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

Date: **16 April 2010**

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***

URGENT

Public Redacted

**Defence Response to the *Requête de l'Accusation aux fins d'avancement de la
déposition de P-219 et d'admission partielle de sa déclaration de synthèse comme
élément de preuve (ICC-01/04-01/07-2022)***

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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**Victims Participation and Reparations
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Introduction

1. By its application of 13th April 2010¹ the Prosecution seeks two rulings in relation to the evidence of witness 219. First, it requests permission to move the testimony of witness 219 forward on its witness list. Second, it requests leave to admit parts of the statements of the witness in lieu of testimony. The Defence for Mr Katanga (hereinafter 'the Defence') opposes the Prosecutor's application in its entirety, requests the rapid resolution of the first issue raised by the Prosecutor, but requests time to consider and respond to the second.
2. The Chamber has stated that it wishes to have the Defence response on both issues by Friday 23rd April. In respect of the first matter – bringing Witness 219 forward in the witness list – the Defence is obviously anxious for an early ruling so that the present uncertainties are removed. The Defence herein responds to that application.
3. In respect of the second matter - to adduce evidence under Rule 68 - the Defence will respond separately by the 23rd April, as requested, but will not here address that issue other than briefly.
4. On the 1st April the Prosecutor indicated that he intended to request that witnesses 157, 238 and 28 be moved to the end of the witness order. The Defence has, late yesterday, received that application in respect of witness 157 and 238,² and will respond by way of a separate filing later today. The issue relating to 157 and 238 (the position of witness 28 is left unmentioned) is plainly different in kind to the issue concerning witness 219 but remains relevant in that it further disturbs the orientation of the Defence in the preparation of the case. It brings forward witnesses for which the Defence are less prepared and seeks to place to a later time those witnesses who have been better prepared by the Defence. The overall effect of the combined Prosecutor's applications is to seek to alter the witness order in a fundamental way. The reason why such a combination of applications is made so late and at short notice is not known to the Defence.

¹ ICC-01/04-01/07-2022-Conf-Red, Requête de l'Accusation aux fins d'avancement de la déposition de P-219 et d'admission partielle de sa déclaration de synthèse comme élément de preuve.

² ICC-01/04-01/07-2024, Notification écrite de l'Accusation concernant le report des témoins P-157 et P-238 à la fin de la présentation des éléments à charge.

Decision of the Chamber and its effect on the Prosecution application

5. In its 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 of 23 October 2009,³ the Chamber granted the Prosecutor's application to add witness P-219 to the Prosecution witness list 'subject to him being called towards the end of the presentation of the Prosecution case'. This decision took into account the difficulty for the defence to organise investigations so soon before the commencement of the trial. In light of that Decision the Defence submits that, absent the consent of the Defence, in order for the Prosecution's application to succeed the Prosecution must first convince the Chamber that circumstances have changed to such an extent as to justify a reconsideration of the decision of the Chamber.

The current circumstances and prejudice to the Defence

6. It is submitted that nothing has changed significantly with respect to the underlying reason for the Chamber's direction that the witness must be heard towards the end of the Prosecution case. There had been an expectation originally that the Defence would be in possession of all material relating to Prosecution evidence prior to the 31st January 2009.⁴ By the time of the Decision to add 219 to the witness list there was effectively only a month remaining before the commencement of trial and this placed the defence in considerable difficulties with regard to investigations. The Chamber must be deemed to have taken into account the difficulty of dealing with the Witness 219 during the first half of the Prosecution case since it deliberately decided to keep this evidence at the later part of the Prosecution case.
7. The position today is that the Defence has organised itself over the intervening months on the basis that Witness 219 will not be called until the Prosecution has covered most of its witnesses. The Defence has laboured under this expectation. Its ability to carry out investigations effectively during the presentation of the evidence of other witnesses is limited. The following observations must be viewed in the light of the fact

³ ICC-01/04-01/07-1553, see, inter alia, paras 25-29.

⁴ ICC-01/04-01/07-856, 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), 23 October 2009.

that Witness 219 is a witness of a highly incriminating nature dealing with a large range of issues in the case through a voluminous package of material amounting to some 1200 pages.

8. The order of witnesses is of more consequence, in terms of preparation time, to the Defence than to the Prosecutor. The Defence has one resource person and needs a minimum level of participation in the investigation process by counsel and assistants. The trial has run on a fairly constant basis as planned and expected. Since the opening of the Prosecution case, the Defence investigative energies have been significantly engaged in dealing with the unexpected pronouncements, relating to Mr Katanga, made by Witnesses 161 and 159, as well as the ongoing preparations for the cross-examination of the witnesses who have been giving evidence. Counsel and assistants have been fully engaged in trial preparation and review of the testimony of those witnesses that have given evidence, as well as extraneous *ex parte* filings. The Defence was not put on notice of the possible imminence of Witness 219 until the closing minutes of the last session. There has been no opportunity for the organisation of missions to the DRC since then. The mission that was conducted during the New Year recess was made without notice that the Prosecution sought to call Witness 219 at a significantly earlier time. Accordingly, the Defence cannot claim to be very much better prepared to deal with Witness 219 one month from now than it was at the time of the decision to admit him as a witness.

9. The cross-examination of this witness in itself requires substantial preparation. The statement taken in December 2009 seeks to summarise 1,200 pages of transcripts. That statement has only just been translated into English – the Registry provides little or no access to translation facilities and translations are done by members of the team. That statement has now to be compared and contrasted with the substantial transcripts. In the light of the current state of investigations into the evidence of Witness 219 and time required for the preparation of the particular witnesses preceding this witness, the Defence is not in a realistic position to allocate sufficient time for the preparation of this cross-examination.

10. Essentially, the Defence position today is not significantly different to that correctly assessed by the Chamber at the time of its decision ordering that the evidence be deferred until the end of the Prosecution case. In fact, since that decision there have

been further burdens placed on the Defence which, at the time of the decision, the Chamber was necessarily unaware. Moreover, the Defence has been placed by the nature and timing of the application in a position of uncertainty pending the Chamber's decision on this matter which is disruptive to the preparation of the forthcoming witnesses due to appear as of the coming week.

Security issues of the witness

11. The Prosecution claims that the advancement of the evidence of witness 219 is necessary for security reasons and that these reasons must be balanced against the interests of the Defence in a fair trial. The Defence submits that, while reasons of security may be taken into account, under no circumstances can such reasons undermine the right to adequate time and facilities to prepare one's case.
12. The reason provided by the Prosecutor consists of the assertion that the shorter the time until testimony, the less security risk faced by the witness. The security concerns giving rise to this assertion, contained in Annex 1 to the Prosecution application, have not been disclosed to the Defence.
13. The Defence makes the following observations which in this regard are necessarily limited and speculative. In the Defence submission, amongst other factors, regard should be had to the credibility of assertions relating to security. [REDACTED]⁵ [REDACTED]⁶ [REDACTED].
14. As the Prosecution argument on security issues has not been disclosed, the Defence is not in a position to make specific, constructive submissions. It is submitted that this amounts to a procedural unfairness. [REDACTED] the Defence requests the Chamber, in any event, to order the Prosecution to disclose the specific assertions made by Witness 219 that form the basis for the 'security concerns'.
15. The Defence further invites the Chamber to consider the extent to which the Prosecution could have raised the issue of advancing the testimony of Witness 219 at

⁵ [REDACTED].

⁶ [REDACTED].

an earlier stage in the proceedings so as not to compound the difficulties of the Defence in preparing for his testimony. In this regard it is to be noted that the issue of the security of the witness was raised by the Prosecutor in December of last year,⁷ now some three and a half months ago. It must be questioned to what extent the Prosecution argument as it has been framed would not have been equally applicable at that time.

16. The Defence is deeply concerned at the disruptive impact on Defence preparations of the present application. The Defence is at a loss to understand why this application, significant as its effect for the Defence plainly is, was raised only in the final minutes of the last session. The Defence subsequently emphasised to the Prosecutor, by an email of 3rd April, that it was anxious for an early resolution to the question of the witness order. Even so, it has taken two weeks for the Prosecution to submit the requested motion to the Chamber. In the meantime the Defence are left in a state of uncertainty as to the future order of witnesses with consequent destabilising effect on its trial preparations over the period of the recess and this situation is continuing.

17. The Defence submits that the application to advance Witness 219 has been made unnecessarily late and to accede to the Prosecutor's request now will have deleterious consequences for the preparation of the Defence case.

The admission of parts of the statement of Witness 219

18. The second issue raised by the Prosecution is an issue which has been presented by the Prosecutor in the context of jurisprudence of an exceptional nature. It requires legal research and proper consideration. The Defence makes the following preliminary observations.

19. First, the *ad hoc* Tribunals provide a specific regime for the admission of statements in lieu of testimony which differs significantly from the provisions of the Rome Statute, Rules and Regulations of the International Criminal Court ("ICC"). This jurisprudence is therefore of limited assistance in the determination of the appropriate course before the ICC, where there is a pronounced emphasis on the principal of orality. It is

⁷ [REDACTED].

submitted that the proposal of the Prosecution is not consistent with the specific provisions of the ICC relating to the admission of written testimony in lieu of oral testimony.

20. Secondly, the Defence will challenge the credibility of Witness 219 and must be given the opportunity to execute that challenge in an effective manner. Even where issues may be collateral to the central allegations in the case, the witness's provision of details should be done in open court to evaluate his consistency with prior statements and his overall credibility and demeanour. The witness's credibility may well be undermined on the basis of his treatment of collateral issues in the case. This is therefore not an appropriate witness for the application of special procedures to expedite his evidence.

ACCORDINGLY, the Defence respectfully requests that:

- (a) The Prosecutor's application to move Witness 219 in the order of witnesses as suggested be dismissed.
- (b) The Prosecutor be ordered to disclose to the Defence those matters, as the Chamber thinks fit, that are contained in Annex 1 of the Prosecution's motion.

Respectfully submitted,



David HOOPER

Dated this 16 April 2010
At London