed a motion requesting the Chamber to admit into evidence pages 13, 14 and paragraph 1 of page 15 of the prior recorded statement ("Request").⁴ The Defence submitted that the purpose of admitting the excerpts was to provide the Chamber with *"tous les renseignements pertinents et disponibles qui sont de nature à les éclairer au moment de leur délibération"* and alleged that these excerpts were essential in that they related to the 24 February 2003 attack on Bogoro.⁵

3. On 21 June 2011, the Prosecution responded to the Request.⁶ First, the Prosecution asserts that the admission into evidence of the excerpts would

¹ ICC-01/04-01/07-T-281-CONF-ENG ET, p. 25

² ICC-01/04-01/07-T-281-CONF-ENG ET, pp. 26-29

³ ICC-01/04-01/07-T-281-CONF-ENG ET, p. 29

⁴ "Requête sollicitant le versement au dossier de quelques extraits de la déclaration écrite, DRC-D02-0001-0750, du témoin DRC-D02-P-0148", 15 June 2011, ICC-01/04-01/07-3019, para. 16

⁵ ICC-01/04-01/07-3019, paras. 18-19

⁶ "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", 21 June 2011, ICC-01/04-01/07-3032

violate the principle of orality.⁷ In this regard, the Prosecution argues that the criteria under Rule 68(b) of the Rules have not been complied with, in that the Defence failed to make a request or ask the witness for his consent to the admission of the statement at the outset of the cross-examination.⁸ Second, the Prosecution submits that the Defence had the opportunity during cross-examination to put the excerpts to the witness or to ask additional questions during re-examination.⁹ Third, the Prosecution alleges that an exception to the principle of orality in this instance would prejudice the interests of the Prosecution and impact on the fairness of the trial.¹⁰ Finally, contrary to the Defence's contention, the previous admission of an investigator's report is not a precedent for the Request.¹¹

4. The same day, the Legal Representatives of the Victims filed their observations, which were substantively similar to the submissions of the Prosecution.¹²

II. ANALYSIS

5. First, the Chamber notes that the principle of orality is enshrined under Article 69(2) of the Statute and confirmed in the recent Appeals Chamber Decision of 3 May 2011.¹³ The Appeals Chamber held that, while a Trial Chamber has the discretion to receive the testimony of a witness by means other

⁷ ICC-01/04-01/07-3032, para. 2

⁸ ICC-01/04-01/07-3032, para. 9

⁹ ICC-01/04-01/07-3032, para. 6

¹⁰ ICC-01/04-01/07-3032, para. 12

¹¹ ICC-01/04-01/07-3032, paras. 13-15

¹² "Observations sur la requête de la Défense de Mathieu Ngudjolo sollicitant le versement au dossier de quelques extraits de la déclaration du témoin DRC-D02-P-0148", 21 June 2011, ICC-01/04-01/07-3030

¹³ *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, para. 76

than in-court personal testimony provided that it is in accordance with the Statute and the Rules of Procedure and Evidence, a Trial Chamber should exercise this discretion with caution so as not to prejudice the rights of the accused or the fairness of the trial.¹⁴

6. This Chamber has adopted a moderated approach towards admitting prior recorded testimony.¹⁵ In the Directions for the conduct of the proceedings ("Directions"), the Presiding Judge has prescribed a specific procedure for the application of Rule 68(b).¹⁶

7. Insofar as Rule 68(b) of the Rules allows the introduction of prior recorded testimony, the Chamber draws attention to the fact that the rule requires the witness to consent to the admission into evidence and that the parties and the Chamber have an opportunity to examine the witness. In the present case, the motion to tender into evidence the excerpts of the statement was put by the Defence after final questioning at the end of the testimony. In the Chamber's view, the requirements of Rule 68(b) have not been fulfilled.

8. Consequently, the Chamber is of the view that, in the present case, there is no reason to deviate from the principle of orality. The Chamber notes, in this regard, that the Defence had an opportunity to question witness DRC-D02-P-0148 in relation to the excerpts of the statement, and therefore considers it inappropriate to admit the selected passages into evidence.

¹⁴ ICC-01/05-01/08-1386, paras. 77-78

¹⁵ "Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572", 25 May 2011, ICC-01/04-01/07-2954; "Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-155 and P-219", 3 September 2010, ICC-01/04-01/07-2362; "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; Oral decision of 26 March 2010, ICC-01/04-01/07-T-124-CONF-ENG ET, pp. 2-4; Oral decision of 23 February 2010, ICC-01/04-01/07-T-124-CONF-ENG ET, pp. 47-48

¹⁶ "Directions for the conduct of the proceedings and testimony in accordance with rule 140", 1 December 2010, ICC-01/04-01/07-1665-Conf, paras. 92-94

9. Furthermore, the Chamber stresses that the admission of the investigator's report DRC-OTP-1061-0121 is not comparable to the present situation. The investigator's report contains an account by a Prosecution investigator of a number of events, including a telephone conversation between the investigator and witness DRC-D02-P-0147/DRC-D03-P-0236. The Chamber notes, in this regard, that the investigator's report was not considered as the prior recorded testimony of witness DRC-D02-P-0147/DRC-D03-P-0236.

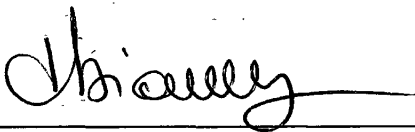
FOR THESE REASONS, THE CHAMBER

REJECTS the Request.

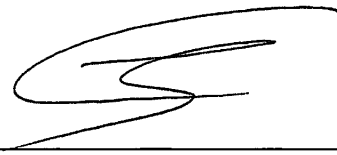
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 30 June 2011

At The Hague, The Netherlands