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Date: 28 August 2007

**PRE-TRIAL CHAMBER I**

**Before:** Judge Sylvia Steiner, Single judge

**Registrar:** Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**Public Document**

**Request for Single Judge to order the Prosecutor to disclose exculpatory materials**

**The Office of the Prosecutor**

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Lawyer

**Office of Public Counsel for the  
Defence**

Mr Xavier-Jean Keïta, Principal Counsel

## 1. Introduction

1. On 17 July 2007, the Honourable Single Judge issued a decision,<sup>1</sup> which authorised the filing of twenty five applications to be recognised as victims in the record of the Situation of the Democratic Republic of Congo (DRC), and granted the Prosecution and the Office of Public Counsel for Defence (OPCD) authorisation to file observations in relation to these applications.
2. On 20 July 2007, the OPCD requested the assistance of the Prosecution to obtain any information or statements which would affect the credibility or contradict the assertions (including dates and location of alleged events) contained within the applications.<sup>2</sup> In particular, the OPCD requested any information which would suggest the following:
  1. that the intensity of hostilities in the villages (and their immediate environs) cited in the application did not meet the requisite threshold for an armed conflict during the period of time cited in the applications;
  2. that the villages mentioned in the applications or their environs may have been inhabited by persons affiliated with armed groups;
  3. that the persons mentioned in the applications may have had links to armed groups;
  4. that the persons mentioned in the applications may have committed criminal acts;
  5. any other information which would impact on their credibility.
3. The Prosecution refused this request in its entirety on the basis that it did not consider that the information requested was relevant, or that the OPCD had a right to exculpatory materials under article 67(2).<sup>3</sup>
4. The OPCD has observed that all OTP observations,<sup>4</sup> which have been filed thus far in relation to victim participation in the situation phase, do not address the question as to whether the applicants in question meet the criteria to be recognised as victims participating before the ICC. In addition, to the knowledge of the OPCD, the OTP has not informed the Chamber as to

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<sup>1</sup> Decision authorising the filing of observations on applications for participation in the proceedings ICC-01/04-358

<sup>2</sup> Confidential Annex A.

<sup>3</sup> See Response of the Prosecution to the OPCD, Confidential Annex B.

<sup>4</sup> To which the OPCD has been granted access.

whether the information set out in the applications might be contradicted by information within its control, or whether the credibility of the applicants might be impugned by information within its control.

5. This Honourable Pre-Trial Chamber has previously held that one of the objectives of victim participation at the situation phase is to clarify the facts;<sup>5</sup> the OPCD therefore respectfully submits that victim participation will not clarify the facts if only one, subjective component of the ‘truth’ is being presented to the Chamber and indeed the public.
6. Accordingly, in order to ensure that the admission of victims at this stage of the proceedings does not unduly prejudice the defence and the fairness and impartiality of the proceedings, the OPCD respectfully requests the Honourable Single Judge to order the OTP to either address these issues in its observations, or disclose any such materials to the OPCD, so that the OPCD can file appropriate observations on these issues.
7. In the event that the Honourable Single Judge rejects this request, then the OPCD requests in the alternative that the applications to participate in the situation phase be dismissed in light of the prejudice to the rights of the defence and the principle of equality of arms that would result if they were permitted to participate at this juncture.

## **2. Legal Basis for the Request**

8. The OPCD has already drawn the attention of the Honourable Chamber to the fact that the OPCD does not have any investigative capacities, and does not benefit from the instructions of a client.
9. The OPCD is therefore fully dependent at this stage on the information provided by the applicants themselves, and any further details or information which might be provided by the Prosecution.
10. In terms of the Prosecutor’s investigative powers and obligations article 54(1)(a) of the Rome Statute stipulates that the Prosecution shall, “in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and in doing so, investigate incriminating and exonerating circumstances equally.”

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<sup>5</sup> Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06 ICC-02/05-74, 17 January 2006, at para. 63.

11. Article 54(1)(a) encapsulates the functions of the Prosecutor as an impartial minister of justice, and by vesting the Prosecutor with independence and wide-reaching powers, aims to ensure fairness in circumstances in which the Defence might not be able to access certain materials themselves.
12. In this regard, the drafters of the Rome Statute were aware that the Defence “would not be able to wield similar authority [as the Prosecutor] to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of recourse between parties.”<sup>6</sup> The Prosecutor was therefore vested with strong investigative powers subject to a “clear and binding mandate for the Prosecutor to investigate both sides of the case equally”.<sup>7</sup>
13. The rationale for vesting the Prosecution with such powers would be completely vitiated if the Prosecution chose to construe their disclosure obligations in the narrowest manner possible. The result can only be a manifest inequality of arms, with little, if any prospects for fair proceedings. In this regard, there cannot be a really *fair* trial, if this fairness has not been practised and guaranteed appropriately in the phases before the trial.”<sup>8</sup>
14. In discussing the scope of the Prosecutor’s obligations under article 54, Bergsmo and Krueger have opined that “[m]aterial collected during the investigative phase should be collected with a view to their ultimate utilisation in Court proceedings”.<sup>9</sup>
15. The OTP can therefore fulfil its obligation to ‘establish the truth’ under article 54 either by submitting such information directly to the Chamber, which it has declined to do thus far, or by disclosing any potential exculpatory material to the defence (which in the current proceedings, is the OPCD).

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<sup>6</sup> M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716 para 2. .

<sup>7</sup> M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716 para 2.

<sup>8</sup> Marchesiello, ‘Proceedings before the Pre-Trial Chamber’ in The Rome Statute of the International Criminal Court (Cassese, Gaeta and Jones eds. 2002) at 1232. See also ICC Appeal Judgment on Extraordinary Review, DRC situation, 13 July 2006 at para. 11.

<sup>9</sup> M. Bergsmo P. Krueger, ‘Duties and Powers of the Prosecutor’ page 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 719, para 29.

16. The OPCD therefore submits that a key consideration in construing the extent of the Prosecutor's disclosure obligations should be the fact that "by seizing material, the Prosecution denies such accused persons access to that material. Experience has demonstrated that the results can be seriously deleterious to the rights of the accused."<sup>10</sup> Hence, the OPCD respectfully submits that the Prosecutor does not fulfil its obligation to establish the truth by merely collecting evidence; in order to preserve the fairness of adversarial proceedings, the Prosecution must actually put the Defence in a position to use that information in court.<sup>11</sup>

17. As stated by the House of Lords in the United Kingdom,<sup>12</sup>

*Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.*

18. The OPCD further observes that the Prosecutor's obligation to take measures to ensure confidentiality of evidence under article 54(f) does not exempt it from complying with its disclosure obligations. As stated by the Honourable Single Judge in the Kony et al case, "[c]ontrary to what is asserted in paragraph 39 of the Prosecutor's submission, it is understood by the commentators cited by the Prosecutor that article 54, paragraph 3(f) of the Statute is "subject to disclosure orders by the Court pursuant to the Statute and the Rules of Procedure and Evidence".<sup>13</sup>

19. In terms of the specific legal provision which would govern the Prosecutor's obligation to disclose the requested materials to the OPCD, the OPCD submits that article 67(2) of the Rome Statute imposes a clear obligation on

<sup>10</sup>Decision of Duty Judge on Search and Seizure Warrant, Case IT-02-55-Misc4, cited in G. McIntyre, 'Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY', 25 August 2003, Outreach Seminar: Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps < <http://www.isrcl.org/Papers/McIntyre.pdf> >

<sup>11</sup> Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Prosecutor v. Blaskic, Decision of the Appeals Chamber dated 26 September 2000, at para. 41 < <http://www.un.org/icty/blaskic/appeal/decision-e/00926PN313780.htm> >

<sup>12</sup> R v H and C [2004] 2 AC 134, at 147

<sup>13</sup> Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005, Kony et al case, ICC-02/04-01/05-147, 8 March 2006 at footnote 82, citing Mr. Bergsmo and P. Kruger, Article 54 in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*

the Prosecutor to disclose exculpatory materials to whichever entity is representing the rights of the defence.

20. Although article 67 refers to the rights of an ‘accused’, the rights of the defence under article 67 apply to all stages of the proceedings before the ICC: this necessarily encompasses the right to obtain exculpatory material under article 67(2).
21. The OPCD further submits that the OTP’s obligations under article 67(2) apply irrespective of whether the OTP has been apprised of the defence strategy.<sup>14</sup>
22. Indeed, the OTP’s obligation to investigate and disclose exculpatory information exists independently of the defence. As stated by the ICTR Appeals Chamber, this positive duty to disclose exculpatory materials stems *“from the Prosecution’s duty to investigate, which the Appeals Chamber has explained runs conterminously with its duty to prosecute. In particular, the Appeals Chamber recalls that one of the purposes of the Prosecution’s investigative function is “to assist the Tribunal to arrive at the truth and to do justice for the international community, victims, and the accused.” The responsibility for disclosing exculpatory material rests on the Prosecution alone, and the determination of what material meets Rule 68 disclosure requirements is primarily a fact-based judgement, falling within the Prosecution’s responsibility. In other words, the Prosecution has a distinct obligation to participate in the process of administering justice by disclosing to the Defence, as required by Rule 68(A), material which it actually knows “may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence”*.<sup>15</sup>
23. It therefore follows that the fact that the OPCD has not been assigned to represent the interests of a particular suspect or accused in these proceedings is irrelevant to the OTP’s obligation to disclose any information which could

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<sup>14</sup> In the Prosecutor v. Thomas Lubanga, the Honourable Pre-Trial Judge confirmed firstly, that the defence was under no obligation to disclose its defence strategy to the Prosecution prior to the confirmation hearing, and that secondly, the Prosecution was nonetheless under a continuing obligation to disclose exculpatory materials to the defence. Decision on the final system of disclosure and the establishment of a timetable ICC-01/04-01/06-102, 15 May 2006 at para 118.

<sup>15</sup> Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, Prosecutor v. Karemera 30 June 2006 at para. 9.

impact on the credibility of the applicant's allegations, and the authenticity of any documents.

24. Finally, the OPCD submits that a further basis for obtaining the information in question from the OTP could be Rule 77 of the Rules of Procedure and Evidence, which imposes an obligation on the Prosecution to permit the Defence to inspect documents and statements *inter alia* which are "material to the preparation of the defence". Notably, this obligation is not tied to a particular stage of the proceedings.

### 3. Categories of information requested

25. In assessing whether a particular document or category of documents falls within the Prosecutor's duty to disclose exculpatory materials, it is not necessary for the OPCD to establish that the materials are definitely exculpatory: this is an evidentiary assessment which falls to the Single Judge to make. Thus, in accordance with the (higher) threshold for triggering the Prosecutor's disclosure obligations at the ICTY, it is sufficient to "present a *prima facie* case which would make probable the exculpatory nature of the materials sought."<sup>16</sup>
26. The OPCD further observes that in the Prosecutor v. Thomas Lubanga Dyilo, the Honourable Pre-Trial Chamber confirmed that the Prosecutor's duty to search for exculpatory materials extends beyond materials which are in the actual control of the Prosecutor; the Prosecutor thus has a positive obligation to seek and request items identified as exculpatory from outside sources.<sup>17</sup>

*3.1 Information suggesting that the intensity of hostilities in the villages and their environs did not meet the threshold for an armed conflict during the requisite time period.*

27. The OPCD submits that information to the effect that the level of fighting in the areas in question was sporadic, random, isolated, or perpetrated by

<sup>16</sup> Prosecutor v. Blaskic, Decision on the Production of Discovery Materials, 27 January 1997, para. 50; see also Prosecution v. Brdjanin and Talic, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment While Matters Affecting Justice and a Fair Trial can be Resolved" 30 October 2002, <http://www.un.org/icty/brdjanin/trialc/decision-e/31123823.htm#11> at para 23.

<sup>17</sup> Decision on Defense Requests for Disclosure of Materials, 17 November 2006  
ICC-01/04-01/06-718



disorganised bandits is clearly exculpatory for the purposes of the current proceedings.

28. In order to be granted the right to participate as a victim before the ICC, it is necessary for the applicant to establish that he or she suffered harm as a result of an offence falling within the jurisdiction of the ICC.
29. Pursuant to article 5(1) of the Rome Statute, the jurisdiction of the ICC is strictly limited to “the most serious crimes of concern to the international community as a whole”.
30. If the alleged offence is a war crime, it is necessary to verify whether the alleged crimes were “committed as part of a plan or policy or as part of a large-scale commission of such crimes”.<sup>18</sup>
31. In addition, the war crime in question must either have been committed in connection with an international armed conflict or an internal armed conflict. In order to reach the level of an armed conflict, it is necessary to establish that there has been a “protracted armed conflict between governmental authorities and organized armed groups or between such groups”.<sup>19</sup> This threshold would not be met by “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.<sup>20</sup>
32. Similarly, alleged crimes against humanity requiring a threshold finding that the acts in question were “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.<sup>21</sup>
33. These nexus requirements cannot be determined in the abstract, but require an analysis of the specific circumstances in the geographical areas cited in the applications, during the time period cited in the applications. Nor can these fundamental requirements be waived. The jurisdiction of the ICC is strictly limited to “the most serious crimes of concern to the international community”,<sup>22</sup> and it would be *ultra vires* for the Court to seise itself of events and create judicial rights for the applicants with respect to alleged offences which do not fall under its jurisdiction.

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<sup>18</sup> Article 8(1) of the Statute.

<sup>19</sup> Article 8(2)(f) of the Statute.

<sup>20</sup> Article 8(2)(f) of the Statute.

<sup>21</sup> Article 7(1) of the Statute.

<sup>22</sup> Article 5(1) of the Statute.



*3.2 Evidence that the villages mentioned in the applications or their environs may have been inhabited by persons affiliated with armed groups, and evidence that the persons mentioned in the applications may have had links to armed groups*

34. The OPCD submits that the potential military character of a location or a person is relevant to the question as to whether that place or person is protected by international humanitarian law, and thus, the assessment as to whether an attack on that place or person constitutes a war crime for the purposes of article 8 of the Rome Statute.
35. For example, article 8(2)(e)(i) excludes from its ambit attacks directed against persons taking a direct part in the hostilities, and articles 8 (2)(e)(viii) and (xii) exempt acts committed for imperative military reasons.
36. Similarly, article 7 (crimes against humanity) imposes the threshold requirement that the alleged offence must have been committed as part of a widespread or systematic attack directed against a civilian population.
37. The OPCD therefore submits that any information to the effect that the locations of the alleged offences were possible military targets or that the applicants may have been participating in the hostilities would be exculpatory, since it would eliminate the underlying assumption that an offence under the Rome Statute had been committed.
38. Finally, evidence that the applicants might have affiliations to armed group is relevant to the applicant's underlying motive and credibility, and the assessment as to whether it would be appropriate for such a person to participate as a victim before the ICC, and whether their participation could impact on the fairness and impartiality of the proceedings and the rights of the defence.

*3.3 Information that the persons mentioned in the applications may have committed criminal acts*

39. The OPCD submits that a necessary criterion of victim participation should be that the alleged victim has not themselves committed, contributed to, or benefited from the criminal acts.<sup>23</sup>

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<sup>23</sup> Law of the Republic of Lithuania on compensation for damage caused by violent crimes (Official

40. In addition, the possible criminal background of an applicant is highly relevant to the credibility of the applicant's assertions, particularly if the crime in question was a crime involving dishonesty or moral turpitude.<sup>24</sup>

*3.4 Any other information which would impact on the credibility or accuracy of the applicant's assertions.*

41. The OPCD submits that the Prosecution's disclosure obligations under article 67(2) should be interpreted in a broad manner to include any information which contradicts or discredits the applicant's assertions.
42. In addition, as regards any supporting material or identification provided by the applicants, the OPCD further submits that the OTP has an obligation to disclose any

*information going to the authenticity of a document so as to enable the Defence to make full use of it. Indeed, if there is other material which tends to establish the authenticity of the document, such other material itself becomes an integral part of the exculpatory evidence as being beneficial to the accused. Moreover, if the Prosecution possesses evidence which tends to suggest that some specific material being ruled on by it may not be authentic, the Prosecutor would, of course, be obliged to transmit such evidence as exculpatory evidence.*<sup>25</sup>

#### **4. Relief Sought:**

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Gazette No 85-3140 of 14 July 2005) < <http://www.tm.lt/default.aspx?item=smurt&lang=3>>. See See also RD Pedro 'Measures to protect victims of crime and the abuse of power in the criminal justice Process' < [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no70/p092-105.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no70/p092-105.pdf)> ( accessed 19 June 2007)

<sup>24</sup>See the Trial judgement in Prosecutor v. Kordic and Cerkez, in which the Chamber observed that in common law jurisdictions "the evidence of witness AT would be treated as that of an accomplice and would be treated with great caution" (26 February 2001 at para 628) <http://www.un.org/icty/kordic/appeal/judgement/index.htm>; and Prosecutor v. Halilovic, 'Decision on Addendum to Further Defence Report *re* Access to Foss Material and Additional Motions *re* Criminal Record of Prosecution Witnesses filed on 5 January 2005 and 11 February 2005, Decision of 18 March 2005, <http://www.un.org/icty/halilovic/trialc/decision-e/050318.htm>. The Chamber referred to the "general principle of law that judgements of domestic courts are public, wherefore the right to privacy of a witness is not violated in any way by allowing access to the Defence to these judgements", and that "a file containing the supporting material of a criminal case ("criminal file") which has led to a conviction, whether or not the witness was later pardoned or whether amnesty was granted to that witness, may contain information which could affect the credibility of a witness, or information as to the "criminal character" of those witnesses who allegedly were involved [...], wherefore the Trial Chamber considers that access to those criminal files may be necessary or relevant for a fair determination of a matter in issue before the Trial Chamber".

<sup>25</sup> Prosecutor v. Blaskic, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, 30 January 1998, para 15. <http://www.un.org/icty/blaskic/trialc1/decisions-e/80130EV113316.htm>

43. In light of the aforementioned submissions, the OPCD respectfully requests the Honourable Single Judge to order the Prosecutor to search for and disclose to the OPCD any material falling within the ambit of article 67(2), and specifically, any information which would suggest the following:

1. that the intensity of hostilities in the villages (and their immediate environs) cited in the application did not meet the requisite threshold for an armed conflict during the period of time cited in the applications;
2. that the villages mentioned in the applications or their environs may have been inhabited by persons affiliated with armed groups;
3. that the persons mentioned in the applications may have had links to armed groups;
4. that the persons mentioned in the applications may have committed criminal acts or any other information which would impact on their credibility.

44. In the alternative, if the Honourable Single Judge rejects the above request for the disclosure of exculpatory materials, the OPCD respectfully requests the Honourable Single Judge to dismiss the applications to participate in the situation phase *in limine* in light of the prejudice to the rights of the defence and the principle of equality of arms.



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Xavier-Jean Keïta  
Principal Counsel of the OPCD

Dated this 28th day of August 2007

At Benin