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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 THE CONGO**

**IN THE CASE OF  
THE PROSECUTOR *v.* GERMAIN KATANGA *and* MATHIEU NGUDJOLO CHUI**

**Public**

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

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo  
Ms Fatou Bensouda  
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**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

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 54(e), 64(3)(c) and 67(1)(b) of the Rome Statute of the International Criminal Court ("Statute"), as well as regulation 35(2) and of the Regulations of the Court ("Regulations"), issues the following decision.

## I. BACKGROUND

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009.<sup>1</sup> To the extent that the Office of the Prosecutor ("Prosecution") was not yet in a position to disclose certain evidence because redactions or other protective measures were still required, the Chamber ordered the Prosecution to submit its requests for these measures by 30 January 2009, allowing it to defer disclosure for the material in question.

2. Prior to the lapse of the time limit, the Prosecution informed the Chamber that it was "seeking protective measures for witness P-219 in cooperation with the Victims and Witnesses Unit"<sup>2</sup> 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."<sup>3</sup>

3. After a lengthy process involving a number of *ex parte* hearings with the Prosecution and the Victims and Witnesses Unit,<sup>4</sup> a solution regarding P-219 was agreed upon. Subsequently, on 7 July 2009, the Prosecution filed its *ex parte* Prosecution only "Requête de l'Accusation sur la base de la norme 35 du

<sup>1</sup> "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

<sup>2</sup> "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

<sup>3</sup> *Idem*.

<sup>4</sup> Hearings held on 3 February 2009, ICC-01/04-01/07-T-56-CONF-EXO-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

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 la liste des éléments à charge et la liste des témoins à charge (Témoin P-219)"<sup>5</sup> ("Request"). Contrary to its normal practice, the Prosecution did not file a version of its Request that was available to the Defence and the Chamber failed to notice this until after it had issued its "Decision on the disclosure of evidentiary material relating to Witness 219" ("Decision") on 27 July 2009.<sup>6</sup>

4. In its Decision, the Chamber granted the Request in part, and ordered the Prosecution to contact P-219 in order to produce a signed witness statement, in lieu of the lengthy transcripts which the Prosecution sought to disclose and for which redactions were requested.<sup>7</sup>

5. On 13 August 2009, the Prosecution filed an "Application for the Variation of an Order regarding Witness 219"<sup>8</sup> ("Application"), invoking security concerns as a ground for requesting authorisation to disclose a summary of P-219's statements instead of a signed witness statement. On that same day, the Prosecution also filed a public version of its original Request, thereby making it available to the Defence for the first time.<sup>9</sup>

6. On 18 August 2009, the Defence for Germain Katanga filed a motion seeking clarification and, if necessary, the vacation of the Chamber's decision of 27 July 2009, as well as reserving its right to appeal the Decision.<sup>10</sup> After having sought the instructions of the Chamber, the Defence for Mathieu Ngudjolo filed a

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<sup>5</sup> ICC-01/04-01/07-1274-Conf-Exp, 7 July 2009

<sup>6</sup> ICC-01/04-01/07-1338-Conf-Exp; "Decision on the disclosure of evidentiary material relating to Witness 219", the Public Redacted Version of decision ICC-01/04-01/07-1338-Conf-Exp was issued on 13 August 2009: ICC-01/04-01/07-1364

<sup>7</sup> Ibid.

<sup>8</sup> ICC-01/04-01/07-1371, the public redacted version is ICC-01/04-01/07-1372

<sup>9</sup> ICC-01/04-01/07-1370

<sup>10</sup> "Defence Motion Seeking Clarification and, if Necessary, vacating of the *Decision on the disclosure of evidentiary material relating to Witness 219*, and/or Extension of Time to Seek Leave to Appeal", 18 August 2009, ICC-01/04-01/07-1388-Conf-Exp

consolidated response to both the Prosecution's Application and the submissions of the Defence for Mr. Katanga on 21 August 2009.<sup>11</sup>

7. On 27 August 2009, the Chamber issued a second "Decision on the disclosure of evidentiary material relating to witness 219"<sup>12</sup> in which it noted *inter alia*<sup>13</sup> that the Prosecution had failed to file a version of its Request that was available to the Defence, thereby preventing them from responding in good time. The Chamber acknowledged that it had failed to notice the Prosecution's omission prior to rendering its Decision of 27 July 2009.<sup>14</sup> The Chamber further observed that, although it did not infer from the absence of Defence observations that they agreed with the Prosecution's Request, the fact that the Defence had been unable to submit its observations, had prevented the Chamber from deciding on the Request with full knowledge of all the relevant considerations. As the Chamber was still to rule on two aspects of the Request that, in its view, most affected the rights of the Defence, namely (i) whether P-219 may be added to the List of Incriminating Witnesses and (ii) the modalities of the disclosure of his statements to the Defence, it considered that no irreparable harm emanated from its first Decision.

8. In order to rule on the pending issues with the full benefit of adversarial argument, the Chamber invited the Defence to file its observations with regard to the two abovementioned aspects of the Request.<sup>15</sup> To enable the Defence to usefully comment on the issues, the Chamber ordered the Prosecution to communicate to the Defence the transcripts relating to P-219. It exceptionally allowed the Prosecution to provisionally apply those redactions for which it

<sup>11</sup> "Réponse consolidée de la Défense de Mathieu Ngudjolo aux requêtes ICC-01/04-01/07-1372 (Accusation) et ICC-01/04-01/07-1388-Conf-Exp (Défense de Germain Katanga) relatives au témoin 219", 21 August 2009, ICC-01/04-01/07-1413

<sup>12</sup> "Decision on the disclosure of evidentiary material relating to Witness 219", 27 August 2009, ICC-01/04-01/07-1434

<sup>13</sup> The Chamber's 27 August 2009 decision dealt in part with matters relating the protective measures accorded to Witness 219 by both Trial Chamber I and Trial Chamber II in the light of regulation 42 of the Regulations.

<sup>14</sup> ICC-01/04-01/07-1434, par. 14

<sup>15</sup> *Ibid.*, par. 15 and 16

sought authorisation from the Chamber in its Request.<sup>16</sup> The Defence was also invited to submit its observations relating to the said redactions.<sup>17</sup>

9. In response to the Chamber's invitation, the Defence for Mathieu Ngudjolo filed its observations on 4 September 2009.<sup>18</sup> It expressed its opposition to the recent multiplication of Prosecution requests pursuant to regulation 35(2) of the Regulations and in particular opposed (i) the addition of P-219 to the Prosecution Witness List, and (ii) the addition of P-219's interview transcripts to the List of Incriminating Evidence.<sup>19</sup> With regard to the question as to whether the Prosecution has fulfilled the criteria of regulation 35(2), the Defence contends that the Prosecution does not submit any valid reasons for the delay. First, it notes that the declarations of P-219 predate the deadline of 30 January 2009, as they date back to February 2007 and November 2008, and are therefore not new.<sup>20</sup> Second, the Defence submits that the circumstances that led to the disclosure of the transcripts two and a half years after the last interview with P-219, are not such as to amount to exceptional circumstances in the sense of regulation 35(2) last sentence.<sup>21</sup> Third, the Defence observes that the Prosecution does not explain how the declarations of P-219 bring to light new facts or why they would be more compelling than other evidence previously disclosed to the Defence.<sup>22</sup>

10. It was further stressed that at this advanced stage in the proceedings, the analysis of this new evidence is especially arduous, if not impossible.<sup>23</sup> It was therefore submitted that P-219's addition to the Prosecution Witness List, as well as the addition of the transcripts relating to his testimony, less than 3 months

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<sup>16</sup> Ibid., par. 17

<sup>17</sup> Ibid., par. 18

<sup>18</sup> "Observations de la Défense de Mathieu Ngudjolo suite à la Décision 1434 de la Chambre de première instance relative au témoin 219", 4 September 2009, ICC-01/04-01/07-1453

<sup>19</sup> Ibid., par. 8 and 23

<sup>20</sup> Ibid., par. 15

<sup>21</sup> Idem.

<sup>22</sup> Idem.

<sup>23</sup> Idem.

prior to the beginning of the hearings on the merits, would severely prejudice the Defence.<sup>24</sup>

11. In relation to the proposed redactions applied to the said transcripts, the Defence for Mathieu Ngudjolo voices its opposition to redactions of the names of family members of P-219 being applied on a permanent basis.<sup>25</sup> It also raises questions in relation to certain redactions that cover entire paragraphs of the transcript and do not seem to pertain to any of the categories of redactions proposed by the Prosecution.<sup>26</sup>

12. The Defence for Germain Katanga submitted its observations on 7 September 2009.<sup>27</sup> It firmly objects to the addition of P-219 to the Prosecution Witness List, arguing that the Prosecution has failed to satisfy the requirements of regulation 35(2) of the Regulations. In the Defence's view, the Prosecution could have added witness P-219 as an anonymous witness to its Prosecution Witness List before the lapse of the deadline on 30 January.<sup>28</sup> The Defence is concerned that P-219, whose first statement was taken almost four years ago, and who provided the most extensive interview transcripts of all the witnesses in the case, should be introduced into the case in this manner, as the Prosecution seemingly had a long-standing intention to use P-219 in the case.<sup>29</sup>

13. Furthermore, the Defence for Germain Katanga argues that "it is entirely within the discretion of the Chamber to dismiss a request to extend the time limit for disclosure of evidence even where the conditions of Regulation 35 are met."<sup>30</sup> It is submitted, in this regard, that the reading and translation, as well as the analysis of the said transcripts, imposes a substantial burden on the Defence at this advanced stage in the proceedings, and that the Defence would

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<sup>24</sup> *Idem.*

<sup>25</sup> *Ibid.*, par. 27 and 29

<sup>26</sup> *Ibid.*, par. 31

<sup>27</sup> "Defence observations relative to Witness 219", 7 September 2009, ICC-01/04-01/07-1460

<sup>28</sup> *Ibid.*, par. 23

<sup>29</sup> *Ibid.*, par. 21

<sup>30</sup> *Ibid.*, par. 19

have to re-open its investigations.<sup>31</sup> Because of this burdensome and prejudicial effect on the Defence, the Chamber is urged to reject the Request, regardless of whether the criteria of regulation 35(2) are met.<sup>32</sup>

14. With regard to the proposed redactions, the Defence for Germain Katanga also objects to any permanent redactions being applied to the transcripts, should the Chamber be minded to allow their addition to the List of Incriminating Evidence.<sup>33</sup> It also observes that some redactions appear excessive<sup>34</sup> and generally adopts the arguments put forward by the Defence of Mathieu Ngudjolo in this respect.<sup>35</sup>

## II. ANALYSIS AND CONCLUSION

### a. Late submission

15. The main point of the Defence appears to be that the Prosecution knew of P-219 as a witness for a long time and that it was clear that it wanted to call him to testify at trial long before the expiration of the time limit.<sup>36</sup> The Defence call into question that security considerations stood in the way of the Prosecution placing P-219 on the Prosecution Witness List as (a) the Prosecution had had ample time to find a suitable arrangement to address the security concerns and (b) even if the security situation had not been resolved at the expiration of the deadline, the statements could already have been disclosed with provisional redactions or in summary form.

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<sup>31</sup> *Ibid.*, par. 26

<sup>32</sup> *Ibid.*, par. 9

<sup>33</sup> *Ibid.*, par. 29

<sup>34</sup> *Ibid.*, par. 32

<sup>35</sup> *Ibid.*, par. 33

<sup>36</sup> ICC-01/04-01/07-1460-Conf-Exp, par. 21

16. The Chamber is of the view that the issue of timely requests for redaction of the transcripts is separate from the question as to whether P-219 may be added to the Prosecution Witness List. The Chamber must therefore determine separately whether the Prosecution has demonstrated valid reasons for each of these questions.

1. *Late request for redactions and disclosure*

17. The Chamber did explicitly not decide the issue as to whether the Prosecution was out of time with regard to the late request for redactions in its Decision of 27 July 2009.<sup>37</sup> The Chamber must therefore address this question for the first time in the present decision. The Chamber is of the view that it must consider this part of the Request under regulation 35(2), *first sentence*, as the Prosecution informed the Chamber before the expiration of the deadline that it was not ready to submit a request for redactions. This was linked to the fact that some of the transcripts of the interviews of November 2008 had not been completed, but also, and more importantly, to the fact that it was exceedingly difficult to redact the transcripts in a way that would not make them entirely illegible for the Defence.

18. The Chamber recalls, in this regard, that on 9 February 2009 the Prosecution proposed to temporarily provide the Defence with summaries or verbatim extracts of the interviews of a number of witnesses (including P-219) until their respective security situation had been dealt with.<sup>38</sup> Although the Defence did not initially reject this proposed provisional measure<sup>39</sup>, it later expressed very clear and strong opposition against the possibility for the Prosecution to disclose summaries on the grounds that there was no legal basis

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<sup>37</sup> ICC-01/04-01/07-1338-Conf-Exp, par. 18

<sup>38</sup> "Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses", 9 February 2009, ICC-01/04-01/07-882, par. 4

<sup>39</sup> "Defence Response to the Prosecution's Submissions on the Modalities of Disclosure Required for the Protection of Incriminating Witnesses", 20 February 2009, ICC-01/04-01/07-909, par. 2; "Réponse de la Défense aux Mesures proposées par l'Accusation quant aux modalités de communication propres à assurer la protection des témoins à charge", 20 February 2009, ICC-01/04-01/07-907

for this during the trial phase and that it would be prejudicial to the Defence, because it would not be possible for it to conduct a meaningful investigation on the basis of summaries.<sup>40</sup> The Defence for Mr. Katanga stated, in this regard, that the disclosure of summaries instead of the actual witness statements “may even lead to the Defence wasting its resources on a misunderstanding of the claims of the witness.”<sup>41</sup>

19. The Chamber is aware that these comments were not made specifically in relation to P-219, but it considered at the time that they applied *mutatis mutandis* and therefore did not authorise the Prosecution to disclose the proposed summaries of P-219’s statements. In addition, the Chamber was of the view that it was not helpful to disclose a heavily redacted version of the transcripts, as this would have rendered them nearly incomprehensible and certainly not very useful for the Defences’ preparation and investigation. Given that the Prosecution only obtained transcripts of interviews in lieu of a signed witness statement of P-219, it was thus not possible to disclose the declarations of the latter until his security situation was settled and his identity could be disclosed to the Defence.

20. The Chamber does agree, however, that the Prosecution could have made its request for authorisation of the redactions of the transcripts sooner. This

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<sup>40</sup> “Observations consolidées de la Défense de Mathieu Ngudjolo relatives aux demandes d’expurgations et autres sollicitées par le Procureur dans ses soumissions référencées sous ICC-01/04-01/07-985 et ICC-01/04-01/07-991”, 1 April 2009, ICC-01/04-01/07-1014, par. 12-19; “Observations de la Défense de Mathieu Ngudjolo relatives à la requête de l’Accusation aux fins de divulgation différée de l’identité et des déclarations des témoins 0267 et 0353 et aux fins de communications à la Défense d’un résumé de leur déclaration dans l’intervalle”, 27 April 2009, ICC-01/04-01/07-1071, par. 16; “Defense Response to Prosecution’s Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 – also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 282 and Witness 90 pursuant to Article 53(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules”, 1 April 2009, ICC-01/04-01/07-1016 par. 23; “Defence response to the public version of Prosecution’s ‘Requête aux fins de divulgation différée de l’identité et des déclarations des témoins 0267 et 0353 et aux fins de communication à la Défense d’un résumé de leur déclaration dans l’intervalle’”, 27 April 2009, ICC-01/04-01/07-1075, par. 23-25

<sup>41</sup> ICC-01/04-01/07-1075, par. 24

would have allowed for their immediate disclosure from the moment the security situation of P-219 had been resolved. It notes, in this regard, that the last transcripts were ready at the beginning of February 2009. It would thus have been possible for the Prosecution to make the request for redactions as soon as it became clear that a solution for the security situation of P-219 was in sight and that his identity was going to be disclosed to the Defence. The Prosecution has not attempted to explain why the request for redactions was not made earlier. The Chamber can therefore not find ‘good cause’ in the sense of regulation 35(2), *first sentence*, of the Regulations.

21. Nevertheless, even if the Chamber were to find that they may not be added to the List of Incriminating Evidence, the transcripts would still have to be disclosed under rule 77 of the Rules. Moreover, the Chamber remains responsible under article 64(2) and 68(1) of the Statute to ensure the protection of victims and witnesses regardless of whether the request for redactions was made timely or not. The Chamber therefore had to decide upon the request for redactions independently of whether it considers the Prosecution can show good cause in the sense of regulation 35(2) and refers in this respect to the *ex parte* hearing, held on 24 September 2009<sup>42</sup> and its “*Décision relative à la levee, au maintien et au prononce de mesures d’expurgations*” of 22 October 2009.<sup>43</sup>

## 2. *Late addition of P-219 to the Prosecution Witness List*

22. With regard to the late addition of P-219 to the Prosecution Witness List, the Chamber first notes that, although the Prosecution’s Request was filed after the expiration of the time limit of 30 January 2009, the Request must be considered as falling under the regime of the first sentence of regulation 35(2). In conformity with the instructions of the Chamber,<sup>44</sup> the Prosecution had informed

<sup>42</sup> ICC-01/04-01/07-T-69-CONF-EXP-ENG ET

<sup>43</sup> ICC-01/04-01/07-1551-Conf-Exp

<sup>44</sup> “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 January 2009, ICC-01/04-01/07-846, par. 5-6

the Chamber and the participants about the situation regarding P-219 before the expiration of the time limit.<sup>45</sup> Since then the situation of P-219 has been on the Chamber's agenda and was dealt with largely on an *ex parte* basis. The Chamber took into consideration the special situation of P-219 and the fact that at the moment of the expiration of the deadline his security situation was not resolved and that as a consequence there were still questions as to whether or not he would be able to testify.

23. Contrary to the contentions of the Defence, the Prosecution was therefore not obliged to demonstrate 'exceptional circumstances' in the sense of regulation 35(2), *last sentence*, as this provision is not applicable in respect of the question as to whether P-219 may be added to the Prosecution Witness List. The Chamber's order of 23 January 2009, although imposing a deadline of 30 January 2009 for the disclosure of all incriminating evidence, expressly left open the possibility that, with regard to particular items of evidence for which protective measures were still required, a later disclosing date would be possible, as long as the Prosecution 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.<sup>46</sup> With regard to those items of evidence for which protective measures were asked before the deadline, the time limit was thus in effect suspended until the Chamber had the opportunity to rule on the respective applications, as long as the Prosecution could show good cause for the delay in the sense of regulation 35(2), *first sentence*. As the Chamber held previously,<sup>47</sup> the special situation of P-219 and the difficulties encountered by the Prosecution in finding a suitable solution constituted such good cause. The Chamber has reconsidered this question in light of the observations made by the

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<sup>45</sup> "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

<sup>46</sup> ICC-01/04-01/07-846, par. 5

<sup>47</sup> "Decision on the disclosure of evidentiary material relating to Witness 219", 27 July 2009, ICC-01/04-01/07-1338, par. 10-14

Defence, but finds no reason to depart from its previous decision that good cause was shown.

**b. Prejudice to the Defence caused by the late disclosure of the statements of P-219**

24. It follows from the above that in principle the Prosecution is entitled to add P-219 to the Prosecution Witness List and to disclose the transcripts of the interviews that were held with him. However, the Chamber agrees with the Defence for Germain Katanga, in that it considers that the fact that an applicant can show that it fulfils the requirements of regulation 35(2) of the Regulations, does not automatically oblige the Chamber to grant the extension of time limit which is being sought. Rather, the Chamber, bearing in mind its obligation under article 67(1) of the Statute, must ensure that the accused receive a fair trial and that they have adequate time and facilities for the preparation of their respective cases. This judicial discretion is vested in the Chamber by virtue of the fact that, according to regulation 1(1) of the Regulations, they “shall be read subject to the Statute and the Rules”. Moreover the Chamber has an overall responsibility to apply the law consistently with internationally recognized human rights in accordance with article 21(3) of the Statute. Accordingly, the Chamber is of the view that, before authorising the late disclosure of P-219’s statements, it has to assess the extent of the prejudice the late addition of P-219 to the Prosecution Witness List would cause to the Defence.

25. Having regard to the arguments raised by the parties, the Chamber is aware of the fact that granting the Request would result in an additional burden upon the Defence at an inconvenient moment in the proceedings. In the analysis of the Chamber, the addition poses two kinds of difficulties: (i) the Defence has to read and assimilate a large volume of new information, and (ii) depending on its analysis of the declarations of P-219, the Defence may consider it necessary to

conduct additional investigations in the field. The Chamber will evaluate both points in turn.

*1. Volume of new information*

26. The Chamber notes that P-219 currently features as the potentially 19th witness to be called in the Prosecution's 'Revised Order of Witnesses it intends to Call at Trial'.<sup>48</sup> This means that it is almost certain that he will not come to testify until after the judicial recess. This should give the Defence some more time to prepare for P-219's testimony.

27. The Chamber is aware that the transcripts are voluminous and that they contain a lot of information that pertains to several aspects of this case. However, the Chamber notes that the redacted form of the transcripts has already been disclosed to the Defence on 28 August 2009, and that the Defence has been made aware of the identity of P-219 as of 18 August 2009. The Defence has therefore already had the opportunity to inspect the said material and was able to appreciate the scope and weight of P-219's testimony. Taking into account the aforementioned, the Chamber is therefore of the opinion that the Defence will have adequate time to process the information contained in the transcripts.

*2. Possible need for additional investigations*

28. The Chamber is concerned about the Defence's ability to conduct additional investigations so close to the start of the hearings on the merits. Not only is there the problem that the Defence has concluded most of its investigations in the Democratic Republic of the Congo ("DRC"), but, according to the Defence for Mr. Katanga, the current security situation in Aweba is such that it would be impossible for it to conduct an investigative mission there.<sup>49</sup>

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<sup>48</sup> Annex B of the "Prosecution's Revised Order of Witnesses it Intends to Call at Trial", 9 October 2009, ICC-01/04-01/07-1518-Conf-AnxB

<sup>49</sup> ICC-01/04-01/07-1388-Conf-Exp, par. 13-14

29. If the Defence considers it necessary to conduct specific additional investigations in relation to P-219, which necessitate travelling to the DRC, and if it can be demonstrated that the Defence is unable to conduct these 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. It will not consider two separate requests for different periods.

### *3. Limitation of topics about which P-219 can testify*

30. The Chamber notes that the Prosecution proposes to question P-219 on a wide range of issues.<sup>50</sup> The Prosecution argues that part of the factual issues mentioned in the transcripts is also dealt with by other incriminating witnesses and are therefore not new to the Defence.<sup>51</sup> While it may be true that the transcripts of P-219 contain no late surprises for the Defence, this does not mean that the Defence does not need to prepare equally for those aspects of the testimony that overlap with other previous testimony as well.

31. Therefore, seeing that P-219 is currently scheduled to be called after three other witnesses who, according to the submissions of the Prosecution, address similar issues,<sup>52</sup> the Chamber invites the Prosecution to make every effort to limit the subjects on which it will question P-219 to matters only he can speak about. To assist the Defence in its preparation, the Prosecution is asked to indicate which parts of the transcripts relate to the issues that will be addressed by P-219 during trial.

#### **c. Production of signed statement by P-219**

32. It is to be recalled that the Chamber has previously instructed the Prosecution to produce a signed witness statement by P-219 in lieu of the

<sup>50</sup> ICC-01/04-01/07-1514-Conf-Anx11

<sup>51</sup> ICC-01/04-01/07-1274-Conf-Exp, par. 30

<sup>52</sup> ICC-01/04-01/07-1518-Conf-AnxB

transcripts.<sup>53</sup> However, the Prosecution informed the Chamber that, although it was able to provide summaries, “the process of obtaining a signature [of P-219] will unduly jeopardize the safety of the witness. For that reason, the Prosecution requests leave to submit unsigned summaries along with redacted transcripts”, and asked for a variation of the Chamber’s order.<sup>54</sup> The Chamber rejected the Prosecution’s request for a variation of its previous order, on the basis of its decision to instruct the Prosecution to disclose the full transcripts to the Defence.<sup>55</sup> However, given the conflicting arguments by the Defence in their submissions of August 2009,<sup>56</sup> the Chamber did not reconfirm its order to the Prosecution and sought additional submissions of the Defence before rendering a final decision on this matter. The question still before the Chamber is therefore, whether it is helpful or indeed necessary that a signed witness statement by P-219 be produced.

33. The Chamber notes, in this regard, that the Defence for Mr. Katanga argues that providing a signed statement would not solve the problems for the Defence and “would but further handicap and prejudice the Defence.”<sup>57</sup>

34. The Defence for Mr. Ngudjolo, on the other hand, argues that the Prosecution has a legal obligation to produce a signed statement by P-219 and that a summary prepared by the Prosecution does not meet the procedural requirements.<sup>58</sup> It further argues that the transcripts contain numerous passages that have nothing to do with the imputed facts of this case. The Defence therefore demands that, in case the Chamber were to allow the addition of P-219 to the Prosecution Witness List, a signed statement by P-219, containing only the

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<sup>53</sup> ICC-01/04-01/07-1338, par. 17

<sup>54</sup> ICC-01/04-01/07-1372, par. 3

<sup>55</sup> ICC-01/04-01/07-1434

<sup>56</sup> ICC-01/04-01/07-1388-Conf-Exp ; ICC-01/04-01/07-1413

<sup>57</sup> ICC-01/04-01/07-1388-Conf-Exp, par. 12

<sup>58</sup> ICC-01/04-01/07-1413-Conf-Exp, par. 15

elements that can be used at trial, be produced by the Prosecution within a short delay.<sup>59</sup>

35. The Chamber agrees with the Defence for Mr. Ngudjolo that it is incumbent upon the Prosecution to produce signed witness statements of all witnesses it wants to present at trial. Rule 111 clearly states that “[a] record shall be made of formal statements made by *any* person who is questioned in connection with an investigation [...t]he record shall be signed by [...] the person who is questioned [...]”. The Chamber is aware of the specific procedure laid down in rule 112, but it is of the view that this concerns an *additional* measure of protection for persons questioned under article 55(2) and not an alternative to the procedure laid down in rule 111. Indeed, the audio/video recording of the interviews of persons suspected of having committed a crime within the jurisdiction of the Court, is first and foremost a measure to safeguard the right of suspects to remain silent and to be presumed innocent. It may also be used to reduce subsequent traumatising of vulnerable witnesses in accordance with rule 112(4), or indeed as a tool for preserving evidence in case of a unique investigative opportunity. However, the Chamber considers that rule 111 applies regardless of whether the statements of a witness are being audio/video recorded. Accordingly, a signed witness statement has to be taken from any person being questioned by the Prosecution in connection with an investigation, which shall be communicated to the Defence in case the Prosecution decides to rely on the person’s testimony, or which has to be disclosed under article 67(2) of the Statute or rule 77 of the Rules.

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<sup>59</sup> ICC-01/04-01/07-1453-Conf-Exp, par. 24

**FOR THESE REASONS,**

**THE CHAMBER**


**GRANTS** the Prosecution Request 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;

**AUTHORISES** the transcripts of witness P-219 to be added to the List of Incriminating Evidence and the Table of Incriminating Evidence, in accordance with the Chamber's "Décision relative à la levée, au maintien et au prononcé de mesures d'expurgations" of 22 October 2009;


**ORDERS** the Prosecution to produce a signed witness statement of P-219;

**INVITES** the Prosecution to make all reasonable efforts to limit the number of topics on which it will question P-219, and to inform the parties and the Chamber of the results of this exercise when it submits his signed witness statement.

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 23 October 2009

At The Hague, the Netherlands