

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: **ICC-01/04-01/07**  
Date: **6 November 2009**

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

***IN THE CASE OF  
THE PROSECUTOR  
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

**Public**

**Prosecution's Response to Defence for Germain Katanga's Application for  
Leave to Appeal the Decision on the Addition of Witness 219**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

**Counsel for the Defence of Germain Katanga**  
Mr David Hooper

**Counsel for the Defence of Mathieu Ngudjolo Chui**  
Mr Jean-Pierre Kilenda Kakengi Basila

**Legal Representatives of Victims**  
Mr Fidel Nsita Luvengika  
Mr Jean-Louis Gilissen

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

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

**States Representatives**

**Amicus Curiae**

## **REGISTRY**

---

**Registrar**  
Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section** **Other**

## Introduction

1. The Defence for Mr Germain Katanga (“the Defence”) has sought 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” (“the Decision”).<sup>1</sup> In the Decision, the Trial Chamber authorised the Prosecution to add witness P-219 to its list of witnesses for trial, and imposed measures to minimise the impact of the late addition on the Defence.<sup>2</sup> The transcripts of P-219’s interview had been disclosed to the Defence in August 2009, and the Trial Chamber authorised the Prosecution to add these to the List and Table of Incriminating Evidence. The Chamber further ordered the Prosecution to produce a signed witness statement to further assist the Defence and the Chamber in their preparation for the witness’s testimony.
2. In certain circumstances, a decision which authorises or rejects the addition of an important witness or evidence during the preparation for trial may give rise to an appealable issue. However, in the present case, the Defence has not demonstrated that the issue which it seeks to appeal in this Decision fulfils the criteria set out in Article 82(1)(d) of the Statute.
3. The arguments raised by the Defence do not warrant granting leave to appeal. Most are disagreements about the sufficiency of the measures which the Trial Chamber has put in place to balance any supposed prejudice which the addition of this witness causes to the Defence. Further, some of the alleged unfairness is the result of the Defence’s own choices or preferences, which cannot justify granting leave to appeal. The Defence also has not demonstrated that this issue affects the expeditious conduct of the proceedings.
4. Both the Prosecution and Defence agree that this is an important witness. The bulk of the Defence’s arguments relate to concerns over the measures which the Trial Chamber has put in place or actively contemplated to ensure that the addition of this witness does not unduly prejudice the Defence. These are matters which can be addressed with the Trial Chamber on an ongoing basis, as investigations are conducted

---

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

<sup>2</sup> The addition of witness P-219 was subject to him being called towards the end of the Prosecution case; and the Chamber also required the Prosecution to obtain a signed witness statement and invited the Prosecution to make all reasonable efforts to limit the scope of testimony and to inform the Chamber and parties of those efforts.

by the Defence, as the evidence unfolds, and as any impact on the Defence can be identified in concrete terms. The Decision expressly contemplates such a course. Furthermore, the Defence may raise any detrimental consequences arising from the instant issue as part of a final appeal against judgment if necessary. Accordingly, the immediate resolution of this issue by the Appeals Chamber is not required to advance the proceedings.

### **Procedural Background**

5. On 23 October 2009, the Trial Chamber issued the Decision,<sup>3</sup> and the Prosecution refers to the extensive procedural background set out therein.<sup>4</sup>
6. On 2 November 2009, the Defence sought leave to appeal the Decision.<sup>5</sup>
7. The Prosecution hereby responds to the Application for Leave to Appeal, pursuant to Regulation 65(3) of the Regulations of the Court.

### **The Decision does not meet the criteria for leave to appeal**

8. The Defence seeks leave to appeal the issue of the Trial Chamber's acceptance of the late addition of witness P-219. This issue does arise out of the Decision.
9. The Defence does not dispute the relevance of this witness: it concedes the importance and relevance of the prospective testimony,<sup>6</sup> which "may be the turning point to persuade the Chamber of the guilt of the accused."<sup>7</sup> Instead, the Defence's submissions primarily dispute the adequacy of the measures which the Decision puts in place or actively contemplates to minimise any prejudice suffered by the late addition of this witness.
10. Further, significant portions of the Application for Leave to Appeal,<sup>8</sup> and the various "sub-errors" alleged in the Application,<sup>9</sup> relate solely to the merits of the Decision. As

---

<sup>3</sup> ICC-01/04-01/07-1553.

<sup>4</sup> Decision, paras. 1-14, 18, 27.

<sup>5</sup> ICC-01/04-01/07-1586 ("Application for Leave to Appeal")

<sup>6</sup> Application for Leave to Appeal, paras. 11 ("Witness P-219 is an important witness") and 17.

<sup>7</sup> Application for Leave to Appeal, para. 17.

<sup>8</sup> Application for Leave to Appeal, paras. 6-9, 14.

<sup>9</sup> Application for Leave to Appeal, para. 2(i) and (ii). Nowhere in the Application does the Defence demonstrate how these alleged errors impact of the fair or expeditious conduct of the proceedings.

the Chambers have consistently held, such arguments are irrelevant to the question of leave to appeal.<sup>10</sup> The Prosecution disputes the Defence's characterisation of the Decision and of the Prosecution's actions in seeking the inclusion of witness P-219 and the disclosure of the transcripts. In particular, the Prosecution rejects the Defence's contention that it failed to give timely notice that it intended to rely on the evidence of witness P-219 or unduly delayed in seeking protective measures:<sup>11</sup> the Prosecution made it clear on 30 January 2009 (prior to the expiry of the Trial Chamber's deadline) that it intended to add witness P-219;<sup>12</sup> it actively proposed providing the Defence with redacted transcripts or summaries of witness P-219's transcripts (along with others) on 9 February 2009;<sup>13</sup> and these transcripts were ultimately disclosed some three months prior to the opening of the trial<sup>14</sup> and at least seven months prior to the earliest date that the witness is likely to testify.<sup>15</sup> Nevertheless, given that questions of the merits of the Decision are not relevant at the present stage, the Prosecution will not address these points further unless they are specifically linked to the requirements of Article 82(1)(d).

*a) The Decision does not impact on the fair conduct of the proceedings*

11. As the Application for Leave to Appeal itself identifies, the main concern of the Defence is not the addition of the witness *per se*, but rather that the measures which the Decision put in place do not adequately protect the Defence from any prejudice which it may suffer as a result of the late addition.<sup>16</sup> The Prosecution submits that a

<sup>10</sup> *Prosecutor v Kony et al*, ICC-02/04-01/05-20, 19 August 2005, paras 15 and 22-23; *Prosecutor v Lubanga*, ICC-01/04-01/06-1417, 2 July 2008, para. 10; *Prosecutor v Bemba*, ICC-01/05-01/08-75, 25 August 2008, para. 9; *Situation in the DRC*, 28 November 2008, ICC-01/04-551, paras. 17; *Prosecutor v Lubanga*, ICC-01/04-01/06-2107, 3 September 2009, para. 28.

<sup>11</sup> Application for Leave to Appeal, paras. 7-8.

<sup>12</sup> ICC-01/04-01/07-859, 30 January 2009, para. 11 ("Witnesses 219 and 292 are witnesses on whom the Prosecution had decided it will rely at trial. The Prosecution is currently seeking protective measures for witness W-219 in co-operation with the Victims and Witnesses Unit"). See Decision, paras. 2, 17.

<sup>13</sup> ICC-01/04-01/07-882, para. 4. See Decision, para. 18.

<sup>14</sup> See Decision, para. 27.

<sup>15</sup> In the Decision, the Trial Chamber noted that "P-219 currently features as the potentially 19<sup>th</sup> witness to be called in the Prosecution's 'Revised Order of Witnesses it intends to Call at Trial'; that as a result "he will not come to testify until after the judicial recess"; which in turn "should give the Defence some more time to prepare for P-219's testimony" (para. 26). In light of the revision to the order in which the Prosecution will call its witnesses at trial, it now expects that P-219 will be the 21<sup>st</sup> witness called (ICC-01/04-01/07-1599, 5 November 2009, para. 8). As a result, the Prosecution expects that P-219 will not testify until well after the judicial recess; in all likelihood not until April at the earliest. Given that by the end of August the Defence had received both the identity and the redacted transcript of the interviews of witness P-219, this gives at least seven months.

<sup>16</sup> See e.g. Application for Leave to Appeal, paras. 11 ("None of the proposed solutions by the Chamber sufficiently remedies the prejudice caused"); 12 ("Granting a short adjournment of the proceedings will not

disagreement over the adequacy of the measures in this case, especially where the Decision makes it clear that the Chamber is willing to consider additional time or measures, does not satisfy the requirements of Article 82(1)(d).<sup>17</sup>

12. While the Defence claims that it cannot prepare adequately for cross-examination of the witness because the trial is scheduled to commence in three weeks, the Prosecution recalls that the Defence received the transcripts of the interviews of witness P-219 some three months before the current date for the commencement of trial.<sup>18</sup> Furthermore, the witness is scheduled to testify towards the end of the Prosecution case, and the Defence will most likely have had at least seven months from the time that they received the transcript and identity of the witness in order to prepare for cross examination.<sup>19</sup>

13. The Defence claims that a “short adjournment” will not be sufficient to investigate witness P-219, and “estimates that, to do so properly, a few months of investigations may be required.”<sup>20</sup> However, as the Prosecution set out above, there are more than just a few months before the witness is likely to testify: rather, it is likely to be approximately seven months.<sup>21</sup>

14. Moreover, the Defence cannot claim that the inclusion of a witness adversely impacts on the fair conduct of the proceedings because they would like to question the witness about a host of additional issues beyond the scope of the testimony elicited by the Prosecution or permitted by the Chamber.<sup>22</sup> Similarly, while the Defence argues that the prejudice could have been diminished by early disclosure of the redacted transcript or even summaries<sup>23</sup> - a course of action also proposed by the Prosecution in

---

compensate the loss of opportunity to have conducted investigations into this new witness at an earlier stage”); 13 (“Limitation of the topics to which P-219 will testify is not a helpful solution ... this proposition does not in any way reduce the prejudice against the Defence”); 14 (“there are no redeeming factors compensating the prejudice”).

<sup>17</sup> See e.g. *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP AND DA, 5 December 2003, paras. 8 and 10; see also *Prosecutor v. Halilovic*, IT-01-48-T, Decision on Motion for Certification, 30 March 2005.

<sup>18</sup> See e.g. Decision, para. 27.

<sup>19</sup> See footnote 15, above.

<sup>20</sup> Application for Leave to Appeal, para. 12.

<sup>21</sup> See footnote 15, above. The Prosecution also notes that the Defence has repeatedly considered that disclosure of witness identities and statements 45 days prior to trial was the minimum required to enable proper preparation (see e.g. ICC-01/04-01/07-909, para. 18; ICC-01/04-01/07-1075, para. 22). In this instance, the Defence had this information for approximately double this period, some three months prior to the commencement of trial.

<sup>22</sup> Application for Leave to Appeal, para. 13.

<sup>23</sup> Application for Leave to Appeal, para. 14.

February<sup>24</sup> - it was the Defence itself who objected repeatedly to the disclosure of summaries.<sup>25</sup> Self-inflicted prejudice cannot form the foundation of an appeal.

15. The Defence thus cannot claim that “there are no redeeming factors compensating the prejudice.”<sup>26</sup> They have had the transcripts and known the identity of the witness for three months prior to the commencement of trial; the witness will not testify until towards the end of the Prosecution case, providing the Defence with a substantial additional period (most likely of the order of a further four months) to prepare for the cross-examination of the witness; the Chamber has requested that the Prosecution limit the areas of examination and has ordered the production of a signed statement to facilitate the preparation of the Defence;<sup>27</sup> and the Decision contemplates an adjournment if despite all of the above the Defence still needs more time to adequately prepare.<sup>28</sup> In these circumstances, the issue as it arises in this Decision does not significantly affect the fair conduct of the proceedings within the meaning of Article 82(1)(d).

*b) The Defence has not demonstrated that the Decision impacts on the expeditious conduct of the proceedings*

16. The Prosecution also submits that the Defence has failed to demonstrate that the issue affects the expeditious conduct of the proceedings. The mere “anticipat[ion]” that the brief adjournment, as contemplated by the Chamber, will be insufficient to allow for proper preparation of cross-examination<sup>29</sup> fails to meet this burden – especially in light of the extensive time already available, as detailed above.

17. Similarly, the fact that the Defence may have to call a number of witnesses to challenge the evidence of witness P-219 does not impact on the expeditious conduct of the proceedings. The same would apply regardless of the time that the witness was

<sup>24</sup> ICC-01/04-01/07-882, 9 February 2009, para. 4. See Decision, para. 18.

<sup>25</sup> E.g. ICC-01/04-01/07-1016, 1 April 2009, para. 23 (“The Defence is interested in reading the statement as it was taken from the witness, not in reading a summarised version thereof, which may not accurately reflect what the witness has stated.”); ICC-01/04-01/07-1075, 27 April 2009, para. 24 (“Summaries would not fulfil the same function for preparation of the defence case and would effectively deprive the defence of all ability to investigate and seek contradiction of specific assertions of a witness, because unless the Defence has sight of the words of the witness it will be difficult to be sure of the exact nature of an assertion and may even lead to the Defence wasting its resources on a misunderstanding of the claims of the witness.”). See Decision, para. 18.

<sup>26</sup> Application for Leave to Appeal, para. 14.

<sup>27</sup> Decision, para. 31.

<sup>28</sup> Decision, para. 29.

<sup>29</sup> Application for Leave to Appeal, para. 16.

included in the Prosecution's list. To accept this argument would be tantamount to accepting that the admission of any substantial piece of evidence or significant witness affected the expeditious conduct of the proceedings because the other party may be forced to counter it.

18. The expeditious conduct of the proceedings relates to their timely and efficient progress, and requires that determinations not unduly delay the determination of criminal responsibility.<sup>30</sup> The proper assessment of the criminal responsibility of the accused, and the determination of the truth, is not unduly delayed by the inclusion of a witness which both parties recognize as being of significant importance.

*c) The Decision may impact on the outcome of the trial*

19. Not every decision to admit evidence will necessarily impact on the outcome of the trial. However, a decision to authorise or reject the addition of an important witness or evidence may have such an impact.<sup>31</sup> As noted above, both parties recognize that witness P-219 is indeed important to certain aspects of the Prosecution's case. The Defence goes so far as to argue that his testimony "may be the turning point to persuade the Chamber of the guilt of the accused."<sup>32</sup>
20. Nevertheless, this is not a situation in which the Chamber has prevented a party from calling a witness or presenting certain evidence. In that scenario, the testimony or evidence is excluded altogether, and the impact on the outcome of the trial is certain and direct. In the present case, although the Prosecution may call witness P-219, his testimony will be subject to challenge by the Defence. Its credibility and reliability will be tested under cross-examination (which the Defence rightly notes is an important part of the process), and the Defence may also lead evidence in rebuttal. The Chamber will be required to evaluate the testimony in light of all of the evidence,

<sup>30</sup> See further submissions and authorities in *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 29.

<sup>31</sup> See e.g. *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 February 2004, para. 12 (in the context of evidence excluded or included based on the interpretation of the indictment). See also *Prosecutor v. Milutinovic et al*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65ter List, 14 March 2007, paras. 13-14 and 16 (granting leave to appeal denial of witness based on impact on fair and expeditious conduct of proceedings).

<sup>32</sup> Application for Leave to Appeal, para. 17.

and it is possible that the Chamber may choose not to rely on it in its judgment on the guilt or innocence of the accused.<sup>33</sup>

21. The Prosecution therefore submits that while the testimony of witness P-219 is important, any impact is not as direct or certain as portrayed by the Defence.

*There is no need for immediate resolution of this issue by the Appeals Chamber*

22. Even if the Chamber determines that the issue may affect the fair and expeditious conduct of the proceedings or the outcome of the trial, the Prosecution submits that leave to appeal should not be granted as the immediate resolution of this issue by the Appeals Chamber is not required in order to materially advance the proceedings. As demonstrated above, the majority of the Defence's arguments relate to the adequacy of the measures contemplated by the Chamber to mitigate any prejudice caused to the Defence. However, the Appeals Chamber need not intervene at this stage in order to resolve such questions.<sup>34</sup> The Trial Chamber has left the door open for the Defence to request an extension if the time available for investigations proves insufficient.

23. The Defence assumes both that an adjournment will be required, and that the "short" adjournment contemplated in the Decision will not be enough. But it does so without knowing the results of its investigations into the witness; without knowing how long will be available until the witness will testify (which the Prosecution estimates to be at least five months from the date of the Decision, and seven months from the disclosure of the identity and transcripts of the witness); and without knowing how long an adjournment the Trial Chamber may ultimately grant if a properly substantiated application is made based on the facts which have emerged during the investigation, rather than the speculative assessments of the time required and available which are put forward by the Defence.

24. Furthermore, if the Defence considers at the end of the trial that it was unable to properly prepare for the evidence of witness P-219, and that given the weight that the Chamber ultimately placed on the witness's testimony it was prejudiced by the

<sup>33</sup> See e.g. *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP AND DA, 5 December 2003, para. 8; *Prosecutor v. Halilovic*, IT-01-48-T, Decision on Motion for Certification, 30 March 2005.

<sup>34</sup> See e.g. *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP AND DA, 5 December 2003, para. 10.

admission of this evidence at this stage, then it may raise this issue as part of a final appeal. The Appeals Chamber could assess the actual impact which admitting this disputed evidence had on the judgment; and if ultimately the Appeals Chamber considers that the evidence was wrongly admitted and was determinative of an issue, then the Appeals Chamber may amend the judgment.

25. Given the availability of avenues for addressing the Defence's concerns before the Trial Chamber and the ability of the Defence to raise any detrimental consequences arising from the instant issue properly as part of a final appeal against judgment if necessary, immediate resolution of the issue by the Appeals Chamber is not required to materially advance the proceedings.

### **Conclusion**

26. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Application for Leave to Appeal.



---

Luis Moreno-Ocampo,  
Prosecutor

Dated this 6<sup>th</sup> day of November 2009

At The Hague, The Netherlands