

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Prosecution's observations on the request by the OPCD for access to previous filings
and for extension of page and time limits**

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Background

1. On 22 September 2006, the Pre-Trial Chamber rendered the decision authorising the Prosecution and the then *ad hoc* counsel for the defence to submit observations on applications a/0004/06 to a/0009/06, a/0016/06 to a/0063/06 and a/0071/06 to participate as victims in the proceedings.¹
2. On 28 November 2006, the *ad hoc* counsel for the defence filed observations on applications a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the record of the investigation in the Situation in the Democratic Republic of the Congo ("the DRC").²
3. On 30 November 2006, the Prosecution filed its observations on applications a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06.³
4. On 23 May 2007, the Single Judge⁴ rendered the decision authorising the Prosecution and the Office of Public Counsel for the Defence ("the OPCD") to file observations on applications a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06 to a/0250/06 to participate as victims in the proceedings ("23 May 2007 Decision").⁵

¹ "Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06", public, 22 September 2006, ICC-01/04-228.

² "Observations du Conseil ad hoc de la défense sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'enquête en République Démocratique du Congo", confidential, 21 November 2006, ICC-01/04-314-Conf.

³ "Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06", public with confidential – ex-parte-Prosecution only Annex, 30 November 2006, ICC-01/04-01/06-315 + Conf-Exp-Anx.

⁴ On 10 May 2007, the Pre-Trial Chamber designated Judge Sylvia Steiner as Single Judge of Pre-Trial Chamber I for the Situation in the DRC and any related case from that date until otherwise decided; "Décision portant désignation d'un juge unique", public, filed on 11 May 2007, ICC-01/04-328.

⁵ "Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure", public, 23 May 2007, ICC-01/04-329.

5. On 24 August 2007, the Single Judge issued the "Order concerning the transmission of further information on victims' application" ("24 August 2007 Order")⁶, by which the Single Judge, among others, (i) ordered the VPRS to extract from the reports submitted to the Chamber further information related to thirty-three applications a/0009/06, a/0018/06, a/0026/06, a/0027/06, a/0038/06, a/0144/06, a/0145/06, a/0148/06, a/0203/06, a/0214/06, a/0220/06, a/0221/06, a/0224/06, a/0227/06 to a/0235/06, a/0237/06, a/0238/06, a/0242/06 to a/0250/06; (ii) ordered the Registry to transmit the further information with a copy of the applications concerned to the OPCD and to the Prosecution within ten days from the notification of the decision.

6. On 29 August 2007, the OPCD submitted its "Request for access to previous filings, and an extension of the page limit and time limit" ("the OPCD Request"), by which the OPCD requested (i) access to all filings concerning the applications referred to in the 24 August 2007 Order; (ii) that the VPRS specify the date on which the further information had been received by the Registry; (iii) to be granted an extension of the time limit from ten to thirty days and that the deadline start to run only after a decision on OPCD's above-mentioned request for access to confidential filings had been issued and; (iv) to be granted an extension of the page limit to forty pages.⁷ The OPCD's request for an extension of the page and time limit was based on an erroneous assumption that the OPCD was tasked with presenting observations on ninety-seven applications in total, with sixty-five of the applications concerning prior proceedings for which the OPCD was not appointed to act pursuant to regulation 77(4) of the Regulations and for which the OPCD claims not to have had access to any confidential filings,

⁶ "Order concerning the transmission of further information on victims' applications", public, 24 August 2007, ICC-01/04-376.

⁷ "Request for access to previous filings, and an extension of the page limit and time limit", public, 29 August 2007, ICC-01/04-379.

namely the observations on the applications submitted by the then *ad hoc* counsel for the defence or by the Prosecution.

7. On 31 August 2007, the Single Judge rendered the "Order on the request by the OPCD for access to previous filings and for extension of page and time limit" ("31 August 2007 Order")⁸, by which the Single Judge clarified that, pursuant to the 24 August 2007 Order, the number of applications for which the OPCD had been authorised to file observations following the transmission of the further information by the VPRS amounted to thirty-three and that only five applications related to prior proceedings, for which observations have been previously submitted by the former *ad hoc* counsel for the defence, namely a/0009/06, a/0018/06, a/0026/06, a/0027/06 and a/0038/06. The Single Judge further (i) ordered the VPRS to specify the date on which the further information was received, (ii) invited the Prosecution to submit observations on the Request and in particular on the request of the OPCD to receive confidential and ex-parte filings, within five days and (iii) suspended the time-limit given to the Prosecution and the OPCD for the filing of observations on the applications for which further information had been received and transmitted to the parties by VPRS pursuant to the 24 August 2007 Order, until otherwise decided.
8. On 31 August 2007, the VPRS informed the Pre-Trial Chamber of the Decision of the Legal Representative of applicants a/0128/06 to a/0187/06, a/0188/06, a/0199/06, a/0203/06, a/0209/06 to a/0214/06, a/0220/06 to a/0222/06, a/0224/06 to a/0230/06 and a/0234/06 to a/0241/06 to withdraw his former request for anonymity. Annexed thereto, the VPRS filed three

⁸ "Order on the request by the OPCD for access to previous filings and for extension of page and time limit", public, 31 August 2007, ICC-01/04-383.

confidential *ex-parte* documents, reserved to the Legal Representative and the OPCV.⁹

9. On 3 September 2007, the VPRS transmitted the further information received under Regulation 86(4) of the Regulations of the Court ("the Regulations") in regard to certain applications,¹⁰ as ordered by the Single Judge in the 24 August 2007 Order.¹¹
10. On 4 September 2007, the OPCD filed a "Response to Order on the request by the OPCD for access to previous filings and for extension of page and time limit", in which it (i) recognized that only five of the sixty-five applications related to prior proceedings, namely a/0009/06, a/0018/06, a/0026/06, a/0027/06 and a/0038/06, (ii) withdrew its request for an extension of the page and time limit, (iii) asked the Single Judge to order the Registry to transmit any court filings pertaining to the applications which are subject of the 24 August 2007 Order, and (iv) asked the Single Judge to confirm whether any additional information was provided to the Chamber with respect to applicants a/0027/06 and a/0144/06.¹²

⁹ "Enregistrement d'un courrier du représentant légal retirant sa demande d'anonymat et d'autres documents relatifs à la représentation légale de demandeurs aux fins de participation", public with three confidential annexes reserved to Mr Keta and the OPCV, 31 August 2007, ICC-01/04-380.

¹⁰ Further information regarding applicant a/0009/06 was transmitted to the Prosecution and OPCD on 3 September 2007, which actually consisted of 34 pages and thus contained the applicant's entire application as registered on 15 December 2006 as ICC-01/04-317-Conf.Exp-Anx. The Prosecution draws the Registry's attention to the fact that identifying information regarding other applicants, not subject to the Single Judge's Order of 24 August 2007 and not subject to any further authorisation given by the Chamber to the OPCD under Regulation 77 (4), was hereby disclosed to the OPCD.

¹¹ The Single Judge had ordered the VPRS to transmit further information related to applications a/0009/06, a/0018/06, a/0026/06, a/0027/06, a/0038/06, a/0144/06, a/0145/06, a/0148/06, a/0203/06, a/0214/06, a/0220/06, a/0221/06, a/0224/06, a/0227/06 to a/0235/06, a/0237/06, a/0238/06, a/0242/06 to a/0250/06; The VPRS clarified in its filing, that it did not receive any further information regarding applications a/0027/06 and a/0144/06, see "Transmission au Bureau du Procureur et au Bureau du Conseil public pour la Défense d'informations supplémentaires sur les demandes de participation, en application de l'ordonnance de la Chambre préliminaire I du 24 août 2007", confidential, 3 September 2007, ICC-01/04-384-Conf-Exp, at page 3.

¹² "Response to Order on the request by OPCD for access to previous filings and for extension of page and time limit", public, 4 September 2007, ICC-01/04-386.

Prosecution's Observations

11. The OPCD was given the limited mandate "to submit observations on the Applications for which further information has been sent".¹³ As clarified by the Single Judge, in principle this applies to thirty-three applications.¹⁴ Of those, the OPCD was already authorized by the Chamber to submit its observations on twenty-eight applications.¹⁵ Therefore only five applications concern prior proceedings in respect of which the OPCD did not previously receive the applications and related further information.¹⁶ In respect of these five applications, further information was eventually received for only four out of the five applications, as clarified by VPRS, namely for applications a/0009/06, a/0018/06, a/0026/06 and a/0038/06.¹⁷
12. Accordingly, the Prosecution is of the view that the OPCD Request for access to Prosecution filings can only be accommodated with respect to the four applications listed above .
13. The Prosecution's Reply to these four applications is set out in one filing, the "Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06" of 30 November 2006 (the "Prosecution's Observations of 30 November 2006"), a public filing containing one confidential *ex-parte* annex.¹⁸ The annex summarizes the applications in a manner that discloses the identity of the applicants. For

¹³ See the 24 August 2007 Order, at page 6.

¹⁴ See the 31 August 2007 Order, at page 4.

¹⁵ See the 31 August 2007 Order, at page 5.

¹⁶ Applications a/0009/06, a/0018/06, a/0026/06, a/0027/06 and a/0038/06, see the 31 August 2007 Order, at 5.

¹⁷ See footnote 11 above.

¹⁸ "Prosecution's Observations on the Applications for Participation of Applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06, a/0072/06 to a/0080/06 and a/0105/06", public with confidential – ex-parte-Prosecution only Annex, 30 November 2006, ICC-01/04-01/06-315 + Conf-Exp-Anx.

that reason, the confidential *ex-parte* annex had not been disclosed to the then *ad hoc* defence counsel. The OPCD's request to receive access to all filings concerning the applications subject to the 24 August 2007 Order, goes beyond the scope of the filings received by the then *ad hoc* defence counsel, due to the fact that the *ad hoc* defence counsel only received redacted applications. The OPCD, however, has been granted access to the identity of certain applicants for victim participation, including those subject to the 24 August 2007 Order.¹⁹

14. Given the limited scope of the OPCD's specific court-ordered mandate, disclosure to the OPCD of information contained in the confidential *ex-parte* annex is only justified to the extent that it directly relates to the four applications. Since the confidential *ex-parte* annex consists of summaries of sixty-five applications, of which only four are subject to the 24 August 2007 Order, the Prosecution requests the Chamber to ensure that the confidential *ex-parte* annex be redacted in such a manner that only the information related to applications a/0009/06, a/0018/06, a/0026/06 and a/0038/06 be disclosed to the OPCD. This procedure is consistent with the suggested procedure contained in the OPCD Request.²⁰ Finally and contrary to paragraphs 20 to 22 of the OPCD Request,²¹ the Prosecution is of the view

¹⁹ "Décision autorisant le dépôt d'observations sur les demandes de participation a la procédure", public, 23 May 2007, ICC-01/04-329 ; "Décision autorisant le dépôt d'observations sur les demandes de participation a la procédure", public, 17 July 2007, ICC-01/04-358 ; "Order concerning the transmission of further information on victims' applications", public, 24 August 2007, ICC-01/04-376.

²⁰ "Request for access to previous filings, and an extension of the page limit and time limit", public, 29 August 2007, ICC-01/04-379, at para28.

²¹ At this occasion, the Prosecution would like to reiterate its concerns regarding the strict adherence of the parties to their confidentiality obligations and to underline the fact that the Chamber alone has the authority of authorising disclosure of confidential materials registered in the file of the situation and the case. For the current or former parties to the proceedings to transmit confidential information to third parties would constitute a breach of their confidentiality obligations (see for instance Art. 8 of the Code of Professional Conduct for Counsel "Code of Conduct"). The Prosecution refers to paragraph 20 to 22 of the OPCD Request, where the OPCD refers to Art. 18 (5) of the Code of Conduct, which states that a Defence Counsel shall convey to replacement counsel the entire case file. The OPCD further points out in paragraph 22, that "since the *ad hoc* counsel for the defence resides in the DRC and does not have an operational secure ICC email account, it is not possible for the *ad hoc* counsel to transmit the case file directly to the OPCD in a secure and timely manner." This allows us to conclude that the

that only the Single Judge can decide whether to allow parties to disclose confidential information regarding victims and witnesses.²²

15. Insofar as the OPCD's request concerns filings of other participants, which in the Prosecutions view only applies to the observations presented by the then *ad hoc* counsel for the defence,²³ the Prosecution leaves it to the discretion of the Chamber, as to whether the filing shall be disclosed to the OPCD.

16. The Prosecution does not oppose the remaining OPCD's requests contained in the OPCD 29 August 2009 Request - items (ii) to (v) -, on the basis that they are still pending decision.

Further requests

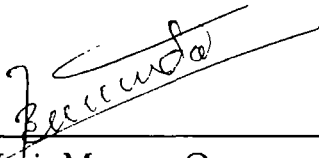
17. The Prosecution wishes to express its concern that the three annexes filed by the VPRS on 31 August 2007 were filed on a confidential and *ex parte* basis to the Legal Representative and the OPCV only. The Prosecution submits that the content of the annexes does not justify their classification as confidential. The content of the annexes has been outlined by VPRS in its filing, as containing: (i) the letter of the Legal Representative to the Court withdrawing his request for anonymity, (ii) the letter of the Registry

OPCD first contacted the former *ad hoc* counsel for the Defence before seeking authorization to receive the confidential materials from the Chamber. The Prosecution submits that all requests to receive confidential information must be directed to the Chamber. Art. 18 (5) of the Code of Conduct cannot apply in the present case, given the limited mandate of the OPCD (which is not a replacement counsel). In addition, Art. 18 (5) can by no means be understood to trump the confidentiality obligations of Art. 8 and those deriving from the Statute.

²² Prosecution's Observations on the "Demande du représentant légal des victimes [EXPURGÉ]", public redacted version, 27 July 2007, ICC-01/04-366, at para 7.

²³ Observations du Conseil ad hoc de la défense sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l'enquête en République Démocratique du Congo, confidential, 21 November 2006, ICC-01/04-314-Conf.

assigning the OPCV as Legal Representative for certain applicants that have not explicitly filed a power of attorney to be represented by the Legal Representative, and (iii) a list of the applicants concerned and the status of their legal representation, i.e. whether they are represented by the OPCV or the Legal Representative. Since this information is relevant to the proceedings and no reasons have been provided to the parties justifying its confidentiality, the Prosecution requests to be provided with a copy of the confidential annexes.



Luis Moreno-Ocampo
Prosecutor

Dated this 5th day of September 2007

At The Hague, The Netherlands