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**International
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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Observations on the Anonymity and the Modalities of Participation
in the Proceedings of Applicants a/0327/07 to a/0337/07**

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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The Office of the Prosecutor ("Prosecution") respectfully submits its Observations on the request made by Applicant a/0333/07 for non-disclosure of his identity; and the set of procedural rights that should be attached to the procedural status of victims at the pre-trial stage of the present case for Applicants a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07.

Background

1. On 2 April 2008, the Single Judge granted the procedural status of victim at the pre-trial stage of the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui to Applicants /0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07 ("Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07").¹

2. The Single Judge requested that Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07 "(i) [...] make a request, if they so wish, for the non-disclosure of their identities to the Defences of Germain Katanga and Mathieu Ngudjolo Chui during the pre-trial stage of the present case; and (ii) to make their observations on the set of procedural rights that should be attached to the procedural status of victim at the pre-trial stage of the present case".² The Single Judge also requested the Prosecution and Defence to submit observations on any anonymity request and the set of procedural rights that should be attached to the procedural status of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and a/0333/07 at the pre-trial stage of the case.³

3. On 9 April, the Legal Representative of Victim a/0333/07 filed its Observations⁴ and on 10 April, the Prosecution was notified of the

¹ ICC-01/04-01/07-357.

² *Ibid.*, p. 14.

³ *Ibid.*

⁴ ICC-01/04-01/07-383.

Observations of the Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07, and a/0331/07.⁵

Overview of Prosecution's position

4. The Prosecution submits that participation of the Legal Representatives of the Victims ("Legal Representatives") in hearings leading up to and including the Confirmation Hearing is a fundamental part of the framework established in the Rome Statute and is, in the Prosecution's view, a milestone in international criminal justice.⁶ As Judge Blattmann said, "victim participation is [...] a right accorded to victims by the Statute".⁷
5. The Prosecution's Observations on the victims' modalities of participation are founded on the difference between *parties* and non-party *participants* at the pre-trial stage. The parties are the Prosecution and the Defence.⁸
6. The burden of proof at pre-trial stage is clearly established by the Statute. Article 61(5) places the onus solely on one party, the Prosecution, to establish substantial grounds to believe that the person committed each of the crimes charged. No other participant is entitled to appropriate or occupy this role.⁹

⁵ ICC-01/04-01/07-385. The Legal Representative filed its Observations after 4pm which explains the Notification taking place on 10 April. The Prosecution submits that the Observations, even if submitted after 4pm on 9 April, should nonetheless be accepted by the Single Judge.

⁶ See *Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 6 and ICC-01/04-143, 24 April 2006, para. 7; *Situation in Uganda*, ICC-02/04-85, 28 February 2007, para. 8; *Situation in Darfur*, ICC-02/05-81, 8 June 2007, para. 8 and ICC-02/05-123 OA, 15 February 2008, p. 1.

⁷ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1119, 18 January 2008, Separate and Dissenting Opinion of Judge Blattmann, para. 13.

⁸ In the Appeals Chamber "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007", ICC-01/04-01/06-925, Judge Pikis, in a separate concurring opinion, stated at para. 15 that "Victims are not made parties to the proceeding nor can they proffer or advance anything other than their 'views and concerns'".

⁹ Judge Pikis, in his separate concurring opinion in the Appeals Chamber decision ICC-01/04-01/06-925, *supra* at para. 16, stated that "In relation to what can victims express their views and concerns? Not in relation to the proof of the case or the advancement of the defence. The burden of proof of the guilt of the accused lies squarely with the Prosecutor. [...] It is not the victims' domain either to reinforce the prosecution or dispute the defence".

Legal Representatives, being non-party participants, are not entitled to lead evidence pertaining to the guilt or innocence of the accused or advance legal positions that are probative to the issue to be litigated between the parties, namely whether the Prosecution has established substantial grounds to believe that the person committed the crimes charged.¹⁰

7. Consistent with the above, it is the overview position of the Prosecution that the Legal Representatives ought to be entitled to participate, in the pre-Confirmation and Confirmation hearings, in various forms which relate to issues specific to their interests.¹¹ Such participation must be performed in a manner that respects the rights of the victims and all the rights granted to the accused.
8. It is the Prosecution's submission that Pre-Trial Chamber I in the Lubanga case ("Lubanga") struck an appropriate balance between the rights of the parties and the exercise of meaningful procedural rights by victims' participants at the pre-trial stage. In the Lubanga case, Pre-Trial Chamber I, provided modalities of participation by which the views and concerns of the victims were presented pursuant to Article 68(3) and concurrently (a) gave due consideration to the requests of the Legal Representatives; (b) protected the roles of the parties; and (c) ensured that the Confirmation Hearing proceeded fairly and expeditiously. The same practice should apply in the present case.
9. It is within this general framework that the Prosecution responds to the specific requests for participation made by the Legal Representatives.

¹⁰ With the exception of the functions that may be exercised on the basis of Rule 91(3), the participation of victims in the proceedings under Article 68(3) is the expression of their views and concerns.

¹¹ The Appeals Chamber has stated that "an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor" (Majority Opinion of the Appeals Chamber, ICC-01/04-01/06-925, 13 June 2007, para. 28, *supra*).

Anonymity request of Victim a/0333/07

10. The Prosecution recognises and accepts that Victim a/0333/07:

[...] vit dans des conditions de grande précarité sur le terrain et dans un contexte d'insécurité généralisé; [...] craint pour elle-même et sa famille des représailles directes, tant des militaires proches des accusés, que des populations civiles encore soumises à l'influence des accusés ; [...] ayant été sous l'autorité des accusés, elle est aujourd'hui considérée comme traître, ce qui augmente d'autant le risque de représailles décrit ci-dessus.¹²

For the security reasons outlined, the Prosecution does not oppose the anonymity request of Victim a/0333/07.

Procedural rights that should be attached to the procedural status of victims at the pre-trial stage

11. The set of procedural rights requested by the Legal Representatives of the Victims can be summarised as follows: (1) access to the record of the case without any restrictions or at the very least to the index of the record; (2) the right to participate to all hearings; (3) the right to present written or oral submissions on any question arising from the pre-confirmation and confirmation proceedings; (4) the right to question witnesses;¹³ and (5) the right to respond to any request, submission or observation of the Prosecution or Defence. The Legal Representative of Victim a/0333/07 argues additionally that the exercise of these rights should be granted irrespective of their anonymity.

¹² ICC-01/04-01/07-383, p. 4.

¹³ The Prosecution notes that the Legal Representative of Victim a/0333/07 seems to request by wording of the title of section B 2), p. 9, the right to: "[...] procéder à l'interrogatoire des témoins". The Prosecution notes that in the second last paragraph of page 11, this request is not argued and neither found in the conclusion at page 12.

The effect of the anonymity of Victim a/0333/07

12. The Prosecution respectfully submits that if Victim a/0333/07 is granted anonymity, Victim a/0333/07 should be afforded the same set of procedural rights as granted to anonymous victims in the Lubanga case.¹⁴ The Prosecution submits that the Decision clearly delineated the impact Victim's anonymity should have on the exercise of some of their procedural rights.

13. On the submission of evidence and the questioning of witnesses, Pre-Trial Chamber I stated:

ATTENDU cependant qu'il serait porté atteinte au principe fondamental interdisant les accusations anonymes s'il était permis aux victimes a/0001/06 à a/0003/06 d'ajouter quelque élément de fait ou de preuve que ce soit au dossier présenté à rencontre de Thomas Lubanga Dyilo par l'Accusation dans le document de notification des charges et l'inventaire des éléments de preuve ; et que de l'avis de la Chambre, il s'ensuit que les victimes a/0001/06 à a/0003/06 ne sauraient interroger les témoins selon la procédure prévue à la règle 91-3 du Règlement.¹⁵

14. In Lubanga, Pre-Trial Chamber I may have limited the access of anonymous victims to the public record and their presence to public hearings but Pre-Trial Chamber I declared that it retained the option, in exceptional circumstances, to make an exception to this principle.¹⁶ Similarly, Pre-Trial Chamber I recognised the right of victims not only to make opening and closing statements but also, with leave of the Chamber, to intervene on a case by case basis during public hearings.¹⁷ The Prosecution submits that the same set of procedural rights should be provided to Victim a/0333/07.

¹⁴ ICC-01/04-01/06-462 ("Decision").

¹⁵ *Ibid.*, p. 7, *in fine*.

¹⁶ *Ibid.*, p. 7.

¹⁷ *Ibid.*

Access to the record of the case without any restrictions or at the very least to the index of the record by Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and alternatively Victim a/0333/07

15. Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 are not requesting anonymity, and therefore, are arguing for an expansion of the set of procedural rights that should be attached to their procedural status of victims. Victim a/0333/07 is requesting the same rights independently of his anonymity being granted or not.

16. The Prosecution submits that access to materials by Victims participants in this case is exhaustively governed by Rule 121(10). This Rule specifically permits the Legal Representatives to consult the record of the proceedings, subject to any restrictions concerning confidentiality and the protection of national security information. It is submitted that this broad right of access to the record of the proceedings is sufficient to permit the Legal Representatives to present their views and concerns as well as to participate in the proceedings to the degree that they have requested.

17. The Prosecution submits that any access to confidential material should only be granted on a case by case basis and when the Victims participants demonstrate that it relates to issues specific to their interests. Additionally, any decision on this particular issue must be mindful of the need to protect the confidentiality of information and the safety and well-being of victims and witnesses. Such a decision should also be mindful of the dangers of further dissemination of sensitive information capable of endangering persons or the integrity of ongoing investigations. The same rule should also apply to the index of the case. The Prosecution contends that confidentiality is not limited to the content of a given filing of the parties but also to the titles of these filings as recorded in the index. The titles of filings are therefore themselves

confidential. Access to the confidential titles of the index, should be granted in the same manner as access to the record of the case.

The right of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and alternatively Victim a/0333/07 to attend and participate to all hearings

18. The Prosecution is not opposed to the Legal Representatives being present and participating in the proceedings leading up to the Confirmation Hearing on issues related to their interests, unless there is a justifiable reason for their exclusion. Similarly, the Prosecution does not oppose the presence of the Legal Representatives during the Confirmation Hearing, unless a justifiable reason exists for their exclusion from a particular session of the hearings. Exceptions will necessarily have to be addressed on an issue-by-issue basis.

The right of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and alternatively Victim a/0333/07 to present written or oral submissions on any question arising from the pre-confirmation and confirmation proceedings

19. The Prosecution submits that the Legal Representatives, under the rubric of Article 68(3), should not be granted a general right to present observations on all questions related to the conduct of the confirmation proceedings. Instead, the Legal Representatives ought to be permitted to present remarks on issues related to the conduct of the confirmation proceedings to the extent that such observations: (a) are limited to issues that directly impact their respective interests; and (b) are not addressed to issues that are restricted to the parties (such as the issue of the confirmation of the charges).
20. The Prosecution recognises that in some circumstances the Legal Representatives may be situated to provide valuable observations which may be of assistance to the Pre-Trial Chamber. While not extending to a general right to make submissions on matters of substantive or procedural law, there may be instances in which observations from the Legal Representatives would not fall within the province or knowledge of either of the parties to provide to

the Chamber. In such cases, the Legal Representatives ought to be permitted to make observations.¹⁸ The Prosecution requests, however, that the Pre-Trial Chamber avoids situations in which the Legal Representatives duplicate submissions or observations made by a party. It is submitted that on an issue-by-issue basis, the Legal Representative could seek the leave of the Trial Chamber to make unique observations and at a time where they are in a position to demonstrate that their representations are appropriate and will be supplementary to positions advanced by the parties.

The right of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and alternatively Victim a/0333/07 to question witnesses

21. The Prosecution submits that any authorisation for the Legal Representatives to question a witness during the Confirmation Hearing must be granted by the Pre-Trial Chamber as a result of an application by the Legal Representative pursuant to Rule 91(3). The Prosecution does not identify the Legal Representatives' submission on this issue as a request to be exempted from the operation of this procedure. Consequently, the Legal Representative's ability to question any witness must be determined witness per witness during the course of the Confirmation Hearing. But considering the objective and limited scope of the Confirmation Hearing, such requests, if any, should be very few.

22. The Prosecution also submits that any examination by the Legal Representatives permitted by the Pre-Trial Chamber pursuant to Rule 91(3), must be limited to issues directly relevant to the interests of the Victims and cannot go into the question of guilt or innocence. The Appeals Chamber has held that "an assessment will need to be made in each case as to whether the interests asserted by victims, do not, in fact, fall outside their personal

¹⁸ As an illustration, at the Confirmation Hearing into the charges against Thomas Lubanga, the Legal Representatives assisted the Pre-Trial Chamber by proffering observations regarding the realities relating to the issuance and obtaining of birth certificates in rural, war torn sectors of the DRC. The Prosecution refers, as an example, to the observations of F. Mulenda, Legal Representative to the Victims, on 28 Nov. 2006, ICC-01/04-01/06-T-47-EN, p. 67, line 16 to p. 69, line 6.

interests and belong instead to the role assigned to the Prosecutor”.¹⁹ Additionally, depending on the circumstances and the witness, questioning under Rule 91(3) can be conducted through the Pre-Trial Chamber on behalf of the Legal Representatives, as foreseen in Rule 91(3)(b).

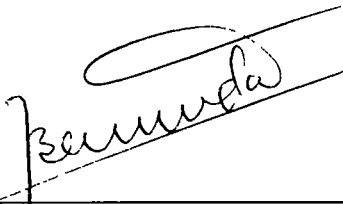
The right of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and alternatively Victim a/0333/07 to respond to any request, submission or observation of the Prosecution or Defence.

23. Regulation 24(2), while *prima facie* broadly allowing a response to be filed by the Legal Representatives to “any document when they are permitted to participate in the proceedings”, expressly provides that its application may be modified by order of the Pre-Trial Chamber. The Prosecution submits that it would be appropriate for this Chamber to permit the Legal Representatives to file a response to only those documents that impact on their interests. This would include responding to documents that relate to issues of reparations and protective measures that concern them. In addition, if there is a particular issue for which the Chamber finds that the Legal Representatives may advance a unique perspective not represented by the parties, the Legal Representatives ought to be permitted to file a response pursuant to Regulation 24(2). However, the Prosecution submits, for the reasons advanced above under the general overview, that the Legal Representatives should not be entitled to file responses to solely inter-party issues.

¹⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28.

Request

The Prosecution does not oppose the anonymity request of Victim a/0333/07 and if granted, the Single Judge should provide for the same set of procedural rights at the pre-trial stage as decided by Pre-Trial Chamber I in the Lubanga case. The Prosecution requests that Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07 and alternatively Victim a/0333/07, be permitted to participate in the pre-trial proceedings in the manner outlined herein.



Fatou Bensouda
Deputy Prosecutor
on behalf of
Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of April 2008

At The Hague, The Netherlands