

**Cour
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Internationale**



**International
Criminal
Court**

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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

***Defence Application for Leave to Appeal the Decision on the Prosecution request
for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses
and the disclosure of related incriminating material to the Defence***

Source: Defence for Mr Germain Katanga

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

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Introduction

1. The Defence for Mr Germain Katanga ("Defence") requests leave to appeal the Trial Chamber's *Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence* ("Decision on P-219").¹
2. The Defence submits that this Decision contains one error warranting the Appeals Chamber's consideration; namely the Trial Chamber erroneously accepted the late addition of witness P-219 to the Prosecution List of Incriminating Witnesses. In rendering this wrongful decision, the Trial Chamber made three sub-errors:
 - (i) The Trial Chamber erroneously considered whether the Prosecution had shown 'good cause' instead of 'exceptional circumstances' for its late request for admission of witness P-219 pursuant to Regulation 55;
 - (ii) The Trial Chamber wrongfully found that the Prosecution had shown good cause for its late request for admission of Witness P-219; and
 - (iii) The Trial Chamber failed to assess properly the prejudice to the Defence caused by the late admission of Witness P-219.

Threshold Criteria for Leave to Appeal

3. The Defence files this *Defence Application for Leave to Appeal the Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence* ("Defence Application") pursuant to article 82(1)(d) of the Rome Statute, Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court.
4. The Chambers have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision, and that meets the following two cumulative criteria:
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

¹ ICC-01/04-01/07-1553, 23 October 2009.

b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²

Issue of Appeal

5. On 23rd January 2009 the Chamber ordered that all incriminating evidence be disclosed to the defence no later than 30th January 2009.³ The Prosecution was given until 30th January to submit any requests for redactions or other protective measures with leave to postpone disclosure of effected material until the Chamber had ruled on the requests. The Prosecution expressed difficulty in disclosing material relating to witness P-219 as it was then ‘seeking protective measures for witness 219 in co-operation with the Victim and Witnesses Unit’ and ‘pending a decision of the Victims and Witnesses Unit the Prosecution is not in a position to disclose the transcripts to the Defence’.⁴ Any discussion relating to security issues in respect of witness P-219 was held on an *ex parte* basis to the exclusion of the Defence. It was not until the Trial Chamber’s Decision of 13 August 2009⁵ that the Defence was made aware of a Prosecution’s request for admission of witness P-219, which it had filed on 7 July 2009 on a confidential *ex parte* basis.⁶
6. The Defence received the transcripts of interviews with witness P-219, exceeding 1300 pages, on 28 August 2009, less than a month before the trial was scheduled to commence. Nonetheless, the Chamber accepted the late admission of witness P-219 by its impugned Decision of 23 October 2009. The Defence submits that the Chamber erred in doing so because the late admission is in violation of Regulation 55 and it gravely prejudices the Defence. In particular, the Defence submits that the admission of witness P-219 so late in the day violates Regulation 55 because the Prosecution has neither demonstrated ‘good cause’ nor ‘exceptional circumstances’ justifying its delay of request for admission.

² ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

³ ICC-01/04-01/07- 846, 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 (règle 132 du Règlement de procédure et de preuve).

⁴ Cf. ICC-01/04-01/07-1434, para. 2.

⁵ ICC-01/04-01/07-1364.

⁶ *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 (Témoignage P-219)*. A public redacted version of the Prosecution Application was served to the Defence only on 14 August 2009.

7. The Defence does not agree with the Chamber that the Prosecution only has to show 'good cause' because it informed the Chamber and the participants before the deadline of the total number of items of incriminating evidence and the pending applications for protective measures.⁷ Whilst indeed the Prosecution had filed a motion for protective measures for, *inter alia*, P-219, on 30 January 2009,⁸ the transcripts of his interviews were not yet on the Prosecution list of incriminating evidence prior to the deadline of 30 January 2009. Thus, the Defence was not informed of the total number of items of incriminating evidence before the deadline. Accordingly, the Chamber erred in assessing whether the Prosecution demonstrated good cause instead of exceptional circumstances for its late request for admission of P-219 to its witness list.

8. In addition, the Defence submits that the Chamber erred in finding that the Prosecution had shown good cause for its late request to add witness P-219 because of "the special situation of P-219 and the difficulties encountered by the Prosecution in finding a suitable solution".⁹ In this regard, the Defence highlights that witness P-219 was one of the first witnesses to be interviewed. He was first interviewed by the Prosecution Office on 15 December 2005,¹⁰ much earlier than most other Prosecution witnesses were interviewed. The Defence has not been informed of any compelling ground explaining the lengthy time it took the Prosecution to find a suitable solution for the security concerns of witness P-219. The Defence fails to understand why witness P-219 is in such a different situation than that of any of the other witnesses, and points out that the Prosecution must show good cause. The Prosecution failed to do so, particularly in light of the number of years that have passed between the first interview of witness P-219 and the eventual Prosecution's request for his addition to the list of its witnesses.

9. The Defence further submits that the Chamber erred in underestimating the prejudice to the Defence caused by the late submission of witness P-219 and the transcripts of his interviews. The transcripts were disclosed barely one month prior to the date the trial was scheduled to start. Even though the commencement of the trial has since been delayed for two months, this additional amount of preparation time does not sufficiently remedy the prejudice caused to the Defence. Indeed, these two months have proved to be very hectic.

⁷ ICC-01/04-01/07-1553, para. 23.

⁸ ICC-01/04-01/07-859.

⁹ ICC-01/04-01/07-1553, para. 23.

¹⁰ DRC-OTP-0150-0041.

In light of all other obligations, including missions, translations, the taking of instructions, discussions and filings relating to agreed facts, evidence, common plan and ordinary filings, the Defence has not had sufficient time to prepare fully for cross-examination of the Prosecution witnesses, let alone to investigate and prepare the new witness P-219, for which there are more than 1300 pages of interview transcripts. Clearly, this is a heavy additional burden on the Defence at such a late stage.

10. Accordingly, the Defence submits that the Chamber erred in adding witness P-219 at this stage of the proceedings. This error warrants the Appeals Chamber's consideration because it significantly affects the fairness and expeditiousness of the proceedings, and the outcome of the trial; and an immediate resolution of the Appeals Chamber may materially advance the proceedings.

Impact on the Fairness of the Proceedings

11. Witness P-219 is an important witness with much detailed information over a long time span. For example, Witness P-219 claims to have been an 'insider' and the number of pages of transcripts of his interviews outweighs that of other Prosecution witnesses. It is apparent that such a witness requires thorough preparation. The Defence has not been given the time to do so. The trial is scheduled to commence in three weeks. The team, despite its experience in other international criminal trials, has found preparation of this case in the particular circumstances presented to it, difficult. This is so, particularly given the many tasks it has to complete simultaneously as specified above, and that the Charging Document has only just been finalised and is still subject to further observations from the participants. The preparation of an important witness such as P-219 has thus not received the focus and attention it deserves. Accordingly, the fairness of the proceedings is greatly undermined by adding this witness at such a late stage when there is insufficient time remaining to the Defence to prepare adequately for cross-examination. None of the proposed solutions by the Chamber sufficiently remedies the prejudice caused.
12. The Defence has had insufficient time and security assurances to conduct investigations in Aveba, which would be important given the contents of the interviews of witness P-219. The Christmas / New Year's recess is unlikely to offer adequate time to conduct such investigations. Granting a short adjournment of the proceedings will not compensate the loss of opportunity to have conducted investigations into this new witness at an earlier

stage.¹¹ Adequate investigations into the credibility of this witness and the reliability of his stories deserve more than a 'short adjournment'. It is difficult to assess how much time is needed to investigate P-219's proposed testimony adequately; much depends on the findings throughout the investigations. However, the Defence estimates that, to do so properly, a few months of investigations may be required. The Defence further stresses that it is hampered by lack of time to conduct full investigations prior to the commencement of the proceedings rather than during the trial. It may be necessary to verify information found in relation to P-219 with other Prosecution witnesses preceding him. No witness stands on his own and cross-reference may be required, which is an impossible task if the investigations are not largely on the way prior to the start of trial.

13. Limitation of the topics to which P-219 will testify is not a helpful solution. The Defence would still have to verify the information that was given by him even if that information does not form part of the examination-in-chief. In order to assess his credibility as a witness, it is essential to verify the correctness of all the submissions made by witness P-219. Thus, the Chamber's proposed solution only saves court time but not preparation time. The Defence further notes that the Chamber proposes to limit his testimony to "matters only he can speak about".¹² The Defence is nonetheless very interested in knowing what this witness has to say on subject areas addressed by other witnesses: do they corroborate or contradict each other? Accordingly, this proposition does not in any way reduce the prejudice against the Defence.

14. The Defence further notes that there are no redeeming factors compensating the prejudice. For instance, the Defence would have been better off with a heavily redacted version of the transcripts, or even a summary thereof at an earlier date than nothing at all. Even if such transcripts may have been 'nearly incomprehensible', it would certainly have been better for the Defence to have those than to have nothing at all.¹³ The Defence notes that the Chamber did not find that any of the Defence's propositions offered a workable solution, but the Defence insists it would at least have given it some idea of what was to come. On the other hand, the Chamber agrees with the Defence that the Prosecution could have made its request for authorization of the redactions of the transcripts sooner and, thus, failed to show 'good cause' for its late request for redactions. The Chamber nonetheless finds this not to be a reason for rejecting the late addition of witness P-219.

¹¹ See, ICC-01/04-01/07-1553, para. 29.

¹² ICC-01/04-01/07-1553, para. 30.

¹³ See, ICC-01/04-01/07-1553, para. 19.

The Defence disagrees because in failing to disclose the transcripts earlier, the Defence was deprived of material that could have partly compensated the prejudice of the late addition of witness P-219.

15. On these grounds, the Defence submits that the fairness of the proceedings is clearly affected by the Chamber's decision to allow the admission of witness P-219 at such a late stage.

Impact on the Expeditionousness of the Proceedings

16. The Defence submits that the expeditionousness of the proceedings will be affected by the late admission of witness P-219. In order to ensure that the proceedings are fair, the Defence will have to be provided with adequate time to prepare his cross-examination. The Defence submits that the Chamber is too optimistic in considering that a brief adjournment of the proceedings would be sufficient to give adequate time and facilities to the Defence to prepare its case. The Defence anticipates that a longer time will be required. Moreover, the Defence may have to call numerous witnesses to contradict what P-219 says in his very lengthy interview. Accordingly, the expeditionousness of the proceedings will be significantly affected by admission of the testimony of P-219.

Impact on the Outcome of the Trial

17. Given the proclaimed importance of witness P-219 and his claimed knowledge about Mr. Katanga and Mr. Ngudjolo, their whereabouts, and the people they were surrounded by, admitting this witness now may have an impact on the outcome of the trial. His testimony may be the turning point to persuade the Chamber of the guilt of the accused. If that were the case, it is of crucial importance that his testimony be tested adequately in order to ensure that the Chamber does not erroneously believe and rely upon this witness if he is, in fact, not trustworthy.

An Immediate Resolution may materially advance the Proceedings

18. It is evident that an immediate resolution of the Appeals Chamber would materially advance the proceedings. If the Appeals Chamber is not given the opportunity to review this matter until an eventual appeal may be lodged against the Chamber's final judgment

in this case, a lot of time and resources would have been wasted if the Appeals Chamber agrees with the Defence that witness P-219 should not have been admitted so late in the day. Such a potential waste of the Court's time and resources may easily be avoided by granting this application for leave to appeal. At the very least, the Defence submits that it has shown that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Conclusion

19. On the grounds adumbrated above, the Defence requests the Trial Chamber to grant leave to appeal the Trial Chamber's *Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence* pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.

Respectfully submitted,



David HOOPER
Lead Counsel for Germain Katanga

Dated this 2nd November 2009

At The Hague