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Date: **24 September 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

**Prosecution's Response to Defence's urgent request to use the pictures of
witnesses P-249, P-268 and P-353**

Source: Office of the Prosecutor

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

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1. On 10 September 2010, Defence for Germain Katanga filed a request seeking the authorization to use the pictures of Witnesses P-249, P-268 and P-353 in the course of their investigations (“Defence’s request”).¹ On 13 September 2010, the Chamber requested that the participants and the Victims and Witnesses Unit (“VWU”) file observations on this request.² On 16 September 2010, the Legal Representatives of the Victims filed their observations.³
2. The Prosecution submits that the Defence’s request should be rejected as it does not follow the prescriptions set out by Trial Chamber II (“Chamber”) in its “Decision sur la requête de la défense de Germain Katanga relative à la communication et l’utilisation de photographies de témoins protégés” (“31 May decision”).⁴

Request for Confidentiality

3. The Prosecution submits this filing as confidential, to follow the same confidentiality level as the Defence’s request. Although the Defence’s request is confidential, the Prosecution has no objection to its response being reclassified as public if the Chamber so decides.

Submission

4. On 31 May 2010, the Chamber decided that if a party wishes to use photographs of a protected witness in the course of its investigations, it shall

¹ ICC-01/04-01/07-2381-Conf.

² Trial Chamber II requested, by way of email, that these observations be filed by 20 September at 12, noon.

³ ICC-01/04-01/07-2394-Conf.

⁴ ICC-01/04-01/07-2148.

file “[...] une demande d’autorisation motivée, lorsque l’identification d’un témoin protégé se révèle particulièrement difficile sur le terrain”.⁵ The Chamber also recalled the Defence’s position on the matter: “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 the prosecution witness in question”.⁶

5. The Chamber ruled that once these conditions are met, the presentation of the photograph of a protected witness shall still be conditioned by the use of a photo-array or photo line-up. The Chamber added that photo line-ups shall be prepared by the VWU and thereafter used by the requesting party for the purpose of its investigations (our emphasis).⁷
6. Finally, the Chamber ordered that a party using a photo of a protected witness shall keep a register “recensant toutes les étapes et les circonstances de l’utilisation de chaque photographie. Celui-ci précisera notamment les dates de sa présentation, le nom des personnes qui y auront accédé et l’auront présentée ainsi que l’identité des tiers à qui elle aura été montrée. Enfin, il conviendra de respecter les bonnes pratiques énoncées dans le Protocole”.⁸
7. The Prosecution concurs and adopts in full, for the purpose of its response, the arguments of the Legal Representatives.⁹ The Legal Representatives submit that the Defence’s request does not demonstrate how or in which way the Defence has exhausted alternative methods in their investigation of the identity of the witnesses.¹⁰ The Legal Representatives concurrently argue that

⁵ *Ibid.*, para. 9.

⁶ *Ibid.* The Chamber recalling the Defence’s position as submitted in its application ICC-01/04-01/07-2097, para. 7.

⁷ *Ibid.*

⁸ *Ibid.*, para. 11.

⁹ ICC-01/04-01/07-2394-Conf.

¹⁰ *Ibid.*, para. 6.

relying on the exigency of the situation or submitting a request on an urgent basis should not constitute good cause for the Chamber to depart from its 31 May decision.¹¹ The Legal Representatives also correctly point out that according to the 31 May decision, it is for the VWU to prepare photo-line ups and not the Defence.¹²

8. The Prosecution also recalls the VWU's prior submission on the matter: the "use of photos potentially has a very high impact on the level of risk for the individual concerned".¹³ This impact is not limited to witnesses who are participants to the Court's protection program. The Prosecution contends that showing photographs of a witness may also undermine the effectiveness of any protective measures which have been granted by the Chamber.
9. The VWU has recognized 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 their subjective perception 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.¹⁴

Witnesses 249 and 268

10. The two witnesses are in the Court's protection program and have benefited, during their testimony, of in-court protective measures (i.e. to protect their identity and psychological well-being, amongst others). The prosecution submits that the Defence's use of pictures depicting these two witnesses

¹¹ *Ibid.*, para. 9.

¹² *Ibid.*, para. 20.

¹³ ICC-01/04-01/07-2092-Conf-Anx, p. 1, Re (3).

¹⁴ *Ibid.*, p. 2.

would undermine the effectiveness of the protective measures granted by the Chamber and/or adopted by the VWU.

Witness 353

11. Witness P-353 is not in the Court's protection program. She has not yet testified and in light of the current schedule is not likely to do so before November 2010.
12. The transcripts of her interview reveal her identity and the identities of her relatives; the identities of two other victims of sexual violence who were abducted from Bogoro during the attack and brought to [REDACTED] with P-353; and the fact that people in [REDACTED] knew her by her name "[REDACTED]".
13. Contrary to the contention of the Defence, the transcripts of the statement of witness P-353 also contain the following identifying information related to the two soldiers alleged to have raped her: their ethnicity; the languages they spoke; their physical appearance; and the fact that they were "[REDACTED]" or [REDACTED]. To the Prosecution's knowledge, P-353 was the only victim of Bogoro who was thereafter detained in [REDACTED] and forcibly married to [REDACTED]. Witness P-353 also describes the house she was kept in [REDACTED] and its whereabouts.
14. The statement of Witness P-353 also provides details on the woman who helped her escape from [REDACTED]. Witness P-353 named this woman "[REDACTED]"; described her ethnicity; mentioned that this woman regularly [REDACTED]; and recounted the itinerary P-353 took with "[REDACTED]" when she fled her abductors and [REDACTED].

15. The Prosecution submits that the Defence, with the current information in their possession, has the necessary “tools” with which to investigate witness P-353 and the particulars of her statement without the use of a photograph. In addition, the fact that witness P-353 does not know the names of her abductors (as argued by the Defence) does not establish a need for the Defence to use her picture during its investigations. The abductors or persons in [REDACTED] may know her identity, independently of whether she is aware of their identity. The circumstances of her abduction, her description of the abductors, the information she provided about her stay in and then escape from [REDACTED], and the information that the Defence possesses about her is sufficient to distinguish her from others and to enable the Defence to investigate her story. At the same time, there would be substantial risk to the witness’s actual and perceived security should her photograph be circulated. That risk outweighs the negligible additional benefit to the Defence. Therefore, the Defence’s assumption that “she will only be recognized in some quarters by a photo rather than by name”¹⁵ is unfounded.

¹⁵ ICC-01/04-01/07-2381-Conf, para. 4.

Conclusion

16. The Defence's request should be rejected as it does not follow the prescriptions set out by the Chamber in its 31 May decision.



Luis Moreno-Ocampo, Prosecutor

Dated this 24th day of September 2010.

At The Hague, The Netherlands