

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: 14 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***

Confidential

**Defence Observations on Victims and Witnesses Unit's Observations on Different
Questions in relation to the Documents ICC-01/04-01/07-2061 and ICC-01/04-01/07-
2060-Red**

Source: Defence for Mr Germain Katanga

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

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Observations of the Defence

1. The Defence for Mr. Katanga ("Defence") hereby submits its observations in response to the observations of the Victim and Witness Unit ("VWU") on the use of photographs during defence investigations,¹ as addressed in Defence Motions ICC-01/04-01/07-2061 and ICC-01/04-01/07-2060-Red.
2. The Defence notes that the VWU recognizes the usefulness of a photo as a tool to identify individuals in the field.² This is precisely the reason for which the Defence seeks permission to use photos in its investigations. It has proven difficult to identify persons in other ways, particularly given that some of them have given different identifying details on different occasions. In respect of some of the Prosecution witnesses, particularly W-249 and W-132, there has been significant confusion about their identity. Real difficulties arise when identifying witnesses with means other than photographs.
3. The Defence fully agrees with the VWU that the names of family members 'can equally be a useful tool to identify individuals in the field'. In this regard, the VWU correctly points out that family members in the DRC do not necessarily bear the same name and that, therefore, 'knowing the names of parents, siblings or other relatives can ... be helpful to establish the identity of an individual'.³ The experience of the Defence is that, in practice, the matrix of family relationships is often essential to reliable investigations. In this regard, the Defence notes the importance of early disclosure of the names and whereabouts of family members. These details are often withheld from the Defence and their absence hampers defence investigations.
4. However useful family names are, their disclosure is no substitute for photographs, particularly where third persons may only know the person by sight rather than by name. Notwithstanding the valuable and appropriate observations of the VWU on this point, the Defence maintains its need to use a photograph to identify persons in investigations.

¹ ICC-01/04-01/07-2092-Conf, Victims and Witnesses Unit's observations on different questions in relation to the documents ICC-01/04-01/07-2061 and ICC-01/04-01/07-2060-Red, 11 May 2010.

² 2092-Conf-Anx-1, page 1 Re(1).

³ 2092-Conf-Anx-1, page 1 Re(2).

5. The VWU further holds that, culturally, the use of pictures can be viewed as intrusive in the context of the DRC, particularly if the picture is taken without prior consent of the person in the picture. According to the VWU, a person's image may generally 'be emotively held as important to the person's integrity and as such is viewed to be very personal'.⁴ For this reason, the VWU recommends considering 'to seek prior consent of or providing further explanations to the concerned witnesses before the use of photos is authorised'; or 'to inform the concerned persons accordingly'.⁵
6. Whilst the Defence is sensitive to cultural values and differences, the experience of the Defence in its investigations in the DRC does not support this view. In dealings with potential defence witnesses, the Defence has not met reluctance in people to have his or her picture taken. Before taking a picture of anyone, the Defence always seeks the person's prior approval. Nobody has so far refused or raised any concern that his or her picture be taken. The Defence has never had the impression that people in the DRC have any issue with their photograph being taken. On the contrary, most persons the Defence has spoken to rather like to be photographed notwithstanding that some of them have expressed serious concerns about their safety and their fears of testifying. To the surprise of the Defence, no questions were ever asked as to the purpose of the photographing of their images. It appeared not to be a concern for any of them. Thus, the Defence is not convinced that a person's image in the DRC may be 'emotively held as important to the person's integrity and as such is viewed to be very personal'. For the same reasons, the Defence is not convinced that there 'is a high risk of adverse psychological impact if photos are used without prior knowledge and consent of the concerned witnesses'.⁶
7. The Defence nonetheless fully appreciates the delicacy of showing pictures of prosecution witnesses to third parties. It understands the concerns of the VWU that, if not done with care and precaution, such showing may increase the level of risk for the individuals concerned.⁷ The Defence concedes that a wide distribution of pictures of prosecution witnesses may increase the risk of them being identified as prosecution witnesses. It agrees that such showing should be kept to a minimum and done only in circumstances where no other tools are available to find out whether a person knows

⁴ 2092-Conf-Anx-1, page 1.

⁵ Ibid.

⁶ 2092-Conf-Anx-1, page 2 Re(5).

⁷ 2092-Conf-Anx-1, page 1, Re(3).

the prosecution witness in question. Provided it is careful in using photographs, the Defence is of the view that there are ways of using photographs without increasing the risk of the persons in the photographs being identified as persons linked to the Court. As is the case in referring to their names, the key is that the Defence takes extreme care in not revealing that the person in the photograph is a prosecution witness. There can be many reasons why a photograph is being shown to a person. In order to test the credibility of potential defence witnesses, the Defence regularly shows them photographs of individuals who they have referred to in their testimony. These could be other potential defence witnesses whose images were photographed by the Defence or persons whose photographs the Defence has obtained in another way, for instance, through the media. It sees therefore no reason why it cannot be done in respect of prosecution witnesses without putting them at risk.

8. The Defence submits that, if done appropriately, there is no difference in effect between showing the picture of a prosecution witness and reference to a prosecution witness's name. In this regard, it notes that the VWU concedes that an increased risk for the security of a witness may be reduced by showing several pictures of different persons. The Defence, therefore, requests that the VWU, the Chamber, the Prosecution and victim representatives have confidence in the professionalism of the Defence in ensuring that prosecution witnesses are not placed at a higher risk and using this tool only where appropriate. In certain situations, it may be necessary to show only one photograph instead of several – a situation met only few days ago by the Defence when dealing with a specific witness who was well known to the party being asked to identify the person in a photo. The Defence has no objection to seeking the advice of the VWU when dealing with particularly vulnerable witnesses. It is also willing to keep a record of the persons to whom a photograph of a witness is shown. The Defence is further prepared to discuss matters in more detail with the VWU with the aim to include the use of photographs in the joint protocol. Again, in exceptional circumstances a party can apply to the court to order more restrictive limits in a particular case of sensitivity.
9. It is respectfully submitted that this is a more practical solution than imposing an obligation on the Defence to seek prior permission from the Court in every circumstance it shows a photograph to a third party, or to seek the prior consent of each single prosecution witness that his or her photograph be exceptionally shown to

third parties. It is rarely clear what will happen in the course of an investigation. There will not always be time to seek leave. It is not a practical solution. In addition, the VWU is best placed to inform the Defence of particular risks to witnesses in concrete situations and the Defence will certainly tailor its investigations accordingly.

Relief Sought

On those grounds, the Defence requests the Trial Chamber to grant it authorisation to use photographs of protected witnesses in its investigations, provided it does so in an appropriate and careful manner and, if considered necessary, after discussing the matter further with the VWU.

Respectfully submitted,



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

Dated this 14th May 2010
At The Hague, The Netherlands