



Original: English

No.: ICC-01/04-01/07
Date: 25 August 2011

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
Defence Response to *Requête en clarification quant à la pratique concernant le déplacement et logement de témoins appelés à comparaître dans la présente affaire*

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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**Victims Participation and Reparations
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Other

A. Introduction

1. The Defence for Mr Katanga (the « Defence ») hereby submits its Response to the *Requête en clarification quant à la pratique concernant le déplacement et logement de témoins appelés à comparaître dans la présente affaire*,¹ submitted by one of the Legal Representatives of the Victims (the « Request »). In this Request, the Legal Representative requests the Chamber:
 - (i) To clarify whether the practice in the present proceedings is that witnesses travel and be accommodated together in The Hague prior to their testimony unless there is an objection from a party or participant;
 - (ii) To invite the VWU to indicate whether the next witnesses, notably witnesses DRC-D02-P-0196 and DRC-D02-P-0259, have travelled and been accommodated together.
2. For the reasons explained below, the Defence requests the Chamber to reject the Request.

B. The Request is Moot

3. As a preliminary observation, the Defence notes that the Request is moot.
4. As for the Legal Representative's first request, the VWU indicated clearly, in two emails dated 24 and 25 May 2011, annexed to this filing, that it is the common practice for witnesses who are not in the Court's protection programme ("ICCPP") to travel and be accommodated together unless there is an objection from a party or participant.² This is in line with the *Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial* ("Protocol"),³ on which the VWU relied in these emails.⁴ Thus, the information sought in the first request is already known to the Legal Representative.

¹ ICC-01/04-01/07-3035-Conf, 27 June 2011.

² Cf. Annex I, emails sent [REDACTED] on 24 and 25 May 2011.

³ ICC-01/04-01/07-842-Conf-Anx, 21st of January 2009.

⁴ [REDACTED] quoted explicitly paragraphs 15 and 26 of the Protocol in her email of 24 May 2011 (*Cf.* Annex I).

5. As regards the second request, witnesses DRC-D02-P-0196 and DRC-D02-P-0259 have completed their testimonies and the Defence does not intend to call any more witnesses (apart from Mr. Katanga) following witness DRC-D02-P-0258 who is currently on the stand. The travel and accommodation arrangements of witnesses DRC-D02-P-0196 and DRC-D02-P-0259 can, therefore, no longer be altered, nor can the witnesses be asked questions about these arrangements, even if the Chamber would have permitted such questions.⁵
6. In his Request, the Legal Representative concedes that the Request is filed late but submits that the question remains pertinent and important, given that the witnesses of Mr. Ngudjolo are still to appear.⁶ It would, however, be unfair and improper to demand disclosure of travel and accommodation arrangements made in respect of Mr. Ngudjolo's witnesses only, while such information was not disclosed in respect of witnesses of any other party.⁷
7. Accordingly, the Request is submitted too late and should be dismissed on that basis alone.

C. Lack of legal basis of the Request

8. The Defence further submits that there is no legal foundation for the Request as it is not within the mandate of the Legal Representatives of the Victims to seek information pertaining to the credibility of the Defence witnesses.⁸ The victims are not parties to the proceedings and it is not their role to test the credibility of witnesses. Indeed, the Chamber stated in its *Directions for the Conduct of the Proceedings and Testimony in accordance with Rule 140* that: "As a matter of general principle, questioning by the Legal Representatives on behalf of victims who participate in the proceedings must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution."⁹

⁵ In an earlier, similar situation, the Chamber directed the parties and participants not to ask questions to a witness about his travel and accommodation arrangements together with another witness. See ICC-01/04-01/07-T-271-Red-ENG WT 30th of May 2011, Page 2. See further below, para. 12.

⁶ ICC-01/04-01/07-3035-Conf, para. 6.

⁷ See further arguments under E : Violation of Equality of Arms, paras. 20-22 below.

⁸ ICC-01/04-01/07-1665-Corr, Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1st December 2009, para.82

⁹ *Ibid.*

9. Therefore, by submitting this Request to the Chamber, the Legal Representative has exceeded his role because, on the one hand the Request does not assist in the ascertainment of the truth, and on the other hand, it tends to support the case of the Prosecution. It is for the Prosecution, not for the Legal Representatives, to challenge the credibility of the defence witnesses.
10. Very recently, the Prosecution made a similar request in respect of defence witnesses DRC-D02-P-0129 and DRC-D02-P-0160. The Prosecution sought information pertaining to the travel and accommodation arrangements in place for these witnesses.¹⁰
11. The VWU replied to the Prosecution by indicating that *“In accordance with the Familiarisation Protocol (ICC-01/04-01/07-842-Conf-Anx) and in the absence of any information from the parties concerning the need to separate them, witnesses D02-P-0129 and D02-P-0160 did travel together and have until now been accommodated together. As specified in the Protocol they have been “warned with appropriate regularity that they must not discuss their impending evidence with each other or anyone else”.”*¹¹
12. The Chamber held that the fact that witnesses DRC-D02-P-0129 and DRC-D02-P-0160 traveled together and were accommodated together in The Hague *“is deemed irrelevant with respect to the testimony given by this witness, Mr. Kagaba, and to the future testimony of Mr. Mbaraza. And that questions should not be put on this point.”*¹² Accordingly, the Chamber has already expressed the view that information similar to that sought in the present Request is irrelevant and can therefore not be argued to assist the ascertainment of the truth.
13. Thus, contrary to the Legal Representative’s suggestion,¹³ the issue raised in its Request has already been explicitly dealt with. Moreover, particularly in light of the Legal Representative’s submission that the information sought goes to the credibility

¹⁰ Cf. Annex I, e-mail sent [REDACTED] to TCII on 24 May 2011.

¹¹ Cf. Annex I, email [REDACTED] of 24 May 2011.

¹² ICC-01/04-01/07-T-271-Red-ENG WT 30th of May 2011, Page 2: *“PRESIDING JUDGE COTTE: (...) When this matter was raised on Friday at the end of the hearing or since it was raised at the end of the hearing on Friday, the Chamber would like to inform you that the fact that you contacted Mr. Christian Mbodjima Mbaraza since you arrived at The Hague is not something abnormal and that shouldn’t pose a problem to you in particular or to the Chamber. The Chamber would like to say, for the benefit of the parties and participants, that this matter is deemed irrelevant with respect to the testimony given by this witness, Mr. Kagaba, and to the future testimony of Mr. Mbaraza. And that questions should not be put on this point. It is imperative for us to focus our proceedings on relevant questions, questions which can provide us with additional information that will help us to better handle the case in hand.”* [Emphasis added].

¹³ ICC-01/04-01/07-3035-Conf, para. 14.

of the witnesses,¹⁴ this issue should not be raised by him. Therefore, the Request of the Legal Representatives of the Victims clearly lacks a legal basis.

D. No breach of the Protocol

14. The parties and participants were erroneously informed by VWU that witnesses DRC-D02-P-0129 and DRC-D02-P-0160 traveled together to The Hague and were accommodated together in The Hague.¹⁵ These arrangements were put in place by the VWU, which is in charge of the travel and accommodation arrangements in respect of all witnesses. It thereby followed the procedure set out in the Protocol. In accordance with the Protocol, witnesses can travel and be accommodated together.
15. In respect of the travel arrangements of witnesses, Paragraph 15 of the Protocol states that *“witnesses participating in the Court's protection programme (ICCPP) and who do not live together will travel separately. Other witnesses who are required at the location of testimony within the same time period and who are travelling from the same area might not be separated during the journey. If a party considers that witnesses with overlapping accounts should be kept apart, they have an obligation to inform the VWU as to which witnesses fall.”*
16. As regards the accommodation of witnesses, Paragraph 26 of the Protocol indicates that *“witnesses participating in the Court's protection programme who do not live together will stay in locations separate from other witnesses. All other witness might stay in the same location. If a party considers that witnesses with overlapping accounts should be kept apart, they have an obligation to inform the VWU as to which witnesses fall into this category”*.
17. Therefore, it is in accordance with the Protocol and the practice for witnesses who are not in the Court's protection programme to travel and be accommodated together if there is no objection from the party calling the witnesses in question. This has been confirmed by the VWU.¹⁶ Thus, the travel and accommodation arrangements put in

¹⁴ ICC-01/04-01/07-3035-Conf, paras. 19 & 20.

¹⁵ Asked by e-mail by Mr Hooper why such information was disclosed to the Prosecution, [REDACTED] replied *“First of all I would like to apologize as we indeed do not disclose in principle such information neither to the defence nor to the OTP”* in an e-mail addressed only to the Defence for Mr Katanga on 25 May 2011 at 5.47 pm.

¹⁶ Cf. Annex I, e-mail [REDACTED] of 24 of May 2011, referring to *‘the relevant extracts of the Protocol concerning separation of witnesses during travel and at the accommodation’*, and quoting Rules 15 and 26 of the Protocol, confirmed by her email of 25 May 2011.

place in respect of witnesses DRC-D02-P-0129 and DRC-D02-P-0160 were appropriate and consistent with the Protocol.

18. Such arrangements are particularly appropriate in light of the obligation upon the VWU pursuant to Paragraph 27 of the Protocol to warn all witnesses “*with appropriate regularity that they must not discuss their impending evidence with each other or anyone else*”.¹⁷ In the case of witnesses DRC-D02-P-0129 and DRC-D02-P-0160, the VWU confirmed that they were reminded regularly that they should not discuss their evidence together.¹⁸ In addition, these witnesses were separated from the moment the first of them began his testimony, which is consistent with the usual practice of the VWU.¹⁹ No risk therefore exists that Defence witnesses have exchanged views with each other in the course of their testimony as they were isolated once their examination began.

19. The Defence notes that the majority of the Prosecution witnesses are in the ICCPP and would therefore, pursuant to the Protocol, have been subject to different travel and accommodation arrangements. There would then undoubtedly be differences in the travel and accommodation arrangements made in respect of the prosecution and defence witnesses. It would, however, be unfair if such differences could be relied on in any way to undermine the credibility of defence witnesses given that they are caused solely by the fact that none of the defence witnesses are in the ICCPP.

E. Violation of equality of arms

20. When, in the past, the Defence requested from the VWU, disclosure of information pertaining to the travel and accommodation arrangements put in place in respect of prosecution witnesses, the VWU firmly refused to provide the Defence with any such information.²⁰

21. Therefore, the Defence has had no information about the travel and accommodation arrangements made in respect of the witnesses called by the Prosecution and thus has not been able to use such information in cross-examination.

¹⁷ ICC-01/04-01/07-842-Conf-Anx 21st of January 2009, para. 16.

¹⁸ Cf. Annex I, e-mail [REDACTED] of 25 May 2011.

¹⁹ Cf. Annex I, e-mail [REDACTED] of 25 May 2011.

²⁰ Cf. e-mail sent [REDACTED] to the Defence for Mr Katanga only on 8 May 2011: " *We are not in a position to disclose any information on witnesses, including their travel and accommodation arrangements, unless instructed to do so by the Trial Chamber and would therefore recommend that you approach the Trial Chamber and the calling party in this regard.*"

22. Disclosure of any such information pertaining to defence witnesses would amount to a breach of the principle of equality of arms as set out in Article 67 (1) of the Statute. Such disclosure would offer a tool to the Prosecution in cross-examining Mr. Ngudjolo's defence witnesses. Such a tool was, however, unavailable to either Defence team while cross-examining the prosecution witnesses.

F. Relief Sought

23. In light of the above considerations, the Defence submits that the Legal Representatives failed to establish any justification for receiving the information sought. Accordingly, the Defence requests the Chamber to dismiss the Request submitted by the Legal Representatives of the Victims in its entirety.

Respectfully submitted,



David HOOPER Q.C.

Dated this 11th July 2011

At The Hague