

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/14-01/18**

Date: **24 March 2022**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with Confidential Annexes A and B

Public Redacted Version "Yekatom Defence Response to 'Confidential Redacted Version of the "Request of the Common Legal Representative of the Former Child Soldiers to maintain redactions to the identifying and contact information of the intermediaries and the organisations mentioned in victim application forms of the dual status individuals P-2582 and P-2620"' (ICC-01/14-01/18-1290-Conf-Red) " 07 March 2022, ICC-01/14-01/18-1305-Conf

Source: Defence for Mr. Alfred Rombhot Yekatom

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

The Office of the Prosecutor

Mr. Karim Asad Ahmad Khan
Mr. James Stewart
Mr. Kweku Vanderpuye

Counsel for Mr. Yekatom

Ms. Mylène Dimitri
Mr. Thomas Hannis
Ms. Anta Guissé
Mr. Gyo Suzuki

Counsel for Mr. Ngaïssona

Mr. Geert-Jan Alexander Knoops
Mr. Richard Omissé-Namkeamaï
Ms. Marie-Hélène Proulx

Legal Representatives of Victims

Mr. Dmytro Suprun

Mr. Abdou Dangabo Moussa
Ms. Elisabeth Rabesandratana
Mr. Yaré Fall
Ms. Marie-Edith Douzima-Lawson
Ms. Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Me Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr. Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom ('Defence') hereby responds to the Common Legal Representative of the Former Child Soldiers' Request of 22 February 2022 (respectively, 'CLR1' and 'Request').¹
2. The Request should be denied. The identifying information of the intermediaries and organisations who assisted dual status victim-witnesses P-2582 and P-2620 in completing their victim application forms (respectively, 'Sought Information' and 'Forms') is subject to disclosure. The CLR1 fails to demonstrate that the Sought Information warrants continued redactions pursuant to Rule 81(4).

PROCEDURAL HISTORY

3. On 13 September 2019, Pre-Trial Chamber II ('PTC II') issued its 'Decision on Motion for Disclosure of Witnesses with Dual Status', in which it *inter alia* directed the Legal Representatives of Victims ('LRV') to provide un-redacted versions of victim application forms of dual status victim-witnesses to the Prosecution ('PTC II Directions').²
4. On 18 November 2019, the CLR1 provided a redacted version of the victim application form of P-2620 to the Prosecution.³
5. On 5 March 2020, the CLR1 provided a redacted version of the victim application form of P-2582 to the Prosecution.⁴

¹ [ICC-01/14-01/18-1290-Conf-Red](#).

² [ICC-01/14-01/18-339](#), para. 12.

³ See, [ICC-01/14-01/18-1290-Conf-Red](#), para. 3.

⁴ See, [ICC-01/14-01/18-1290-Conf-Red](#), para. 4.

6. On 8 October 2020, the Chamber issued the 'Decision on Protocols at Trial' ('Decision on Protocols') adopting *inter alia* the 'Protocol governing the redaction of evidence at trial' ('Redaction Protocol').⁵
7. On 19 January 2022, the Defence sent a disclosure request to the CLR1, requesting the Sought Information ('First Defence Request').⁶
8. On 20 January 2022, the CLR1 responded to the First Defence Request, stating that it should be addressed to the Prosecution, which it considered to be the 'disclosing party' pursuant to the Redaction Protocol.⁷
9. The same day, further to the CLR1's suggestion, the Defence sent a disclosure request to the Prosecution in relation to the Sought Information ('Second Defence Request').⁸
10. On 11 February 2022, the Prosecution responded to the Second Defence Request, stating that redactions on the Forms had been applied by the LRV/Registry, and that the Sought Information was thus not in the possession of the Prosecution.⁹
11. On 14 February 2022, the Defence contacted the CLR1, reiterating its request for the Sought Information, *inter alia* on the basis of the Prosecution's indication that the redactions had been applied by the LRV/Registry and not the Prosecution ('Third Defence Request');¹⁰ the Defence also requested disclosure of redacted portions of the Forms pertaining to proof of identity information for the P-2582 and P-2620 ('Proof of ID Information').

⁵ [ICC-01/14-01/18-677](#); see also, [ICC-01/14-01/18-677-Anx3](#).

⁶ Email from the Yekatom Defence to the CLR1 sent on 19 January 2022 at 17:55 (see Annex A).

⁷ Email from the CLR1 to Yekatom Defence sent on 20 January 2022 at 09:12 (see Annex A).

⁸ Email from the Yekatom Defence to the Prosecution sent on 20 January 2022 at 10:12 (see Annex B).

⁹ Email from the Prosecution to the Yekatom Defence sent on 11 February 2022 at 12:59 (see Annex B).

¹⁰ Email from the Yekatom Defence to the CLR1 sent on 14 February 2022 at 14:25 (see Annex A).

12. On 15 February 2022, the CLR1 responded to the Third Defence Request, reiterating that the request should have been addressed to the Prosecution, but informing the Defence that lesser redacted versions of the Forms, in which the Sought Information and the Proof of ID Information was un-redacted, had been provided to the Prosecution that day.¹¹
13. On 23 February 2022, the CLR1 filed the Request.
14. On 25 February 2022, the Prosecution disclosed the Proof of ID Information.¹²
15. On 1 March 2022, the Prosecution filed its response to the Request ('Prosecution Response').¹³
16. On 4 March 2022, the Registry filed its observations on the Request ('Observations').¹⁴
17. On the same day, the Prosecution disclosed three additional pages of the victim application form of P-2620, comprising supplementary information provided by P-2620 ('Supplementary Pages').¹⁵

SUBMISSIONS

I. Preliminary Issue: the conduct of the CLR1 and Prosecution.

18. In its Decision on Protocols, the Chamber held that the procedure set out by PTC II in respect of dual status victim-witnesses was 'largely applicable' and expressly reiterated the PTC II Directions.¹⁶ The Redaction Protocol can thus be understood as having been adopted on the basis of the Chamber's

¹¹ Email from the CLR1 to the Yekatom Defence sent on 15 February 2022 at 10:22 (see Annex A); see also, [ICC-01/14-01/18-1290-Conf-Red](#), para. 13.

¹² [CAR-OTP-2135-2230](#) and [CAR-OTP-2135-2237](#); the Proof of ID Information as it pertains to P-2620 was re-disclosed in the 'Additional Pages' (see, para. 17 of this filing) with ERN [CAR-OTP-2135-2412](#), at 2416.

¹³ [ICC-01/14-01/18-1297-Conf-Red](#).

¹⁴ [ICC-01/14-01/18-1302-Conf-Red](#).

¹⁵ Email from the Prosecution to Defence sent on 4 March 2022 at 18:53; see, [CAR-OTP-2135-2412](#), at 2417-2419.

¹⁶ [ICC-01/14-01/18-677](#), paras 74-76.

understanding that the Prosecution was in possession of un-redacted versions of victims' application forms of dual status victim-witnesses, and by extension, that it would be in a position to ensure that its obligations under the Redaction Protocol could be met; likewise, its investigative duties under Article 54(1), and its broader disclosure obligations under Article 67(2) and Rule 77.

19. In having failed to provide the Prosecution with un-redacted versions of the Forms, the CLR1 was thus in violation of both the Decision on Protocols and the Redaction Protocol.
20. There is no reasonable justification for the CLR1's failure to provide the Prosecution with un-redacted versions of the Forms. The PTC II Directions were issued over express LRV objections regarding this matter; it was thus entirely a 'live' issue in these proceedings. Further, the PTC II Directions reflect long-established practice followed in multiple cases before the Court,¹⁷ including at least one in which CLR1 Counsel participated as an LRV.¹⁸
21. The prejudice occasioned by CLR1's violation of the Redaction Protocol is compounded by the CLR1's conduct in dealing with the Defence's *inter partes* requests. When the Defence first contacted the CLR1 requesting the Sought Information, the CLR1 referred the Defence to the Prosecution, despite having only provided the Prosecution with versions of the Forms in which the Sought Information was redacted.¹⁹ The CLR1 could have responded in a number of

¹⁷ See e.g., *Prosecutor v Ruto, Kosgey and Sang*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, [ICC-01/09-01/11-169](#), 8 July 2011 ('Ruto et al. Decision'), para. 13; *Prosecutor v Lubanga*, Decision on the defence application for disclosure of victims applications, [ICC-01/04-01/06-1637](#), 21 January 2009, para. 12 ; *Prosecutor v Ongwen*, Decision on the "Prosecution's Request to be Provided with Unredacted Copies of Victims' Applications Submitted in the Situation in Uganda and the Case of The Prosecutor v. Joseph Kony et al.", [ICC-02/04-01/15-280](#), 29 July 2015, p. 5.

¹⁸ *Prosecutor v Ntaganda*, Order on the provision of victim application forms of dual status witnesses, [ICC-01/04-02/06-1060](#), 17 December 2015, para. 3 (wherein Trial Chamber VI ordered that the Registry provide the Prosecution with 'all complete victim application forms for dual status witnesses').

¹⁹ See Annex A; see also, [ICC-01/14-01/18-1290-Conf-Red](#), paras 2-3, 13.

ways, in the spirit of *inter partes* cooperation: it could have conveyed to the Defence its position that the Sought Information was not subject to disclosure, so as to allow the Defence to seize the Chamber; it could have promptly seized the Chamber itself; or it could have immediately provided the Prosecution with the Sought Information, so as to allow the latter to duly discharge its disclosure obligations.²⁰ Instead of responding to the Defence in constructive manner however, the CLR1 elected to send the Defence on what was effectively a fool's errand, and ultimately, to file the Request over one month after receiving the First Defence Request.

22. The CLR1's regrettable conduct in this regard effectively forestalled Defence attempts to obtain material that is clearly relevant to its preparations. The Chamber will recall the Prosecution's announcement, on 15 February 2022, that P-2582 would be advanced over forty places in the witness order [REDACTED], and that her appearance was to be expected as early as 1 April 2022.²¹ While that particular risk appears to have since subsided,²² it nonetheless vividly illustrates the potential impact of the CLR1's conduct on Defence preparations, and by extension, on the very fairness of these proceedings.
23. Nor is the Prosecution free of blame in this matter. The Prosecution had the duty to follow up on the CLR1's apparent violation of the Redaction Protocol, and to request disclosure of un-redacted versions of the Forms so as to be in a position to meet its various investigative and disclosure obligations. Its wilful blindness in this regard thus itself comprises a violation of the Redaction Protocol, if not in letter, then in spirit.

²⁰ The Defence notes that the CLR1 waited until 15 February 2022 – nearly one month after having received the First Defence Request – to provide the Prosecution with lesser redacted versions of the Forms; see [ICC-01/14-01/18-1290-Conf-Red](#), para. 13.

²¹ See Email from Prosecution to Trial Chamber V, Parties and Participants sent on 15 February 2022 at 11:16.

²² See Email from Trial Chamber to Parties and Participants sent on 24 February 2022 at 19:20.

24. The full extent of the prejudice occasioned to Defence preparations by the conduct of the CLR1 and Prosecution is as yet unclear. That being said, the Defence here notes that the Proof of ID Information attached to the Forms, as well as the Supplementary Pages, have been revealed to contain exculpatory information affecting the credibility not only of P-2620, but that of a further two Prosecution witnesses.²³ At this stage therefore, there exist serious concerns about to whether the Prosecution has met its statutory duties in respect of the Forms. In this regard, the Defence is troubled by the CLR1's suggestion that the Prosecution, after having received the Second Defence Request, effectively declined to receive the Forms²⁴ – and by extension, to assess the Sought Information – as early as 27 January 2022,²⁵ instead simply deferring responsibility vis-à-vis the Second Defence Request back to the CLR1, two weeks later.

II. The Sought Information is subject to disclosure.

i) The Sought Information is material to Defence preparations.

25. At the outset, the Defence notes the Prosecution position that the Sought Information with respect to P-2620 is material to defence preparations pursuant to Rule 77.²⁶

²³ Specifically, [REDACTED] (P-2671), who claims to [REDACTED] P-2620, and states that [REDACTED], and that [REDACTED]; see [CAR-OTP-2122-9042-R04](#), paras 12, 15; and [REDACTED] (P-0365), [REDACTED] to be P-2620's birth certificate, which records P2620's [REDACTED]; see, [CAR-OTP-2122-9042-R02](#), paras 21-26; the witness statements of both P-2671 and P-0365 are the subject of Prosecution Rule 68(2) applications, see [ICC-01/14-01/18-802-Conf](#); [REDACTED] of P-2671 and P-0365 and [REDACTED], see below, paras 27-29.

²⁴ See, where Trial Chamber VI held, in relation to the Prosecution's disclosure obligations applicable to dual status victim-witnesses, that 'For the Prosecution, this means it must obtain and provide the Defence with all the disclosable information in a dual status witness's victim application [emphasis added]', *Prosecutor vs. Ntaganda*, Decision on victims' participation in trial proceedings, 6 February 2015, [ICC-01/04-02/06-449](#) ('Ntaganda Decision'), para. 40.

²⁵ See, [ICC-01/14-01/18-1290-Conf-Red](#), paras 9-10.

²⁶ [ICC-01/14-01/18-1297-Conf-Red](#), para. 4.

26. There are substantial discrepancies between the victim application forms for Prosecution witnesses P-2620 and P-2582 ('Forms')²⁷ and their witness statements.²⁸
27. In her witness statement of [REDACTED], P-2620 stated that she was unaware of the fact that a victim application form [REDACTED] had been completed on her behalf by the legal representative she had met.²⁹ When shown the form, she stated that she did not recognise it.³⁰ She further stated that she did not remember telling him her date of birth;³¹ that her ethnicity was not as stated in the form;³² that she did not remember stating [REDACTED] Mr Yekatom's group;³³ and that contrary to the information contained in the form and subsequently reiterated in the Supplementary Pages ([REDACTED]), she had never been to [REDACTED], she did not know of anyone named [REDACTED] and that she [REDACTED].³⁴ In the Supplementary Pages, she seems to suggest that [REDACTED];³⁵ she also appears to suggest that [REDACTED], whereas in her statement, she describes [REDACTED].³⁶
28. In her statement, P-2620's date of birth is recorded [REDACTED]; in her form (and the Proof of ID Information), it is recorded [REDACTED]; and in the Supplementary Pages, it is recorded as [REDACTED].³⁷ In the Supplementary Pages, P-2620 states that the Proof of ID Information, attached to her form and

²⁷ With respective ERNs [CAR-OTP-2123-0072](#) and [CAR-OTP-2126-0456](#); a lesser redacted version of P-2620's form was re-disclosed along with the Proof of ID Information and Supplementary Pages, with ERN [CAR-OTP-2135-2412](#).

²⁸ With respective ERNs [CAR-OTP-2123-0057-R03](#) and [CAR-OTP-2117-0605-R05](#)

²⁹ [CAR-OTP-2123-0057-R03](#), para. 73.

³⁰ [CAR-OTP-2123-0057-R03](#), para. 73.

³¹ [CAR-OTP-2123-0057-R03](#), para. 72.

³² [CAR-OTP-2123-0057-R03](#), paras 75-76.

³³ [CAR-OTP-2123-0057-R03](#), para. 76; [CAR-OTP-2135-2412](#), at 2412.

³⁴ [CAR-OTP-2123-0057-R03](#), paras 77-79; [CAR-OTP-2135-2412](#), at 2412, 2418.

³⁵ [CAR-OTP-2135-2412](#), at 2418; compare, at 2412; also compare, [CAR-OTP-2123-0057-R03](#), paras 28-32.

³⁶ [CAR-OTP-2135-2412](#), at 2418; compare, [CAR-OTP-2123-0057-R03](#), paras 15-62, regarding the Anti-Balaka base in [REDACTED]; see also, paras 69-71 regarding her leaving the Anti-Balaka.

³⁷ [CAR-OTP-2123-0057-R03](#), at 0057; [CAR-OTP-2135-2412](#), at 2412, 2416, 2419.

signed by the ‘*Chef du Village*’, contains ‘errors’ and should be disregarded.³⁸ In the Proof of ID Information, and as re-confirmed in the Supplementary Pages, the respective names of P-2620’s mother and father are listed [REDACTED], whereas in her statement, they are listed as [REDACTED].³⁹

29. Similarly, information contained in P-2582’s victim application form appears to differ from her witness statement. For instance, in her form, it is stated that [REDACTED].⁴⁰ In her statement however, P-2582 states that [REDACTED]; and on the arrival of the Seleka, [REDACTED].⁴¹ She makes no mention of [REDACTED].
30. More broadly, the allegations in the witness statements of P-2620 and P-2582 are highly contested; in this regard, the Defence respectfully refers the Chamber to its submissions of 7 March 2022, opposing the Prosecution’s Rule 68(3) application for P-2582.⁴² Further, as the Chamber is aware, the Defence also contests that children who participated in the ESF demobilisation ceremonies, [REDACTED], were child soldiers and/or part of Mr Yekatom’s group.⁴³ It is submitted that the above discrepancies, as well as the Request more broadly, must be assessed against this backdrop.

ii) The Sought Information is subject to disclosure pursuant to established case law.

31. As has been held by the Appeals Chamber, as well as in these proceedings, victim application forms of dual status victim-witnesses are subject to the Prosecution’s disclosure obligations under the Statute and the Rules.⁴⁴ The

³⁸ [CAR-OTP-2135-2412](#), at 2419.

³⁹ [CAR-OTP-2135-2412](#), at 2416, 2419; [CAR-OTP-2123-0057-R03](#), at 0057.

⁴⁰ [CAR-OTP-2126-0456](#), at 0456.

⁴¹ [CAR-OTP-2117-0605](#), paras 13, 15.

⁴² [ICC-01/14-01/18-1283-Conf](#).

⁴³ See e.g., [ICC-01/14-01/18-1237-Conf](#), para. 12.

⁴⁴ *Prosecutor v. Gbagbo And Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, [ICC-02/11-01/15-915-Red](#) (‘Gbagbo & Blé Goudé AC Judgment’), para. 56; [ICC-01/14-01/18-339](#), para. 11; see also, [Ntaganda Decision](#), para. 40; see also, *Prosecutor v. Bemba*, Public redacted version of the First Decision on the prosecution and

Appeals Chamber has also held that the assessment of whether identifying information of intermediaries is subject to disclosure is one made on an individual-by-individual basis.⁴⁵

32. More specifically, in *Lubanga*, Trial Chamber I established a framework for the disclosure of identifying information of intermediaries, holding *inter alia* that:

The threshold for disclosure is whether prima facie grounds have been identified for suspecting that the intermediary in question had been in contact with one or more witnesses whose incriminating evidence has been materially called into question, for instance by internal contradiction or by other evidence. In these circumstances, the intermediary's identity is disclosable under Rule 77 of the Rules.⁴⁶

33. The Defence submits that this test is met as regards the Sought Information. The 'contact' limb is met, given the roles of the Intermediaries and Organisation. Further, the evidence⁴⁷ of both P-2582 and P-2620 has been materially called into question, both by internal contradictions and other evidence, as set out above. The CLR1's claim that, 'beyond alleging inconsistencies between the [Forms] and the witness statements, the Defence does not put forward any grounds for suspicion regarding the intermediaries' is without merit, and comprises a concerning attempt to downplay the obvious red flags in the Forms and the evidence of P-2582 and P-2620.⁴⁸
34. Trial Chamber VI's oral Decision in *Ntaganda*, denying a defence application for the disclosure of identifying information of an intermediary who assisted a dual status victim-witness to complete her application form, is materially

defence request for the admission of evidence, dated 15 December 2011, [ICC-01/05-01/08-2012-Red](#), 9 February 2012 ('Bemba Decision'), paras 98-99.

⁴⁵ See, *Prosecutor v. Lubanga*, Redacted Decision on Intermediaries, [ICC-01/04-01/06-2434-Red2](#), 31 May 2010 ('Lubanga Decision on Intermediaries'), para. 139(a); compare, [ICC-01/14-01/18-1302-Conf-Red](#), para. 10 (especially, 'the Registry still considers that identifying information of Registry intermediaries should be systematically redacted'); also compare, [ICC-01/14-01/18-1290-Conf-Red](#), para. 23.

⁴⁶ [Lubanga Decision on Intermediaries](#), para. 139(b).

⁴⁷ The Prosecution has tendered the witness statement of P-2582 and is expected to tender that of P-2620; see *supra*, para. 31, and [ICC-01/14-01/18-642-Conf-AnxA](#), p. 19.

⁴⁸ [ICC-01/14-01/18-1290-Conf-Red](#), para. 35.

distinguishable.⁴⁹ First, the Prosecution opposed the defence application in that case, including on the basis of lack of relevance of the information.⁵⁰ Second, the information in question was redacted pursuant to Rule 81(2) with the aim of protection of ongoing or further Prosecution investigations.⁵¹ Third, the witness did not deny completing her application form; on the contrary, she expressly stated that she remembered having done so.⁵² And fourth, the application was made at a late stage, i.e. while the witness was on the stand.⁵³

35. In the *Lubanga* case, Trial Chamber I granted a defence request for disclosure of *inter alia* identifying information of individuals who assisted three dual status victim-witnesses in completing their victim application forms, on the basis that the information in question would be ‘useful to the defence’.⁵⁴ While the ‘usefulness’ envisaged was in relation to the issue of establishing the identity of anonymous witnesses, in circumstances where the issue of the ‘true identity’ of certain Prosecution and participating victim witnesses was a central aspect of the Defence case,⁵⁵ the decision in question is nevertheless instructive, given that in granting the request, Trial Chamber I expressly considered, in addition to the ‘true identity’ issue, the fact that there was ‘evidence which suggests that witnesses who claimed they are former child soldiers [...] have not told the truth’.⁵⁶

III. The CLR1 has not established that the Sought Information should remain redacted pursuant to Rule 81(4).

⁴⁹ See *Ibid*; *Prosecutor v. Ntaganda*, Transcript of 3 May 2016, [ICC-01/04-02/06-T-94-Red2-ENG](#), pp 34-36.

⁵⁰ *Prosecutor v. Ntaganda*, Transcript of 3 May 2016, [ICC-01/04-02/06-T-94-Red2-ENG](#), pp 6-7.

⁵¹ *Ibid*, p. 6; see also, *Prosecutor v. Ntaganda*, Annex A to Decision on the Protocol establishing a redaction regime, [ICC-01/04-02/06-411-AnxA](#), 12 February 2014, para. 36.

⁵² *Prosecutor v. Ntaganda*, Transcript of 3 May 2016, [ICC-01/04-02/06-T-94-Red2-ENG](#), p. 6.

⁵³ *Ibid*.

⁵⁴ *Prosecutor v. Lubanga*, Redacted Decision on the disclosure of information from victims’ application forms (a/0225/06, a/0229/06, a/0270/07), [ICC-01/04-01/06-2586-Red](#), 4 February 2011 (‘Lubanga Decision on Victim Application Forms’), para. 41, see also, paras 33 and 48.

⁵⁵ See [Lubanga Decision on Victim Application Forms](#), para. 2.

⁵⁶ *Ibid*, para. 4.

36. The Defence notes that the Chamber has previously cited with approval the finding of Trial Chamber X that ‘identifying information of [...] individuals who have [...] acquired or established knowledge of the events or circumstances part of a witness’s narrative cannot be redacted pursuant to [B.3]’; and extended this principle to category B.5.⁵⁷ Pursuant to this principle, identifying information of the Intermediary or Organisation that assisted P-2620 to complete her application form cannot be redacted pursuant to B.3 or B.5, given that they have knowledge of the circumstances part of P-2620’s narrative regarding the completion of the application form as set out her statement – including whether she was even involved in the process at all.

i) *Category B.3 does not apply to the Sought Information.*

37. The CLR1’s reliance on the definition of ‘innocent third parties’ as set out in the redaction protocol adopted by Trial Chamber I in *Gbagbo & Blé Goudé* is misplaced.⁵⁸

38. First, the suggestion that the Intermediaries and Organisations ‘have not agreed to be part of the Court process and may not even be aware of it’ is without merit.⁵⁹ In *Gbagbo & Blé Goudé*, Trial Chamber I found that intermediaries who assisted individuals to complete victim application forms ‘have engaged in the Court process’ and therefore were not ‘appropriately categorised’ as ‘innocent third parties’.⁶⁰

⁵⁷ [ICC-01/14-01/18-677](#), paras 71-72.

⁵⁸ [ICC-01/14-01/18-1290-Conf-Red](#), para. 24, fns 26-28; citing *Prosecutor v Gbagbo & Blé Goudé*, Protocol Establishing a Redaction Regime in the Case of *The Prosecutor v. Laurent Gbagbo*, [ICC-02/11-01/11-737-AnxA](#), 15 December 2014 (*‘Gbagbo & Blé Goudé Protocol’*), paras 40, 43.

⁵⁹ [ICC-01/14-01/18-1290-Conf-Red](#), paras 24-28; the CLR1’s submission at paragraph 28, that the Intermediaries and Organisations have not ‘explicitly’ agreed - a qualification that finds no support in the *Gbagbo & Blé Goudé* Protocol – should be understood as a concession that this aspect of the cited definition of ‘innocent third party’ is not met.

⁶⁰ *Prosecutor v Gbagbo & Blé Goudé*, Decision on the Legal Representative of Victims’ requests to maintain redactions to information relating to certain intermediaries, [ICC-02/11-01/15-202](#), 2 September 2015, para. 16; see also, Decision on Prosecutor’s requests for lifting of certain redactions in victim application forms (ICC-02/11-01/15-465 and ICC-02/11-01/15-493), [ICC-02/11-01/15-506](#), 9 May 2016, para. 16.

39. Indeed, the nexus between the Forms and the Court's legal proceedings is evident. On the Forms, the Court's emblem can be found at the header of each victim application form, and the Court is expressly named in two of the listed questions.⁶¹ Question 15 of the Form sets out the various options available to a prospective applicant as regards legal representation in the context of proceedings before the Court.⁶² Various legal terms are found throughout the Forms – e.g. 'lawyer'; 'team of counsel'; 'reparations'; and 'finding of guilt'.⁶³
40. Second, as regards the supposed risk to the Intermediaries and Organisations of being perceived as potential witnesses or collaborators with the Court: the Defence is unable to fully respond to the CLR1 submissions on account of the redactions to the Request.⁶⁴ However, should the Intermediaries' or Organisations' collaboration with the Court already be a matter of public record however, this would militate against the CLR1's position.⁶⁵
41. Third, the suggestion that the Sought Information 'is of no relevance to any "live issue" ⁶⁶ known in the case' is manifestly without merit. While the relevance of the Sought Information is set out above, the Defence here submits that this CLR1 suggestion aptly illustrates the broader unreasonableness of the Request.
42. The case law relied upon by the CLR1 in this regard is of little support. The Single Judge's finding in the *Ruto, Kosgey & Sang*, that victims application forms cannot be considered as evidence, is *obiter dicta* issued in the context of a

⁶¹ See e.g., [CAR-OTP-2123-0072](#), at 0072; see also, 0074, questions 8, 9, and 15.

⁶² In this regard, P-2620 indicated that she wished to be represented by counsel from the Court's Office of Public Counsel for Victims, while P-2582 indicated that she had already secured legal representation in proceedings before the Court; see [CAR-OTP-2123-0072](#), at 0074, and [CAR-OTP-2126-0456](#), at 0458.

⁶³ See e.g., [CAR-OTP-2123-0072](#), at 0072-0074.

⁶⁴ [ICC-01/14-01/18-1290-Conf-Red](#), paras 29-30.

⁶⁵ See, [Lubanga Decision on Victim Application Forms](#), paras 32, 43.

⁶⁶ The CLR1 appears to have misquoted the case law relied upon, narrowing the relevant aspect of the definition in *Gbagbo & Blé Goudé* Protocol from 'any known issue'; see, [ICC-01/14-01/18-1290-Conf-Red](#), para. 24, citing [Gbagbo & Blé Goudé Protocol](#), para. 43.

defence request that the Prosecution be provided with un-redacted versions of victim applications forms of victim-witnesses.⁶⁷ Trial Chamber III's decision in *Bemba* is of similarly limited relevance for the Request, relating as it does to the admissibility of victims application forms of dual status victim-witnesses.⁶⁸ Lastly, the CLR1 mischaracterises the Single Judge's finding in *Mbarushimana*, as well as those of the Trial Chamber I in *Lubanga* – both of which relate to assessment of applications of victims seeking participation and are thus of no relevance to the circumstances at hand.⁶⁹

ii) *Category B.5 does not apply to the Sought Information.*

43. In *Katanga*, the Appeals Chamber set out the principles pursuant to which a Rule 81(4) application might be authorised. It held that the primary consideration was whether the disclosure of identifying information would 'pose a danger to the particular person'; and that danger 'must involve an objectively justifiable risk to the safety of the person concerned', which 'must arise from disclosing the particular information *to the Defence*, as opposed to disclosing the information to the public at large'.⁷⁰
44. The onus was on the CLR1 to justify non-disclosure of the Sought Information;⁷¹ however, this threshold is not met.
45. The Defence is not privy to the CLR1's claims regarding the alleged risk to the Intermediaries and Organisations,⁷² however it notes the CLR1's heavy

⁶⁷ [ICC-01/14-01/18-1290-Conf-Red](#), para. 32, citing [Ruto et al. Decision](#), paras 8-16; see also, para. 11, where the Single Judge expressly noted that where information in the possession of victims, where collected by the Prosecution, 'reveals itself [...] in any way material for the preparation of the defence', this would trigger the Prosecution's statutory disclosure obligation.

⁶⁸ [Bemba Decision](#), paras 96-103; see, [ICC-01/14-01/18-1290-Conf-Red](#), para. 32.

⁶⁹ *Prosecutor v Mbarushimana*, Decision on the 138 applications for victims' participation in the proceedings, [ICC-01/04-01/10-351](#), 11 August 2011, paras 29-30; *Prosecutor v Lubanga*, Public Redacted version of the Decision on the applications by 7 victims to participate in the proceedings, [ICC-01/04-01/06-2764-Red](#), 25 July 2011, para. 25; see [ICC-01/14-01/18-1290-Conf-Red](#), paras 33-34, fns 35-36.

⁷⁰ *Prosecutor v Katanga*, 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", [ICC-01/04-01/07-475](#), 13 May 2008 ('Katanga AC Judgment'), para. 71.

⁷¹ [ICC-01/14-01/18-677-Anx3](#), para. 6; see also, [Gbagbo & Blé Goudé AC Judgment](#), paras. 60-61.

reliance on arguments going to alleged risks to the safety of individuals other than the Intermediaries and Organisations.⁷³ This reliance is misplaced: as the Appeals Chamber has held, for the purposes of Article 81(4), it is only the risk ‘to the particular person’ – in this case, to the Intermediaries and Organisations – that is to be assessed by the Chamber. The narrowness of this test reflects the fact that, as held by the Appeals Chamber with respect to Rule 81(4), ‘the overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule’.⁷⁴ The CLR1’s attempt to broaden the test should not be condoned.

46. The claimed risks to ‘all victims’ assisted by the Intermediaries and Organisations, ‘as well as their families’, are thus irrelevant for the purposes of the Request.⁷⁵ Even supposing for the sake of argument that these alleged risks could be taken into consideration, the CLR1 fails to substantiate its speculative claim that the Defence could discover the identities of ‘all victims’ assisted by the Intermediaries and Organisation;⁷⁶ indeed, the Request is silent on just how this might eventuate. Similarly speculative is the claim that these victims’ psychological well-being would be affected by their awareness of the disclosure of Sought Information (as further illustrated by the qualifier that this would be ‘very likely’).⁷⁷ The CLR1 also fails to explain why or how these victims would ever become aware of the disclosure of the Sought Information. In any event, the Defence understands the Confidentiality Protocol would apply to the Sought Information and thus neutralise any such risk.⁷⁸ In a similar vein, a victims’ decision not to participate in the proceedings ‘out of

⁷² [ICC-01/14-01/18-1290-Conf-Red](#), para. 39, presumably referring to redacted information at para. 30.

⁷³ *Ibid*, para. 38.

⁷⁴ [Katanga AC Judgment](#), para. 70.

⁷⁵ [ICC-01/14-01/18-1290-Conf-Red](#), paras 39-40.

⁷⁶ [ICC-01/14-01/18-1290-Conf-Red](#), para. 40.

⁷⁷ *Ibid*, para. 42.

⁷⁸ See [ICC-01/14-01/18-677-Anx5](#); see also, [Katanga AC Judgment](#), para. 71.

fear for their safety’⁷⁹ is an entirely subjective consideration. The risk of a victim’s identity becoming known to a defence is inherent to victims’ participation in all proceedings before this Court; the mere fact that a victim might feel fear or apprehension in this regard cannot suffice to justify non-disclosure of material information, as it would broaden the Rule 81(4) threshold in a way that would be patently contrary to the rights of an accused. In any event, these victims would likely be aware of the possibility that their own identities might eventually become known to the Defence, for example during any eventual CLR1 case.

47. Further, in the Request, the CLR1 suggests that the requirements for non-disclosure pursuant to Rule 81(4) include a consideration as to whether there exists an ‘objectively justifiable risk [...] which may prejudice further or ongoing investigations’.⁸⁰ This position finds no support in the case law relied upon in the Request.⁸¹ In fact, the CLR1 appears to have co-opted the test applicable to redactions under Rule 81(2), which relates to prejudice to Prosecution investigations and thus has no bearing on the matter at hand.⁸²

48. The suggestion that the CLR1/VPRS’s ongoing field activities warrant the same protection as Prosecution investigations is not only unfounded, but misguided. The Prosecution and the CLR1/VPRS have entirely different roles under the Court’s legal framework, not least given the Prosecution’s statutory duty to assist the Chamber’s truth-seeking function, and its concomitant

⁷⁹ [ICC-01/14-01/18-1290-Conf-Red](#), para. 41; while the CLR1 claims that ‘several’ participating victims ‘expressed serious concerns’ regarding disclosure of the Sought Information, the Defence notes that there is no suggestion that these victims expressed a wish to no longer participate in the proceedings.

⁸⁰ [ICC-01/14-01/18-1290-Conf-Red](#), para. 38.

⁸¹ Ibid, fn. 40 and references cited therein.

⁸² See where the Single Judge in *Katanga* set out the differing tests under Rules 81(2) and 81(4), *Prosecutor v Katanga*, First Decision on the Prosecution Request for Authorisation to Redact Witness Statements, [ICC-01/04-01/07-90](#), 7 December 2007, (‘Katanga PTC Decision’) para. 4; relied on with approval in [Katanga AC Judgment](#), para.68.

duties and obligations vis-à-vis the Defence – none of which apply to the CLR1 or VPRS.

49. Much of the CLR1's claims of 'objectively justifiable risk' are based on this mischaracterisation of the applicable test. As such, the CLR1 claim that many participating victims 'may decide to no longer participate in the present proceedings' or that 'new potentially eligible victims may decide to abstain from applying to participate', are not only speculative, but also not pertinent to the Chamber's assessment as to whether the test has been met.⁸³ For the same reason, the CLR1's unsubstantiated claim that disclosure of the Sought Information would 'jeopardise the discharge of [the Intermediaries' and Organisations'] various tasks and compromise the safety of their field operations' should not play a part in the Chamber's assessment of 'objectively justifiable risk'.⁸⁴ Indeed, the very fact that the CLR1 attempts to invoke mundane logistical issues experienced by the Registry, such as COVID-related travel restrictions, in seeking to justify non-disclosure of information material to Defence preparations, aptly illustrates the extent to which the CLR1 fails to appreciate the interests at stake in this matter.
50. The Registry Observations, to the extent that they are available to the Defence, are similarly vague, unsubstantiated and speculative and fail to demonstrate an 'objectively justifiable risk'.⁸⁵ The fact that the Registry appears to believe that the 'general postulate of the publicity of the proceedings' is the countervailing principle against which the non-disclosure of the Sought Information must be balanced, betrays a fundamental incomprehension of the

⁸³ [ICC-01/14-01/18-1290-Conf-Red](#), para. 41.

⁸⁴ Ibid, paras 44-45.

⁸⁵ [ICC-01/14-01/18-1302-Conf-Red](#), paras 15-19

issue at hand and its underlying interests; the Chamber should weigh the Observations with this in mind.⁸⁶

IV. Prior consent of the Intermediaries and Organisations is not required.

51. The CLR1 appears to confuse the legal framework applicable to protective measures with that applicable to restrictions on disclosure.⁸⁷ Its reliance on Regulation 42(4) of the Regulations of the Court is thus misplaced, relating as it does to prior consent for variation of protective measures for victims and witnesses;⁸⁸ the cited decisions of Trial Chamber IV and Trial Chamber I are distinguishable for the same reason.⁸⁹ There is no suggestion that protective measures are applicable in relation to the Intermediaries and Organisations.
52. Nor does Trial Chamber I's decision in *Lubanga*, relied upon in the Request, support the CLR1 position.⁹⁰ There is no suggestion that prior consent was required for the disclosure of individuals' identity to the Defence.⁹¹ Indeed, at one of the cited passages of the decision, Trial Chamber I cites to an in-court exchange between LRV counsel and Presiding Judge Fulford where, in response to LRV counsel's suggestion that prior consent of the individual in question be secured, the Presiding Judge stated that while their views were 'of interest', 'Whether or not they have the power to dictate what should happen

⁸⁶ Ibid, para. 11.

⁸⁷ Compare, Rule 81 and Rule 87.

⁸⁸ See also, Rule 87.

⁸⁹ See, [ICC-01/14-01/18-1290-Conf-Red](#), para. 51, fn. 54; note also that in the cited decision of Trial Chamber I, disclosure of a witness's identity to the Defence was granted despite the express lack of consent of that witness; see, *Prosecutor v Lubanga*, Public Redacted Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009, [ICC-01/04-01/06-2209-Red](#), 16 March 2010, para. 36. See also, [ICC-01/14-01/18-1290-Conf-Red](#), para. 51, fn. 53, where the CLR1 relies on a decision of Trial Chamber II made pursuant to Regulation 42 more broadly, and which is distinguishable on that basis.

⁹⁰ See, [ICC-01/14-01/18-1290-Conf-Red](#), para. 51, fn. 53, citing [Lubanga Decision on Victim Application Forms](#), paras 15, 43.

⁹¹ See, where Trial Chamber I granted disclosure of identifying information of an individual who assisted without any suggestion that their consent or views be obtained, [Lubanga Decision on Victim Application Forms](#), para. 41.

by virtue of whether they give their [consent] or not, is perhaps another issue'.⁹²

53. The views of an individual whose identifying information is sought by the Defence are at best potentially relevant to the Chamber's broader assessment of whether there might exist an 'objectively justifiable risk' to that individual should that information be disclosed. No requirement of prior consent can be read into the legal framework concerning disclosure, not least given that imposing such a requirement would give undue weight to the personal views of an individual, when balanced against an accused's right to defence preparation. This is especially so where the individual(s) in question have knowingly 'engaged in the Court process'.⁹³
54. The Defence also notes that, while the CLR1 argues that prior consent of the Intermediaries and Organisations must be secured, it appears to have made no effort in actually seeking their views in this regard, despite having been on notice of the Defence's interest in the Sought Information since 19 January 2022. The CLR1's apparent failure to do so, especially in light of its non-compliance with the Redaction Protocol and its *inter partes* conduct, should preclude any serious consideration of this argument by the Chamber.

V. Maintaining redactions of the Sought Information is disproportionate and unduly prejudicial to the Defence.

55. The suggestion that the Defence's ability to eventually cross-examine P-2582 and P-2620 would counterbalance the prejudice entailed by non-disclosure of the Sought Information is without merit.
56. The CLR1 over-reaches in suggesting that non-disclosure of the Sought Information prior to the completion of the victim application process strikes

⁹² See, [Lubanga Decision on Victim Application Forms](#), para. 15, citing [ICC-01/04-01/06-T-277-Red2-ENG](#), 13:13-14:14.

⁹³ Supra, para. 38.

‘the right balance’ between Mr Yekatom’s fair trial rights and the interests of victims. On the contrary, the Sought Information is required for the purposes of conducting meaningful investigations, which necessarily must be conducted sufficiently in advance of the cross-examination of P-2620 and P-2582, so as to allow effective Defence preparations in accordance with Mr Yekatom’s statutory rights.⁹⁴

57. In addition, with respect to P-2620, the Defence would likely seek to put the names of the Intermediary and Organisation to her, in light of her denials regarding her form. Further, if P-2620’s form is indeed a fabrication as she seems to suggest, there is no reason to believe that she would provide any information as regards the Intermediary and Organisation, which would leave the Defence at an investigative impasse.
58. Lastly, as held by the Appeals Chamber, in balancing the interests at stake when considering an application under Rule 68(4), ‘the requirements of adversarial proceedings and equality of arms’ must also be taken into account.⁹⁵ In this regard, the fact that the CLR1 has provided the Prosecution with the Sought Information should further militate against his Request for non-disclosure to the Defence.

CONFIDENTIALITY

59. This Response and its Annexes are filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed forthwith.

RELIEF SOUGHT

⁹⁴ See, where the Single Judge in *Katanga* held that redactions under Rule 81(4) must not be ‘prejudicial to or inconsistent with the rights of an arrested person and a fair and impartial trial’, [Katanga PTC Decision](#), para. 4; relied on with approval in [Katanga AC Judgment](#), para.68.

⁹⁵ [Katanga AC Judgment](#), para. 73(a).

60. In light of the above, the Defence respectfully requests that Trial Chamber V:
- FIND** that the CLR1 and Prosecution have violated the Redaction Protocol;
- ORDER** the CLR1 to immediately provide un-redacted dual status victim-witnesses' victim application forms to the Prosecution, in accordance with the Redaction Protocol;
- DENY** the Request; and,
- ORDER** that the Sought Information be immediately disclosed to the Defence.

RESPECTFULLY SUBMITTED ON THIS 24th DAY OF MARCH 2022



Me Mylène Dimitri
Lead Counsel for Mr. Yekatom

The Hague, the Netherlands