

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 1 October 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 document № ICC-01/04-01/07-2396-Conf**

**“Victims and Witnesses Unit's observations on the "Defence Request to be authorised to use pictures of Prosecution witnesses in the course of its investigations"(ICC-01/04-01/07-2381-Conf)”**

**Source:** The Registry

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

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**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**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

Mr Didier-Daniel Preira

**Counsel Support Section**

**Victims and Witnesses Unit**

Ms Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**The Registrar of the International Criminal Court (the “ICC”);**

**NOTING** the “Ordonnance relative aux mesures de protection de certains témoins cités à comparaître par le Procureur et par la Chambre (règles 87 et 88 du Règlement de procédure et de preuve” issued by Trial Chamber II (the “Chamber”) on 23 November 2009<sup>1</sup> ;

**NOTING** the “Instructions sur la manière d’approcher des tiers utiles aux enquêtes de la Défense” issued by the Chamber on 18 December 2009 (the “Instructions”)<sup>2</sup> ;

**NOTING** the “Protocol on investigations in relation to witnesses benefiting from protective measures” submitted by the Victims and Witnesses Unit on 26 March 2010 (the “Protocol of 26 March 2010”)<sup>3</sup> following the above mentioned Instructions;

**NOTING** the “Décision sur le “Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection”” issued by the Chamber on 26 April 2010<sup>4</sup> ;

**NOTING** the “Victims and Witnesses Unit’s observations on different questions raised in relation to the documents ICC-01/04-01/07-2061 and ICC-01/04-01/07-2060-Red” submitted on 11 May 2010<sup>5</sup>;

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<sup>1</sup> ICC-01/04-01/07-1667-Conf

<sup>2</sup> ICC-01/04-01/07-1734

<sup>3</sup> ICC-01/04-01/07-2007-Anx1

<sup>4</sup> ICC-01/04-01/07-2047

<sup>5</sup> ICC-01/04-01/07-2092-Anx

**NOTING** the “Décision sur la requête de la Défense de Germain Katanga relative à la communication et l’utilisation de photographies de témoins protégés” issued by the Chamber on 31 May 2010<sup>6</sup>;

**NOTING** the “Defence Request to be authorised to use pictures of Prosecution witnesses in the course of its investigations” submitted by the Defence for Germain Katanga on 10 September 2010 (the “Defence Request”)<sup>7</sup>;

**NOTING** the Chamber’s instruction dated 13 September 2010<sup>8</sup>;

**NOTING** the “Réponse des représentants légaux des victimes à la requête urgente de la Défense de G. Katanga visant à être autorisée à utiliser la photographie de témoins de l’accusation aux fins de ses enquêtes (ICC-04-01/07-2381-Conf)” submitted on 16 September 2010<sup>9</sup>;

**NOTING** articles 43(6), 67 (e), 68(1) and (4) of the Rome Statute, rules 16 to 19, 86 to 89 of the Rules of Procedure and Evidence, regulations 23bis and 41 of the Regulations of the Court and regulations 79 to 96 of the Regulations of the Registry;

**CONSIDERING** that the Defence requests “leave from the Chamber to show the pictures of incriminating witnesses 249, 268 and 353 in the course of its investigations”;

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<sup>6</sup> ICC-01/04-01/07-2148

<sup>7</sup> ICC-01/04-01/07-2381-Conf

<sup>8</sup> E-mail sent by the Legal Officer of the Chamber to the VWU on 13 September 2010

<sup>9</sup> ICC-01/04/01/07-2394-Conf

**CONSIDERING** that the Chamber instructs, on 13 September 2010, the parties and participants, as well as the Victims and Witnesses Unit, to file their observations on the Defence Request no later than 20 September 2010 at 12 PM;

**CONSIDERING** that the present document is classified as confidential as it submits observations on a confidential document and also contains information related to three witnesses which is still confidential and which should not be disclosed to the public;

**CONSIDERING** that information related to the particular situations of witnesses 249 and 353 should be brought to the attention of the Judges and is currently only available to the Chamber, the VWU submits them in a confidential *ex parte* annex attached to the current document;

**CONSIDERING** that the Victims and Witnesses Unit's general views on the use of photographs in the course of investigations are outlined in the "Victims and Witnesses Unit's observations on different questions raised in relation to the documents ICC-01/04-01/07-2061 and ICC-01/04-01/07-2060-Red";

**RESPECTFULLY SUBMITS** the following observations:

**Preliminary remarks**

1. The general principles described in the "Victims and Witnesses Unit's observations on different questions raised in relation to the documents ICC-01/04-01/07-2061 and ICC-01/04-01/07-2060-Red" should prevail when it comes to the use of photographs in the course of investigations. Therefore, they are fully applicable to the current Defence request.

2. The VWU considers that a more restrictive approach is to be adopted towards photographs, and, more generally, confidential identifying information contained in visual and/or non-textual documents, as compared to the approach applicable to textual documents.
3. In that perspective, the VWU recalls its advice “that any use of photographs, if authorised, at all should be targeted to achieve a particular line of inquiry, alternative modes of investigations were exhausted or not feasible, and consequently restricted to the extent possible”<sup>10</sup>.
4. Furthermore, the VWU reiterates its concern that the use of photographs can have a “high impact on the level of risk for the individuals concerned”. “This may be the case both for individuals who are participants in the Court's protection programme and other individuals who benefit from procedural protective measures”<sup>11</sup>.
5. The VWU repeats its concern that photographs may generally enable a much larger group of people to identify an individual by sight (rather than by name); thus, much less intricate knowledge of the individual concerned is required, and a link to the Court can be established far more easily. Therefore, particular care should be given that the use of photographs as such does not link the individuals concerned to the Court.

**On the importance to seek the consent or to inform the concerned persons before the use of photographs**

6. The VWU emphasises the importance to seek the consent of, or at least to inform, the person whose picture is to be used in the course of an investigation and respectfully recalls the following:
7. A distinction can be drawn between photographs provided by the individuals concerned and those generated by the Court. Depending on the circumstances

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<sup>10</sup> ICC-01/04-01/07-2092-Conf-Anx p. 1, Re (6) and (7)

<sup>11</sup> ICC-01/04-01/07-2092-Conf-Anx p. 1, Re (3)

of how such material was taken and recorded, the VWU recommends seeking consent before the use of photographs is authorised.

8. In cases where the Chamber decides to release photographs without the prior consent of the witness, the VWU recommends informing the concerned persons accordingly provided that this would not impede the purpose of conducting the investigations.
9. Along with its recommendation to obtain consent, the VWU would like to emphasize its prior note that there is a higher risk of adverse psychological impact if photographs are used without the prior knowledge and consent of a witness. These concerns are amplified with regard to witnesses who are considered to be vulnerable. A key element in the process of victim traumatisation arises from the sense of loss of control (of their lives, wellbeing and/or integrity) and unwanted intrusion that may occur within a single trauma event or series of traumatic events. In a similar way, treatment for many survivors of traumatic abuse can involve processes to aid the individual resuming control and psycho-social integrity. Given these considerations, the usage of photographs without prior informed consent may problematically reinforce a sense of helplessness and represent a further intrusion (that indeed may risk the victim experiencing a form of re-violation).
10. It is conceivable that some vulnerable witnesses may consider themselves "let down" or even deceived by the Court, which might impact upon their and others' future level of cooperation with the ICC.
11. Focusing on psychological considerations, it would be important that witnesses are informed fully in advance of how any provided photographs may be utilised (at least as much as may be foreseen), thus to enable informed consent.
12. Should this prove impractical or be decided against, it would be preferable for any concerned individual to be fully informed of the use of photographs as swiftly as possible after such a decision or act is taken.

**On the application of these principles to the three witnesses concerned**

12. The VWU recalls that Witnesses 249 and 268 are both participants in the ICC Protection Programme (“ICCPP”). Both witnesses have also been granted procedural protective measures. [REDACTED]<sup>12</sup>. Therefore, the three witnesses are in the category of persons for which the use of photographs can have a particularly high impact on the level of risk for their security.
13. Furthermore, the VWU considers that some specific information related to the particular situations of witnesses 249 and 353 may be relevant and should be provided to the Chamber. As this information is, at the moment, only available to the Chamber, the VWU submits it in a confidential *ex parte* annex attached to the present document.
14. The VWU concludes that the three witnesses should be asked for informed consent before their pictures would be used for investigations. Should the Chamber decide not to order the acquisition of such consent, the VWU recommends that the witnesses be fully informed of the use of their photographs. Furthermore, particular care should be given that the use of photographs as such does not link the individuals concerned to the Court.

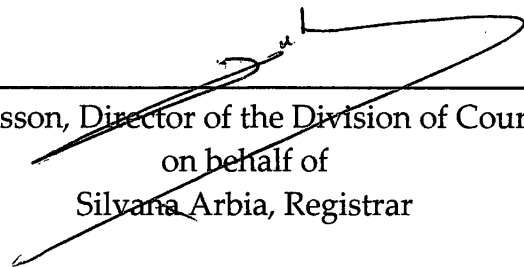
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<sup>12</sup> ICC-01/04-01/07-1667-Conf p.12



**On the way the panel of photographs is to be prepared**

15. The VWU supports the Defence proposal regarding the way the panel of photographs is to be prepared.
16. The VWU is satisfied with the investigating party preparing the material they intend to use for the purpose of their investigation. The VWU would then advise on whether the way the panel of photographs is prepared protects the witnesses' security and welfare.



Marc Dubuisson, Director of the Division of Court Services  
on behalf of  
Sylvana Arbia, Registrar

Dated this 1 October 2010

At The Hague, The Netherlands