

**Cour
Pénale
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**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 THE CONGO

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

Public Document

Decision on the "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"

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

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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 article 82(1)(d) of the Rome Statute of the International Criminal Court (“Statute”), issues the following decision on the “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*” (“Application”).¹

I. BACKGROUND

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009.² 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. Filing such a request by 30 January 2009, effectively allowed the Prosecution to defer the disclosure of those items of evidence.

2. Adhering to the deadline, the Prosecution informed the Chamber that it was “seeking protective measures for witness P-219 in cooperation with the Victims and Witnesses Unit”³ 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.”⁴

3. After a lengthy process involving a number of *ex parte* hearings with the Prosecution and the Victims and Witnesses Unit,⁵ a solution regarding P-219 was

¹ “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*”, 2 November 2009, ICC-01/04-01/07-1586

² “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

³ “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

⁴ *Idem*.

⁵ The Chamber held a number of *ex parte* hearings on the matter: 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;

agreed upon. The Prosecution, on 7 July 2009 filed an *ex parte* Prosecution only request,⁶ seeking the addition of the transcripts of the interviews held with P-219 to its List of Incriminating Evidence. It further sought authorisation for a number of redactions to be applied to the said transcripts. Both requests were based on regulation 35(2) of the Regulations of the Court ("Regulations"). Contrary to usual practice, the Prosecution did not file a version of this request available to the Defence. The Chamber failed to notice this until after it had issued a decision on the request on 27 July 2009.⁷ In this decision, the Chamber ordered the Prosecution to produce a signed witness statement in lieu of the lengthy transcripts of the interviews held with P-219, which in their totality exceed 1000 pages.⁸

4. On 13 August 2009, the Prosecution applied for a variation of the Chamber's order,⁹ in which it requested the Chamber's permission to disclose a summary of P-219's statements instead of the signed witness statement. This request was subsequently rejected.¹⁰ A public version of its original request was filed on 13 August 2009.

5. On 18 August 2009, the Defence for Germain Katanga seized the Chamber with a request for clarification and, if necessary, the vacation of the Chamber's decision of 27 July 2009, at the same time reserving its right to appeal the Decision.¹¹ After having sought the instructions of the Chamber, the Defence for Mathieu

16 March 2009, ICC-01/04-01/07-T-62-CONF-EXP-ENGET, 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

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 la liste des éléments à charge et la liste des témoins à charge (Témoignage P-219)", 7 July 2009, ICC-01/04-01/07-1274-Conf-Exp

⁷ "Decision on the disclosure of evidentiary material relating to Witness 219", 27 July 2009, ICC-01/04-01/07-1338-Conf-Exp; a public redacted version of this decision was issued on 13 August 2009: ICC-01/04-01/07-1364

⁸ *Ibid.*, par. 27

⁹ "Application for the Variation of an Order regarding Witness 219", 18 August 2009, ICC-01/04-01/07-1371, the public redacted version of the filing is ICC-01/04-01/07-1372

¹⁰ ICC-01/04-01/07-1434, par. 17

¹¹ "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

Ngudjolo filed a consolidated response to both the Prosecution's Application and the submissions of the Defence for Mr. Katanga on 21 August 2009.¹²

6. On 27 August 2009, the Chamber issued a second decision on disclosure of evidence relating to P-219.¹³ The Chamber noted, *inter alia*,¹⁴ 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. 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. The Chamber invited the Defence to file observations on the said two aspects of the request that were yet to be ruled on.¹⁵ To enable the Defence to comment usefully on the issues, the Chamber ordered the Prosecution to communicate to the Defence the transcripts relating to P-219, exceptionally allowing the provisional application of the requested redactions.¹⁶ The redacted transcripts were disclosed to the Defence on 28 August 2009. The Defence was invited to submit its observations on the proposed redactions.¹⁷

7. After having received the parties' observations on the matter¹⁸, the Chamber rendered a third decision on the Prosecution request on 23 October 2009

¹² "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

¹³ "Decision on the disclosure of evidentiary material relating to witness 219", 27 August 2009, ICC-01/04-01/07-1434

¹⁴ Decision ICC-01/04-01/07-1434 in part dealt 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.

¹⁵ ICC-01/04-01/07-1434, par. 15 and 16

¹⁶ *Ibid.*, par. 17

¹⁷ *Ibid.*, par. 18

¹⁸ "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 ; "Defence observations relative to Witness 219", 7 September 2009, ICC-01/04-01/07-1460

("Impugned Decision").¹⁹ The Chamber ruled that the special situation of P-219 and the difficulties encountered by the Prosecution in finding a suitable solution constituted 'good cause' within the meaning of regulation 35(2) *first sentence*.²⁰ It referred to its previous finding on the matter,²¹ and held that after having "reconsidered this question in light of the observations made by the Defence, [it] finds no reason to depart from its previous decision that 'good cause' was shown."²²

8. Despite its finding that the Prosecution was able to show 'good cause' within the meaning of regulation 35 of the Regulations, the Chamber considered that the addition of the evidence relating to P-219 was not an automatic right. Rather, the Chamber considered it appropriate to exercise its judicial discretion in deciding whether to allow the material to be added to the Prosecution List of Incriminating Evidence at this late stage in light of the potential prejudice to the Defence.²³

9. Applying itself to the question of the potential prejudice caused to the Defence, the Chamber acknowledged that the statements of P-219 contained a lot of information pertaining to several aspects of the case.²⁴ Nevertheless, the Chamber noted that a redacted version of the said transcripts had already been disclosed to the Defence on 28 August 2009, and that the Defence would have adequate time and facilities to process the information included in the transcripts the Prosecution sought to disclose.²⁵ In order to allay Defence concerns that additional investigatory missions to the field may be required, the Chamber stated 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

¹⁹ "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

²⁰ ICC-01/04-01/07-1553, par. 23

²¹ "Decision on the disclosure of evidentiary material relating to Witness 219", 27 July 2009, ICC-01/04-01/07-1364, par. 10-14

²² ICC-01/04-01/07-1553, par. 23

²³ *Ibid.*, par. 24

²⁴ *Ibid.*, par. 27

²⁵ *Ibid.*, par. 27

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.”²⁶ No such request was received.

10. In further addressing the question of the prejudice that the late addition of P-219 could potentially cause to the Defence, the Chamber also considered the Prosecution’s proposed order of calling witnesses. It concluded that, given the fact that P-219 featured as the 19th witness to be called by the Prosecution, the Defence disposed of additional preparation time for his testimony.²⁷

11. Finally, the Chamber ordered the production of a signed statement by P-219.²⁸ This statement was produced on 17 December 2009²⁹, which the Chamber allowed to be added to the Prosecution List of Incriminating Evidence on 19 January 2010.³⁰

²⁶ ICC-01/04-01/07-1553, par. 29

²⁷ Ibid., par. 26

²⁸ Ibid., par. 35

²⁹ “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

³⁰ “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

A. Defence Application

12. On 2 November 2009, the Defence for Germain Katanga filed its Application.³¹ The Defence submits that the Impugned Decision “contains one error warranting the Appeals Chamber’s consideration; namely [that] the Trial Chamber erroneously accepted the late addition of witness P-219 to the Prosecution List of Incriminating Witnesses.”³² It is further contended that “[i]n rendering this wrongful decision, the Trial Chamber made three sub-errors”.³³ These ‘sub-errors’ are identified as follows:

“(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 [sic];

(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 submission of Witness P-219”³⁴

13. In other words, the Defence for Germain Katanga argues that the Chamber applied the wrong criterion in evaluating the Prosecution’s request for adding P-219 – ‘good cause’ instead of ‘exceptional circumstances’³⁵ – and that, moreover, in applying the criterion adopted it erred in finding that the Prosecution had shown good cause.³⁶ In addition, independently of these two alleged errors, the Defence asserts that the Chamber underestimated the prejudice caused to the Defence by the late addition of P-219 to the Prosecution’s case.³⁷

14. In the Defence’s view the combined effect of these alleged errors significantly affects the fairness and expeditiousness of the proceedings. An

³¹ ICC-01/04-01/07-1586, par. 3

³² Ibid., par. 1

³³ Ibid., par. 2

³⁴ Idem

³⁵ Ibid., par. 7

³⁶ Ibid., par. 8

³⁷ Ibid., par. 9

immediate resolution by the Appeals Chamber would therefore materially advance the proceedings.³⁸

15. In essence, all of the Defence's arguments relate to the same point, namely that the Defence will require much more time to prepare for the testimony of P-219 than it assumes is envisaged by the Impugned Decision. It is submitted that if additional time is not given to the Defence, they will suffer unfair prejudice, or, in the alternative, if extra time is given to the Defence, the proceedings will be unduly delayed.

B. Prosecution Response

16. On 6 November 2009, the Prosecution submitted its "Response to the Defence for Germain Katanga's Application for Leave to Appeal the Decision on the Addition of Witness 219" ("Response").³⁹ The Prosecution does not challenge the fact that the appealable issue arises out of the Impugned Decision⁴⁰, but it does not agree that the issue meets the criteria for leave to appeal.

17. In relation to the question whether the Impugned Decision affects the fair conduct of the proceedings, the Prosecution argues that "a disagreement over the adequacy of the measures [to compensate any possible prejudice to the Defence] 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)."⁴¹ Moreover, the Prosecution states that "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."⁴²

³⁸ Ibid., par. 10

³⁹ ICC-01/04-01/07-1608

⁴⁰ Ibid., par. 8

⁴¹ Ibid., par. 11

⁴² Ibid., par. 14, referring to par. 22 of the Application.

18. With regard to the question as to whether the Impugned Decision may impact the expeditious conduct of the proceedings, the Prosecution submits that accepting the Defence objection “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.”⁴³

19. Concerning the potential impact of the Impugned Decision on the outcome of the trial, the Prosecution does not deny that the addition of an important witness may have this effect. However, the Prosecution submits that “while the testimony of witness P-219 is important, any impact is not as direct or certain as portrayed by the Defence.”⁴⁴

20. Finally, the Prosecution argues that an immediate resolution of the issue by the Appeals Chamber is not necessary, because it would involve appellate review of speculative arguments about prejudice which has not yet been sustained.⁴⁵ Instead, the Prosecution argues, “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 admission of this evidence at this stage, then it may raise this issue as apart of a final appeal.”⁴⁶

⁴³ Ibid., par. 17

⁴⁴ Ibid., par. 21

⁴⁵ Ibid., par. 24

⁴⁶ Ibid., par. 24

II. ANALYSIS AND CONCLUSION

21. Having regard to article 81(2)(d) of the Statute, as interpreted by the Appeals Chamber in its "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal"⁴⁷ of 13 July 2006, the Chamber considers the issues raised by the Defence in light of the following criteria:

- a) Whether the matter is an "appealable issue";
- b) Whether the issue at hand could significantly affect:
 - (i) The fair and expeditious conduct of the proceedings; or
 - (ii) The outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

22. The requirements set out in a), b), and c) above, are cumulative. The failure to fulfil one or more of them is fatal to an application for leave to appeal.⁴⁸

A. Is there an appealable issue?

23. As has previously been stated by the Appeals Chamber, an "issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion [...] An issue is constituted by a subject, the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one."⁴⁹

⁴⁷ "Judgement on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, par. 9-20

⁴⁸ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Application to Lift the Stay of the Proceedings'", 24 September 2008, ICC-01/04-01/06-1473, par. 22

⁴⁹ "Judgment on the Prosecutor's Application for Evidentiary Review of Pre-Trial Chamber I's

24. The Chamber is of the view that the issue as defined by the Defence does not qualify as an appealable issue. Although two of the sub-issues are related to the application of regulation 35 of the Regulations, this was not the basis upon which the Chamber decided to admit the late addition of P-219. Rather, as the Chamber stated in paragraph 24 of the Impugned Decision, “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.” The Chamber went on to consider whether the late addition of P-219 would violate the right of the accused to have a fair trial and to have adequate time and facilities for the preparation of their defence.

25. The real point of contention is thus whether or not the Chamber will – in the future – give the Defence sufficient time to prepare for the testimony of P-219. The Defence has been heard on this issue and the Chamber has considered its arguments. However, the Chamber has decided to allow the addition of P-219 despite these arguments. It therefore seems that this is a question on which the Defence is simply in disagreement. The Appeals Chamber has stated clearly that questions over which there is merely disagreement or conflicting opinion do not form an appealable issue.⁵⁰ Accordingly, this is the type of decision which typically falls within the full discretion of the Trial Chamber, and for which, in the opinion of the Chamber, interlocutory appellate review is excluded, except in the most exceptional circumstances.

26. Indeed, if the Appeals Chamber were to review at this stage, the Trial Chamber’s assessment of the impact of the late addition of P-219 to the Prosecution Witness List, it would necessarily have to speculate, since it is not yet known how much time the Defence will have had to prepare for cross-examination of P-219. Moreover, it is not yet known whether and, if so, to what extent, the Chamber will rely on his testimony in reaching its judgment. Matters of this kind can only be meaningfully reviewed in light of the proceedings as a whole, when the real impact

31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, par. 9

⁵⁰ Idem

of the decision can be evaluated. They do not raise matters of principle, the impact of which can be appraised independently of the specific facts of the case.

27. Consequently, regardless of whether the issue has the potential of significantly affecting the fair and expeditious conduct of the proceedings or the outcome of the trial, the matter cannot be properly reviewed by the Appeals Chamber as an interlocutory appeal.

FOR THESE REASONS,

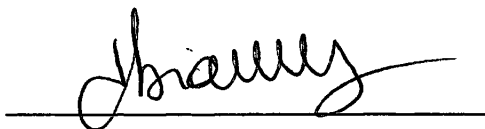
THE CHAMBER,

REJECTS the Defence's Application for leave to appeal;

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 20 April 2010

At The Hague, the Netherlands