



Original: **French**

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

Date: **8 February 2012**

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 with confidential annex

Decision on the Prosecutor's request seeking leave to meet Witness P-219 in the presence of the Victims and Witnesses Unit

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

Office of the Prosecutor

Mr Luis Moreno Ocampo, 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 Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section Other**

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”, respectively), acting pursuant to article 64 of the Rome Statute and rule 134(3) of the Rules of Procedure and Evidence, decides the following.

I. Background and submissions of the parties

1. On 31 January 2012, the Office of the Prosecutor (“the Prosecutor”) e-mailed the Chamber in accordance with Decision 2711 of 18 February 2011 (“Decision of 18 February 2011”)¹ seeking the Chamber’s leave (“the Prosecutor’s request”)² to meet Witness P-219 in the presence of the Victims and Witnesses Unit (“VWU”). The Prosecutor stated that he had recently been informed of problems related to the safety of Witness P-219, and recalled that [REDACTED] the witness [REDACTED]. The Prosecutor stated that, after approaching VWU to discuss Witness P-219’s security needs, it was agreed that a joint meeting between the Office of the Prosecutor, VWU and Witness P-219 would be advisable “in order to address his security needs more appropriately and take any protection measures deemed necessary”.³ The Prosecutor emphasised that the meeting would be held in the presence of a member of VWU and that absolutely no discussion of the facts of the case or P-219’s testimony before the Chamber would take place.⁴

2. By e-mail of the same day, the Chamber instructed the parties and participants to state any objections to the Prosecutor’s request by 4 p.m. on 2 February 2012.⁵

3. On 1 February 2012, the Defence for Germain Katanga stated that it would not object to a joint meeting between the Office of the Prosecutor, VWU and Witness P-219, but that it wished to be informed of any changes requested by the witness and

¹ *Decision on the Office of the Prosecutor’s request to communicate with Witness P-250*, 18 February 2011, ICC-01/04-01/07-2711-Conf-tENG (see also the public redacted version, ICC-01/04-01/07-2711-Red-tENG).

² E-mail to the Chamber from the Office of the Prosecutor, 31 January 2012 at 14.39. See the annex to this decision.

³ *Ibidem*.

⁴ *Ibidem*.

⁵ E-mail from a legal officer of the Chamber to the parties and participants, 31 January 2012 at 15.16. See the annex to this decision.

the reasons given.⁶ The Prosecutor responded, agreeing to inform the Defence of the outcome of the meeting, under the proviso that he would not disclose any information which might compromise the witness's safety and protection.⁷ The Defence for Germain Katanga accepted this proposal.⁸

4. That same day, the common legal representative of the main group of victims ("the Legal Representative") submitted his observations and requested the Chamber to grant the Prosecutor's request.⁹ However, he noted that, although the Chamber stated in its Decision of 18 February 2011 that restrictions on contact between a party and a witness were to apply only until the end of the substantive hearings, he was of the view that they should remain in place for the integrity of the proceedings.¹⁰ He added that it could not yet be ruled out that in the event of an appeal the Appeals Chamber would be required to examine one of the witnesses or to remand a factual issue to the Trial Chamber, which could require the witness to be recalled.¹¹

5. On 2 February 2012, the Defence for Mathieu Ngudjolo submitted a response requesting the Chamber to dismiss the Prosecutor's request.¹² It essentially relied on the absence of any indication as to the nature and gravity of the problems allegedly faced by Witness P-219¹³ and the lack of any legal basis for the request.¹⁴

⁶ E-mail to the Chamber from the Defence for Germain Katanga, 1 February 2012 at 10.11. See the annex to this decision.

⁷ E-mail to the Chamber from the Office of the Prosecutor, 1 February 2012 at 10.43. See the annex to this decision.

⁸ E-mail to the Chamber from the Defence for Germain Katanga, 1 February 2012 at 11.32. See the annex to this decision.

⁹ Common legal representative of the main group of victims, "*Observations sur la requête du Procureur en vue de pouvoir contacter le témoin à charge P-219*", 1 February 2012, ICC-01/04-01/07-3230-Conf.

¹⁰ *Ibid.*, para. 5.

¹¹ *Ibidem.*

¹² "*Réponse de la Défense de Mathieu Ngudjolo à la Requête de l'Accusation afin d'être autorisée à rencontrer le témoin OTP-P-0219 en présence de l'Unité des victimes et des témoins (Courriel du 31 janvier 2012)*", 2 February 2012, ICC-01/04-01/07-3232-Conf.

¹³ *Ibid.*, paras. 4-6.

¹⁴ *Ibid.*, paras. 4 and 7-10.

II. Discussion

6. In its Decision of 18 February 2011 on the conditions in which it is possible for a party to contact a witness after the witness has testified, the Chamber considered, following Trial Chamber I's stance on the matter, that once a witness has completed his or her testimony, "contact between the party which called the witness and the witness should be prohibited until all evidence has been presented in the case".¹⁵ However, it conceded that, in certain circumstances, it may be necessary for a party which called a witness to re-establish contact with the witness. It emphasised that such situations, which it believed to be exceptional, should be brought to its attention in advance. It added that it would rule on a case-by-case basis on such requests and the conditions in which meetings might take place.¹⁶

7. The Chamber is of the view that the Legal Representative's argument that the prohibition of contact should be extended beyond the closure of the submission of evidence does not contain any new material which would prompt it to revisit the aforementioned Decision of 18 February 2011.

8. The Chamber nevertheless notes that, on 7 February 2012, it declared the presentation of evidence closed, in accordance with article 64 of the Rome Statute and rule 141 of the Rules of Procedure and Evidence.¹⁷

9. In light of that decision, it therefore holds that the prohibition of contact between a party which called a witness and that witness is now lifted, that the Chamber's leave is no longer required and that the Prosecutor's request must be considered null and void.

10. Furthermore, the Chamber takes formal note of the agreement reached between the Prosecutor and the Defence for Germain Katanga that the Prosecutor is

¹⁵ Decision of 18 February 2011, para. 10.

¹⁶ *Ibidem*.

¹⁷ *Déclaration de la clôture de la présentation des moyens de preuve*, 7 February 2012, ICC-01/04-01/07-3235.

prepared to inform the Defence of the outcome of the proposed meeting, under the conditions set out at paragraph 3 of this decision.

FOR THESE REASONS, the Chamber

DECLARES the Prosecutor's request null and void; and

TAKES FORMAL NOTE of the agreement reached between the Prosecutor and the Defence for Germain Katanga that the latter be informed of the outcome of the meeting.

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 8 February 2012,

At The Hague, The Netherlands