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TRIAL CHAMBER II

Before: Judge Marc Perrin de Brichambaut, Presiding
Judge Olga Herrera Carbuccion
Judge Péter Kovacs

***SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA***

PUBLIC REDACTED VERSION

Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications

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
Section**

Ms Fiona McKay

Other

Mr Pieter de Baan (Trust Fund for Victims)

INTRODUCTION

1. The defence for Mr Katanga (“the defence”) hereby requests the disclosure of unredacted (or less redacted) versions of the applications to participate in the proceedings or reparations, submitted by the victims admitted to participate in the proceedings, which have already been notified. This application is a separate issue to the observations on reparations already submitted, or the consolidated response to the observations on reparations submitted by all parties, participants and third parties, which the defence intends to submit by the deadline of 12 June 2015.
2. The defence files these observations as confidential since they mention the name of legal representatives previously appointed by the applicants, whose identity remains confidential.

LEGAL PRINCIPLES

3. The defence request relies on Mr Katanga’s right to a fair trial, pursuant to Articles 64(2) and 67(1) of the Rome Statute. As noted by the Appeals Chamber in its Order on reparations in the *Lubanga* case, the principles adopted for the reparation procedure should not “prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial”.¹
4. The information sought is not within the possession of the prosecution – which has likewise received redacted versions of the victims’ applications only – but of the Victims Protection and Reparations Section (‘VPRS’). The disclosure regime as described in rules 77, 81 and 82 of the Rules of Procedure and Evidence referring to the scope and limitations of the Prosecutor’s disclosure obligations vis-à-vis the defence is therefore not directly applicable. The Prosecutor cannot disclose information she does not have. It is therefore the responsibility of Chamber to assess whether the redactions should be applied, and if so, be maintained or lifted.² In

¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129-AnxA, Order for Reparations, 3 March 2015, para. 49.

² *Prosecutor v. Lubanga*, ICC-01/04-01/06-2586-Red, Redacted Decision on the disclosure of information from victims' application forms (a/0225/06, a/0229/06 and □5 a/0270/07), 23 November 2010, para. 4. *See also* para. 2.

making this assessment, the Chamber is to apply criteria similar to that applied for disclosure by the Prosecutor. The presumption is that disclosure of any information relevant to defence preparations will be effected in full.³ Only exceptionally can information be redacted to protect the safety and security of victims or members of their family.⁴

5. Indeed, pursuant to article 68(1), measures can be taken to protect the safety, physical and psychological well-being, dignity and privacy of victims when their safety so requires. Further, rule 81(4) of the Rules of Procedure and Evidence requires the Court to take « the necessary steps to ensure the confidentiality of information [...] to protect the safety of witnesses and victims and members of their families ». ⁵ However, protective measures can be taken only if not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial (article 68(1)).⁶ By article 64(2) the Chamber “must ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. The language employed - ‘full respect for the rights of the accused’, as opposed to ‘due regard’ for the victims - renders the rights of the accused paramount.
6. In line with these principles, the scope of protective measures “cannot exceed what is strictly necessary in light of the applicant’s security situation”.⁷ Indeed, the principle of proportionality must be respected at all times, pursuant to which “protective measures should restrict the rights of the suspect or accused only as far as necessary”.⁸ In this context, it is important to note the *Lubanga* Chamber’s

³ *Ibid*, para. 4.

⁴ *Ibid*.

⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1637, Decision on the defence application for disclosure of victims applications, 21 January 2009, para. 9.

⁶ ICC-01/04-01/07-579, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10 June 2008, para 30.

⁷ *Prosecutor v. Kony et al*, ICC-02/04-01/05-134, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, para. 23.

⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1308, Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, 6 May 2008, para. 25, reliance on: ICC-01/04-01/06-568, Judgment on the prosecutor's appeal against the decision of Pre-Trial Chamber I entitled

observation that the “mere assertion that someone is in □ danger ”[...] of itself does not necessarily lead to a proper conclusion that the individual is, in fact, going to be in danger - just because counsel claims it”.⁹

7. The proportionality principle also dictates that protective measures be put in place only “where they are the only sufficient and feasible measure”.¹⁰ The defence can further request for the lifting of permanent redactions at any stage if it can demonstrate that the information sought is necessary for effective defence preparations.¹¹
8. The determination of the correct balance between the protection of the security of victims and the rights of the accused is a ‘fact-sensitive decision’.¹² Whilst the balance may tilt in favour of the victim at the initial stage of the proceedings,¹³ the balance must be reassessed at a later stage, in particular when proceedings are coming to a close, as is the situation in the present case. It is common practice at the Court to allow a significantly greater number of redactions prior to trial than during or after trial. This is understandable given that, as the proceedings advance, the adverse impact on the accused increases while the risks for victims and witnesses tend to reduce.

"Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, para. 37; ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First decision on the prosecution request and amended requests for redactions under Rule 81", 14 December 2006, paras 33 to 34, para. 24.

⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2586-Red, Redacted Decision on the disclosure of information from victims' application forms (a/0225/06, a/0229/06 and a/0270/07), 23 November 2010, para. 6.

¹⁰ *Supra* note 8.

¹¹ *See*, for instance, ICC-01/04-01/07-1725, Décision sur l'appel de la Défense de Germain Katanga contre la « décision relative à la levée, au maintien et au prononcé de mesures d'expurgations » datée du 22 octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp), 17 December 2009, paras. 13 and 18.

¹² *Prosecutor v. Lubanga*, ICC-01/04-01/06-1637, Decision on the defence application for disclosure of victims applications, 21 January 2000, paras 9- 10.

¹³ *Prosecutor v. Kony et al*, ICC-02/04-01/05-134, Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 1 February 2007, paras. 19-23.

SUBMISSIONS

9. The defence submits that the time has come to re-evaluate the necessity of the redactions initially authorised in the victims' applications. The defence was initially provided a heavily redacted version of all the victims' applications to participate in the proceedings or for reparations, the identity of the applicants remaining redacted pending the Chamber's final decision on their participation in the proceedings. Once the victims were admitted to participate in the proceedings, the Chamber ordered the disclosure of their identity to the defence. This was done by the notification, by the Registry, of indexes of victims admitted to participate in the proceedings, containing only their number, their names and date of birth.¹⁴
10. However, despite the disclosure to the defence of the identity of the victims admitted to participate in the proceedings, their application forms were not redisclosed in an unredacted or less redacted format to the defence. Redactions in these applications can extend, *inter alia*, to the identity of the intermediary who assisted the applicant to fill the form,¹⁵ to the identity of the person(s) killed and their link with the victim, and to a number of details contained in their summary of the Bogoro attack¹⁶ and of the harm suffered.¹⁷ The redactions can even extend to matters such as the number of chickens or cows pillaged.¹⁸
11. Whilst initially these redactions may have been deemed necessary, given the redaction of the identity of the victims, they can no longer be justified following the disclosure to the defence of the identity of all the participating victims.
12. These redactions are also no longer justified in light of the circumstances today, as compared to the circumstances at the outset of the proceedings. The redactions in

¹⁴ See ICC-01/04-01/07-1633-Conf-Exp, ICC-01/04-01/07-1663-Conf-Exp, ICC-01/04-01/07-1664-Conf-Exp, ICC-01/04-01/07-1733-Conf-Exp, ICC-01/04-01/07-1816-Conf-Exp.

¹⁵ Cf. « *Section I, Informations sur la personne qui vous a aidé à remplir ce formulaire* » of the forms. See for instance, [REDACTED].

¹⁶ Cf. « *Section E, Informations sur les dommages, pertes ou préjudices subis* » of the forms. See for instance, [REDACTED].

¹⁷ Cf. « *Section D, Informations relatives au(x) crime(s) allégué(s)* » of the forms. See for instance, ICC-01/04-01/07-1108-Conf-Exp-Anx48, pp. 9-10.

¹⁸ See for instance [REDACTED].

victim applications were initially considered necessary in light of the volatile security situation in the Ituri district, which led the Chamber to decide to redact their identity and any identifying information.¹⁹ The security situation in the Ituri district is still unsettled, but there is no evidence that the security situation of victims who participated in the Katanga trial is any different to that of any other Congolese citizen living in Ituri. Nor is there any established link between the situation in Ituri and any of the ICC proceedings addressing crimes committed in the eastern part of the DRC. Any risk factor for participating victims appears to be, as with all the inhabitants, determined solely by the unsettled nature of the Ituri district. Any conflict over the past several years has been between the Congolese army and militia groups still active in the region. Principally, the Ngiti civilian population have been at risk as a consequence of the continued unsettled nature of Walendu Bindi, which has led to significant army attacks on their community. The Hema community, who do not live in Walendu Bindi, have not been involved.

13. Therefore, security risks of participating victims no longer justify the redactions initially imposed, especially given that their identity itself has already been disclosed to the defence. The identities of the participating victims have been known to Mr. Katanga for many years, with no demonstrable impact on their security. There is no evidence that any information Mr. Katanga received in the course of the proceedings put any victim or witness at risk.
14. Furthermore, the redacted information sought is relevant and necessary for the defence's preparation given that it would allow the defence, *inter alia*:
 - to test the credibility of the victims, by identifying any eventual inconsistency between their initial application and any information submitted later;
 - to assess the extent of the prejudice of the victims.
15. The necessity to scrutinize, and where necessary challenge, the reparation claims of victims is emphasized by the fact that a number of victims and witnesses have clearly made false claims in the *Katanga* proceedings. Indeed, as previously indicated,²⁰ the

¹⁹ ICC-01/04-01/07-479, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10 June 2008, para. 31.

²⁰ ICC-01/04-01/07-3549, Defence Observations on Reparations, 15 May 2015, para. 44.

Legal Representative of Victims withdrew two victims from the list because of their unreliability.²¹ One victim witness, who claimed to have personally witnessed the Bogoro attack and the crimes committed, was later found not to have been present. Having been informed of this, the Prosecutor had no choice but to request the withdrawal of the witness, which the Chamber authorised.²² Apart from this witness, the Chamber rejected extensive areas of the testimony of a significant number of witnesses on the basis of their unreliability.²³

16. In her dissenting opinion, Judge Van der Wijngaert specifically noted the unreliability of a number of victim witnesses, not necessarily as a result of deliberate falsity but rather trauma and time lapse:²⁴

Even if time lapse and trauma can explain why witnesses give incoherent or contradictory evidence, this does not justify reliance thereon. Indeed, understanding why someone may be unreliable does not make the unreliability disappear. On the contrary, such insights should be a reason for treating the evidence in question with extra caution.

²¹ See ICC-01/04-01/07-2668-Red2, Complément d'informations relatif au retrait de la victime a/0381/09 de la liste des témoins du représentant légal, 1^{er} février 2011; ICC-01/04-01/07-2669, Notification du retrait de la victime a/0381/09 de la liste des témoins du représentant légal, 31 January 2011 ; ICC-01/04-01/07-2674, Décision relative à la Notification du retrait de la victime a/0381/09 de la liste des témoins du représentant légal. See also ICC-01/04-01/07-2695-Red, Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal, 10 February 2011, and ICC-01/04-01/07-2699-Red, Décision relative à la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal, 26 February 2011.

²² ICC-01/04-01/07-2631-Conf, Prosecution's Notice that it will not rely on the testimony of Prosecution Witness P-159 to prove its case, 14 December 2010; ICC-01/04-01/07-2731, Public Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011. More than a year later, the Chamber issued an order expressing "the view that the Prosecution has had sufficient time to determine its position in relation to this issue. As perjury is a very serious matter, the Chamber hopes that the Prosecution has meanwhile taken the necessary steps to investigate the issue and has decided on the appropriate course of action." (ICC-01/04-01/07-3223, Order to the Prosecutor regarding the alleged false testimony of witness P-159, 13 January 2012, para. 4). In its response, the Prosecution however claimed good faith on the part of the victim: "It bears reminding that the Prosecution withdrew witness P-159's evidence because, after the witness had already testified, it received contrary information that raised credibility questions. In that circumstance, the remedy the Prosecution undertook, notifying the parties and Chamber of its intent to not rely on witness P-159's in-court testimony, immediately and completely protected the rights of the accused. The Prosecution's Notice ensured that the evidence of witness P-159, the credibility of which was called into question by other information that the Prosecution deemed to have been given in good faith, would not have the potential to mislead the Chamber in its finding of guilt or innocence" (ICC-01/04-01/07-3225, Prosecution's response regarding its investigations into the alleged false testimony of witness P-159, 31 January 2012, para. 4).

²³ See, *inter alia*, ICC-01/04-01/07-3436, *Jugement rendu en application de l'article 74 du Statut*, 7 March 2014, paras 144 (P-28), 177-179 (P-219), 318-319 (P-280), 291-292 (P-279).

²⁴ ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, paras. 50-54, at para. 52.

17. These examples illustrate the need to scrutinize reparation claims because they may well be exaggerated or falsified.
18. For the same reasons, it is important that the defence be made aware of the identities of the intermediaries, and / or the legal representatives, who assisted the victims in filling out the forms. There is no reason at all to believe the disclosure of their identities would put their security at risk. In *Lubanga*, the Chamber disclosed the identities of certain intermediaries who had assisted victim applicants in that trial, taking into account the fact that there were “no grounds for suspecting that material security risks will be created by revealing this information.”²⁵
19. The defence submits that the disclosure of the identities of these intermediaries is necessary to get insight in how information found its way into victim application forms. The defence notes that there are striking similarities between many of the application forms in terms of the details and vocabulary used,²⁶ which may suggest that the intermediaries, and/or their legal representatives, have influenced the information provided. It has become apparent that intermediaries used by the Prosecutor have improperly influenced witnesses and encouraged them to provide false information.²⁷ There is no reason to believe that such undue influence could not occur in the taking of victims’ statements for the purpose of reparations. It is currently unclear how the information in the application forms came about – *e.g.* how much information came from the victims themselves and in their own words; and how much was suggested to them. An example indicating that the information provided does not necessarily derive from the witness’s own words is that many of them have annotated a near identical sketch to other victims, despite many of them being illiterate.²⁸ Also, in the course of their assisting victims to participate in the *Katanga* proceedings, [REDACTED] provided them with a standard form to be signed which indicated that

²⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2586-Red, Redacted Decision on the disclosure of information from victims’ application forms (a/0225/06, a/0229/06 and a/0270/07), 23 November 2010, para. 41.

²⁶ For instance, the accounts of victims [REDACTED] are strikingly similar [REDACTED]. Victims [REDACTED] have also provided strikingly similar details.

Similarly, the applications of victims [REDACTED] are very similar in detail and words used.

²⁷ See *e.g.*, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, pp. 63–220.

²⁸ See *e.g.* [REDACTED], as well as numerous other applicants represented by [REDACTED].

the FNI and FRPI were responsible for the Bogoro attack.²⁹ This was, however, well before the Chamber had made any findings on the factual allegations and supports the defence's concern that intermediaries may put words in the mouths of applicants. Even well-intended intermediaries may influence victims in the information-gathering exercise by asking leading questions. There is a risk that victims or witnesses may have a tendency to say what they think their interviewer wants to hear, whether or not it is factually accurate.

20. Mr. Katanga's interest in having full access to the redacted material has increased in light of the Appeals Chamber's determination that he can be held personally liable for the reparation claims made by, or on behalf of the participating victims.³⁰ It is only fair for the defence to have a full opportunity to test the victims' credibility and the veracity of their claims to ensure he is indeed liable for the harm.

21. This is particularly important given the low standard which is applied to determine whether victims qualify to participate as victims during the proceedings. This is apparent, for instance, from the following observation made by the Pre-Trial Chamber in the case of *Kony et al*:

It would be untenable for the Chamber to engage in a substantive assessment of the credibility or the reliability of a victim's application before the commencement of the trial. Accordingly the Chamber will merely ensure that there are, prima facie, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court.³¹

22. Therefore, the defence submits, this request for full disclosure is currently justified and necessary to safeguard Mr. Katanga's fair trial rights. The defence merely requests disclosure to Mr. Katanga and his defence team, not to the public at large.

23. The defence additionally notes that the Trial Chamber, in its "*Décision sur la demande de clarification concernant la mise en oeuvre de la Règle 94 du Règlement*

²⁹ See e.g. the applications [REDACTED].

³⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, paras 1 and 5.

³¹ *Prosecutor v. Kony et al*, ICC-02/04-01/05-252, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 ICC-02/04-01/05-252, 10 August 2007, para. 99.

de procédure et de preuve et étapes ultérieures de la procédure",³² ordered the Legal Representative of Victims, in consultation with the Registry, to file consolidated documents for the victims already admitted to participate in the proceedings, approving the following suggestion of the Registry in its "Registry's Observations on the Legal Representative of Victims' request for clarification ICC-01/04-01/07-3527":³³

'4. In light of the above, the Registry respectfully proposes as follows:

a) The Chamber may consider the following documents as constituting a valid request for reparations pursuant to Rule 94 of the Rules:

(i) where an application form for reparations was presented by the victim, either in a joint application for both participation in proceedings and reparations or in a separate application for reparations, the VPRS may file this application for reparations together with a follow up form appended to it, which will include the additional information provided by the victim during the Consultation, as reported in Annex 2 of the Report;⁷

(ii) where an application form for participation in the proceedings was presented by the victim but no request for reparations, the VPRS may file this application for participation in the proceedings together with a follow up form appended to it, which will include the additional information provided by the victim during the Consultation, as reported in Annex 2 of the Report;

[...]

c) The Registry stands ready to prepare and file the consolidated documents described in paragraph 4 (a) and (b), if so ordered by the Chamber.'

24. If these "consolidated documents" imply the re-filing of previous applications for participation or reparations already notified to the defence, the defence requests that they also be disclosed in an unredacted or less redacted version, for the same reasons as mentioned above.

CONCLUSION

25. In light of the above, the defence asks for the disclosure of the unredacted (or less redacted) version of the applications already filed, or to be refiled by the victims admitted to participate in the proceedings.

³² ICC-01/04-01/07-3546, 08 May 2015, paras 17-21, pp. 9-10.

³³ ICC-01/04-01/07-3535-Corr, 16-04-2015, para. 4.

26. The defence does not object to the redaction of the current address of the victims.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D Hooper', with a long horizontal stroke extending to the right.

David Hooper Q.C.

Dated this 22nd May 2015,
London.