

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 July 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

CORRIGENDUM

PUBLIC

**Decision on Request to admit prior recorded testimony of P-30 as well as
related video excerpts**

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

The Office of the Prosecutor

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Mr Eric MacDonald

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Counsel for Mathieu Ngudjolo Chui

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Legal Representatives of the Applicants

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to articles 67(1)(c) and 69(2) of the Rome Statute of the International Criminal Court ("Statute"), rule 68(b) of the Rules of Procedure and Evidence ("Rules"), issues the following decision:

I. PROCEDURAL HISTORY

1. On 3 June 2010, the Prosecution filed a request pursuant to rule 68(b) of the Rules, asking the Chamber to admit into evidence:

- a. Several passages of the statement of P-30 and the annexes thereto;
- b. 22 excerpts of a number of videos, which were allegedly made by P-30.¹

2. Having examined the material, the Chamber observes that the excerpts vary in length and subject matter. Sometimes they overlap. The 22 excerpts have a total duration of almost four hours, not counting some excerpts which overlap. According to the Prosecution, if the Chamber were to grant the request, this would reduce the time necessary for examination-in-chief of P-30 from over six hours to approximately 3 hours and 40 minutes.²

3. The Prosecution claims that the 22 excerpts and corresponding parts of the statement of P-30 are relevant to the establishment of (1) the existence of an armed conflict, (2) the existence of a widespread or systematic attack

¹ "Requête aux fins de versement par écrit d'extraits d'éléments de preuve fournis par le témoin P-30", 3 June 2010, ICC-01/04-01/07-2161-Conf ("Request")

² ICC-01/04-01/07-2161-Conf, par. 20

against the civilian population at the time of events (including murders and pillaging), and (3) the fact that the FNI was in existence as of the end of December 2002.³ The statement of P-30 further contains information about the professional background of P-30 as well as the circumstances in which the videos were made.⁴

4. The Prosecution argues that the videos and the statement of P-30 are reliable and that the information contained in them is well-known and is already corroborated or will be so in the future.⁵

5. The Prosecution intends to examine P-30 at trial regarding his professional background as well as in relation to a number of other video excerpts, which are not included in the 22 excerpts that are the subject of the Request.⁶

6. The Defence from Mr. Ngudjolo responded on 17 June 2010.⁷ It demands the Chamber to reject the Request in its entirety. The most important grounds invoked by the Defence are that: (a) rule 68(b) cannot be used to tender documentary evidence;⁸ (b) the length of the video material is disproportional to what it purports to establish;⁹ (c) without further explanation the excerpts have limited probative value;¹⁰ (d) allowing the excerpts into evidence obliges the Defence to conduct cross-examination on everything that is shown in the many excerpts, which will negate any time

³ ICC-01/04-01/07-2121-Conf, par. 30

⁴ Ibid., par. 33

⁵ Ibid., par. 37

⁶ Ibid., par. 53

⁷ "Réponse de la Défense de Mathieu Ngudjolo Chui à la 'Requête aux fins de versement par écrit d'extraits d'éléments de preuve fournis par le témoin P-30' ICC-01/04-01/07-2161", 17 June 2010, ICC-01/04-01/07-2199-Conf

⁸ Ibid., par. 11

⁹ Ibid., par. 14

¹⁰ Ibid., par. 17

saved in examination-in-chief;¹¹ (e) the relevance of the excerpts is not clear because the Prosecution did not explain its theory about the excerpts;¹² (f) certain excerpts contain disturbing images that might stigmatise the accused and therefore prejudice the Defence.¹³

7. On 17 June 2010, the Defence for Mr. Katanga asked for an extension of time limit in order to respond to the Request¹⁴, which the Chamber accorded on the same day.¹⁵ On 21 June 2010 the Defence for Mr. Katanga submitted its observations,¹⁶ asking the Chamber to reject the Request, except for a limited number of paragraphs in P-30's statement which pertain to his personal background and working method.¹⁷ The Defence for Mr. Katanga invokes the following grounds: (a) rule 68(b) is not aimed at the admission of exhibits;¹⁸ (b) the reliability of the content of the video excerpts is in question;¹⁹ (c) the assertions made in the videos cannot be tested;²⁰ (d) the relevance of the excerpts is disputed, as it is not clear whether the same state of affairs as reflected in the excerpts pertained in February 2003;²¹ (e) some excerpts show witnesses P-12 and P-2, who still have to testify before the Chamber;²² (f) prejudice arises from the unnecessary showing of dead bodies, "which can only serve the purpose of provoking feelings of shock in the

¹¹ Ibid., par. 21 and 27

¹² Ibid., par. 26

¹³ Ibid., par. 30

¹⁴ "Defence Request for an Extension of Time to Respond to Prosecutor's 'Requête aux fins de versement par écrit d'extraits d'éléments de preuve fournis par le témoin P-30'", 17 June 2010, ICC-01/04-01/07-2200

¹⁵ Email of the Presiding Judge of 17 June 2010 at 12h06

¹⁶ "Defence Response to Prosecutor's 'Requête aux fins de versement par écrit d'extraits d'éléments de preuve fournis par le témoin P-30 (ICC-01/04-01/07-2161-Conf)", 21 June 2010, ICC-01/04-01/07-2206-Conf

¹⁷ Ibid., par. 39, 40 and 42, referring to paragraphs 1-24, 25-50, 52 and 73-78

¹⁸ Ibid., par. 9

¹⁹ Ibid., par. 15

²⁰ Ibid., par. 20

²¹ Ibid., par. 24

²² Ibid., par. 30

minds of the tribunal of fact";²³ (g) certain passages from the statement relate to excerpts that are not included in the Request;²⁴

8. On 18 June 2010, the Prosecution filed a motion to modify the Request by withdrawing two passages, which, according to the Prosecution, should not have been included in the first excerpt²⁵ of video DRC-OTP-0127-0065.²⁶

II. ANALYSIS

9. The Chamber acknowledges the efforts of the Prosecution in trying to reduce the time needed for the examination of P-30. However, in light of the following reasons, it is unable to grant the Request in its entirety.

10. First, in making its Request, the Prosecution relies on rule 68(b) of the Rules and on paragraph 92 of the Chamber's "Directions for the conduct of the proceedings and testimony in accordance with rule 140"²⁷, which implements this rule. It is true that in paragraph 92, the Chamber stated that a party requesting the admission of parts of prior recorded testimony should attach any other material to which reference is made in the statement. However, the Chamber notes that the information on which the Prosecution seems to rely finds its origin in what is shown in the video excerpts, rather than in the statement of P-30 as such. In fact, apart from the passages pertaining to the personal history of P-30 and the chain of custody of the video tapes, the statement is primarily descriptive of what is shown in the videos. Indeed, without the video excerpts to which it relates, the statement of P-30 loses most of its import. The Request therefore appears to be more a request for the admission of the 22 video excerpts without going through a

²³ Ibid., par. 33

²⁴ Ibid., par. 37

²⁵ ICC-01/04-01/07-2161-Conf-AnxD.1

²⁶ "Prosecution's Request to withdraw the admission of parts of a video extract referred to in Application ICC-01/04-01/07-2161-Conf", 18 June 2010, ICC-01/04-01/07-2203-Conf

²⁷ ICC-01/04-01/07-1665 ("Rule 140 Directions")

witness, in the sense of paragraph 98 of the Rule 140 Directions, rather than a request to allow the introduction of the prior recorded testimony of P-30.

11. Second, the Chamber notes that parts of the statement of P-30, which the Prosecution wishes to be admitted into evidence, relate to video fragments not included in the 22 excerpts.²⁸ The Prosecution has failed to explain the relevance of these passages or why the corresponding excerpts of the videos, which relate largely to events concerning the UPC, are not included in the Request.²⁹ The Chamber does not consider it to be its task to speculate about which propositions these passages are intended to support, according to the theory of the Prosecution, and is therefore unable to assess their relevance.

12. Third, with regard to the passages of the statement that do relate to one or more of the 22 excerpts (paragraphs 229-239 and 242-248 of the statement³⁰; 3rd and 4th entry on page 4 and all entries on page 19 of Annex I³¹; paragraphs 7-9, 11-13, and 15-26 of Annex III³²), as well as the 22 video excerpts themselves, the Chamber observes that, although they may be relevant to the propositions advanced by the Prosecution in paragraph 30 of its Request,³³ their number and total duration are disproportional compared to their limited probative value.

13. In assessing the probative value of the excerpts, the Chamber has taken into consideration two factors, namely the materiality of the information contained in the excerpts and the inherent reliability of the video evidence. The first criterion analyses whether an item of evidence, if taken at

²⁸ E.g., paragraphs 102-105 of the statement (DRC-OTP-0151-0595), which refer to the '4th scene' of video DRC-OTP-0120-0294.

²⁹ The Chamber finds that footnote 25 of the Request does not provide any substantive explanation as to why the Prosecution included these passages of P-30's statement.

³⁰ DRC-OTP-0151-0583

³¹ DRC-OTP-0151-0621

³² DRC-OTP-0151-0645

³³ See paragraph 3 of the present decision.

face value, is capable of influencing the Chamber's decision in a significant manner. The second criterion assesses whether an item of evidence possesses sufficient indicia of reliability.

14. For instance, Excerpt 1³⁴ allegedly shows a reconciliation meeting of the *Commission de Pacification de l'Ituri* attended by representatives of the United Nations Mission in DR Congo ("MONUC") and representatives of different politico-military factions. The Prosecution wishes to rely on this hour-long excerpt in order to establish that there was an armed conflict in the territories of Djugu and Irumu, including attacks against the civilian population, murders, massacres, arson and destruction.³⁵ However, the excerpt contains mainly repetitive hearsay statements from persons seemingly having political motives, which severely limits the prima facie reliability of the information they provide. Moreover, the Chamber finds that the several statements by representatives of political groups are largely of a general or aspiring nature and do not provide sufficiently material information in relation to the propositions advanced by the Prosecution. It would therefore unduly burden the case record for such a lengthy video excerpt to be admitted into evidence in its entirety, as this would impose a burden upon the Defence to address all the issues potentially raised by the video excerpt, given that the Prosecution has not indicated with sufficient clarity which exact inferences it proposes should be drawn from which specific passages in the excerpt.

15. Similar or analogous concerns pertain to many of the other excerpts as well.

³⁴ Minutes 00:00:07-01:01:26 of video DRC-OTP-0127-0065, mentioned in annex D1 of the Request

³⁵ Annex D1, p. 1

16. Under these circumstances, the Chamber finds itself unable to grant the Prosecution's Request, except for those passages in the statement and the annexes thereto which explain the personal history of P-30, the background to making of the videos and the conditions under which they were handed over to the Prosecution.

17. This does not imply that the Prosecution is prevented from presenting some of the 22 excerpts during the examination of P-30, but the Chamber will rule upon the admissibility of the excerpt(s) shown only at that stage. However, in case the Prosecution decides to present excerpts during the examination of P-30, the Chamber encourages the Prosecution to make a careful selection of the most material fragments, which best support the specific propositions the Prosecution is trying to establish. The Chamber notes, in this regard, that referring to overly generic propositions, such as 'contextual elements' or 'existence of an armed conflict' does not assist the Chamber in evaluating the relevance and/or probative value of a particular item of evidence, especially when the content of the item in question may be used in support of a wide range of potential inferences. The Chamber therefore encourages the Prosecution to endeavour to be as precise as possible in this respect and to indicate the exact inferences the Chamber is invited to draw from the proffered evidence.

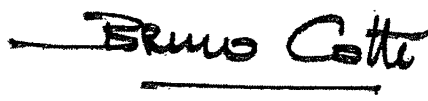
FOR THESE REASONS,

THE CHAMBER,

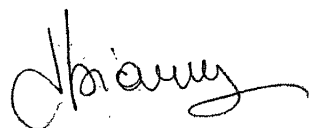
GRANTS the Request as it relates to paragraphs 1-50, 52, 73-83, 85-88, 112-113, 130, 172-173, 196, 249-253 of the prior recorded testimony of P-30, contained in his statement (DRC-OTP-0151-0583), and in the opening paragraph and paragraphs 1 and 5 of Annex III (DRC-OTP-0151-0645), on the condition that P-30 will be available for cross-examination; and

REJECTS the remainder of the Request.

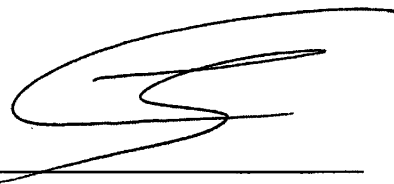
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 15 July 2010

At The Hague, the Netherlands