

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 13 August 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Redacted version

Decision on the disclosure of evidentiary material relating to Witness 219

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

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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 regulation 35 (2) of the Regulations of the Court ("Regulations"), issues the following decision on the "Requête de l'Accusation sur la base de la norme 35 du Règlement aux fins de communication à la Défense d'éléments de preuve, d'expurgations ou de levée d'expurgations dans des éléments de preuve et aux fins de la liste des éléments à charge et la liste des témoins à charge (Témoins P-219)"¹ ("Request").

I. BACKGROUND

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009.² To the extent that the Prosecution was not yet in a position to disclose certain evidence, because redactions or other protective measures were still required, the Chamber gave the Prosecution until 30 January 2009 to submit any requests for such measures and allowed postponing the disclosure of the material in question until the Chamber had ruled upon the requests.

2. In accordance with this ruling, on 30 January 2009 the Prosecution submitted an application for redactions relating to three witnesses and informed the Chamber that for another four witnesses it was not yet able to file redaction requests.³ In relation to W-219, the Prosecution informed the Chamber that it was "seeking protective measures for witness W-219 in co-operation with the Victims and Witnesses Unit" and that "[p]ending a decision of the Victims and Witnesses

¹ ICC-01/04-01/07-1274-Conf-Exp, [REDACTED]

² "Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état", 23 January 2009, ICC-01/04-01/07-846

³ "Prosecution's Application to Redact Evidence Relating to Witnesses W-132, W-157 and W-287 and Provision of Information Relating to Witnesses W-12, W-132, W-219, W-249, W-287, W-292 and W-353", 30 January 2009, ICC-01/04-01/07-859

Unit, the Prosecution is not in a position to disclose the transcripts to the Defence.”⁴

3. After having held several status conferences during which the situation of W-219 was discussed⁵, as well as after the provision of additional information by the Prosecution via electronic correspondence⁶, the Chamber ordered the Victims and Witnesses Unit to provide a report on the situation of W-219.⁷ In its report of 23 April 2009, the Registry stated merely that W-219 perceived his security situation to be one of high risk and that the VWU and the Prosecution were exploring the most appropriate solution to address this.⁸ The Chamber convened another status conference with the Prosecution and the VWU to discuss this matter, among others, on 8 May 2009.⁹ During this hearing the situation of W-219 was discussed extensively¹⁰ and the Chamber instructed the VWU to submit another report on the situation of this witness by 22 May 2009. This report was duly submitted [REDACTED] The Prosecution also asked for an urgent hearing on the matter, which the Chamber convened¹¹ on 9 June 2009. During the hearing, the Chamber heard submissions from both the Prosecution and the Registry [REDACTED] demanded a report on the progress thereof by [REDACTED] The Registry submitted a report on [REDACTED], as requested, [REDACTED]

⁴ Ibid, par. 11

⁵ Hearing held on 3 February 2009, ICC-01/04-01/07-T-56-ENG-ET; *ex parte* hearing with the Office of the Prosecutor, held on 25 February 2009, ICC-01/04-01/07-T-60-CONF-EXP-ENG-ET; *ex parte* hearing with the Office of the Prosecutor, ICC-01/04-01/07-T-62-CONF-EXP-ENG-ET.

⁶ Annex to ICC-01/04-01/07-1037-Conf-Exp

⁷ “Ordonnance aux fins de consultation de l’Unité d’aide aux victimes et aux témoins concernant la situation des témoins 219, 267 et 353”, 7 April 2009, ICC-01/04-01/07-1037-Conf-Exp

⁸ “Report pursuant to ‘Ordonnance aux fins de consultation de l’Unité d’aide aux victimes et aux témoins concernant la situation des témoins 219, 267, 353’”, 23 April 2009, ICC-01/04-01/07-1070-Conf-Exp, par. 29

⁹ “Ordonnance aux fins de la convocation d’une audience *ex parte* sur la protection des témoins à charge 267, 353 et 219”, 5 May 2009, ICC-01/04-01/07-1106,

¹⁰ ICC-01/04-01/07-T-64-CONF-EXP-ENG-ET

¹¹ “Ordonnance aux fins de la convocation d’une audience *ex parte* sur la protection du témoin à charge 219”, 2 June 2009, ICC-01/04-01/07-1185

4. After the security situation of W-219 was settled, the Prosecution filed its Request on [REDACTED], in which it seeks the permission of the Chamber to disclose a number of items of evidence relating to this witness to the Defence. As the deadline for disclosing both incriminating and exonerating has lapsed, the Prosecution submits this Request on the basis of regulation 35 (2) of the Regulations.

5. In particular, the Prosecution seeks to obtain the Chamber's permission to disclose 12 documents containing incriminating evidence, provided by witness W-219, as well as two documents¹² provided by the said witness that fall within the ambit of rule 77 of the Rules of Procedure and Evidence ("Rules").¹³ The 12 documents of incriminating evidence are, according to the Prosecution, mainly comprised of annexes to transcripts of witness interviews of W-219.¹⁴ The two documents falling under rule 77 disclosure are comprised of one page each and are, in the Prosecution's submissions, of such a nature that their late disclosure will not prejudice the Defence in their preparation time. No redactions are sought to be authorised for these documents.¹⁵

6. The Prosecution further seeks to obtain an extension of time limit pursuant to regulation 35(2) of the Regulations in order to disclose to the Defence a number of interview notes and the transcripts of the interviews with W-219, which took place in [REDACTED]. However, for these documents, which amount to more than 1300 pages, the Prosecution also seeks a limited number of redactions.

¹² ERN Numbers DRC-OTP-0138-0234; DRC-OTP-0138-0235

¹³ ICC-01/04-01/07-1274-Conf-Exp, par.2

¹⁴ Ibid., par. 14; The 12 documents carry the following ERN numbers: DRC-OTP-0138-0236; DRC-OTP-1006-0091; DRC-OTP-10027-0050; DRC-OTP-1027-0051; DRC-OTP-1027-0052; DRC-OTP-1027-0053; DRC-OTP-1027-0054; DRC-OTP-1027-0055; DRC-OTP-1027-0056; DRC-OTP-1027-0057; DRC-OTP-1027-0058; DRC-OTP-1027-0059

¹⁵ Ibid., par. 13

7. Finally, the Prosecution requests the lifting of the redaction of the signature of W-219 in two previously disclosed annexes to the interviews¹⁶, one of which the Prosecution wants reclassified from Rule 77 material to incriminating material.

8. Apart from two items, which are said to be rule 77 material, the Prosecution wishes to add all the above-mentioned documents to the List of Incriminating Evidence. Moreover, the Prosecution asks permission to add W-219 to the Witness List.

9. Neither of the Defence teams submitted observation in relation to this Request.

¹⁶ Idem

II. ANALYSIS AND CONCLUSION

A. Late submission

10. The Prosecution, reiterating the submissions made during the *ex parte* hearing of 9 June 2009, submits that the conditions of regulation 35(2) are fulfilled in relation to its Request; namely that it was unable to file the application within the time limit for reasons outside its control¹⁷, as there had been ongoing uncertainty about the security situation of W-219. According to the Prosecution, it had been unable to foresee at what point W-219 would have accepted the disclosure of his identity.¹⁸ Moreover, the Prosecution advanced that in the absence of the relevant transcripts and given the uncertainty as to whether witness W-219 would benefit from appropriate protective measures, the Prosecution was not in the position to include witness W-219 in its Witness List.¹⁹

11. The Prosecution further submits that, having regard to the fact that the trial will only start in approximately three months, the Defence disposes of sufficient time to analyse the items of evidence for the disclosure of which the Prosecution seeks authorisation.²⁰

12. However, it is also clear to the Chamber that it cannot hold the Prosecution solely responsible for this delay, as the matter was, to an important extent, outside of its control.

13. Moreover, the Prosecution did inform the Chamber before the expiration of the time limit about the situation and the Chamber considers that the security situation of W-219 and the difficulties faced by the Prosecution in finding a suitable solution for it, constituted 'good cause' in the sense of

¹⁷ Ibid., par. 11

¹⁸ Ibid., par. 6

¹⁹ Ibid., par. 11

²⁰ Ibid., par. 12

regulation 35 (2) first sentence. Although the Prosecution did not, at that time, ask for a formal extension of time limit, presumably because it was unable to specify the length of the extension, the Chamber considers that the Prosecution did comply with its obligation of keeping the Chamber informed of any pending delayed disclosures.²¹

14. Accordingly, the Chamber is minded to allow the late disclosure of the documents and materials contained in the Request. However, before doing so, the Chamber must ascertain whether the nature and the volume of the information are not such as would overburden the Defence, considering the approaching starting date of the trial.²²

15. With regard to the 12 incriminating²³ and two rule 77²⁴ annexes the Prosecution wishes to disclose without any redactions, the Chamber sees no obstacle to their disclosure at this stage, as the information is not very voluminous and does not seem to contain any significantly new elements, considering that the annexes are related to questions known to the Defence.

16. However, regarding the transcripts of the two interviews with W-219, the Chamber is concerned about the sheer volume of the information, which exceeds one thousand pages. Even though the Prosecution asserts that the questions dealt with in these interviews are not unfamiliar to the Defence, the Chamber is of the view that it would be unfair to impose upon the Defence the burden of having to analyse such a great mass of new information two months before the start of the trial. Indeed, the Chamber considers that it is an arduous and time-consuming process to identify which parts of the transcripts contain the most pertinent information.

²¹ "Décision sur les témoins 002, 030, 323 et 373", 14 May 2009, ICC-01/04-01/07-1135, par. 18

²² "Décision sur les témoins 002, 030, 323 et 373", 14 May 2009, ICC-01/04-01/07-1135, par. 2

²³ DRC-OTP-1006-0091; DRC-OTP-1027-0050; DRC-OTP-1027-0051; DRC-OTP-1027-0052; DRC-OTP-1027-0053; DRC-OTP-1027-0054; DRC-OTP-1027-0055; DRC-OTP-1027-0056; DRC-OTP-1027-0057; DRC-OTP-1027-0058; DRC-OTP-1027-0059

²⁴ DRC-OTP-0138-0234; DRC-OTP-0138-0235

17. The Chamber therefore considers that it is preferable for the Prosecution to produce a signed witness statement, containing a synthesis of what the witness declared during the interview, rather than providing the transcripts of the interview that contain large amounts of unessential information. As the witness will be called to testify in person, it will be the testimony during trial that will be in evidence. It should therefore be sufficient for the Defence to have a signed witness statement in order to prepare for the examination of W-219. However, if the Defence insists on receiving the actual transcripts, it may direct a request to the Chamber to that effect.

B. Request for redactions

18. As the Prosecution is asked to produce signed witness statements in lieu of the large volume of transcripts, there is, at this time, no need to consider the requested redactions.

19. However, the Chamber still needs to consider the Prosecution's request for redactions in the interview notes of 15 December 2005 (DRC-OTP-0150-0041). The Chamber notes that the redactions proposed to be applied to the interview notes of witness W-219 of 15 December 2005 are indeed of a very limited number. They related exclusively to information capable of identifying witness W-219 and do not in any way impair the readability of the interview notes in question. Accordingly, the Chamber does not object to the redactions sought and permits the Prosecution to apply the proposed redactions to the interview notes it discloses to the Defence.

C. Lifting of redactions in DRC-OTP-1006-0089 and DRC-OTP1006-0090

20. The Prosecution also seeks to obtain the Chamber's authorisation to lift the redaction of W-219's signature, which was previously authorised by the

Chamber.²⁵ It is contended that in the context of W-219's identity being communicated to the Defence, redactions of the signature are no longer necessary.²⁶

21. Under these circumstances, the Chamber sees no impediment to the lifting of the redaction of W-219's signature.

D. Addition of documents to the List of Incriminating Evidence

22. Apart from two documents the Prosecution intends to disclose as rule 77 material²⁷, the Prosecution seeks leave to add all the material contained in its Request to the List of Incriminating Evidence.

23. The Chamber notes that two documents (DRC-OTP-1006-0089 and DRC-OTP-006-0090) were previously disclosed to the Defence. As the Defence has previously been provided with the redacted version of the said documents, the Prosecution contends that no prejudice is caused by their late addition to the List of Incriminating Evidence.²⁸ Although the Chamber is of the view that there is an important difference between evidence being disclosed as rule 77 material and its inclusion on the List of Incriminating Evidence, it does not consider that the reclassification causes any prejudice to the Defence.

24. With regard to the 12 annexes²⁹, which the Prosecution wishes to add to the List of Incriminating Evidence, the Chamber notes that they are not very voluminous and that their late addition will not cause any prejudice to the Defence.

²⁵ The first relevant document is document DRC-OTP-1006-0089 annexed to the witness statement of W-219 carrying the ERN number DRC-OTP-1006-0702.

²⁶ ICC-01/04-01/07-1274-Conf-Exp, par. 32

²⁷ DRC-OTP-0138-0234 and DRC-OTP-0138-0235

²⁸ *Ibid.*, par. 36

²⁹ DRC-OTP-1006-0091; DRC-OTP-1027-0050; DRC-OTP-1027-0051; DRC-OTP-1027-0052; DRC-OTP-1027-0053; DRC-OTP-1027-0054; DRC-OTP-1027-0055; DRC-OTP-1027-0056; DRC-OTP-1027-0057; DRC-OTP-1027-0058; DRC-OTP-1027-0059

25. In respect of the transcripts of the interviews with W-219, the Chamber has asked the Prosecution to produce signed statements in place of the transcripts. The Chamber authorises the Prosecution to add these statements to the List of Incriminating Evidence as soon as they have been disclosed to the Defence. The annexes, which belong to the transcripts of those interviews, may also be added to the List.

26. With regard to the interview notes of 15 December 2005 the Chamber considers that their addition to the List of Incriminating Evidence does not prejudice the Defence. Given the abovementioned, as well as the fact that the interview notes comprise only 4 pages, the Defence will have sufficient time to exploit the material before the start of the trial.

E. Addition of W-219 to Witness List

27. The Prosecution further requests the Chamber, provided that relocation of witness W-219 takes place, to allow it to add witness W-219 to its list of witnesses. It argues that the accused still dispose of sufficient time to integrate the witness statement of witness W-219 into their respective cases and that thus no prejudice to the rights of the Defence would be caused by this late addition to the witness list.³⁰

FOR THESE REASONS,

THE CHAMBER

AUTHORISES the disclosure as incriminating evidence and their inclusion in the List of Incriminating Evidence of the following items:

DRC-OTP-1006-0091; DRC-OTP-1027-0050; DRC-OTP-1027-0051; DRC-OTP-1027-0052; DRC-OTP-1027-0053; DRC-OTP-1027-0054 ; DRC-OTP-1027-0055; DRC-OTP-1027-0056; DRC-OTP-1027-0057; DRC-OTP-1027-0058; DRC-OTP-1027-0059; DRC-OTP-1006-0089; DRC-OTP1006-0090 and DRC-OTP-0150-0041.

³⁰ Ibid., par. 37

ORDERS the Prosecution to contact W-219 in order to produce signed statements in lieu of the transcripts of the interviews for which the Prosecution seeks authorisation for disclosure. If the Prosecution considers it is necessary to redact certain information from the statements in accordance with rule 80 (4), it shall file a request to that effect immediately after obtaining the statement.

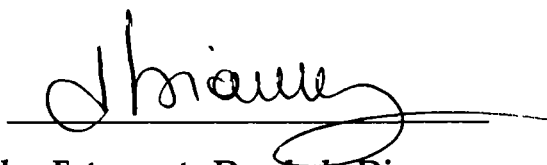
RESERVES its position as to whether and how the evidentiary material relating to W-219 should be integrated in the Table of Incriminating Evidence, in accordance with its decision of 13 March 2009, until it has ruled on the Defence requests of 17 and 20 July 2009, relating to the said table.

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



Judge Bruno Cotte

Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Hans-Peter Kaul

Dated this 13 August 2009

At The Hague, the Netherlands