

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07
Date: 24 February 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 Document

Decision on the Prosecution's renunciation of the testimony of witness P-159

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

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 for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64, 69 and 70 of the Rome Statute (“the Statute”) and rules 134(3), 162 and 165 of the Rules of Procedure and Evidence (“the Rules”), decides as follows:

I. PROCEDURAL HISTORY

1. Witness P-159, a witness called by the Prosecution, testified before this Chamber between 17 and 29 March 2010. The witness made the solemn declaration in accordance with article 69(1) and rule 66(1).¹ During his testimony witness P-159 stated several times that he was present during the attack on Bogoro.²

2. On 14 December 2010, the Prosecution informed the Chamber that it would no longer rely on the testimony of witness P-159 to prove its case against Germain Katanga and Mathieu Ngudjolo (“the Prosecution’s Notice”).³ The Prosecution did not provide reasons or an explanation for this.

3. On 6 January 2011, the Chamber asked the parties and participants via email to file any observations they might have regarding the Prosecution’s Notice.

4. On 17 January 2011, both Defence teams filed observations. The Defence for Mr. Ngudjolo stated that it did not oppose the Prosecution’s Notice and asked the Chamber to take note of it.⁴ The Defence for Mr. Katanga also took note of the Prosecution’s position regarding witness P-159 but requested the Chamber

¹ ICC-01/04-01/07-T-118-CONF-ENG ET, p. 65, lines 6-7.

² ICC-01/04-01/07-T-118-CONF-ENG ET, p. 72, lines 12-26 ; ICC-01/04-01/07-T-123-CONF-ENG ET, p. 16, lines 10-18.

³ “Prosecution’s Notice that it will not rely on the testimony of Prosecution Witness P-159 to prove its case”, 14 December 2010, ICC-01/04-01/07-2631-Conf [hereinafter “Prosecution’s Notice”].

⁴ “Observations de la Défense de Mathieu Ngudjolo sur ‘Prosecution’s notice that it will not rely on the testimony of Prosecution Witness P-159 to prove its case’- ICC-01/04-01/07-2631-Conf du 14 décembre 2010”, 17 January 2011, ICC-01/04-01/07-2649-Conf.

to confirm that it would not rely on P-159's testimony as incriminating evidence in its final judgment.⁵ In their observations, the two Defence teams made reference to statements of the alleged father and sister of witness P-159, who both claimed that the latter was not present in Bogoro on the 24th of February 2003. The Katanga Defence annexed another statement by the father of witness P-159 in which the same assertion is repeated.⁶

5. Neither of the two Victims' Legal Representatives raised any objection against the Prosecution's Notice.⁷

6. On 18 January 2011, the Prosecution applied for leave to respond to the Observations of the Katanga Defence.⁸ The Prosecution argued that the Defence's request that the Chamber exclude witness P-159's testimony from its deliberations on the question of guilt of the two accused was tantamount to a counter-claim and that it should have an opportunity to respond to this.

7. On 20 January 2011, the Chamber granted the Prosecution leave to reply and asked it to specifically address (1) whether the Prosecution intended to object to the Defence's request to exclude witness P-159's testimony and (2) whether there is a legal basis for such an exclusion and, if so, what procedural steps should be taken and by whom. The Chamber also invited the parties and participants to submit a rejoinder to the Prosecution's reply within seven days.

⁵ "Defence Observations on the Prosecution's Notice that it will not rely on the testimony of Prosecution Witness to prove its case", 17 January 2011, ICC-01/04-01/07-2651-Conf.

⁶ "Declaration de Monsieur Joseph Ngabu", 26 March 2010, ICC-01/04-01/07-2651-Conf-Anx1.

⁷ "Observations sur la 'Prosecution's Notice that it will not rely on the testimony of Prosecution Witness to prove its case'", 16 January 2011, ICC-01/04-01/07-2468-Conf; "Observations sur la 'Prosecution's Notice that it will not rely on the testimony of Prosecution Witness to prove its case'", 17 January 2011, ICC-01/04-01/07-2650-Conf.

⁸ "Demande d'autorisation de répliquer aux 'Defence Observations on the Prosecution's Notice that it will not rely on the testimony of Prosecution Witness to prove its case'", 18 January 2011, ICC-01/04-01/07-2655-Conf.

8. On 28 January 2011, the Prosecution filed its reply.⁹ The Prosecution acknowledges that the father and sister of witness P-159 stated that they themselves were present in Bogoro during the attack, but that P-159 was not.¹⁰ The Prosecution does not object to the Defence's request that the Chamber exclude the testimony of P-159. The Prosecution argues that the Chamber has the inherent power to do so, even after the evidence has been admitted into the record.¹¹ However, the Prosecution is of the view that exclusion of the testimony of P-159 should not lead to the exclusion of the transcripts thereof from the record. Instead, the Prosecution suggests that the transcript of P-159's testimony, as well as all exhibits that were admitted during his testimony, be maintained in the record and that mention of their exclusion be made in the metadata.¹²

9. On 7 February 2011, the two Defence teams filed their rejoinder. Both Defence teams agree with the Prosecution that there is no need to expunge the transcript and exhibits in relation to P-159 from the record, even if the Chamber accepts the Defence's request to formally declare that it will not rely on P-159's evidence. However, the Katanga Defence does not accept the Prosecution's suggestion that exclusion of P-159's testimony as incriminating evidence would imply that the Chamber could no longer rely on P-159's evidence at all. The Defence reserves the right to "refer to any aspects of the witness's testimony that may, for whatever reason, be reasonably viewed as exculpatory or assisting the defence case."¹³

10. As a separate matter, the Defence for Mr. Ngudjolo argues that there is agreement between the parties that P-159 has lied during his testimony and asks

⁹ "Prosecution's Reply to Defence 'Observations on the Prosecution's Notice that it will not rely on the testimony of Prosecution Witness to prove its case'", 28 January 2011, ICC-01/04-01/07-2667-Conf.

¹⁰ Id., para 5. The statements of both individuals, as well as an Investigator's report were annexed to the Prosecution's reply, ICC-01/04-01/07-2667-Conf-Anx A, B and C.

¹¹ Id., para 10.

¹² Id., para 14.

¹³ ICC-01/04-01/07-2689-Conf, para 6.

the Chamber to order that legal proceedings for perjury against P-159 be initiated.¹⁴

II. ANALYSIS

A. Renunciation of evidence

11. The Chamber notes that there is agreement between the parties that there are serious questions about the credibility of P-159's testimony. The parties also seem to agree that it would expedite the proceedings if the Chamber put on the record that it will not rely on P-159's testimony for making any findings against the accused. It has been suggested, in this regard, that the Chamber might decide to 'exclude' the evidence of P-159 without excluding it from the record altogether.

12. The Chamber observes that there are no legal provisions in the Statute, Rules or Regulations of the Court, which provide a procedure for dealing with the present situation. Although the Prosecution argues that the Chamber has "the discretion to hear an objection on the relevance or the admissibility of evidence, even, exceptionally, after the evidence has been admitted into the record"¹⁵, it does not seem to be the object of the parties' submissions to retroactively challenge the admissibility of P-159's testimony.

13. In essence, the parties are jointly requesting the Chamber to ignore P-159's testimony – at least for its incriminating content. While there is no formal agreement in this regard, it is clear that the parties are all of the view that P-159's testimony is unsafe. Although strictly speaking this situation does not fall under the terms of Rule 69 on agreements as to evidence, the Chamber can take note of the apparent consensus among the parties that P-159's testimony lacks probative

¹⁴ ICC-01/04-01/07-2683-Conf, *in fine*.

¹⁵ ICC-01/04-01/07-2667-Conf, para 10.

value. Such consensus cannot bind the Chamber in its assessment of the evidence in question and there are no automatic consequences attached to it.

14. However, in the present circumstances, having regard to the fact that it is the party who called the witness who is renouncing the testimony and having considered the evidence given by the witness in light of the parties' evidential arguments, especially the fact that no one contests the reliability of the contradicting statements of P-159's father and sister, the Chamber accepts the parties' concurrent submissions that there are persuasive reasons to doubt whether P-159 has spoken the entire truth.

15. Under these conditions, and given the need to guarantee the fairness and expeditiousness of the proceedings, the Chamber informs the parties that it will not give any evidentiary weight to P-159's testimony in its deliberations on the question of guilt of the accused. The Defence can thus dispense with efforts to refute or disprove any of the incriminating assertions made by P-159. The same applies to the exhibits that were admitted during P159's testimony. Insofar as the Defence may wish to rely on P-159's testimony for exculpatory purposes, it is free to do so, although the Chamber considers that the avowed lack of credibility affects all of P-159's factual assertions.

16. The Chamber considers that this decision is sufficient to protect the interests of the Defence and that there is no need to delete the transcript of P-159's testimony or any of the exhibits that were admitted during this testimony from the record. Nonetheless, the Chamber considers that the record should reflect the current decision, and instructs the Registry to add an appropriate annotation to the transcript of P-159's testimony as well as to the exhibits that were admitted through this witness.

B. Prosecution for perjury

17. The Defence for Mr. Ngudjolo alleges that the parties are in agreement that P-159 lied¹⁶ and asks the Chamber to order the initiation of legal proceedings for giving false testimony. The Chamber notes, however, that the Prosecution took no position on P-159's alleged mendacity. In its reply, the Prosecution acknowledged the contradiction between P-159's testimony and the statements of his father and sister and concluded that, from the Prosecution's point of view, "it was unnecessary to add to the truly contentious issues at trial, the specific credibility contest between P-159 [...] and P-612 and P-163 [...]. Therefore, by filing its Notice, the Prosecution intended to state on the record that from its standpoint and in accordance with the principles of a fair and expeditious trial, the Defence did not have to investigate or present evidence to refute the testimony of Witness P-159."¹⁷ The Prosecution therefore accepts that there is a serious issue of credibility with P-159's testimony, but it apparently has not concluded thus far that P-159 actually committed perjury.

18. The Chamber reminds the parties that the Statute and the Rules have vested the authority to initiate an investigation on the offences defined in Article 70 in the Prosecutor, whether he acts *proprio motu* or on the basis of information communicated to him by the Chamber or any other reliable source.¹⁸ The Prosecution must thus be given an opportunity to make a decision in this regard. However, if the Prosecution does not initiate proceedings, the Court may still decide to request the Democratic Republic of the Congo to submit the case to its competent authorities, in accordance with Article 70(4) and Rule 162(4).

¹⁶ ICC-01/04-01/07-2683-Conf, para 14, 24 et seq.

¹⁷ ICC-01/04-01/07-2667-Conf, paras 6-7.

¹⁸ Oral Decision of 22 September 2010, ICC-01/04-01/07-T-190-CONF-ENG ET, p. 1-5.

FOR THESE REASONS,

THE CHAMBER,

DECIDES that it will not give any evidentiary weight to witness P-159's testimony in its deliberations on the question of guilt of the accused;

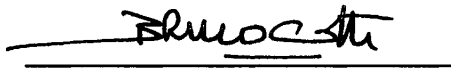
ORDERS the Registry to apply the appropriate annotations to the transcripts of witness P-159's testimony and the following exhibits:

EVD-OTP-00053	EVD-D02-00021	EVD-D02-00025
EVD-OTP-00054	EVD-D02-00022	EVD-D03-00012
EVD-D02-00019	EVD-D02-00023	EVD-D03-00013
EVD-D02-00020	EVD-D02-00024	EVD-V19-00001

and;

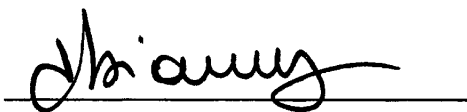
REMAINS SEIZED of the Defence's request to initiate proceedings for the giving of false testimony when under an obligation pursuant to article 69(1) to tell the truth.

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

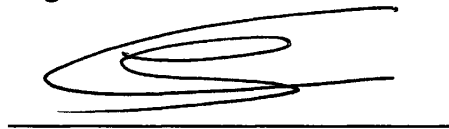


Judge Bruno Cotte

Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 24 February 2011

At The Hague, the Netherlands