

**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 THE CONGO

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

Confidential

Prosecution's Response to VWU's Observations of 11 May 2010

Source: Office of the Prosecutor

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

The Office of the Prosecutor

**Counsel for the Defence of Germain
Katanga**

Mr David Hooper

Mr Andreas O'Shea

**Counsel for the Defence of 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

Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Confidentiality

1. The Prosecution submits the present document as Confidential as it responds to a filing and addresses information classified as confidential.

Background

2. On 4 May 2010, the defence of Germain Katanga ("the Defence") requested Trial Chamber II ("the Chamber") to order the Prosecution to disclose photographs of some incriminating witnesses in the possession of the Prosecution, as well as some additional documents relating to the identity of these witnesses, and to permit the Defence to show, for the purposes of its investigation and in conformity with the recent witness protocol ("the Protocol"),¹ such photographs to "other persons" ("Defence Request").²
3. On 5 May 2010, the Defence Request was discussed during a hearing before the Chamber and the Prosecution made extensive submissions on this matter.³
4. On 11 May 2010, the VWU filed its observations on the Defence Request ("VWU Observations").⁴
5. The Prosecution hereby responds to the VWU Observations.

Submissions

6. The Prosecution agrees with the assessment of the VWU that "the use of photos potentially has a very high impact on the level of risk for the individuals concerned".⁵ As stated by the VWU, this impact is not limited to witnesses who are participants to the Court's protection program. Rather, showing photographs

¹ ICC-01/04-01/07-2007-Anx1.

² ICC-01/04-01/07-2060-Conf-Exp ; ICC-01/04-01/07-2060-Red.

³ ICC-01/04-01/07-T-136-CONF-ENG, pp. 2-14.

⁴ ICC-01/04-01/07-2092-Conf-Anx.

⁵ VWU Observations, p. 1, Re(3).

of a witness may also undermine the effectiveness of procedural protective measures which have been granted by the Chamber. The use of photographs as requested by the Defence would not only impact on existing protective measures, but, according to the VWU, it will in effect limit the availability and effectiveness of the measures which the Chamber will be able to order in the future.⁶

7. The Prosecution further endorses the assessment of the VWU that the use by the Defence of photos of Prosecution witnesses during its investigations affects not only the actual level of risk of Prosecution witnesses, but also the subjective perception of witnesses that they are "at a very high level of risk". According to the VWU this may cause "extreme difficulties" in the management of witnesses and ultimately affects the willingness of these witnesses to cooperate with the Court.⁷
8. As a result of the above, the VWU strongly advises the Chamber against a "blanket" approach of authorising the use of photos, and recommends that any authorisation to that effect be "based on a specific application" by the Defence. According to the VWU, such an application must outline the target to achieve during the investigation, the particular line of inquiry, and demonstrate that alternative modes of investigations were exhausted or not feasible.⁸
9. The Prosecution agrees with these recommendations. A specific application to be made on a case-by-case basis will allow the Chamber to assess the impact that the use of photographs will have on the risk of a particular Prosecution witness. Moreover, as a request must identify a specific forensic purpose and a particular line of inquiry, the Chamber will be able to conduct a proper balancing exercise between the value of a specific investigative step and the identified risk. In so doing, the Chamber will, in compliance with its duty under Article 68(1), ensure that witnesses are appropriately protected,⁹ and it will further provide that

⁶ *Ibid.*

⁷ VWU Observations, p. 2.

⁸ VWU Observations, p. 2.

⁹ See also ICC-01/04-01/07-776 OA 7, para. 101.

witnesses who decide to cooperate with the Court are able to testify free from fear and intimidation.

10. If the Chamber were to grant blanket authorization to the Defence to use photographs of Prosecution witnesses during its investigations, it would effectively outsource its statutory duties to a party which has no obligation to protect witnesses, or the resources or information to make an informed assessment of the risk that the use of photographs would have to witnesses and their families.
11. The Prosecution is mindful of the Chamber's duty under Article 64(2) of the Statute to balance the protection of victims and witnesses against the fairness of proceedings and the rights of the accused.¹⁰ The Defence has an undisputed right to investigate and prepare its case. However, this right does not abrogate the obligation upon the Court to ensure that witnesses are adequately protected.¹¹ Respecting the rights of the Defence does not permit the Court to place the assessments of risk, and the appropriate actions to prevent and manage that risk, solely in the hands of the Defence and beyond any judicial review. These powers – and duties – must be retained by the Chamber.
12. For these reasons, the Prosecution agrees with VWU's recommendation that the Chamber must require the Defence to make a discrete application if it wishes to use a photograph during its investigations. It must then decide on a case-by-case basis whether and under what conditions it is warranted to grant the Defence such authorization. The Prosecution also supports the VWU's proposition to require the Defence to keep a log of all instances where photographs have been used. Regarding the idea of amending the Protocol to reflect these additional

¹⁰ The requirement to balance the need for protection of witnesses against the rights of the accused applies also at the trial stage – see e.g. ICC-01/04-01/06-2209-Red, para. 9. Such a balance necessarily requires a careful case-by-case analysis based on all of the relevant facts (para. 10). See also ICC-01/04-01/06-1924-Anx2, paras 16, 18, 20.

¹¹ There have been circumstances in which items or information which may have been material to the preparation of the Defence was not provided because of security concerns. In those cases the Chamber balanced the different interests at stake and looked for alternative measures – see e.g. ICC-01/04-01/06-1924-Anx2; ICC-01/04-01/06-2209-Red.

safeguards for the purposes of the Defence's use of photographs, the Prosecution recalls its general concerns over the Protocol.

13. As the Chamber is aware, the Prosecution has a range of broader concerns regarding the Protocol. To the extent that any amendments to the Protocol are limited to the manner in which the Defence may use photographs of Prosecution witnesses, this alone will not address the Prosecution's concerns or impact on its application for leave to appeal the decision endorsing the Protocol.¹² Even with the amendments proposed by the VWU, the Protocol would continue to fall short of providing appropriate safeguards for the bulk of all the instances in which other protected information of Prosecution witnesses (such as their identity or other identifying information) is revealed to third parties.¹³

Conclusion

14. For the above reasons, the Prosecution requests that the Chamber either reject the Defence Request or ensure that any use by the Defence of photographs of Prosecution witnesses is subjected to appropriate safeguards, especially the Chamber's control on a case-by-case basis of the instances and the manner in which the photographs are to be used.



Luis Moreno Ocampo, Prosecutor

Dated this 14th day of May 2010

At The Hague, The Netherlands

¹² ICC-01/04-01/07-2062.

¹³ This may not be the case, however, if the Protocol were to be amended in a manner that includes appropriate guarantees similar to those proposed by the VWU for the use of photographs, and especially if the Chamber's continuous control over the instances and the manner in which confidential information is disclosed by the Defence to third parties, were to be extended to all types of protected information and not only to the image of Prosecution witnesses.