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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single judge

Registrar: Mr Bruno Cathala

SITUATION OF THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

Public Redacted Version of Response to 'Demande du représentant légal des victimes (expurgé)'

The Office of the Prosecutor

Mr. Luis Moreno Ocampo
Ms. Fatou Bensouda
Mr. Ekkehard Withopf

Office of Public Counsel for Defence

Mr. Xavier-Jean Keïta

1. Introduction

1. On 17 July 2007, the Honourable Single Judge issued a 'Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure',¹ in which the Single Judge ordered the Registry to transmit the applications to participate as victims to the Office of Public Counsel for the Defence (OPCD), and granted the OPCD the right to file observations in relation to these applications within 30 days of notification of the applications and the Report of the Registry.
2. On 19 July 2007, the Single Judge issued a confidential decision suspending the transfer of the Report of the Registry to the Prosecution and the OPCD until further notice.²
3. On 23 July 2007, a person purporting to be a legal representative of the applicants filed a request, demanding the following relief from the Chamber: firstly, that the OPCD be ordered to return all unredacted versions of the applications filed in the proceeding thus far, and that the Registry consequently provide redacted versions in their place; secondly, that the Chamber provide assurances that all future applications submitted by the legal representative in question are transmitted in a redacted format; thirdly, that the Report of the Registry either be withheld from the OPCD, or transmitted in a redacted format; that the Report of the Registry be transmitted to the legal representative of the victims; fourthly, that the Chamber ensures that the identity of the legal representative is redacted from public documents; and finally, that the legal representative be accorded a right to be heard in relation to issues concerning the protection and security of the applications, prior to the issuance of a decision on such matters.
4. In response, the OPCD respectfully submits that the application should be dismissed in its entirety. The legal representative is in essence, seeking reconsideration of previously adjudicated matters. Such a remedy does not exist before the ICC. In addition, the legal representative has failed to put forth any objective basis for the requested relief; the representative has failed to adduce any reasons as to how and why disclosure to the OPCD of the information in question could endanger the safety of the applicants. Finally, the measures sought by the applicants would prejudice the fairness of the proceedings and the rights of the defence.

¹ Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure ICC-01/04-358

² ICC-01/04-360-Conf

5. Finally, the OPCD respectfully seeks clarification as to the deadline for filing observations.

2. Legal Submissions

2.1 Status of the legal representative and locus standi

6. None of the applicants have stated in their application form that they were assisted by a legal representative,³ nor have they included a power of attorney which would enable a counsel to represent their interests before the Court.
7. Furthermore, the OPCD has not been notified of any filing to the effect that a legal representative has either been assigned by the ICC to these applicants, or privately hired by the applicants themselves.
8. As such, the OPCD respectfully submits that the person purporting to be a legal representative has no standing to directly seise the Court of a request for the aforementioned relief in relation to the applicants.
9. In this connection, in the Uganda situation, Pre-Trial Chamber II concluded that in order to file arguments on behalf of applicants, it is necessary to possess an appropriate mandate.⁴
10. Accordingly, in light of the fact that the motion has not been filed by someone possessing an express mandate to act on behalf of applicants a/163/06 to a/187/06, it should be dismissed *in limine litis*.

2.2 The requested remedies have no legal basis

11. As regards the return of unredacted materials, the legal representative is essentially requesting the Chamber to reconsider a previously adjudicated issue. The legal representative acknowledges as much, stating that “le représentant voudrait revenir sur

³ Applicant a/0176/06 marked both Yes and No in response to the question as to whether the applicant has a legal representative, and subsequently requested that one be designated by the ICC.

⁴ Decision on the OPCV's observations on victims' applications and on the Prosecution's objection thereto at page 5, ICC-02/04-01/05-243

la question pour ce qui concerne les victimes visées dans la décision du 23 mai 2007 ainsi que la décision du 17 juillet 2007”.⁵

12. As regards the applications, which were transmitted to the OPCD in unredacted format pursuant to the decision of 17 July 2007, the OPCD respectfully submits that the applicants were already provided with a right to be heard and an adequate opportunity to explain their concerns, and provide justification as to why their identities should not be disclosed to a defence team. The application forms expressly requires the applicants to provide reasons as to why they wish to benefit from protective measures.⁶ The application form is also accompanied by a guide,⁷ which explicitly advises that part or all of the information provided in the application form may be provided to the prosecution and the defence, that potential applicants should thus consider the potential risks which could flow from participation before deciding whether to participate,⁸ and moreover, that “it is very important to give as full reasons as possible for any request for non communication, in order to demonstrate to the judges why an exception should be made to the rule that information should be communicated”.⁹
13. Accordingly, the applicants were duly notified *before* they submitted their application forms that their identities might be communicated to the defence, that the burden was on them to provide sufficient justification as to why it might be necessary to withhold their identity, and finally, that the Chamber might nonetheless reject their request.
14. The OPCD therefore submits that this element of the request filed by the legal representative is also in effect, a request for reconsideration of the Single Judge’s decision.
15. Pre-Trial Chamber 1, Pre-Trial Chamber II and the Appeals Chamber have repeatedly concluded that the remedy of reconsideration is not available at the ICC, and that a “participant’s failure to avail itself of the proper procedural mechanism in compliance

⁵ At para 9.

⁶ Section H of the application form.

⁷ A Guide for the Participation of Victims in the Proceedings Before the Court http://www.icc-cpi.int/library/victims/VPRS_Booklet_En.pdf

⁸ At page 21.

⁹ At page 37.

with all relevant rules is tantamount to that participant waiving its right to have its concerns regarding a given decision considered by the Chamber”.¹⁰

16. This finding has operated thus far to the benefit of applicants in both the DRC situation¹¹ and the Uganda situation. Pre-Trial Chamber II has also stipulated that in accordance with regulation 42(3) of the Regulations of the Court, once protective measures have been defined by a Chamber, they can only be varied if the moving party is able to demonstrate a change in circumstances which would warrant the variation.¹² In the present case, the legal representatives has not cited any circumstances which have occurred since the decision of 17 July 2007, or any information which the Chamber was not aware of when it issued its decision.
17. As a matter of fairness and equality, the above findings of law should be applied to the present requests to preclude a constant reopening and re-litigation of decisions.
18. The OPCD further submits that the requested remedies have no practical purpose. The OPCD has already received the applications in question, and uploaded them into Ringtail. In the case of applications pertaining to the 23 May 2007 decision, the OPCD has finalised and filed its observations.
19. The requests should thus be dismissed as being vexatious and frivolous.

2.2 The requested remedies have no factual basis

20. In terms of the justification proffered by the applicants as to why their identities should be withheld from the defence, the request simply opines that “qu’en l’absence d’une *nécessité* immediate, les identités des demandeurs devraient rester confidentielles.”¹³ This completely reverses the burden for protective measures - The Statute clearly places the burden on the applicants to demonstrate why it is necessary for their identities ; the burden is not on the defence to justify why such measures should not be imposed.

¹⁰ Decision on Prosecutor's "Application to lift redactions from applications for Victims' Participation to be provided to the OTP" and on the Prosecution's further submissions supplementing such Application, and request for extension of time 20 February 2007, at page 5, ICC-02/04-01/05-209

¹¹ Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168; Decision on the Prosecution Motion for Reconsideration, 23 May 2006, ICC-01/04-01/06-123

¹² Decision on the Prosecutor's Applications dated 22 March 2007 and on the OPCV's Requests dated 29 March 2007, at page 5, ICC-02/04-01/05-239

¹³ At para 15.

21. The Appeals Chamber has confirmed that protective measures under article 68 and rule 81(4) should only be employed in exceptional circumstances,¹⁴ after an “evaluation of the infeasibility or insufficiency of less restrictive protective measures.”¹⁵
22. The Appeals Chamber also held that any decision to withhold the identity of a person from the defence must be based on an elaborated determination that disclosure of the identity of the person in question to the defence (as opposed to the general public or persons outside of the defence team) would endanger the security of the person or their family; mere reference to the security situation in specific parts of the Democratic Republic of Congo would not suffice.¹⁶
23. Concerning the risk of endangerment to the applicants, their representative, or persons who have assisted them, as the Single Judge has rightly pointed out, the OPCD is bound by the strict requirements of confidentiality, as set out in the Staff Regulations and the Code of Professional Conduct.
24. In this regard, the OPCD wishes to emphasise that it has implemented a strict confidentiality policy within the Office. For example, all internal memoranda and preparatory drafts within the OPCD refer to the applicants solely by the number designated by VPRS. The CD roms containing the applications are stored in a locked cabinet. The electronic versions of the applications are stored in a ringtail database which is hosted by the Registry, in accordance with the same security specifications as other sensitive units of the Court. After submitting its observations, the OPCD shreds all draft documents, and the hard copies of the applications. The OPCD has also had training from the Victims and Witnesses Unit in relation to general security and witness protection issues.
25. In terms of the possible risk of disclosure, unlike the OTP, the OPCD does not possess any investigative faculty – there is therefore no risk that information could be disclosed in the course of conducting investigations in the field. In addition, it will not be seeking instructions from a suspect or accused in relation to the applications.

¹⁴ 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, at paras. 34 and 35, ICC-01/04-01/06-568

¹⁵ At para. 37.

¹⁶ 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”, at para. 21, 14 December 2006, ICC-01/04-01/06-773

26. Any concerns regarding disclosure would therefore apply equally if not with more force to the OTP and OPCV, since the OPCD is much smaller in size and does not conduct field operations.
27. Finally, the OPCD has amply demonstrated its good faith and commitment to the code of conduct by contacting the Registry on two occasions to inform them that confidential information had been inadvertently publicly disclosed,¹⁷ in order to enable the error to be corrected in a timely manner.
28. As to the allegation that disclosure of the applicants' identities at this stage to the OPCD could create a conflict of interest – the legal representative has not provided any information concerning the nature or scope of the conflict.
29. The OPCD submits that mere access to confidential material *per se* does not create a conflict of interest;¹⁸ the OPCD is bound by the Code of Conduct to respect the confidentiality imposed by the Chamber and not to disclose the identities to any other defence team or accused. If an accused or defence team required access to such information, the appropriate avenue would be for them to seek relief from the Chamber, and not the OPCD. Accordingly, since other defence teams do not have a right to request such information from the OPCD, the OPCD does not incur any potential conflict of duties by virtue of the fact that it possesses the information in question.
30. In this regard, the OPCD submits that a conflict of interest would only arise if the OPCD adopted a position which could potentially impact on the credibility or presumption of innocence of another accused. At this stage of the proceedings, the OPCD is not required to comment on whether the harm allegedly suffered by the applicants can be attributed to a particular suspect or accused.¹⁹ Accordingly, a conflict does not arise if the OPCD simply puts the applicants or the prosecution to proof by challenging the accuracy, consistency and credibility of the applicants' assertions.

¹⁷ By entities other than the OPCD.

¹⁸ See in this regard, the following ICTY decision: Decision On Prosecution's Motion For Review Of The Decision Of The Registrar To Assign Mr. Rodney Dixon As Co-Counsel To The Accused Kubura, Prosecutor v. Hadzihasanovic *et al*, 26 March 2002

¹⁹ The OPCD nonetheless submits that the inclusion of completely unsupported assertions concerning the alleged responsibility of an individual or political group may impinge on the overall credibility of the particular applicant and their ability to recollect events in an accurate manner.

31. Moreover, the OPCD submits that it is completely illogical and inconsistent for the legal representative to proffer such an argument, whilst contemporaneously relying on the services of the OPCV, and permitting them to access such material. The OPCV has a similar structure and mandate to the OPCD, and also faces the possibility that it will be required to provide support and assistance to victims who may have different interests.
32. Finally, the OPCD observes that the possibility of a conflict of interest is not a valid criterion for imposing protective measures, particularly in light of the vague and abstract nature of the legal representative's assertion.
33. The OPCD therefore respectfully submits that the argument that the OPCD should not be provided with the material in question because of possible conflicts of interest is irrelevant and completely lacking in foundation.

2.3 The requested measures would impact on the fairness and impartiality of the proceedings, and would prejudice the ability of the OPCD to formulate its observations on the applications

34. Findings concerning victim participation in the situation phase are not necessarily provisional; it may be the case that the events in question are not litigated in a particular case. As such, the finding by the Single Judge that a person has suffered harm as a result of the commission of an offence which falls under the Rome Statute might never be challenged by a future defence team. It is therefore imperative for the integrity and accuracy of the judicial and public record that the OPCD be provided with a full and effective opportunity to challenge all factual, legal, and procedural elements of the applications.
35. Without the identities of the applicants, the OPCD can not verify the accuracy of the signature of the applicants, it would be denied access to attached supporting materials, which identify the applicants but which may be necessary to ascertain familial links or to verify the age of the applicant at present and during the events in question, it would be precluded from assessing whether the applicant has any ties to other applicants or was present during their interview.
36. Furthermore, in order to ensure that the OPCD is not able to deduce the identity of the applicants, other information which could possibly identify the applicant might also be

redacted, such as the date and location of the events, the profession of the applicant, and whether the applicant has any political or military ties.

37. In light of the above, the OPCD respectfully submits that the identity of the applicant is a fundamental component of the veracity and credibility of their assertions.
38. As regards the Report of the Registry, the OPCD reiterates that with respect to information which is filed in the record of the proceedings, the burden is not on the OPCD to demonstrate why it is necessary for it to access such material. On the contrary, the participant seeking to withhold the information in question from another party must meet the stringent criteria outlined above for *ex parte* filings and redactions. In this regard, the legal representative has not provided any explanation as to how and why disclosure of the information contained within the Report of the Registry to the OPCD could endanger the security of persons, who are entitled to protection under the Rome Statute and Rules of Procedure and Evidence.
39. In addition, the OPCD respectfully submits that whilst the Statute and Rules permit the Chamber to receive *ex parte* materials for the purpose of temporary protective measures, it does not permit the Chamber to render factual determinations which are prejudicial to the defence, without permitting the defence to access the material on which it based its determination.
40. Thus, in a judgement dated 14 December 2006, the Appeals Chamber noted that “in its consideration of the present appeal, it took into account only the public version of the Prosecutor’s Response to the Document in Support of the Appeal and not the *ex parte* version of it. The Prosecutor had not provided any explanation as to why he filed an *ex parte* version of the Response to the Document in Support of the Appeal. The Appeals Chamber considers that it would be inappropriate to take into account a filing of a participant that was not notified to the other participant”.²⁰
41. Similarly, those articles and rules which permit the non-disclosure of information are subject to the caveat that a participant cannot seek to introduce that information as evidence in the proceedings without prior disclosure to the other party.²¹

²⁰ Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Second Decision on the Prosecution’s Requests and Amended Requests for Redactions under Rule 81’, 14 December 2006, page 5, ICC-01/04-01/06-774

²¹ See for example, rule 81(2), (5) and (6), and rule 82(1) of the Rules of Procedure and Evidence.

42. Alternatively, if the Chamber is of the view that it is either necessary or useful for it to utilise the Report of the Registry in formulating its decision, it follows that it would also be necessary or useful to the parties to access this information.

43. [Redacted]

44. [Redacted]

45. As has been held by the ad hoc Tribunals, the existence of prior inconsistent statements goes directly to the credibility of a person's recollection.²² The OPCD therefore submits that it is necessary for the OPCD to be disclosed the different versions of the person's factual allegations, and the context in which the subsequent information was provided.

46. Moreover, as a matter of procedural fairness, the OPCD does not wish to dedicate its limited time and resources to resolving procedural ambiguities or raising issues in its observations, which are rendered moot by information which is contained within the Report. For example, whilst several applicants might state in their application forms that they do not wish to participate at the preliminary phase, the Report of the Registry might contain subsequent information to the effect that the applicant has expressed a wish to participate at this stage. The Report might also contain crucial information concerning the presence of interpreters and the language used during the interview, and the circumstances of the interviews. The Report might also organise the applications by date, event, and type of offence, thus obviating the need of the parties to replicate this work.

47. Accordingly, the OPCD respectfully submit that the information contained within the Report is either directly exculpatory, or of material relevance to the ability of the OPCD to prepare its observations.

²² 'Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence', Prosecutor v. Limaj et al, 25 April 2005, <http://www.un.org/icty/limaj/trialc/decision-e/050425-2.htm>; 'Decision on Admission into Evidence of Prior Statement of a Witness', Prosecutor v. Halilovic, 5 July 2005, <http://www.un.org/icty/halilovic/trialc/decision-e/050705.htm>; Appeals Judgment, Prosecutor v. Kupreskic, 23 October 2001, para 162, <http://www.un.org/icty/kupreskic/appeal/judgement/index.htm>; 'Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92 bis as a Basis to Challenge Credibility and to Refresh Memory', Prosecutor v. Blagoje Simic et al, 23 May 2003.

2.4 Deadline for filing observations

48. The OPCD observes that in the decision of 17 July 2007, the Honourable Single Judge stated that the deadline for filing observations would start to run from the state on which the parties received the applications, and the Report of the Registry.
49. In the subsequent decisions suspending the transmission of the Report of the Registry, the Single Judge did not vary the conditions under which the deadline should start to run.
50. The OPCD therefore respectfully submits that in light of the fact that the second decision did not expressly vary the deadline, the first decision remains operative; namely, the deadline will once commence to run once the parties have received both the applications *and* the Report of the Registry.
51. In this connection, the OPCD submits that in any case, it would be procedurally fair to suspend the deadline for the observations, pending the Single Judge's resolution as to whether the Report should be transmitted to parties in its entirety, in redacted format or not at all.
52. If the OPCD were to commence its factual review, it may be required to revise its conclusions based on new or contradictory information. Legal and factual research may also have been rendered moot by information in the Report.
53. In addition, the time and resources of the OPCD have been diverted from the task of reviewing the observations by virtue of its need (and right) to respond to the request of the legal representative.
54. The OPCD therefore respectfully requests the Single Judge to clarify whether the initial formulation of the triggering of the deadline is still operative, and if not, to order, pursuant to Regulation 35(2) of the Regulations of the Court, that the deadline shall be suspended pending resolution of the requests of the legal representative.

3. Conclusions

55. Whilst protective measures play an important role in judicial proceedings before the ICC, they are an exceptional measure, which should be employed for the sole purpose of ensuring that the safety and security of persons is not endangered.

56. Protective measures should *not* be used as a litigation strategy – for example, by seeking to withhold any information which reflects adversely on the credibility or consistency of applications, or in order to marginalise the role of the defence in the proceedings.
57. As elaborated above, the legal representative has failed to adduce any compelling reasons as to why disclosure of the information in question to the OPCD could endanger the safety or security of persons.
58. In addition, the applicants have been given an adequate opportunity to be heard, and to explain their concerns to the Chamber in their application form. It is not permissible to reopen these issues simply because the applicants do not agree with the findings of the Chamber.
59. In this connection, the Statute clearly recognises that the right of victims to participate in the proceedings is subordinated to right to fair trial and the rights of the defence. Accordingly, if the applicants assert that in order to participate, they require certain measure which infringe on the fairness of the proceedings and the rights of the defence, it is the right to participate which must be abandoned in order to preserve the latter rights. Indeed, the OPCD respectfully submits that the right to participate is premised on the victims' right to achieve justice – yet there can be no justice without fair and impartial proceedings, and respect for the rights of the defence.

4. Relief Sought

60. For the reasons set out above, the OPCD respectfully requests the Honourable Single Judge to;
- i. reject the requests of the legal representative in their entirety; and
 - ii. clarify whether the deadline for filing observations has commenced to run, and if so, to suspend the deadline pending the Single Judge's decision on the requests of the legal representative.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 26th day of July, 2007

At The Hague