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

Date: 4 May 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 CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Redacted Version of the

Urgent Defence request for disclosure

Source: Defence for Mr. Germain Katanga

Document 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
Mr Eric Macdonald, Senior Trial Lawyer

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence for Mr. Germain Katanga ('Defence') hereby requests that it be provided with the photos, in the possession of the Prosecutor, of incriminating witnesses. The Defence further requests disclosure of any items relating to the identity of the incriminating witnesses, such as identity cards, that are or have been in the possession of the Prosecutor.
2. The application does not apply to witnesses 233, 419, 418, 373, 30, 2 or 317. In respect to those incriminating witnesses that are due to give evidence this week – witnesses 249 and 132 – this application is necessarily very urgent.
3. This request for disclosure has been prompted by a number of factors. In particular, over the past several months the Defence has met with difficulty in making its investigations into individual incriminating witnesses and the histories that they have related in their statements. The aggregate effect of these difficulties has prompted this application at this time. It is to be noted that several of the witnesses who gave oral testimony have departed considerably from their written accounts. The Defence has met with difficulty and confusion in respect of several of the witnesses yet to give evidence. A number of witnesses may be known under a different name or alias. For example Witness 249 and 132 appear to be known under several names. Witness 132 admits to having provided a false name. Investigations into 249 and 132 have proved to be particularly complicated.
4. At present the Defence is subject to a regime in respect of photographs of witnesses that is unduly limiting. The Defence has attempted to conduct the case with the current restrictions imposed by the Prosecution but it has come to realise that it has been considerably handicapped by not having copies of the photographs. The disclosure of a photo image of a witness to the Defence and to the accused is important. The accused may be unable to remember a name but may recall a face. The present system of showing paper copies during a disclosure meeting or in Court is very limiting. It is unfair and unduly restrictive to Defence investigations to allow the Defence access to photographs of witnesses only shortly before or on the first day of testimony of the witness in Court. Not all members of the Defence team may be present at the limited opportunity offered by the Prosecution. The Defence investigator, the very person conducting most of the investigations, is never present.

5. Further, in addition to the Defence team and the accused having access to such photographs the photographs should also be available to the Defence for the purpose of investigations. A photo is an important tool for investigations. It may be the only means of triggering a recollection and confirming or contradicting essential elements of an incriminating witness's statements. Potential defence witnesses may not recall or know a name, but may well recognise a face. The use of a photograph is essentially no different in practice, or revealing of identity, than the use of a name. The essential precaution to take is that in using the photograph the Defence do not identify its subject as being a witness or person associated with the Court.
6. The Defence will discharge its responsibilities in a very cautious manner. The Defence helped in drafting the recent, approved protocol relating to the non-identification of persons as incriminating witnesses. The manner of dealing with photographs plainly falls within that approved practice and will be strictly adhered to. For example, if a photograph of an incriminating witness is shown it will not be shown in isolation but together with other photographs. The Defence will not reveal that a photo is of a witness or of someone otherwise connected to the Court.
7. More specifically, the Defence for Ngudjolo requested the Prosecution to disclose photographs of Witness 28. The Prosecution, on 3 November 2009, agreed only to show the Defence paper copies in Court. The Defence was not allowed to retain these photos.¹ At the time, the Defence believed it was the practice of the Prosecution of the ICC. The Defence subsequently discovered² that the Prosecution in the Lubanga case disclosed in 'Ringtail' photos of Witness 157 to the Lubanga Defence. Witness 157 is an incriminating witness in both the *Lubanga* and the *Katanga* cases. The Defence then requested their disclosure by email on 22 April 2010 but the Prosecution replied by email of 23 April 2010 that *'Like the practice for witness 28 and 250, we can show you the pictures of the witness but for security reasons and as per the practice in our case we are not disclosing these pictures.'* (underlined by the Prosecution itself in the email).
8. Further, the Defence recently realised that the Prosecution had not disclosed all the material in its possession regarding Witness 132. Consequently the Defence, by email

¹ ICC-01/04-01/07-T-76-CONF-ENG CT 03-11-2009, pp 59-61.

² By studying the Prosecution Table listing all the evidence disclosed to the Lubanga Defence and not disclosed to the Katanga and Ngudjolo Defence, sent by email to the Katanga Defence on 31 March 2010.

of 26 April 2010, requested the disclosure of the electoral card produced by W-132 and information on a phone call by the witness with the Prosecution on 25 June 2008. The Prosecution replied by email of 28 April 2010 that they were ready to show the electoral card to the Defence but refused to disclose it in conformity with the practice in the Katanga case *‘since it contains a photograph of the witness’*.

9. There is no good or apparent reason why the Katanga Defence team should be subject to a different disclosure regime than that which appears to be the applied in the Lubanga case. The Defence for Mr. Katanga respects the same rules as the Defence for Lubanga and respects the same confidentiality obligations.
10. The Defence is also concerned at the level of disclosure it is receiving. During the disclosure meeting of 28 April 2010, the case manager for the Katanga Defence was shown the electoral card of Witness 132, containing a picture of the witness, and the following information: *carte d’électeur, Name: [REDACTED], Prénom: [REDACTED], secteur d’origine: [REDACTED], Père: [REDACTED], Mère: [REDACTED]*. Aside from the importance of the photograph the Defence should also have had disclosed to it this further information.
11. The information contained on the electoral card of Witness 132 demonstrates the necessity to disclose such documents to the Defence. Witnesses may be confused or misleading about their date of birth and can give different dates of birth between their statement and oral testimony. This electoral card is obviously relevant to W-132’s testimony and should have been disclosed spontaneously by the Prosecution earlier, without the Defence having to request it. It is not the role of the Defence to investigate the evidence the Prosecution has in its possession on incriminating witnesses. Everything relating to an incriminating witness is relevant for the Defence.

Reliefs sought

12. The Defence respectfully requests the Chamber;

(i) to order the Prosecution to disclose the photographs of the incriminating witnesses, other than those referred to above, in the possession of the Prosecution.

- (ii) to order the Prosecution to disclose documents such as identity cards relating to an incriminating witness that is or has been in the possession of the Prosecution.
- (iii) to permit the Defence to show, for the purposes of its investigation and in strict conformity with the recent witness protocol, such photographs to other persons.

Respectfully submitted,



David Hooper Q.C.
Lead Counsel for Mr. Germain Katanga

Dated this 4 May 2010
At London