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**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 REDACTED VERSION**

**Corrigendum to the Decision on the Prosecution Motion for admission of  
prior recorded testimony of Witness P-02 and accompanying video  
excerpts**

**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  
Ms Fatou Bensouda  
Mr Eric MacDonald

**Counsel for Germain Katanga**

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Mr Andreas O'Shea

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**Legal Representatives of the Victims**

Mr Fidel Nsita Luvengika  
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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**

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**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") and Rule 68(b) of the Rules of Procedure and Evidence ("Rules"), issues the following decision:

## I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 15 June 2010, the Prosecution filed its motion<sup>1</sup> requesting the Chamber to admit into evidence, pursuant to Article 69(2) of the Statute and Rule 68(b) of the Rules, the following material:

- a. various passages of Witness P-02's first and second written statements ("First Statement" and "Second Statement", respectively; "Statements", collectively)<sup>2</sup> and of some annexes to the Second Statement ("Annexes");<sup>3</sup> and
- b. *one* excerpt (from 01:13:13 to 01:22:55)<sup>4</sup> of the video DRC-OTP-0080-0006;<sup>5</sup> *one* excerpt (from 00:00:15 to 00:03:12)<sup>6</sup> of the video DRC-OTP-0081-0006;<sup>7</sup> *one* excerpt (from 00:39:20 to 00:41:23)<sup>8</sup> of the video DRC-OTP-0082-0004;<sup>9</sup> and *two* excerpts (from 00:00:05 to 00:05:00;

<sup>1</sup> Requête aux fins de versement par écrit d'éléments de preuve fournis par le témoin P-02, ICC-01/04-01/07-2196-Conf, 15 June 2010 ("Motion").

<sup>2</sup> ICC-01/04-01/07-2196-Conf, Annexes A.1.A, A.1.B, B.1.A and B.1.B.

<sup>3</sup> ICC-01/04-01/07-2196-Conf, Annexes C.1.A, C.1.B, C.5.A and C.5.B, C.9.A, C.9.B, C.10.A and C.10.B. The Chamber understands that of the ten sets of documents contained in Annex C, the Prosecution tenders only four sets of documents ((i) C.1.A and C.1.B; (ii) C.5.A and C.5.B; (iii) C.9.A and C.9.B; and (iv) C.10.A and C.10.B) by way of the present Motion. Therefore, Annexes C.2.A, C.2.B, C.3.A, C.3.B, C.4.A, C.4.B, C.6.A, C.6.B, C.7.A, C.7.B, C.8.A and C.8.B will not be considered in the present Decision. *See* ICC-01/04-01/07-2196-Conf, fn. 5.

<sup>4</sup> ICC-01/04-01/07-2196-Conf, Annex D.3.1.

<sup>5</sup> ICC-01/04-01/07-2196-Conf, Annex D.2.

<sup>6</sup> ICC-01/04-01/07-2196-Conf, Annex E.3.2.

<sup>7</sup> ICC-01/04-01/07-2196-Conf, Annex E.2.

<sup>8</sup> ICC-01/04-01/07-2196-Conf, Annex F.3.3.

<sup>9</sup> ICC-01/04-01/07-2196-Conf, Annex F.2.

from 00:12:00 to 00:12:30)<sup>10</sup> of the video DRC OTP-0087-0014<sup>11</sup> (“Five Video Excerpts”, collectively).<sup>12</sup>

2. Witness P-02 [REDACTED] allegedly provided a number of videos, including the above mentioned ones, to the Prosecution [REDACTED].<sup>13</sup> In his First Statement, he explains the circumstances in which [REDACTED] videos were made as well as [REDACTED].<sup>14</sup> In his Second Statement and Annexes thereto, he comments on the sequences of the videos.<sup>15</sup>

3. The Prosecution submits that in Witness P-02’s examination-in-chief, it intends to have him comment on a number of excerpts of 15 videos and to tender them into evidence through him.<sup>16</sup> According to the Prosecution, many of the video excerpts require precision concerning dates and places, or relate directly to the accused or the attack on Bogoro and the control thereof by the forces of the *Front des Nationalistes et Intégrationnistes* (“FNI”) and the *Force de Résistance Patriotique en Ituri* (“FRPI”).<sup>17</sup> Such excerpts are not included in the present Motion.<sup>18</sup> However, the Prosecution avers that the above mentioned Five Video Excerpts, constituting 20 minutes and 7 seconds in total, do not require any oral comment by Witness P-02.<sup>19</sup> It asserts that if his Statements and Annexes concerning his profile and activities as well as the Five Video Excerpts are admitted, it will be able to save one hour of court time.<sup>20</sup> The

<sup>10</sup> ICC-01/04-01/07-2196-Conf, Annexes G.3.4 and G.3.5.

<sup>11</sup> ICC-01/04-01/07-2196-Conf, Annex G.2.

<sup>12</sup> Those videos are accompanied by their transcripts and the translations thereof (ICC-01/04-01/07-2196-Conf, Annexes D.4, D.5, E.4, E.5, F.4, F.5, G.4 and G.5).

<sup>13</sup> ICC-01/04-01/07-2196-Conf, paras 7-8.

<sup>14</sup> ICC-01/04-01/07-2196-Conf, par. 9.

<sup>15</sup> ICC-01/04-01/07-2196-Conf, paras 1, 10.

<sup>16</sup> ICC-01/04-01/07-2196-Conf, par. 12.

<sup>17</sup> ICC-01/04-01/07-2196-Conf, paras 15-16. See also *ibid.*, par. 33.

<sup>18</sup> ICC-01/04-01/07-2196-Conf, par. 16. See also *ibid.*, par. 33.

<sup>19</sup> ICC-01/04-01/07-2196-Conf, paras 14, 18.

<sup>20</sup> ICC-01/04-01/07-2196-Conf, par. 19. See also *ibid.*, par. 14.

Prosecution intends to use 7 hours and 45 minutes, allocated to Witness P-02's examination-in-chief, for the remaining video excerpts.<sup>21</sup>

4. According to the Prosecution, the Five Video Excerpts and the selected passages of his Statements and Annexes do not require Witness P-02's supplementary oral explanation.<sup>22</sup> In support of this submission, the Prosecution argues that they (i) are relevant, as they concern, for example, the existence of an armed conflict in Ituri, Witness P-02's professional career and the circumstances in which the video recordings were made;<sup>23</sup> (ii) are reliable, as Witness P-02 confirmed that [REDACTED] the videos in question and signed the Statements knowing that they could be used in the criminal proceedings before the Court;<sup>24</sup> (iii) clearly establish the circumstances of the recording of the Five Video Excerpts, including dates and places of the recording;<sup>25</sup> (iv) are corroborated by documentary evidence or other witnesses' testimony;<sup>26</sup> and (v) do not relate to individual criminal responsibility of the accused, as they consist mainly of the evidence concerning the context of the case.<sup>27</sup>

5. The Prosecution further argues that the accused will not be prejudiced as Witness P-02 will appear before the Court and be available for cross-examination by the Defence.<sup>28</sup> The Prosecution also notes that Witness P-02

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<sup>21</sup> ICC-01/04-01/07-2196-Conf, par. 20. *See also ibid.*, par. 12.

<sup>22</sup> ICC-01/04-01/07-2196-Conf, paras 21, 28. *See also ibid.*, par. 17, stating that the Five Video Excerpts speak for themselves.

<sup>23</sup> ICC-01/04-01/07-2196-Conf, paras 21-24.

<sup>24</sup> ICC-01/04-01/07-2196-Conf, paras 21, 25 also stating that the Statements and the Annexes were taken in accordance with Rule 111 of the Rules.

<sup>25</sup> ICC-01/04-01/07-2196-Conf, paras 21, 26.

<sup>26</sup> ICC-01/04-01/07-2196-Conf, paras 21, 27.

<sup>27</sup> ICC-01/04-01/07-2196-Conf, paras 21, 30.

<sup>28</sup> ICC-01/04-01/07-2196-Conf, paras 21, 31.

consented to tendering into evidence the above mentioned selected material and will reiterate his consent under oath in court.<sup>29</sup>

6. On 28 June 2010, the Defence for Mr. Germain Katanga (“Mr. Katanga”) filed its response opposing the Motion in part.<sup>30</sup> It submits that Rule 68(b) of the Rules is designed to address the possibility of the admission of prior recorded testimony, and not to facilitate the admission of exhibits.<sup>31</sup> According to the Defence for Mr. Katanga, by introducing parts of Witness P-02’s prior testimony through the present Motion, the Prosecution is attempting, in effect, to facilitate the quick admission of video evidence.<sup>32</sup> It also argues that the determination of the reliability and relevance of the video excerpts depends on the testimony of Witness P-02. Therefore, in its view, it is prejudicial to the rights of the accused to make such a determination before the witness has been questioned on their reliability and relevance in court, including through cross-examination.<sup>33</sup>

7. The Defence for Mr. Katanga further submits that Witness P-02’s explanations as to the circumstances in which the videos were filmed are not sufficient to establish the reliability of the contents of the Five Video Excerpts sought to be admitted, since some of them contain assertions of facts, which were made by persons “with political positions or motives” and provided neither under oath nor in the presence of prosecutorial or judicial authorities.<sup>34</sup> It also asserts that many parts of the Five Video Excerpts relate to events so long after the attack on Bogoro that they arguably lack relevance

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<sup>29</sup> ICC-01/04-01/07-2196-Conf, paras 21, 31-32.

<sup>30</sup> Defence Response to Prosecutor’s *Requête aux fins de versement par écrit d’éléments de preuve fournis par le témoin P-02* (ICC-01/04-/01/07-2196-Conf), ICC-01/04-01/07-2216-Conf, 28 June 2010.

<sup>31</sup> ICC-01/04-01/07-2216-Conf, par. 9.

<sup>32</sup> ICC-01/04-01/07-2216-Conf, par. 10.

<sup>33</sup> ICC-01/04-01/07-2216-Conf, paras, 12, 16. See also *ibid.*, paras 27-29 referring to the principle that witnesses should be heard in person.

<sup>34</sup> ICC-01/04-01/07-2216-Conf, paras 15-21.

to the Bogoro attack.<sup>35</sup> Moreover, the Defence for Mr. Katanga is of the view that the prejudice to the rights of the accused arises from the facts that (i) as corroborative evidence, the Prosecution merely refers to the Table of Incriminating Evidence without specifically identifying such evidence or points to a piece of evidence whose credibility is in question;<sup>36</sup> that (ii) some parts of the material sought to be admitted relate to contentious matters which are the subjects of the charges in the present case and ultimately relevant to the responsibility of the accused;<sup>37</sup> and (iii) that some of the Five Video Excerpts constitute the unnecessary showing of the dead bodies and the filming of accounts of killings which have no sufficient correlation to the charges against the accused.<sup>38</sup>

8. Furthermore, with regard to the passages in the Statements which do not specifically relate to the Five Video Excerpts in question, the Defence for Mr. Katanga maintains that most of such passages may not be admitted since they merely concern (i) the procedure in taking the Statements,<sup>39</sup> (ii) Witness P-02's work [REDACTED], which has no relevance to the present case,<sup>40</sup> (iii) factual assertions which may be based on his opinions on the political situation rather than his personal observations thereof,<sup>41</sup> or (iv) videos which are not sought to be admitted through this Motion and some of which have not even been disclosed as incriminating evidence.<sup>42</sup> The Defence for Mr.

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<sup>35</sup> ICC-01/04-01/07-2216-Conf, paras 24-25.

<sup>36</sup> ICC-01/04-01/07-2216-Conf, par. 30.

<sup>37</sup> ICC-01/04-01/07-2216-Conf, paras 31-32.

<sup>38</sup> ICC-01/04-01/07-2216-Conf, paras 33-35.

<sup>39</sup> ICC-01/04-01/07-2216-Conf, paras 39, 41 referring to paras 1-9 of the First Statement and paras 1-9 of the Second Statement, respectively.

<sup>40</sup> ICC-01/04-01/07-2216-Conf, par. 40 referring to paras 14-29 of the First Statement.

<sup>41</sup> ICC-01/04-01/07-2216-Conf, paras 40 and 51 referring to paras 14-29 of the First Statement and par. 35 of the Second Statement, respectively.

<sup>42</sup> ICC-01/04-01/07-2216-Conf, paras 43-50, 53-57, also questioning the reliability and relevance of the passages concerning videos which are not sought to be admitted, and pointing out that some of such passages are not only contextual but also incriminating.

Katanga does not object to the admission of a small portion of the First Statement concerning Witness P-02's background.<sup>43</sup>

9. On 28 June 2010, the Defence for Mr. Mathieu Ngudjolo Chui ("Mr. Ngudjolo") also filed its response opposing the Motion.<sup>44</sup> It submits that Rule 68(b) of the Rules governs the modality of the presentation of evidence through documentary or audio/video recording of testimony provided by a neutral person who saw or heard a matter and could testify to the truth of that matter.<sup>45</sup> According to the Defence of Mr. Ngudjolo, the material that the Prosecution wishes to tender into evidence does not constitute testimony because (i) it concerns matters distant from the temporal and geographical context of the present case, and therefore does not present the facts with a view to establishing the truth,<sup>46</sup> and (ii) it lacks the neutrality due to the fact that Witness P-02 worked [REDACTED].<sup>47</sup> The Defence for Ngudjolo also argues that for the same reasons, the material in question is not relevant to the charges in the present case.<sup>48</sup> It further avers that the principle of orality dictates that witnesses called before a court must be directly questioned and orally respond<sup>49</sup> and that Rule 68 of the Rules only allows the admission of written statements in limited circumstances.<sup>50</sup> Moreover, the Defence for Mr.

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<sup>43</sup> ICC-01/04-01/07-2216-Conf, par. 39, referring to paras 10-13 of the First Statement.

<sup>44</sup> Réponse de la Défense de Mathieu Ngudjolo à la « Requête aux fins de versement par écrit d'éléments de preuve fournis par le témoin P-02 » ICC-01/04-01/07-2196-Conf, ICC-01/04-01/07-2215-Conf, 28 June 2010.

<sup>45</sup> ICC-01/03/01/07-2215-Conf, 28 June 2010, paras 6-9.

<sup>46</sup> ICC-01/03/01/07-2215-Conf, paras 10-11.

<sup>47</sup> ICC-01/03/01/07-2215-Conf, par. 12.

<sup>48</sup> ICC-01/03/01/07-2215-Conf, paras 16-17. See also *ibid.*, paras 23-27 where the Defence of Mr. Ngudjolo maintains that the material in question is distinguishable from the statement of Witness P-373 previously admitted by the Chamber, as the latter concerned contextual matters which were "l'objet de l'intérêt et de l'examen par la Chambre", such as the existence of the camps and the usage of child soldiers.

<sup>49</sup> ICC-01/03/01/07-2215-Conf, paras 19, 21-22.

<sup>50</sup> ICC-01/03/01/07-2215-Conf, par. 20, also stating that such limited circumstances would be where there will be no further opportunity to obtain the information in question, a witness cannot appear in person before the Court, or the Defence had an opportunity to exercise its rights when the recording of the prior testimony was made.

Ngudjolo appears to understand that the Prosecution seeks to have the Statements, Annexes and the Five Video Excerpts admitted without any oral testimony of the witness, and asserts that this would violate the rights of the Defence.<sup>51</sup>

## II. APPLICABLE LAW

10. Article 69(2) of the Statute provides:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. [...] These measures shall not be prejudicial to or inconsistent with the rights of the accused.

11. Rule 68(b) of the Rules empowers a Trial Chamber to allow, in accordance with Article 69(2) of the Statute:

the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: [...]

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

The term “previously recorded testimony” under this Rule has been interpreted as including written statements provided by a witness.<sup>52</sup>

12. Furthermore, in paragraph 92 of the “Directions for the conduct of the proceedings and testimony in accordance with rule 140”,<sup>53</sup> the Chamber instructed that a party requesting the admission of parts of prior recorded

<sup>51</sup> ICC-01/03/01/07-2215-Conf, par. 31. See also *ibid.*, paras 27-30, 32.

<sup>52</sup> Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses, ICC-01/04-01/06-1603, 15 January 2009, paras 18-19.

<sup>53</sup> Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665 (ICC-01/04-01/07-1665-Corr), 20 November 2010.

testimony should attach any other material to which references are made in those parts.

13. The Chamber is of the view that, as with any other material tendered into evidence, it must examine whether the prior recorded testimony and the accompanying material, if any, satisfy the criteria for the admissibility of evidence, namely (i) whether they are relevant to the charges in the present case, (ii) whether they are of probative value, (iii) and whether their probative value is not outweighed by their prejudicial effect.<sup>54</sup> As the Chamber previously stated, the probative value comprises two factors, namely the materiality of the information contained in a piece of evidence and the reliability of the piece of evidence.<sup>55</sup>

14. The Chamber agrees with Trial Chamber I in *Lubanga* that “fact-specific decisions” need to be taken in determining whether a previously recorded testimony may be introduced in place of “live” evidence pursuant to Rule 68(b) of the Rules.<sup>56</sup> The factors in favour of allowing the introduction of a previously recorded testimony include, but are not limited to, (i) that the testimony relates to issues which are not materially in dispute; (ii) that it is not central to core issues in the case, but rather provides relevant background information; and (iii) that it is corroborative of other evidence.<sup>57</sup> In assessing

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<sup>54</sup> See Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts, ICC-01/04-01/07-2233 (ICC-01/04-01/07-2233-Corr), 30 June 2010, paras 11-15. As for the standard of the admissibility of evidence, see Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la décision orale du 4 mars 2010 autorisant l’utilisation et le dépôt en preuve de trois photographies”, ICC-01/04-01/06-2404, 29 April 2010, par. 23; Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of four documents, ICC-01/04-01/06-1399, 13 June 2008, paras 24-32.

<sup>55</sup> ICC-01/04-01/07-2233 (ICC-01/04-01/07-2233-Corr), par. 13, also stating that that the first criterion assesses whether an item of evidence, if taken at face value, is capable of influencing the Chamber’s decision in a significant manner, and that the second criterion analyses whether an item of evidence possesses sufficient indicia of reliability.

<sup>56</sup> ICC-01/04-01/06-1603, par. 21.

<sup>57</sup> ICC-01/04-01/06-1603, paras 22, 24.

whether to allow the measures set fourth in Rule 68(b) of the Rules, the Chamber must ensure that they are not prejudicial to or inconsistent with the rights of the accused.<sup>58</sup> In making this assessment, the Chamber considers it an important factor that, while the evidence of the witness who has provided the previously recorded testimony will not be *viva voce* in its entirety, he or she will appear before the Court and will be available for cross-examination by the Defence.

### III. ANALYSIS

15. For convenience, the Chamber will first discuss the Second Statement, the Annexes thereto and the Five Video Excerpts. It will then turn to the First Statement.

#### A. The Second Statement, Annexes and Five Video Excerpts

16. The parts of the Second Statement of Witness P-02 and the Annexes thereto which the Prosecution designated as relevant<sup>59</sup> contain passages regarding (i) the procedure of taking the Second Statement,<sup>60</sup> (ii) the chain of custody of the video tapes,<sup>61</sup> (iii) Witness P-02's comments on the videos from which the Five Video Excerpts have been taken,<sup>62</sup> and (iv) his comments on other videos which the Prosecution does not seek to tender by way of the present Motion.<sup>63</sup>

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<sup>58</sup> Article 69(2) of the Statute.

<sup>59</sup> ICC-01/04-01/07-2196-Conf, highlighted parts in Annex B.1.A, C.1.A, C.5.A, C.9.A and C.10.A and parts not discarded in Annex B.1.B, C.1.B, C.5.B, C.9.B and C.10.B. The Chamber understands that the Prosecution seeks tender those parts, rather than the entire Second Statement and the Annexes.

<sup>60</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), paras 1-9, 125.

<sup>61</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), par. 10.

<sup>62</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), paras 19-20, 39-40, 54-55, 93-94; Annexes C.1.A, C.1.B, C.5.A, C.5.B, C.9.A, C.9.B, C.10.A and C.10.B.

<sup>63</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), paras 11, 23-26, 35, 37-38, 41-46, 48-51, 60-62.

17. Among the passages in the Second Statement which do not directly refer to the Five Video Excerpts, the Chamber considers that those regarding (i) the procedure of taking the Second Statement<sup>64</sup> and (ii) the chain of custody of the video tapes<sup>65</sup> are relevant and have probative value as they are inseparable from the videos which the Prosecution attempts to tender through Witness P-02, and provide authentication thereof. Those passages are therefore admitted provided that Witness P-02 appears before the Court.

18. According to the Second Statement, the Annexes thereto and the corresponding lines of the appended transcripts, the Five Video Excerpts depict (i) [REDACTED]; (ii) [REDACTED]; (iii) [REDACTED]; (iv) [REDACTED]; and (v) [REDACTED]. The Chamber observes that four of the Five Video Excerpts and the corresponding lines of the attached transcripts, as well as the portions of the Second Statement and the Annexes referring to them, do not directly relate to the attack on Bogoro on 24 February 2003. However, they are relevant to the alleged existence of an armed conflict and the political and military situations in the Ituri district in the first half of 2003. Furthermore, in the present Motion, the Prosecution has strived to select specific segments of the videos which are limited in length, so that their relevance is discernible. While the evidence concerning the identity of the attackers on Bogoro is of significance to the case, it corroborates other evidence which is already in the trial record. The Defence will have an opportunity to raise their concerns on the reliability and materiality of the contents of the Five Video Excerpts with Witness P-02, who will appear before the Court. The Chamber is aware that the contents of the Five Video Excerpts constitute hearsay evidence, since the individuals making assertions therein cannot be examined in court. However, in the view of the Chamber, the

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<sup>64</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), paras 1-9, 125.

<sup>65</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), par. 10.

hearsay nature of the evidence does not *per se* provide a sufficient reason for completely excluding this evidence.<sup>66</sup> Rather, it constitutes one of the factors to be considered in light of the entire trial record when determining weight to be accorded to the Five Video Excerpts.

19. The Chamber nevertheless notes that insofar as the Motion relates to certain parts of the Annexes containing Witness P-02's comments which do not relate to the Five Video Excerpts but refer to other sequences of the same videos,<sup>67</sup> it is unable, in the absence of the corresponding video sequences, to find any relevance or probative value with respect to those parts of the Annexes.

20. Thus, the designated portions of the Second Statement and the Annexes particularly referring to the Five Video Excerpts<sup>68</sup> are admitted into evidence provided that Witness P-02 appears before the Court. The Five Video Excerpts<sup>69</sup> and the corresponding lines of the appended transcripts<sup>70</sup> are

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<sup>66</sup> Cf. ICC-01/04-01/06-1399, paras 28-29.

<sup>67</sup> Comments at 00:15:37, 00:25:27 and 00:25:36 in Annexes C.5.A and C.5.B; Comments at 00:03:11 in the second, third and fourth sentences, 01:37:00 and 01:49:45 in Annexes C.9.A and C.9.B; Comments at 00:05:21, 00:09:22, 00:11:41, 00:13:18, 00:16:37 and 00:40:51 in Annexes C.10.A and C.10.B. On the other hand, the Chamber observes that comments at 00:03:11 in the first and fifth sentences in Annexes C.9.A and C.9.B ([REDACTED]; [REDACTED]) appear to refer to the location and the date of the scene contained in one of the Five Video Excerpts subject to the Motion (the excerpt from 00:39:20 to 00:41:23 of the video DRC-OTP-0082-0004).

<sup>68</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), paras 19-20, 39-40, 54-55, 93-94; Annexes C.1.A and C.1.B, comments at 01:13:13 and 01:18:02; Annexes C.5.A and C.5.B, comments at 00:00:30; Annexes C.9.A and C.9.B, comments at 00:03:11 in the first and fifth sentences; Annexes C.10.A and C.10.B, comments at 00:00:00, 00:00:50, 00:01:15 and 00:12:13.

<sup>69</sup> ICC-01/04-01/07-2196-Conf, Annexes D.3.1, E.3.2, F.3.3, G.3.4 and G.3.5.

<sup>70</sup> ICC-01/04-01/07-2196-Conf, Annex D.5 (the translation of the transcript of the video DRC-OTP-0080-0006), lines 1025-1139; the corresponding part of Annex D.4 (the transcript of the video DRC-OTP-0080-0006); Annex E.5 (the translation of the transcript of the video DRC-OTP-0081-0006), lines 3-37; the corresponding part of Annex E.4 (the transcript of the video DRC-OTP-0081-0006); Annex F.5 (the translation of the transcript of the video DRC-OTP-0082-0004), lines 418-434; the corresponding part of Annex F.4 (the transcript of the video DRC-OTP-0082-0004); Annex G.5 (the translation of the transcript of the video DRC-OTP-0087-0014), lines 5-60 and 280-286; the corresponding parts of Annex G.4 (the transcript of the video DRC-OTP-0087-0014).

provisionally admitted into evidence, provided that the relevance and probative value of the Five Video Excerpts (including the authentication of thereof given by Witness P-02 in the Second Statement) remain intact after cross-examination of Witness P-02 on those excerpts.

21. With respect to the designated passages in the Second Statement containing Witness P-02's comments on the videos which are not included in the Five Video Excerpts subject to the present Motion,<sup>71</sup> the Chamber considers that the Prosecution has failed to establish their relevance. The Chamber does not regard those passages as providing general descriptions of Witness P-02's profile or professional activities. Nor does it suffice for the Prosecution to describe those passages as referring to "autres informations d'intérêt" (other information of interest).<sup>72</sup> Moreover, the Prosecution does not explain why the corresponding excerpts of the videos are not included in the Motion. The Chamber does not consider it to be its task to speculate about which proposition of the Prosecution these passages are intended to establish, and is therefore unable to assess their relevance.

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<sup>71</sup> ICC-01/04-01/07-2196-Conf, Second Statement (Annexes B.1.A and B.1.B), paras 11, 23-26, 35 (eighth sentence), 37-38, 41-46, 48-51, 60-62.

<sup>72</sup> ICC-01/04-01/07-2196-Conf, par. 24. The Trial Chamber notes that the eighth sentence of par. 35, which is designated by the Prosecution as relevant, is part of his comments on another video than the Five Video Excerpts in question. It reads: "[REDACTED]." This sentence is not directly descriptive of the video and can be read independently from his comments in the same paragraph explaining the video. However, one needs to read the entire paragraph 35 in order to understand what time period the term "[REDACTED]" refers to. The sentence standing alone does not indicate when [REDACTED]. Yet the Prosecution does not designate the other parts than the eighth sentence in paragraph 35 as relevant. Hence, the Chamber does not see, at the present stage, sufficient relevance or probative value to admit the eighth sentence of paragraph 35. The other paragraphs (paras 11, 23-26, 37-38, 41-46, 48-51, 60-62) dealing with the videos which are not subject to the present Motion are designated by the Prosecution as relevant in their entirety. They provide Witness P-02's explanations of the contents of such videos or the situations in which they were made. Those paragraphs do not make much sense in the absence of the corresponding videos.

## B. The First Statement

22. The parts of the First Statement of Witness P-02 which the Prosecution designates as relevant<sup>73</sup> contain passages pertaining to (i) the procedure of taking the First Statement,<sup>74</sup> (ii) the personal and professional background of Witness P-02,<sup>75</sup> (iii) the chain of custody of the video tapes<sup>76</sup> and (iv) his personal observations of political situations and conflicts in the Ituri district between 2000 and 2002.<sup>77</sup> The Chamber is of the view that the matters (i) to (iii) above are relevant and have probative value as they are inseparable from the Five Video Excerpts and the pertinent portions of the Second Statement and the Annexes. The Chamber also observes that while the passages addressing the last issue - (iv) - mainly focuses on [REDACTED], they also provide some information concerning the broader political background of the region relevant to the case, such as ethnic tensions and distribution of arms involving the Lendu. They are also limited in length. The nature of Witness P-02's observations in those passages (whether they are purely his opinions or based on his personal experiences) can be tested when he appears for cross-examination. Based on those considerations, the Chamber admits into evidence all the designated passages in the First Statement provided that Witness P-02 appears before the Court.

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<sup>73</sup> ICC-01/04-01/07-2196-Conf, highlighted parts in Annex A.1.A and parts not discarded in Annex A.1.B. The Chamber understands that the Prosecution seeks tender those parts, rather than the entire First Statement.

<sup>74</sup> ICC-01/04-01/07-2196-Conf, First Statement (Annexes A.1.A and A.1.B), paras 1-9.

<sup>75</sup> ICC-01/04-01/07-2196-Conf, First Statement (Annexes A.1.A and A.1.B), paras 10-19, 26-27.

<sup>76</sup> ICC-01/04-01/07-2196-Conf, First Statement (Annexes A.1.A and A.1.B), par. 33.

<sup>77</sup> ICC-01/04-01/07-2196-Conf, First Statement (Annexes A.1.A and A.1.B), paras 20-25, 28-29.

### **C. Procedural matters**

23. As the designated portions of the First Statement, the designated portions of the Second Statement and the Annexes referring to the Five Video Excerpts, as well as the Five Video Excerpts and the corresponding lines of the appended transcripts have been provisionally admitted through the present Decision, they will be marked for identification and given MFI numbers for the time being. The Prosecution may request the assignment of EVD numbers to the provisionally admitted portions of the First and Second Statements and the Annexes thereto, once Witness P-02 makes the solemn undertaking and gives consent to the submission of those documents to the Chamber. Immediately after this, the Defence may cross-examine Witness P-02 with respect to the Five Video Excerpts. After this short cross-examination on the Five Video Excerpts, the Prosecution may seek the assignment of EVD numbers to the Five Video Excerpts and the corresponding lines of the transcripts. Subsequently, the normal course of interrogation of Witness P-02 will resume, and the Prosecution may start its examination-in-chief of Witness P-02 on the topics not subject to the present Motion.

**FOR THESE REASONS,**

**THE CHAMBER,**

**GRANTS** the Motion **IN PART** with respect to

- (i) paragraphs 1-29 and 33 of the First Statement;<sup>78</sup> paragraphs 1-10, 19-20, 39-40, 54-55, 93-94 and 125 of the Second Statement;<sup>79</sup> and Witness P-02's comments in the Annexes referring to the Five Video Excerpts,<sup>80</sup> provided that Witness P-02 appears before the Court;
- (ii) the Five Video Excerpts<sup>81</sup> and the corresponding parts of the transcripts of the relevant videos and the translations thereof,<sup>82</sup> provided that the relevance and probative value of the Five Video Excerpts remain intact after cross-examination of Witness P-02 on those excerpts; and

**ORDERS** the Prosecution to re-file, no later than 13 August 2010, the First Statement, the Second Statement and the Annexes, as well as the transcripts of the relevant videos and the translations thereof, highlighting the portions provisionally admitted into evidence in the present Decision;

**INSTRUCTS** the Registry to upload the re-filed material and the Five Video Excerpts in E-Court and assign MFI numbers to them; and

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<sup>78</sup> ICC-01/04-01/07-2196-Conf, Annexes A.1.A and A.1.B.

<sup>79</sup> ICC-01/04-01/07-2196-Conf, Annexes B.1.A and B.1.B.

<sup>80</sup> ICC-01/04-01/07-2196-Conf, Annexes C.1.A and C.1.B, comments at 01:13:13 and 01:18:02; Annexes C.5.A and C.5.B, comments at 00:00:30; Annexes C.9.A and C.9.B, comments at 00:03:11 in the first and fifth sentences; Annexes C.10.A and C.10.B, comments at 00:00:00, 00:00:50, 00:01:15 and 00:12:13.

<sup>81</sup> ICC-01/04-01/07-2196-Conf, Annexes D.3.1, E.3.2, F.3.3, G.3.4 and G.3.5.

<sup>82</sup> ICC-01/04-01/07-2196-Conf, Annex D.5, lines 1025-1139 and the corresponding part of Annex D.4; Annex E.5, lines 3-37 and the corresponding part of Annex E.4; Annex F.5, lines 418-434 and the corresponding part of Annex F.4; Annex G.5, lines 5-60 and 280-286 and the corresponding parts of Annex G.4.

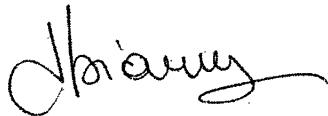
**REJECTS** the remainder of the Motion.

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

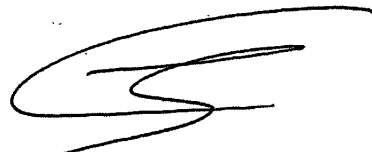


**Judge Bruno Cotte**

**Presiding Judge**



**Judge Fatoumata Dembele Diarra**



**Judge Christine Van den Wyngaert**

Dated this 27th August 2010

At The Hague, the Netherlands