

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 March 2011

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

**Public Redacted Version of « Decision on the Prosecutor's request to prepone
the testimony of P-219 » (ICC-01/04-01/07-2057-Conf, 29 April 2010)**

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
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

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**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

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 articles 64, 67 and 68 of the Rome Statute of the International Criminal Court ("Statute"), and regulations 43 and 54 of the Regulations of the Court ("Regulations") issues the following decision:

I. BACKGROUND

A. Preliminary history

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009.¹ The Chamber further ordered that requests for redactions or other protective measures for evidence that the Office of the Prosecutor ("Prosecution") was not yet in a position to disclose by 30 January 2009, be filed on the same day.

2. Adhering to this deadline, the Prosecution informed the Chamber that it was "seeking protective measures for witness P-219 in cooperation with the Victims and Witnesses Unit"² and that "[p]ending a decision of the Victims and Witnesses Unit, the Prosecution was not in a position to disclose the transcripts to the Defence."³

3. After a lengthy process involving a number of *ex parte* hearings with the Prosecution and the Victims and Witnesses Unit,⁴ a solution regarding P-219's security situation was agreed upon, and on 23 October 2009 the

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 *Idem*.

⁴ The Chamber held a number of *ex parte* hearings on the matter: 3 February 2009, ICC-01/04-01/07-T-56-CONF-EXP-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

Chamber rendered a decision allowing the late addition of P-219 to the Prosecution Witness List.⁵ However, the Chamber acknowledged that the statements of P-219 contained a lot of information pertaining to several aspects of the case and that their late addition might cause prejudice to the Defence if the latter did not have sufficient time to prepare for P-219's testimony.⁶ The Chamber noted in this regard, that a redacted version of the transcripts of P-219's prior statements had already been disclosed to the Defence on 28 August 2009.⁷ Nevertheless, in order to allay Defence concerns about insufficient preparation time, the Chamber made the late addition of P-219 to the Prosecution Witness List conditional upon him being called towards the end of the Prosecution case.⁸ On 5 November 2009, the Prosecution submitted a revised list with the calling order of its witnesses.⁹ According to this list, P-219 would be called as the 21st witness out of 26.¹⁰

4. In addition to demanding that P-219 be called towards the end of the Prosecution case, the Chamber also decided that "if it can be demonstrated that the Defence is unable to conduct [...] investigations once the hearings on the merits have commenced, then the Defence may request the Chamber for a short adjournment of the proceedings. The Chamber encourages the two Defence teams to consult with each other as well as with the Registry, prior to making such a request, and if possible make a common request."¹¹ However, no such request was received.

⁵ "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", 23 October 2009, ICC-01/04-01/07-1553

⁶ Ibid., par. 27

⁷ Idem.,

⁸ Ibid., first operative paragraph of the decision.

⁹ "Dépôt d'une liste révisée des témoins de l'Accusation et de leur ordre de déposition", 5 November 2009, ICC-01/04-01/07-1599

¹⁰ ICC-01/04-01/07-1599-Conf-AnxB

¹¹ ICC-01/04-01/07-1553, par. 29

5. Finally, the Chamber ordered the production of a signed statement by P-219.¹² This statement was produced on 17 December 2009¹³, which the Chamber allowed to be added to the Prosecution List of Incriminating Evidence on 19 January 2010.¹⁴

B. The Prosecution request

6. On 13 April 2010, the Prosecution made a request to prepone the testimony of P-219 ("Request").¹⁵ According to this Request, P-219 would be called in thirteenth position. The Prosecution justified its Request on the basis of alleged serious concerns about the security situation of P-219.¹⁶ The reasons for these concerns are further substantiated in Annex 1 to the Request.¹⁷

7. The Prosecution also asks permission from the Chamber to tender into evidence part of the prior recorded testimony of P-219 on the basis of rule 68(b) of the Rules of Procedure and Evidence. The Chamber will address this aspect of the Request in a separate decision.

8. On 16 April 2010, the Defence for Mr. Katanga responded to the Prosecution's Request.¹⁸ In its response, the Defence asked the Chamber to reject the Request, arguing that it was not prepared to cross-examine him at such short notice. However, during a hearing held on 22 April 2010, the

¹² Ibid., par. 35

¹³ "Communication d'un procès-verbal de synthèse du témoin P-219 et demande d'ajout de ce procès-verbal sur la liste des éléments à charge de l'Accusation", 17 December 2009, ICC-01/04-01/07-1727

¹⁴ "Decision on the Prosecution's request for authorisation to add the signed record of questioning by P-219 to the Prosecution List of Incriminating Evidence", 19 January 2010, ICC-01/04-01/07-1772

¹⁵ "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", 13 April 2010, ICC-01/04-01/07-2022-Conf-Exp. Two redacted versions were filed on the same day: ICC-01/04-01/07-2022-Conf-Red (available only to the defence) and ICC-01/04-01/07-2022-Conf-Red 2 (public)

¹⁶ Ibid., par. 9

¹⁷ ICC-01/04-01/07-2022-Conf-Exp-Anx1

¹⁸ "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)", 16 April 2010, ICC-01/04-01/07-2026-Conf-Exp

Defence adjusted its position in light of the fact that there was unexpectedly one extra week without hearings, which would give the Defence additional time to prepare for P-219's testimony.¹⁹ The Defence for Mr. Katanga therefore stated that it was 'neutral' in respect of whether or not P-219 is advanced in the order of witnesses.

9. However, in its response of 23 April 2010, the Defence for Mr. Ngudjolo asked the Chamber to reject the Prosecution's Request.²⁰ Although the Defence recognises the Chamber's obligation to protect witnesses, it also argues that this cannot be at the expense of the rights of the Defence.²¹ It is argued in this regard, that the Defence's right to have adequate time and facilities for the preparation of its defence would be seriously affected by the advancement of P-219's testimony, as this would create problems in terms of planning its investigations and the preparation of the cross-examination of P-219.²²

10. Finally, the Victims' Legal Representatives submitted their observations on 23 April 2010.²³ They are of the view that the Request is reasonable and defer to the Chamber on this matter.²⁴

II. ANALYSIS

11. As a general remark, the Chamber notes that a number of changes have already been made in the calling order of Prosecution witnesses. Although the Chamber understands that many of these changes are brought about independently of the will of the Prosecution, it cannot ignore the

¹⁹ ICC-01/04-01/07-T-132-CONF-ENG ET, page 83

²⁰ "Réponse de la Défense de Mathieu Ngudjolo à l'écriture du Procureur référencée ICC-01/04-01/07-2022-Conf-Red", 23 April 2010, ICC-01/04-01/07-2042-Conf

²¹ Ibid., par. 13

²² Ibid., par. 16-17

²³ "Observations des représentants légaux sur la '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'", 23 April 2010, ICC-01/04-01/07-2043-Conf

²⁴ Ibid., par. 13

disruptive effect such changes may have on the organisation and preparation of the Defence teams. This is especially true when the testimony of the witness involved is a key element in the Prosecution case. The Chamber notes in this regard that P-219 is an important witness, whose testimony covers a wide range of issues that go directly to the criminal responsibility of the accused.

12. The Chamber also recalls that it allowed the late addition of P-219 to the Prosecution Witness List on the condition that he would be called towards the end of the Prosecution case.²⁵

13. The Chamber is therefore not inclined to allow the advancement of P-219's testimony, unless there are compelling reasons to do so. Obviously, if there is a security imperative, the Chamber must consider this very seriously. However, even if a security risk has been established and it is clear that preponing the witness' testimony may help in alleviating this risk, the Chamber must still weigh this against the possible prejudice to the rights of the accused that may be caused by changing the order of witnesses.

14. In order to obtain the necessary information for evaluating the Prosecution Request, the Chamber instructed the Victims and Witnesses Unit ("VWU") to submit an up to date report on P-219's security situation and psychological condition. The VWU is a neutral body within the Registry, working under an obligation of impartiality in accordance with rule 18(b) of the Rules. On 28 April 2010, the VWU submitted its report and made the following recommendations:

- 1) It is usually preferable, in psychological and security terms, for any witness to attend The Hague for testimony in an expeditious timeframe. In this specific case, the witness's early attendance would allow him to proceed with establishing himself in business and his family in their current location without the distraction of forthcoming testimony.

²⁵ ICC-01/04-01/07-1553

2) There are no specific security concerns that would warrant advice that he attend The Hague earlier than scheduled:

- (a) He is satisfied with current, improved, security;
- (b) [REDACTED];
- (c) [REDACTED];
- (d) [REDACTED].

3) [REDACTED].

4) This established, as with any witness, it would certainly be preferable that testimony be expedited – as this would allow him to concentrate on developing his work/ business and thereby be more able to support himself and his family in the future.

5) The VWU remain able to monitor and support as required, in psychological and security terms, irrespective of when the witness is called to attend The Hague.²⁶

15. The Chamber concludes from this report, which is based on very recent personal interviews with P-219 by the VWU's Protection Officer and psychologist, that there are no compelling reasons for preponing P-219's testimony.

16. In light of its previous observations, the Chamber therefore considers that it is not necessary to examine the matter any further.

²⁶ "Report on situation of P-219", submitted to the Chamber by email of 28 April 2010 at 12h41.

FOR THESE REASONS,

THE CHAMBER,

REJECTS the Request to prepone the testimony of P-219;

ORDERS the VWU to continue monitoring the security situation of P-219 closely and to keep the Chamber informed of any changes in that situation.

Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 10 March 2011

At The Hague, the Netherlands