

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 3 September 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

**Decision on Prosecutor's request to allow the introduction into evidence
of the prior recorded testimony of P-166 and P-219**

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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Legal Representatives of the Applicants

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 and 69 of the Rome Statute of the International Criminal Court ("Statute"), and Rule 68 of the Rules of Procedure and Evidence ("Rules"), issues the following decision:

I. PROCEDURAL HISTORY

A. Prosecution request to admit into evidence the prior recorded testimony of P-166 and P-219

1. *Request 2020*

1. On 1 April 2010, the Prosecution filed a motion requesting the Chamber to admit into evidence the written statement of witness P-166 and its annexes, which include a list of persons allegedly killed during different attacks on Bogoro (compiled by the witness).¹

2. Request 2020 is based on Articles 69(2) of the Statute and Rule 68(b) of the Rules. It refers to paragraph 92 of the Chamber's "Directions for the conduct of the proceedings and testimony in accordance with rule 140".² The Prosecution argues that granting this request will not cause prejudice to the Defence because: the witness will still appear before the Court; he may be cross-examined; and in accordance with Article 67(1)(c) of the Statute such a procedure would prevent excessive delay in the trial.³ The request also makes reference to (i) a decision by Trial Chamber I regarding the admission of a written statement of a witness in

¹ "Requête de l'Accusation aux fins d'admission de la déclaration écrite du témoin P-166 et de ses annexes", 1 April 2010, ICC-01/04-01/07-2020-Conf ("Request 2020").

² ICC-01/04-01/07-1665-Corr, 1 December 2009 ("Rule 140 Decision").

³ ICC-01/04-01/07-2020-Conf, para. 2.

lieu of direct examination⁴ ("Decision 1603"); and (ii) an oral decision by Trial Chamber II regarding the admission of the declaration of witness P-373.⁵

2. Request 2022

3. On 13 April 2010, the Prosecution filed a second request under Rule 68(b) of the Rules, this time concerning witness P-219.⁶ Contrary to Request 2020, it does not pertain to all of the prior recorded statement of P-219.⁷ Instead, the Prosecution proposes that only specific passages of P-219's statement be admitted into evidence ("Selected Passages"), together with two sketches (DRC-OTP-1027-0052 and DRC-OTP-1006-0089) made by the witness. The Prosecution intends to orally examine P-219 on much of the remainder of his prior statement.

4. According to the Prosecution, the information contained in the Selected Passages is relevant, credible and has probative value within the meaning of Article 69(4) of the Statute. Moreover, the Prosecution argues that the information is corroborated by other documentary, as well as, testimonial evidence.⁸

5. The Prosecution claims that, if the Chamber were to accept its request, this would halve the duration of the examination-in-chief of P-219 and focus on the essential questions of this case, such as the authority of the co-accused over their respective groups, the presence of child soldiers, the supply of funds, weapons and other material in preparation of the attack on Bogoro, the planning and

⁴ "Decision on the Prosecution's application for the admission of the prior recorded statements of two witnesses", 15 January 2009, ICC-01/04-01/07-1603.

⁵ ICC-01/04-01/06-1603.

⁶ "Requête de l'Accusation aux fins d'avancement de la déposition de P-219 et d'admission partielle de sa déclaration de synthèse comme élément de preuve", 13 April 2010, ICC-01/04-01/07-2022-Conf-Exp ("Request 2022").

⁷ ICC-01/04-01/07-2022-Conf-Exp, paras 18-19.

⁸ Ibid., para. 23.

execution of the attack, and the crimes committed, specifically sexual crimes and the practice of forced marriage in Aveba and Zumbe.⁹

6. Finally, the Prosecution states that Request 2022 does not affect the fairness of the proceedings, as P-219 will be available for cross-examination and the Chamber will be able to evaluate his overall credibility on the basis of his answers to other questions.¹⁰

B. Defence objections

7. The Defence for Mathieu Ngudjolo responded to Request 2020 on 15 April 2010¹¹ and to Request 2022 on 23 April 2010.¹² The Defence for Germain Katanga responded to Request 2020 on the 19 of April 2010¹³ and to Request 2022 on 23 April 2010.¹⁴ Although not all the Defence objections are shared by both Defence teams or are formulated in precisely the same way, the Chamber will address them together. They may be summarised and listed as follows:

- a. Written declarations do not constitute prior recorded testimony within the meaning of Rule 68 of the Rules.¹⁵
- b. Decision 1603 of Trial Chamber I and the oral decision of Trial Chamber II regarding P-373 must be distinguished from the present cases, because, contrary to the testimonies involved in those

⁹ Ibid., paras 24-25.

¹⁰ Ibid., paras 27-28.

¹¹ "Réponse de la Défense de Mathieu Ngudjolo à la requête ICC-01/04-01/07-2020-Conf du Procureur", 15 avril 2010, ICC-01/04-01/07-2025-Conf, para. 6.

¹² "Réponse de la Défense de Mathieu Ngudjolo à l'écriture du Procureur référencée ICC-01/04-01/07-2022-Conf-Red", 23 April 2010, ICC-01/04-01/07-2042-Conf.

¹³ 'Defence Response to *Requête de l'Accusation aux fins d'admission de la déclaration écrite du témoin P-166 et de ses annexes*', 19 April 2010, ICC-01/04-01/07-2031-Conf.

¹⁴ "Second Defence Response to 'Requête de l'Accusation aux fins d'avancement de la déposition de P-219 et d'admission partielle de sa déclaration de synthèse comme élément de preuve'", 23 April 2010, ICC-01/04-01/07-2046-Conf.

¹⁵ ICC-01/04-01/07-2025-Conf, paras 7-9.

instances, the allegations by P-166 and P-219 address core issues of the case and are materially disputed by the Defence.¹⁶

- c. Statements provided to investigators of the Office of the Prosecutor have no probative value.
- d. Past experience has demonstrated that witnesses have often contradicted their prior statements when testifying under oath before the Chamber.¹⁷ Admitting prior statements is thus considered to be the “ultimate form of leading a witness in his evidence.”¹⁸
- e. Admitting prior statements is harmful to the integrity of the proceedings and violates the principle of orality.¹⁹ Any exceptions to the orality principle must be based on an express provision of the Statute or the Rules and may not be prejudicial to the rights of the Defence.²⁰
- f. There will be no time gain, as the absence of examination-in-chief will inevitably lengthen the time needed for cross-examination.²¹
- g. In relation to Request 2022, the selected passages are related to the rest of the statement and can only be properly understood in the context of the statement as a whole.²²

¹⁶ ICC-01/04-01/07-2025-Conf, paras 12-13 ; ICC-01/04-01/07-2042-Conf, paras 39-40 ; ICC-01/04-01/07-2031-Conf, paras 5-6.

¹⁷ ICC-01/04-01/07-2025-Conf, paras 20-21 ; ICC-01/04-01/07-2046-Conf, para. 16.

¹⁸ ICC-01/04-01/07-2046-Conf, para. 10.

¹⁹ ICC-01/04-01/07-2025-Conf, paras 23-25.

²⁰ ICC-01/04-01/07-2025-Conf, para. 26 ; ICC-01/04-01/07-2031-Conf, paras 1-3.

²¹ ICC-01/04-01/07-2046-Conf, para. 14.

²² ICC-01/04-01/07-2046-Conf, para. 17.

C. Observations of the Victims' Legal Representatives

8. On 23 April 2010, the Legal Representatives of the victims jointly submitted observations in relation to Request 2022.²³ Although they accept that Request 2022 complies with the requirements of Article 69 of the Statute and Rule 68(b) of the Rules, they emphasise the importance of having a comprehensive debate on all the topics that will be addressed by P-219.²⁴ They argue that the search for the truth would best be served by a full contradictory debate on all of P-219's testimony.²⁵

9. In relation to Request 2020, the common Legal Representative of the main group of victims filed observations on 27 April 2010.²⁶ Although the Legal Representative is neutral on whether the Chamber should grant Request 2020, it draws the attention of the Chamber to the fact that P-166 is a victim who has been allowed to participate in the proceedings and that he is an important witness from the perspective of the victims.²⁷

²³ "Observations des représentants légaux sur la 'Requête de l'Accusation aux fins d'avancement de la déposition de P-219 et d'admission partielle de sa déclaration de synthèse comme élément de preuve'", 23 April 2010, ICC-01/04-01/07-2043-Conf.

²⁴ ICC-01/04-01/07-2043-Conf, paras 18-19.

²⁵ Ibid., para. 19.

²⁶ "Observations sur la 'Requête de l'Accusation aux fins d'admission de la déclaration écrite du témoin P-166 et de ses annexes'", 27 April 2010, ICC-01/04-01/07-2050-Conf.

²⁷ ICC-01/04-01/07-2050-Conf, para. 7.

II. ANALYSIS

A. Preliminary objections

1. *Whether the statements of P-166 and P-219 qualify as prior recorded testimony in the sense of Rule 68*

10. A preliminary objection raised by the Defence against Request 2020 and Request 2022 is that the statements of P-166 and P-219 do not qualify as prior recorded testimony within the meaning of Rule 68 of the Rules.

11. The Chamber agrees that not every communication of information by an individual is testimony in this sense. According to Article 69(2), witnesses appearing before the Trial Chamber, who provide information that is relevant to the case, give testimony. When they are called by the Prosecution to testify against the accused, the latter's right under Article 67(1)(e) "to examine or have examined witnesses against him or her" clearly pertains. However, equally statements that were made out-of-court can qualify as testimony. This is apparent from the wording of Article 56(1)(a), which refers to a "unique opportunity to take testimony" and of Article 93(1)(b), which expressly mentions the taking of evidence, "including testimony under oath" in the context of assistance provided by States Parties "in relation to investigations or prosecutions". Moreover, a narrow interpretation of the word testimony would entirely undermine the very right protected by Article 67(1)(e) and deprive Rule 68 of meaning.

12. At the same time, not every assertion made by a person outside the courtroom can be considered testimony for the purposes of Rule 68, even if it relates to the subject-matter of the case. Rule 68 protects the parties' - and especially the accused's - right to examine adverse witnesses; it is not an exclusionary rule against all out-of-court statements. As the Chamber has

previously held, there is no rule against hearsay evidence in this Court.²⁸ Thus, it is important to distinguish between out-of-court statements which qualify as prior recorded testimony under Rule 68, and those that do not.

13. Generally speaking, statements provided to representatives of the Office of the Prosecutor, which at the time the witness knew might be used in proceedings before the Court, will be considered testimony. It is evident that the statements of P-166 and P-219 fall squarely within this category and must therefore be treated as prior recorded testimony within the meaning of Rule 68 of the Rules. Since both will be available for examination by the parties and the Chamber, their prior recorded testimony could, in principle, be admitted under the exception contained in Rule 68(b).

2. *Whether admitting prior recorded testimony violates the principle of orality*

14. To the extent that Article 69(2) enshrines the principle of orality, it also expressly envisages exceptions to it. Indeed, this paragraph provides for the possibility that testimony of a witness may be introduced in the form of documents or written transcripts if this is (a) in accordance with the Statute and the Rules and (b) it is not prejudicial to or inconsistent with the rights of the accused. Rule 68 clearly provides one of those exceptions, containing the necessary guarantees to safeguard the rights of the accused, as is required by Article 69(2), which it implements.

15. However, as the terms of Rule 68 clearly indicate, the Chamber retains discretion to determine whether to admit prior recorded testimony, even when it fulfils the criteria of Rule 68(a) or (b). In exercising this discretion, the Chamber will take into consideration the potential prejudice that may be caused by the fact

²⁸ Oral decision of 12 July 2010, ICC-01/04-01/07-T-170-CONF-ENG ET.

that the witness is not giving his or her evidence in open court.²⁹ When the Chamber finds, for example, that its evaluation of the probative value of the evidence, and especially the credibility thereof, might be affected by whether or not the witness testifies in person, it may reject a request for admission of prior recorded testimony for that reason.³⁰

3. *Whether statements can be admitted only in part*

16. The Chamber recalls that in paragraph 92 of the Rule 140 Decision, it indicated that “the application shall be accompanied by a copy of the prior recorded statement indicating precisely which passages the party calling the witness wishes to enter into evidence.” This language speaks for itself and unambiguously implies that prior recorded testimony may be admitted only in part.³¹

4. *Whether Rule 68(b) can be applied when the prior recorded testimony relates to the ‘acts and conduct’ of the accused*

17. The Chamber starts by noting that Rule 68 does not contain any limitation as to the nature of the content of prior recorded testimony. It thus in principle also applies to statements that go to the acts and conduct of the accused.

18. It is instructive to consider that the equivalent rule before the United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“ICTY”), Rule 92^{ter} of the Rules of Procedure and Evidence, expressly provides that evidence admitted under its provisions “may include evidence that goes to proof of the acts and conduct of

²⁹ “Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts”, 27 August 2010, ICC-01/04-01/07-2289-Corr-Red.

³⁰ ICC-01/04-01/06-1603, para. 21.

³¹ Ibid., para. 22.

the accused as charged in the indictment.” This rule allows a trial chamber of the ICTY to admit evidence of a witness in the form of a written statement or transcript on the conditions, *inter alia*, that the witness is present in court and available for cross-examination and any questioning by judges. In this regard, the Chamber draws attention to the fact that Rule 68(b) of the Rules also requires that the witness must be available for cross-examination.³²

19. This does not mean that the Chamber has no discretion to reject a request under Rule 68(b) on this basis. However, before allowing the party calling the witness to omit examination-in-chief, the Chamber will assess the relative importance of the statement and determine whether it is more appropriate to hear the testimony directly from the witness. Factors to be taken into consideration, in this regard, are whether direct oral testimony is likely to provide any additional information and, in particular, whether the Chamber deems it necessary to observe the giving of evidence by the witness in full. In certain cases there may also be prejudice to the Defence if the witness does not make his or her allegations against the accused in open court.

5. *Calculation of time allotted for cross-examination when there is no examination-in-chief*

20. In its Rule 140 Decision, the Chamber indicated that each Defence team would be allocated roughly 60 per cent of the time used by the Prosecution for examination-in-chief. When prior recorded testimony is admitted, examination-in-chief is by definition wholly or partially omitted and so the Chamber has no basis for calculating the time available to the Defence for cross-examination. Moreover, as argued by the Defence, the lack of examination-in-chief may lengthen the time that would normally be required to conduct cross-examination. The Chamber will take those circumstances into account and may allow the

³² ICC-01/04-01/07-2289-Corr-Red, para. 14.

Defence a margin of autonomy in deciding how much time it needs to cross-examine the witness, depending on the importance of the prior recorded testimony.

B. Analysis of the statements

1. Prior recorded testimony of P-166

21. The Prosecution requests the Chamber to admit into evidence the entire statement which P-166 made to the Prosecution in 2007.³³ Although the Prosecution had grounds to believe that P-166 had committed a crime within the jurisdiction of the Court, the interview was not recorded at the request of the witness. The witness also waived his right to counsel.

22. For the sake of analysis, the Chamber has divided P-166's statement into three parts:

- a. Part A, dealing with the list of victims of the attacks on Bogoro and destruction of property (paragraphs 66-85; 93-108).
- b. Part B, dealing with the actual attack and the involvement of different groups and persons (paragraphs 109-120).
- c. Part C, which comprises the rest of the statement.

23. In relation to Part C of the statement of P-166, its main usefulness lies in the general anthropological and geographical information about Bogoro that it contains. It also contains information about the recent history of that village, especially relating to the several attacks it allegedly endured in the prelude to the attack of 24 February 2003.

³³ DRC-OTP-1007-0002.

24. The Chamber cannot see a problem in admitting this part of the statement on the basis of Rule 68(b), as long as the witness appears in person and confirms under oath its veracity. Several other witnesses have testified about these events and the statement of P-166 does not seem to add anything that is fundamentally new or different from their testimony.

25. Equally, the maps contained in Annex B (DRC-OTP-1007-0026 and DRC-OTP-1007-0027) are admitted into evidence under the same conditions provided that P-166 confirms authorship of the maps.

26. Part A is perhaps the most important aspect of P-166's statement and is directly related to Annex C thereto (DRC-OTP-1007-0029), which is a list of persons who were allegedly killed in the several attacks on Bogoro, including the attack of 24 February 2003. According to P-166, this list is a compilation of several lists prepared by others, as well as of information which P-166 obtained directly from relatives of the deceased. The Prosecution intends to "ask questions" of P-166 on this issue.³⁴ The projected time needed for this is 1.5 hours.³⁵

27. As the Prosecution intends to examine P-166 on this part of his statement, the Chamber considers that it does not form part of Request 2020. Indeed, it would be inappropriate to admit Part A of the statement into evidence when the Prosecution is still going to examine the witness on the same topic, as this might have the effect of leading the witness. Moreover, it would not be appropriate to admit into evidence Annex C at this stage. As Part A cannot be admitted into evidence pursuant to Rule 68(b), there is no foundation, yet, for admitting the exhibit in Annex C.

³⁴ ICC-01/04-01/07-2020-Conf, para. 14.

³⁵ Ibid., para. 9.

28. Finally, regarding Part B, the Chamber is not convinced that it would be appropriate to admit into evidence those parts of the statement which relate directly to the attack of 24 February 2003 pursuant to Rule 68(b). The Chamber finds that Part B deals with matters which may be of considerable significance to the case. If the Prosecution wishes to rely on this testimony, it must orally examine P-166 on these points.

2. *Prior recorded testimony of P-219*

29. Request 2022 only pertains to selected extracts of P-219's statement, which relate to the build-up of the conflict, previous attacks in other locations, background information on the FRPI and the FNI and the links between the two, the different camps of the FRPI and the layout of the camp in Aveba. Further, there are extracts dealing with the use of alcohol and drugs by FPRI members and the system of communication between FRPI units. Altogether, the extracts cover about one quarter of the statement. In relation to each of these topics, the Prosecution provided references to other documentary and testimonial evidence, including prior recorded statements of witnesses who have not yet testified, said to corroborate the information provided in the selected paragraphs.³⁶

30. Request 2022 also encompasses two sketches, made by P-219, one of which shows the positions of several FRPI camps on a map;³⁷ the other depicting the layout of the FRPI camp in Aveba.³⁸

31. In relation to the remainder of the statement, the Prosecution previously announced that it would not question the witness on every aspect of it and indicated the paragraphs on which it would not examine the witness.³⁹

³⁶ ICC-01/04-01/07-2022-Conf-Exp, footnotes 31 to 33.

³⁷ DRC-OTP-1006-0089.

³⁸ DRC-OTP-1027-0051.

32. The intention of the Prosecution is to focus the interrogation of P-219 on what it describes as matters that form the heart of the debate, namely, the position of authority of the accused within their respective organisations, the presence of child soldiers, the supply of funds, weapons and materials in preparation of the attack on Bogoro, the planning of the attack, the execution of the attack, the abuses that were committed, particularly the sexual crimes, and the practice of forced marriages at Aveba and Zumbe.⁴⁰

33. Although the Chamber agrees that it is very important to focus any examination on the core issues of the case, it is not convinced that all of the topics which the Prosecution wishes to adduce without examination-in-chief are of secondary importance. For example, the genesis and history of the FRPI and FNI, and especially the links between these two groups, is potentially of considerable importance to this case. The same is true for the methods of communication and the use of certain substances by members of the FRPI, especially in the context of the military operations and the attack on Bogoro.

34. At the same time, the Chamber considers that the information on these topics, provided in the statement by P-219, is not always sufficiently precise to materially advance the Chamber's factual inquiry. It would therefore be advantageous if the Prosecution solicited more specific information from the witness on those aspects of the statement that are material in this case.

35. The Chamber therefore considers it inappropriate to admit the selected passages from P-219's statement into evidence; the Prosecution should question P-219 on those issues during examination-in-chief. If the Prosecution deems it

³⁹ "Notice d'information de l'Accusation à la Chambre et aux participants des points sur lesquels elle n'envisage pas, à ce stade du procès, de faire porter l'interrogatoire de P-219", 8 February 2010, ICC-01/04-01/07-1847-Conf.

⁴⁰ ICC-01/04-01/07-2022-conf-Exp, para. 24.

necessary to introduce the annotated map and the sketch of the camp in Aveba, it can request them to be admitted through the witness.

FOR THESE REASONS,

THE CHAMBER,

GRANTS Request 2020 **IN PART;**

ADMITS into evidence the prior recorded testimony of P-166, DRC-OTP-1007-0002, with the exception of paragraphs 66-85 and 93-108 (dealing with the list of victims of the attacks on Bogoro and destruction of property) as well as paragraphs 109-120 (dealing with the actual attack and the involvement of different groups and persons), on the condition that P-166 will appear before the Court;

ADMITS into evidence maps DRC-OTP-1007-0026 and DRC-OTP-1007-0027 on the condition that P-166 will appear before the Court and confirm that he is their author; and

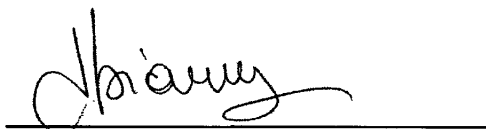
REJECTS Request 2022.

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 3rd September 2010

At The Hague, the Netherlands