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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document
Public Redacted Version

**Prosecution's Submission of Information and Request for the Variation of
Protective Measures for Witness 219**

Source: Office of the Prosecutor

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

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**Other
Trial Chamber II**

The Prosecution hereby informs Trial Chamber I that on 18 August 2009 it disclosed the identity of P-219 in the case of *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (“the Katanga case”). Therefore, the Prosecution requests a variation of the protective measures imposed by Trial Chamber I, on 9 April 2009, in relation to P-219.

Background

1. On 5 December 2008, before Trial Chamber I, the Prosecution sought leave to disclose anonymous summaries of the interviews of P-219.¹
2. On 30 January 2009, the Prosecution informed Trial Chamber II that it was seeking protective measures for P-219.² At that time, Trial Chamber II was not informed of the pending request for witness P-219 before Trial Chamber I.
3. [REDACTED].³ [REDACTED].⁴
4. On 25 March 2009, Trial Chamber II provisionally authorised the redaction of P-219’s identity and signature from two annotated annexes.⁵
5. On 9 April 2009, Trial Chamber I authorised the non-disclosure of P-219’s identity and the disclosure of summaries and admissions of facts in lieu of the

¹ ICC-01/04-01/06-1545-Conf-Exp, para 77. The public redacted version is ICC-01/04-01/06-1552.

² ICC-01/04-01/07-859.

³ [REDACTED].

⁴ [REDACTED].

⁵ ICC-01/04-01/07-987-Conf-Exp. See also public decision ICC-01/04-01/07-1034.

witness's interview transcripts (see paragraph 1 above).⁶ Prior to issuing its decision, Trial Chamber I was not informed by the Prosecution that Trial Chamber II had implemented the protective measures mentioned in paragraph 4.

6. [REDACTED].⁷ [REDACTED].

7. On 7 July 2009, before Trial Chamber II, 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 modification de la liste des éléments à charge et de la liste des témoins à charge (Témoin P-219)".⁸ The Prosecution was requesting, *inter alia*, the authorisation to disclose the transcripts of the two recorded interviews of P-219, along with some additional material, [REDACTED].

8. On 27 July 2009, Trial Chamber II rendered its "Decision on the disclosure of evidentiary material relating to Witness 219".⁹ The Decision granted the Prosecution's request in part but also ordered the disclosure of signed statements in lieu of the witness's transcripts of interviews.

9. [REDACTED].

⁶ ICC-01/04-01/06-1814-Conf. 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", see ICC-01/04-01/06-1924-Anx2.

⁷ [REDACTED].

⁸ ICC-01/04-01/07-1274-Conf-Exp. The public redacted version is ICC-01/04-01/07-1370.

⁹ ICC-01/04-01/07-1338-Conf-Exp. A public redacted version was issued on 13 August 2009, ICC-01/04-01/07-1364.

10. On 13 August 2009, the Prosecution filed an “Application for the Variation of an Order regarding Witness 219”, it invoked security concerns as a ground for requesting authorisation to disclose two unsigned summaries of P-219’s interviews instead of signed statements, as initially ordered by Trial Chamber II.¹⁰
11. On 18 August 2009, the Prosecution disclosed some documents related to P-219, thereby effectively revealing the identity of P-219 to the Defence in the Katanga case.¹¹ The Prosecution did not seek a variation of the protective measures implemented by Trial Chamber I regarding P-219 prior to the said disclosure.
12. On 27 August 2009, Trial Chamber II issued a “Decision on the disclosure of evidentiary material relating to Witness 219” (“Decision of 27 August 2009”), in which it outlines, *inter alia*, the Prosecution’s failure to comply with the spirit of Regulation 42 of the Court (“Regulation 42”) and instructs the Prosecution to immediately inform Trial Chamber I about this decision and the fact that the identity of P-219 has been disclosed to the Defence. Trial Chamber II also ordered, on an exceptional basis, that the Prosecution disclose the interview transcripts of P-219 with the redactions requested by the Prosecution on 7 July 2009.¹²
13. On 28 August 2009, the interview transcripts of P-219 were disclosed with the redactions as ordered by Trial Chamber II.¹³

¹⁰ ICC-01/04-01/07-1371-Conf-Exp. The public redacted version is ICC-01/04-01/07-1372.

¹¹ “Prosecution’s Communication of Incriminatory Evidence disclosed to the Defence on 18 August 2009”, 18 August 2009, ICC-01/04-01/07-1404.

¹² ICC-01/04-01/07-1434.

¹³ ICC-01/04-01/07-1437.

Submissions

14. The Prosecution should have notified Trial Chamber I, prior to 9 April 2009, that protective measures had been implemented by Trial Chamber II in relation to P-219.¹⁴ As stated by Trial Chamber II, this would have allowed Trial Chamber I the possibility of referring the matter to Trial Chamber II before approving its significant protective measures.

15. The Prosecution also recognises that it should have requested a variation of the protective measures regarding the identity of P-219 to Trial Chamber I before disclosing his identity in the Katanga case.

16. The Prosecution is conscious of the importance of its obligations pursuant to Regulation 42; the lack of notice and formal request in the above-mentioned instances were due to an internal oversight. The Prosecution would also like to reassure Trial Chamber I that this disclosure has not compromised in any manner the security of P-219. The Prosecution has been mindful of P-219's security concerns.

17. The Prosecution submits that, as Trial Chamber II has noted in its decision of 27 August 2009, the "security of this witness is not jeopardized by the fact that his identity is now revealed in the present case".¹⁵ Two reasons support this conclusion: 1) the status of P-219 is different in the two cases - the witness serves as a *tu quoque* witness in the case against Thomas Lubanga while he is an incriminating witness in the Katanga case; 2) Considerable protective

¹⁴ See decision ICC-01/04-01/07-987-Conf-Exp of 25 March 2009.

¹⁵ ICC-01/04-01/07-1434, p. 6, para. 12.

measures, before Trial Chamber II, have been implemented for the protection of P-219 since Trial Chamber I's decision of 9 April 2009.

18. [REDACTED].

19. The Prosecution is prepared to disclose to the Defence team of Thomas Lubanga the same evidentiary material regarding P-219 as was disclosed to date in the Katanga case. This material would be disclosed with the same protective measures ordered by Trial Chamber II on 27 August 2009.

Conclusion

20. The Prosecution therefore requests that the protective measures currently in place for witness P-219 before Trial Chamber I be varied and harmonised with the protective measures ordered by Trial Chamber II, on 27 August 2009.



Luis Moreno-Ocampo, Prosecutor

Dated this 31st day of August 2009

At The Hague, The Netherlands