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TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

**Decision on the Application of the Defence for Thomas Lubanga Dyilo
of 24 April 2017 concerning Redactions in some of the Files of
Potentially Eligible Victims**

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

Office of the Prosecutor

Counsel for Thomas Lubanga Dyilo

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Legal Representatives of V01 Victims

Mr Luc Walley

Mr Franck Mulenda

Legal Representatives of V02 Victims

Ms Carine Bapita Buyangandu

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REGISTRY

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Mr Herman von Hebel

Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Trust Fund for Victims

Mr Pieter de Baan

TRIAL CHAMBER II (“Chamber”) of the International Criminal Court, acting pursuant to articles 68(1) and 75 of the Rome Statute (“Statute”), issues the following decision.¹

I. Procedural history

1. On 22 February 2017, the Chamber set a schedule for the Registry to provide the Defence for Thomas Lubanga Dyilo (“Defence”) with redacted versions of the files of victims potentially eligible for reparations in the instant case (“Potentially Eligible Victims”) compiled by the Office of Public Counsel for Victims (“OPCV”) and the Trust Fund for Victims (“Trust Fund”) in collaboration with the Legal Representatives of V01 and V02 Victims (“Order of 22 February 2017”).²
2. On 24 April 2017, the Defence filed an application seeking that it be provided with new, less redacted versions of some of the files of Potentially Eligible Victims which had been transmitted to it on 22 March³ and 5 April 2017,⁴ and that it be granted additional time to submit its observations on the files in question (“Application”).⁵
3. On 2 and 5 May 2017 – as instructed by the Chamber⁶ – the Registry,⁷ the OPCV⁸ and the Legal Representatives of V02⁹ and V01¹⁰ Victims filed their respective observations on the Application.

¹ Judge Herrera Carbuca reiterates her opinions of 15 July 2016 (ICC-01/04-01/06-3217-Anx-tENG) and 25 October 2016 (ICC-01/04-01/06-3252-Anx-tENG).

² “*Ordonnance relative à la transmission des dossiers de victimes potentiellement éligibles aux réparations à l’équipe de défense de Thomas Lubanga Dyilo*”, 22 February 2017, ICC-01/04-01/06-3275.

³ “Second Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Order ICC-01/04-01/06-3275 of 22 February 2017”, 22 March 2017, ICC-01/04-01/06-3281 and confidential annexes 1-23.

⁴ “Third Transmission to the Defence of Redacted Applications for Reparations pursuant to Trial Chamber II Order ICC-01/04-01/06-3275 of 22 February 2017”, 5 April 2017, ICC-01/04-01/06-3288 and confidential annexes 1-95.

⁵ “*Requête de la Défense de M. Lubanga aux fins de nouvelles communications des dossiers de réparation*”, dated 14 April 2017 and registered on 24 April 2017, ICC-01/04-01/06-3294.

⁶ “Order fixing the schedule for the submission of observations on the Application by the Defence team for Thomas Lubanga Dyilo of 14 April 2017”, 28 April 2017, ICC-01/04-01/06-3302-tENG.

II. Analysis

4. The Chamber notes that pursuant to article 68(1) of the Statute, “[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims”.¹¹ The Chamber recalls that, in order to decide on the appropriate protective measures during investigation, prosecution and trial, judges must strike a balance between the free exercise of the defence’s rights, the need to protect victims and witnesses under article 68 of the Statute,¹² and the circumstances of the case,¹³ in keeping with the principle of proportionality.¹⁴ Moreover, such decisions must not impair the meaningful exercise of the defence’s right of response.¹⁵

⁷ “Registry’s Observations on the Defence Request of 14 April 2017 pursuant to Trial Chamber Order ICC-01/04-01/06-3302 of 28 April 2017”, 2 May 2017, ICC-01/04-01/06-3303 (“Registry Observations”).

⁸ “Observations sur la requête de la Défense du 14 avril 2017”, 5 May 2017, ICC-01/04-01/06-3307 (“OPCV Observations”).

⁹ “Observations de l’équipe V02 conformément à l’ordonnance ICC-01/04-01/06-3302 de la Chambre en date du 28 avril 2017”, 5 May 2017, ICC-01/04-01/06-3309-Conf (“LRV 02 Observations”).

¹⁰ “Observations du groupe de victimes V01 à la requête de la Défense du 14 avril 2017”, 5 May 2017, ICC-01/04-01/06-3310 (“LRV 01 Observations”).

¹¹ See also rules 86-88 of the Rules of Procedure and Evidence.

¹² *The Prosecutor v. Germain Katanga*, Appeals Chamber, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475 (“Judgment of 13 May 2008”), para. 66. See also Appeals Chamber, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘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, ICC-01/04-01/06-568 (“Decision of 13 October 2006”), para. 37.

¹³ Judgment of 13 May 2008, para. 68.

¹⁴ Appeals Chamber, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2006, ICC-01/04-01/06-773, paras. 33-34; Decision of 13 October 2006, para. 37; Trial Chamber I, “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/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, 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”, dated 6 May 2008 and registered on 7 May 2008, ICC-01/04-01/06-1308, para. 25; Trial Chamber I, “Decision on the disclosure of information from victims’ application forms (a/0225/06, a/0229/06 and a/0270/07)”, 14 October 2010, ICC-01/04-01/06-2586-Conf-Exp (“Decision of 14 October 2010”), para. 4.

¹⁵ *The Prosecutor v. Saif Al-Islam Gaddafi*, Appeals Chamber, “Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”, 24 July 2014, ICC-01/11-01/11-565, para. 80. See also the separate opinions of Judge Sang-Hyun Song and Judge Anita Ušacka.

5. The Chamber notes that the same principles apply to the reparations phase. The Chamber recalls that, in all matters relating to reparations, the Chamber must implement appropriate measures to ensure the safety, physical and psychological well-being and privacy of potentially eligible victims.¹⁶ The Chamber further recalls that nothing in the principles applicable to the reparations phase may “prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial”.¹⁷ During the reparations phase, as during any proceedings before the Court, the Chamber must “[TRANSLATION] strike a fair balance between the divergent rights and interests of the victims and of the convicted person”.¹⁸

6. The Chamber recalls that, in its Order of 22 February 2017, it called for the transmission of Potentially Eligible Victim files to the Defence so that the Defence could submit observations on the files and examine the eligibility of the victims and the merits of their allegations. The Chamber instructed the Registry on the types of redactions to make in the files before their transmission to the Defence.

7. More specifically, for all of the files of Potentially Eligible Victims, the Chamber instructed the Registry to redact any information pertaining to victims’ current places of residence or other contact details that could be used to locate them,¹⁹ as well as any information on the identities of intermediaries who may have participated in the preparation of the files.²⁰ For the files of Potentially Eligible Victims who had refused the disclosure of their identities to the Defence, the Chamber instructed the Registry to redact the victims’ names and any other information that might compromise their identities.²¹

8. The Defence contests the redactions made in the files of those Potentially Eligible Victims who had consented to the disclosure of their identities, on the

¹⁶ “Order for Reparations”, 3 March 2015, ICC-01/04-01/06-3129-AnxA (“Reparations Order”), para. 15. See also *The Prosecutor v. Germain Katanga*, “Ordonnance de réparation en vertu de l’article 75 du Statut”, ICC-01/04-01/07-3728 (“Reparations Order of 24 March 2017”), para. 30; and rules 94(2) and 97(3) of the Rules of Procedure and Evidence.

¹⁷ Reparations Order, para. 49.

¹⁸ Reparations Order of 24 March 2017, para. 18.

¹⁹ Order of 22 February 2017, para. 14.

²⁰ Order of 22 February 2017, para. 19.

²¹ Order of 22 February 2017, paras. 16 and 18.

ground that the redactions fail to comply with the instructions given by the Chamber in its Order of 22 February 2017.²²

9. Firstly, the Defence contends that the only part of the files that should have been affected by redaction of the current places of residence of Potentially Eligible Victims was subsection G, “Victim contact information”.²³ The Chamber finds that this interpretation is mistaken. The Chamber considers that, for the purpose of effectively protecting Potentially Eligible Victims in accordance with article 68(1) of the Statute and the relevant principles highlighted above, the redactions ordered are applicable to the files of Potentially Eligible Victims in their entirety. It may thus prove necessary to redact a place name, which could be used to locate a Potentially Eligible Victim, appearing anywhere in section 2, “Claim to victim status”.

10. Secondly, the Defence submits that the redactions affect a great deal of information not related to the current locations of Potentially Eligible Victims, particularly in sections of the files pertaining to the description of events, such as: places of enlistment and combat; names of camps and commanders; and the duties of former child soldiers.²⁴ The Defence contends that this information is material to its examination of the applicants’ eligibility²⁵ and that the Registry has to justify any additional redactions.²⁶

11. The Chamber notes the Registry’s observation that any information which could be used to identify third parties – such as former child soldiers (where the applicant is an indirect Potentially Eligible Victim), members of the applicant’s family or witnesses – was redacted because the persons concerned had not consented to the disclosure of their identities to the Defence.²⁷

²² Application, paras. 4 and 15 and p. 5.

²³ Application, para. 12.

²⁴ Application, paras. 9 and 13.

²⁵ Application, para. 14.

²⁶ Application, p. 5.

²⁷ Registry Observations, para. 8. The Registry stated in its observations that, before implementing the redactions ordered by the Chamber, it consulted the Legal Representatives of V01 and V02 Victims, the OPCV and the Trust Fund, because it considered them best placed to know what redactions were necessary to protect the interests of their clients and those of any other individuals mentioned in the

12. As indicated above, the Chamber ordered the redaction of any information that might be used to identify and locate Potentially Eligible Victims who had refused the disclosure of their identities to the Defence.²⁸ However, the Chamber's Order of 22 February 2017 did not explicitly address the issue of information pertaining to third parties, such as witnesses or the relatives of Potentially Eligible Victims. Nonetheless, the Chamber considers that any information which might be used to identify and locate a person named or mentioned in an application for reparations, but who has not expressly consented to the disclosure of his or her identity to the Defence, must also be redacted, as the Registry proposes. Accordingly, the Chamber finds that it is justified to redact a place name that might be used to locate a witness or a relative of a Potentially Eligible Victim, the role of a former child soldier within the UPC/FPLC or a commander's name that might be used to identify the direct Potentially Eligible Victim.

13. Having reviewed the files that the Defence cites and the redactions that it contests, and having assessed the compliance of the Registry's redactions, the Chamber finds the redactions reasonable and justified. Moreover, the Chamber finds that, despite the redactions, the forms disclose enough information for the Defence to meaningfully exercise its right to respond to the files of Potentially Eligible Victims.

forms (Registry Observations, paras. 7 and 10). The Legal Representatives of V01 and V02 Victims and the OPCV concurred with the Registry Observations (LRV 02 Observations, para. 12; LRV 01 Observations, para. 4; OPCV Observations, para. 6).

²⁸ Order of 22 February 2017, paras. 14 and 18.

FOR THESE REASONS, the Chamber

REJECTS the Application.

Done in both English and French, the French version being authoritative.

[signed]

Judge Marc Perrin de Brichambaut
Presiding Judge

[signed]

Judge Olga Herrera Carbuccion

[signed]

Judge Péter Kovács

Dated this 5 June 2017

At The Hague, Netherlands