



Original: **French**

No.: **ICC-01/04-01/07**
Date: **30 August 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 THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Redacted Version

**Decision on the Application by the Defence for Germain Katanga for Disclosure
of the Audio Records of Interview of Witness P-219**

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, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

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 Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

TRIAL CHAMBER II of the International Criminal Court (“the Chamber”), acting pursuant to rules 76, 77 and 111 of the Rules of Procedure and Evidence (“the Rules”) and regulation 23*bis* of the Regulations of the Court, decides as follows:

I. Background

1. By an urgent application dated 8 July 2010,¹ the Defence for Germain Katanga (“the Defence”) requested disclosure of the audio records of the interviews conducted between the Office of the Prosecutor and Witness P-219 in December 2009 for the purpose of producing a signed statement from the witness, in accordance with the order of the Chamber in its decision of 23 October 2009.² The Defence bases its request on rule 77 of the Rules, inasmuch as those audio records are material to the preparation of the cross-examination of that witness.³ It further contends that the Prosecutor is obliged to disclose all witness statements in his possession, regardless of their form.⁴

2. The Prosecutor responded to the Defence’s request on 19 July 2010.⁵ He contends, firstly, that the audio records in question are not material to the preparation of the defence of the accused persons within the meaning of rule 77 of the Rules,⁶ and, secondly, that it follows from rules 76 and 111 of the same Rules that he is only

¹ Defence for Germain Katanga, “*Defence Request for the Disclosure of the Audio Records of Interview of Incriminating Witness 219 Dated December 2009*”, 8 July 2010, ICC-01/04-01/07-2250.

² *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. The Defence had previously requested that this be unofficially disclosed to the Prosecutor, however this request was rejected and the Defence was invited to seize the Chamber of the matter (see ICC-01/04-01/07-2250, paras. 1 to 3).

³ ICC-01/04-01/07-2250, paras. 5 and 6.

⁴ *Ibid.*, paras. 7 to 8.

⁵ Office of the Prosecutor, Response of the Prosecution to the “Defence Request for the Disclosure of the Audio Records of Interview of Incriminating Witness 219 Dated December 2009”, 19 July 2010, ICC-01/04-01/07-2291-Conf-Exp and ICC-01/04-01/07-2291-Conf-Red (confidential redacted version).

⁶ *Ibid.*, paras. 12 and 17 to 20.

obliged to disclose the statements of incriminating witnesses in the form of a written record, and that audio records do not fall within the scope for disclosure.⁷

II. Analysis

3. The Chamber is of the view that rule 111 of the Rules does not have the effect of limiting the scope of the Prosecutor's disclosure obligations. In fact, it sets only one *minimum* requirement as to how all statements must be recorded by his Office. It follows that, when the Office of the Prosecutor discloses any such statement in accordance with rule 76, it must necessarily do so in the form of a record signed by the person questioned, even if the Office has had recourse to other forms of record. Such is the interpretation that was upheld by the Chamber in its decision of 23 October 2009.⁸ However, neither the aforementioned rule 111 nor that decision has the effect of excluding the disclosure of an audio record which the Prosecutor has made, even though he was not required to do so, if, in particular, it becomes apparent that this audio record is material to the preparation of the defence within the meaning of rule 77 of the Rules, which covers all kinds of "material", subject only to the restrictions of the Statute and to rules 81 and 82.

4. In the present case, the Chamber considers that, contrary to what the Prosecutor suggests,⁹ the Defence does not have to provide concrete examples to support its allegations relating to discrepancies between different statements by the witness concerned, or to the witness's credibility, in order to demonstrate that the audio records in question are material to the preparation of the defence. In effect, preparing the cross-examination of a witness will inevitably prompt speculation as to his or her credibility or to any inconsistencies, and access to the audio records of the interview, in addition to the record of the statement, can only facilitate that task. Further, the Chamber notes that such disclosure would not cause any prejudice to

⁷ Ibid., paras. 13 and 14.

⁸ ICC-01/04-01/07-1553, para. 35.

⁹ ICC-01/04-01/07-2291-Conf-Exp, paras. 17 to 20.

the Prosecutor and, moreover, that he has not presented any argument to that effect. The Chamber accordingly considers that the Prosecutor must disclose such audio records to the Defence, in accordance with rule 77.

5. [REDACTED]¹⁰

6. Finally, the Chamber notes that, although the Prosecutor has justified the fact that his response¹¹ is *ex parte*, only available to the Office of the Prosecutor and the Defence for Germain Katanga, he has not, however, explained why the redacted version of that response to a public request was confidential. With a view to ensuring that the proceedings are conducted publicly, the Chamber considers it appropriate to reclassify the Prosecutor's filing, unless the Prosecutor is able to demonstrate, within two days following notification of the present decision, that the redacted version of his response contains confidential information.

FOR THESE REASONS, the Chamber

GRANTS the application;

[REDACTED];

[REDACTED];

ORDERS the Prosecutor to disclose the requested audio records to the Defence for Germain Katanga and to the Defence for Mathieu Ngudjolo [REDACTED]; and

ORDERS the Registry to reclassify ICC-01/04-01/07-2291-Conf-Red as a public document, unless the Prosecutor raises an objection within two days following notification of the present decision.

¹⁰ ICC-01/04-01/07-2291-Conf-Exp, footnote 16.

¹¹ *Ibid.*, para. 4.

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Christine Van den Wyngaert

Dated this 30 August 2010
At The Hague, The Netherlands