

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 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

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:

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

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani
Mr Richard Kazadi Kabimba
Ms Magali Pirard
Mr Dieudonné Kaluba Didwa
Mr Lievin Ngondji Ongombe
Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

**Other
Trial Chamber I**

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 article 67(1)(b) of the Rome Statute of the International Criminal Court ("Statute"); regulations 24, 35 (2) and 42 of the Regulations of the Court ("Regulations"), issues the following decision:

I. BACKGROUND

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009.¹ To the extent that the Office of the Prosecutor ("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 informed the Chamber that in relation to P-219 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 Unit, the Prosecution is not in a position to disclose the transcripts to the Defence"²

3. In anticipation of a resolution of this issue, on 25 March 2009 the Chamber provisionally authorised³ the redaction of P-219's identity and signature from two annexes to his declarations (annotated maps).⁴ The Chamber thus decided, as an interim measure, to protect P-219's identity until a decision

¹ "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

² "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, par 11

³ "Décision concernant trois requêtes du Procureur aux fins de maintien des suppressions ou de rétablissement de passages supprimés", 25 March 2009, ICC-01/04-01/07-987, par 47-8

⁴ DRC-OTP-1006-0089 and 90

was reached on a definitive protection regime for this witness, in light of the ongoing efforts of the Prosecution and the Victims and Witnesses Unit to find a solution that would allow the disclosure of his identity, while at the same time protecting his personal security

4. After a lengthy process of consultations with P-219 and a number of *ex parte* status conferences with the Prosecution and the Victims and Witnesses Unit,⁵ a solution for P-219 was agreed upon. Subsequently, on 7 July 2009, the Prosecution filed its "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 (Témoin P-219)"⁶ ("Request"). This Request was filed *ex parte*, Prosecution only. No version that was available to the Defence was filed until after the Chamber issued its "Decision on the disclosure of evidentiary material relating to Witness 219" ("Decision") on 27 July 2009.⁷

5. In the Decision, the Chamber granted the Prosecution's Request in part, but ordered the Prosecution to contact P-219 in order to produce a signed declaration, in lieu of the lengthy transcripts which the Prosecution wanted to disclose and for which redactions were sought.⁸

6. On 13 August 2009, the Prosecution filed an "Application for the Variation of an Order regarding Witness 219"⁹ ("Application"), invoking security concerns as a ground for requesting authorisation to disclose a summary of

⁵ Hearings held on 3 February 2009, ICC-01/04-01/07-T-56-CONF-EXO-ENG-ET, 25 February 2009, ICC-01/04-01/07-T-60-CONF-EXP-ENG-ET, 16 March 2009, ICC-01/04-01/07-T-62-CONF-EXP-ENG-ET, 8 May 2009 ICC-01/04-01/07-T-64-CONF-EXP-ENG-ET and 9 June 2009, ICC-01/04-01/07-T-66-CONF-EXP-ENG-ET

⁶ ICC-01/04-01/07-1274-Conf-Exp, 7 July 2009

⁷ ICC-01/04-01/07-1338-Conf-Exp, a Public Redacted Version was issued on 13 August 2009, ICC-01/04-01/07-1364

⁸ *Ibid*

⁹ ICC-01/04-01/07-1371, the public redacted version is ICC-01/04-01/07-1372

P-219's statements instead of a signed declaration. On that same day, the Prosecution also filed a public version of its original Request ¹⁰

7. The Defence for Mr Katanga reacted to the Chamber's Decision on 18 August 2009, asking the Chamber for clarification and reserving its right to appeal.¹¹ After having sought the instructions of the Chamber, the Defence for Mr. Ngudjolo filed a consolidated response to both the Prosecution's Application and the submissions of the Defence for Mr. Katanga.¹²

II. ANALYSIS and CONCLUSION

A. The Prosecution's failure to comply with regulation 42

8. As stated in the procedural background to this decision, the Chamber decided to provisionally protect P-219 on the 25th of March 2009. What the Chamber did not know at that time, was that another application for more far-reaching protective measures was pending before Trial Chamber I since December 2008. In the event, on 9 April 2009 Trial Chamber I decided to protect P-219's identity and to authorise the disclosure of summaries and admissions of fact instead of the statements of P-219.¹³

9. According to regulation 42, the Prosecution was under the obligation to apply to this Chamber for a variation of the protective measures it had ordered. However, since the application for more restrictive measures was

¹⁰ ICC-01/04-01/07-1370

¹¹ "Defence Motion Seeking Clarification and, if Necessary, vacating of the *Decision on the disclosure of evidentiary material relating to Witness 219, and/or Extension of Time to Seek Leave to Appeal*", 18 August 2009, ICC-01/04-01/07-1388-Conf-Exp

¹² "Réponse consolidée de la Défense de Mathieu Ngudjolo aux requêtes ICC-01/04-01/07-1372 (Accusation) et ICC-01/04-01/07-1388-Conf-Exp (Défense de Germain Katanga) relatives au témoin 219", 21 August 2009, ICC-01/04-01/07-1413

¹³ "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of twenty-five Individuals providing *Tu Quoque* Information' of 5 December 2008", 9 April 2009, ICC-01/04-01/06-1814-Conf. A corrigendum to this decision was filed on 5 May 2009 [ICC-01/04-01/06-1836-Conf] and on 2 June 2009, Trial Chamber I filed its "Decision issuing corrected and redacted versions of "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing *Tu Quoque* Information' of 5 December 2008", 2 June 2009, ICC-01/04-01/06-1924 (with two confidential annexes)

already pending before Trial Chamber I, it was the Prosecution's responsibility to inform Trial Chamber I of the Chamber's decision of 25 March 2009. This would have allowed Trial Chamber I to refer the matter to this Chamber before approving more stringent measures.

10. Likewise, the Prosecution should have informed this Chamber of Trial Chamber I's decision of 9 April 2009, in order to allow it to decide in full knowledge of P-219's protective status. By not doing so, the Prosecution in effect induced the Chamber into negating previously ordered protective measures of which it was not aware.

11. The Chamber notes, in this regard, that its Decision has already been partially implemented. Indeed, on 18 August, the Prosecution disclosed 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-OTP-1006-0090 and DRC-OTP-0150-0041,¹⁴ as authorised by the Decision. In so doing, the identity of P-219 has been revealed to the Defence, which largely undermines the protective measures ordered by Trial Chamber I.

12. However, considering the status of P-219 in the respective cases (P-219 is an incriminating witness in this case, whereas he serves as a *tu quoque* witness in the case against Mr. Lubanga) and the fact that, since Trial Chamber I's decision of 9 April 2009, considerable additional protective measures have been implemented, the Chamber is of the view that the security of the witness is not jeopardised by the fact that his identity is now revealed in the present case.

¹⁴ "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 18 August 2009", 18 August 2009, ICC-01/04-01/07-1404

13. Nevertheless, in order to comply with the spirit of regulation 42, the Chamber orders the Prosecution to inform Trial Chamber I of the situation concerning P-219 in order to harmonise the protective measures, as necessary.

B. The denial of the right to respond of the Defence

14. As was already noted above, the Prosecution omitted to file a redacted version of its Request at a useful time for the Defence to be able to exercise its right to respond.¹⁵ The Chamber failed to notice this omission and observed in its Decision that "Neither of the Defence teams submitted observations in relation to this Request".¹⁶ Although the Chamber did not infer from this absence of Defence observations that they agreed with the Prosecution's Request, the fact that the Defence was unable to make submissions has prevented the Chamber from deciding on the Request with full knowledge of all the relevant considerations.

15. Nevertheless, as the Chamber is still to rule on the two aspects of the Request that most affect the rights of the Defence, namely whether P-219 may be added to the List of Incriminating Witnesses and the modalities of the disclosure of his statements to the Defence, the Chamber is of the view that no irreparable prejudice to the Defence has resulted from the Decision and its partial implementation.

16. However, before ruling on these two points, the Chamber considers that it is necessary to receive the Defence's submissions on them, taking into consideration the Prosecution's Request and the additional information of which the Defence now disposes.

17. In order to allow the Defence to exercise its right to respond with full knowledge of the significance of P-219's testimony, the Chamber, in light of the comments made by both Defence teams, orders the Prosecution to communicate to the Defence the full transcripts, provisionally applying the redactions it

¹⁵ Regulation 24

¹⁶ ICC-01/04-01/06-1338-Conf-Exp, par. 9

proposes to the Chamber. This is an exception to the general procedure for redactions,¹⁷ which is justified by the necessity for the Defence to be aware of the content and volume of the statements of P-219 in order to be able to respond usefully to the Prosecution's Request, especially with regard to the time needed to process the information before the start of the hearings on the merits in case the witness were to be added to the List of Incriminating Witnesses.

18. With regard to the requested redactions, the Defence is equally invited to make submissions, especially if the Defence identifies specific redacted passages that it deems to contain particularly relevant information. The Chamber urges the Defence to be as precise as possible and to motivate its submissions in light of the particular circumstances of P-219 and his potential significance for the Defence.

¹⁷ "Décision relative à la procédure d'expurgation", 12 January 2009, ICC-01/04-01/07-819

FOR THESE REASONS,

THE CHAMBER

INSTRUCTS the Prosecution to immediately inform Trial Chamber I about the Decision and the fact that the identity of P-219 has been disclosed to the Defence,

REJECTS the Prosecution's "Application for the Variation of an Order regarding Witness 219";

ORDERS the Prosecution to communicate the statements of P-219 to the Defence, with the proposed redactions, no later than Friday 28 August 2009 at 1 p.m.; and

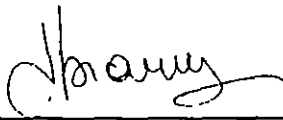
INVITES the Defence to respond to the Prosecution's Request no later than Monday 7 September 2009 at 4 p.m

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 27 August 2009

At The Hague, the Netherlands