



Original: English

No.: ICC-01/04-01/07
Date: 28 November 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

**Defence Response to *Demande d'admettre un rapport de Human Rights Watch en
preuve documentaire***

Source: Defence for Mr Germain Katanga

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

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A. Introduction

1. On the 25th October 2011, with only the evidence of Mathieu Ngudjolo remaining as defence testimony, the Trial Chamber ordered that any remaining motions for the admission of evidence, through bar table or through witnesses called by the Chamber, be filed by the 21st November 2011, and that any response be filed by the 28th November 2011.¹ On the 11th of November 2011, the witness testimony called by the parties and participants in the trial of Germain Katanga and Mathieu Ngudjolo drew to a close. On the 21st November, two motions were filed, both by the legal representatives of victims, one with the view to the admission of additional documentary evidence and the other aimed at suggesting witness testimony for the Chamber to call. The former is addressed in this response.
2. The common legal representative of the principal group of victims filed a motion on the 21st November 2011 for the admission of a Human Rights Watch report² entitled ‘Seeking Justice: the Prosecution of Sexual Violence in the Congo War’ (“the HRW Report”).³
3. It is conceded that the legal representative has the capacity to seek the admission of a document into evidence through bar table and that the issue discussed in the Human Rights Report falls squarely within the mandate of the common legal representative of the principal group of victims. It is further accepted by the Defence for Mr Katanga (“the Defence”) that the issue of sexual violence is, in general terms, relevant to the charges.
4. Nonetheless, the Defence takes issue with the admissibility of the document in the circumstances.

¹ Email of 25 October 2011, entitled ‘*Informations relatives à la conduite de l’instance*’, sent by the Legal Assistant of the Trial Chamber.

² ICC-01/04-01/07-3205, Demande d’admettre un rapport de Human Rights Watch en preuve documentaire.

³ Cf. English version of the report, DRC-OTP-0154-0441, disclosed *inter partes* by the Prosecution on 17 March 2011 pursuant to Rule 77 of the Rules of Procedure and Evidence; the Prosecution never sought its admission as evidence. The report is available in English at <http://allafrica.com/download/resource/main/main/00010407:2ffb4aa454a57b9fd4b1f7c54d94e3a3.pdf>.

B. Applicable principles

5. In its Decision on the Prosecutor's Bar Table Motions of 17 December 2010, the Chamber has set out the requirements for the admissibility of a document through a bar table motion. It held that in determining admissibility it would have regard to the relevance of the document, its probative value and finally how its probative value balances against any prejudice which its admission might cause to the accused.⁴
6. Probative value is determined by reference to the reliability of the document as well as the measure in which an item of evidence is likely to influence the determination of an issue.⁵
7. Prejudicial effect must be viewed in the light of any adverse effect which the admission of a document may have on the effective exercise of the rights of the accused under the Statute.
8. Non-governmental reports must demonstrate indications of impartiality as well as a sufficient indication of sources and methodology employed in the compilation of the report.⁶ In its Decision on the Prosecutor's Bar Table Motions, the Chamber held that:

If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned.⁷

C. Probative value

9. The issues of relevance and probative value are closely related in that, for a document to be relevant, it must have some probative value. However, a document can be relevant to an issue but have little probative value.

⁴ ICC-04/01-01/07-2635, 17 December 2010, para. 14.

⁵ ICC-01/04-01/07-2635, para. 20.

⁶ ICC-04/01-01/07 2635, para 30.

⁷ ICC-04/01-01/07 2635, para 30.

10. The legal representative seeks to use the HRW Report in relation to the establishment of the widespread nature of crimes of sexual violence. However, it is not sexual violence in general terms which must be established for the purposes of the charges but the widespread commission of the specific crimes of rape and sexual slavery respectively. Establishing the widespread commission of rape and sexual slavery is a necessary element for the crimes against humanity of rape and sexual slavery.
11. The legal representative relies *inter alia* on the sentence 'Human Rights Watch has documented widespread acts of sexual violence committed by Lendu armed groups and their allies, in particular Ngiti armed groups.' The vague nature of this assertion has very limited probative value. It does not specify which forms of sexual violence are incorporated within this statement. It does not specify which Ngiti groups are concerned or where the crimes committed by these groups were committed.
12. In arguing for its probative value, the legal representative relies on the status of Human Rights Watch as an independent non-governmental organisation of great reputation. He does not support this argument of reputation with evidence. Undoubtedly, Human Rights Watch is an organisation which is active and well known. That it is an organisation with any particular reputation is a matter to be established and not a fact of common knowledge. So the document's probative value cannot be founded upon its author organisation's reputation.
13. The legal representative also refers to the participation of Alison Des Forges and the recognition of her expertise before the ICTR. However, her expertise was recognised in the context of the Rwandan genocide in 1994, not the crisis in Eastern DRC in 2003. Furthermore, it is clearly stated in the acknowledgements that her role was to edit the report, not to research, collate or provide the information in the report. This factor therefore cannot add to the probative value of the report.
14. In addition, the legal representative relies upon the fact, as he expresses it, that it is clear from the content and end notes that the report was based upon individual interviews by HRW with direct victims of sexual violence, representatives of the military forces or other local authorities, representatives of non-governmental organisations for the rights of women and local hospital staff.⁸ While it is possible to

⁸ ICC-01/04-01/07-3205, para. 17.

see from the text that interviews took place with these categories of individuals, there are only certain references to these in the content, but many of findings are not supported by reference to specific sources. Where sources are referred to they usually amount to reference to another Human Rights Report or report of a similar nature, the reliability of which is not substantiated, or in the alternative to a single interview with an individual or to interviews in general without further clarification.

15. Neither is it clear what methodology was employed to reach the overall assertions about the extent of sexual violence, outside reference to the subjective and unsubstantiated hearsay assertions of certain unidentified individuals. In this context, the Report by itself cannot be accorded any significant level of probative value. Indeed, it must be considered as lacking in reliability such that it should not be admitted, applying the Chamber's criteria as set out above.

D. Prejudicial effect

16. Against the limited probative value of the HRW Report has to be balanced the prejudice to the Accused of introducing the document into evidence. There are two references within the document which are potentially prejudicial to the Defence and to both of which the legal representative has made reference and therefore wishes to rely upon.

17. The first is the reference to the assertion that Lendu and their allies, including in particular Ngiti armed forces, have been involved in widespread sexual violence.⁹ The source of this statement is footnoted¹⁰ to be another HRW report: 'Human Rights Watch, Covered in Blood.' The Prosecution sought the admission of this report¹¹ through the Bar and the Chamber dismissed it for insufficient probative value;¹² thus this report was not admitted into evidence. There has not been Prosecution evidence on the widespread nature of sexual violence by Ngiti armed groups and this was not therefore a matter which the Defence seriously had to confront. The Defence would therefore be prejudiced by an attempt to introduce this material at this concluding

⁹ ICC-01/04-01/07-3205, para. 15, with reference to page 21 of the French version of the HRW report (page 18 of the English version).

¹⁰ See footnote 49 of the French version of the Report and footnote 50 of the English version of the Report.

¹¹ DRC-OTP-0074-0797, HRW Report entitled 'Ituri: "Covered in Blood". Ethnically Targeted Violence in North-eastern DR Congo', disclosed as incriminating evidence on 29 January 2008.

¹² ICC-01/04-01/07-2635, para. 36.

stage of the proceedings when all the Defence witness testimony has been completed. This would impact upon the Accused's right to examine witnesses, or have witnesses examined, for his cause under the same conditions as witnesses against him in terms of Article 67(1)(e) of the Statute.

18. Second, the report makes reference to an interview with Floribert Ngabu, a defence witness.¹³ This reference arguably carries the innuendo that Ngabu had no respect for the national law by stating that it did not apply in Ituri and that he was in favour of summary executions of authors of rapes, deriving from his alleged lack of concern. These are matters which could have been put to him when he testified. However, the legal representative did not attempt to do this or ask him about his alleged statements in this report. This deprived the Defence of the opportunity of addressing the issue with the witness since there was no need to address a document which had not been put to the witness. This would also impact upon the Accused's right to examine witnesses, or have witnesses examined, for his cause under the same conditions as witnesses against him in terms of Article 67(1)(e) of the Statute.

E. Conclusion

19. Accordingly, the Defence submits that the Human Rights Watch Report in question has limited probative value. It has a prejudicial effect on the fairness of the proceedings resulting partly from the legal representative's failure to put it to the witness, Mr Njabu, and from the difficulty of the Defence addressing the evidence presented by the report at this stage of the proceedings. It is consequently submitted that its admission now would militate against the fairness of the proceedings.

¹³ ICC-01/04-01/07-3205, para. 17, with reference to page 22 of the French version of the HRW Report.

Respectfully submitted,



David HOOPER Q.C.

Dated this 28 November 2011

At The Hague