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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
Request for Clarification**

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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/0230/06, a/0234/06, a/0235/06, a/0237/06
and a/0238/06

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1. On 24 August 2007, the Honourable Single Judge issued an 'Order concerning the transmission of further information on victims' applications' (Order of 24 August 2007), in which the Single Judge referred firstly to the fact that the Victims Participation and Reparation Section (VPRS) had transmitted to the Chamber additional information pertaining to applicants 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, a/0228/06, a/0229/06, a/0230/06, a/0231/06, a/0232/06, a/0233/06, a/0234/06, a/0235/06, a/0237/06, a/0238/06, a/0242/06, a/0243/06, a/0244/06, a/0245/06, a/0246/06, a/0247/06, a/0248/06, a/0249/06, a/0250/06, and secondly, that this information had not been transmitted to the Prosecution, *ad hoc* counsel for the defence, or the Office of Public Counsel for the Defence (OPCD).
2. The Honourable Single Judge therefore ordered VPRS to extract this information from the *ex parte* Reports submitted to the Chamber, and transmit it to the OTP and the OPCD, together with a copy of the applications concerned, within ten days from the notification of the decision.
3. On 29 August 2007, the OPCD filed a request seeking access to all prior confidential filings which related to these applications. The OPCD based its request on Regulation 14(b) of the Regulations of the Registry, Regulation 31 of the Regulations of the Court, the Decision Reclassifying Certain Documents in the Record of the Situation in the Democratic Republic of the Congo, dated 21 April 2006, and article 18(5) of the Code of Professional Conduct for Counsel.
4. On 4 September 2007, the OPCD responded to a request for clarification from the Single Judge, in which the OPCD acknowledged that it had miscounted the number of applications, but nonetheless maintained its request for access to all filings which concern the specific applications which are the subject of dispositive section of the Order of 24 August 2007, namely, applications a/0009/06, a/0018/06, a/0026/06, a/0027/06 and a/0038/06, and reiterated its proposition that if necessary, any extraneous information concerning other applications could be redacted from these filings.
5. On 5 September 2007, the Prosecution filed its observations on the request by the OPCD for access to previous filings and for extension of page and time limits, in

which the Prosecution acceded to the request for access to those components of the requested filings which addressed the applications transmitted to the OPCD. Nonetheless, at footnote 22 of the filing, the Prosecution expressed its concern as to whether the OPCD had complied with its confidentiality obligations and bluntly asserted that the OPCD had attempted to obtain these documents from the *ad hoc* counsel for the Defence before going before the Single Judge. The OTP further opined that “the Prosecution is of the view that only the Single Judge can decide whether to allow parties to disclose confidential information regarding victims and witnesses.”¹

6. On 11 September 2007, the Honourable Single Judge rendered her ‘Decision on the request by the OPCD for access to previous filings’, in which the Single Judge granted the OPCD access to the requested documents (with the extraneous sections redacted), but nonetheless stated the following: firstly, that the mandate of the OPCD is not intended to be a continuation of the mandate of the former *ad hoc* Counsel for the defence; secondly, that “only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses”; and thirdly, that “the OPCD should abstain from directly contacting the former *ad hoc* Counsel for the defence”.
7. The OPCD is greatly concerned about the broad terms of the Honourable Single Judge’s ruling and respectfully submits that as statements of law, aspects of this decision could have far-ranging implications for the workings of the OPCD and defence counsel in general. The OPCD therefore requests urgent clarification of the scope of this ruling.
8. The OPCD is also concerned that the statement of the Single Judge could be interpreted as an implied endorsement of the baseless allegation of the Prosecution, and, in light of the fact that the Honourable Single Judge’s decision was rendered before the deadline for requesting leave to file a reply had expired, the OPCD would like to utilise this opportunity to categorically refute the allegations of the Prosecution.

2.1 The Allegations of the Prosecution

9. Concerning the allegations of the OTP, the OPCD would like to state for the judicial record that it has not been in communication in any form with the *ad hoc* counsel concerning the Order of 24 August 2007. It is completely illogical and unfair to base an assertion about a party’s ethics solely from the OPCD’s citation of article 18 of the

¹ At para. 14.

Code of Conduct and its reference to the possibility that the *ad hoc* counsel for the defence did not have the means to transmit documents in a secure and timely manner. Indeed, in contradistinction to the Prosecution's baseless assertion that "[t]his allows us to conclude that the OPCD first contacted the former *ad hoc* counsel for the Defence before seeking authorization to receive the confidential materials from the Chamber", it is apparent from the OPCD's filings of 29 August 2007 and 4 September 2007 that the OPCD had not been in contact with the *ad hoc* counsel for the defence and had expressly chosen to direct its request immediately to the Single Judge.

10. Firstly, in light of the fact the OPCD was not in a position to review the order until 28 August 2007,² it simply would not have been feasible for the OPCD to have communicated with the *ad hoc* counsel by email, received a response, and then drafted, formatted and filed a 9 page motion by 29 August at 14.41pm. Thus, the fact that the OPCD chose to allocate its limited resources to the arguably more arduous task of filing a formal motion to request the Single Judge to pronounce on its legal entitlement to these documents amply demonstrates the OPCD's commitment to respecting its confidentiality obligations in circumstances in which its legal entitlements may be ambiguous pending judicial clarification.
11. Secondly, whilst the OPCD referred to article 18 of the Code of Code to support the general principle that it possessed a legal entitlement to receive any prior court filings which were relevant to its specific mandate, it is clear from the overall submissions of the OPCD that whilst the legal principle of article 18 was applicable, the OPCD clearly recognised that the modalities for transmitting documents in these specific circumstances were not.
12. Indeed, the OPCD readily stated that its mandate was more limited than that of the former *ad hoc* counsel, and that "[i]n the event that the aforementioned confidential and *ex parte* filings address applications which are not the subject of the 24 August 2007 order, the OPCD submits that this additional information could easily be redacted from the filings transmitted to the OPCD."³
13. In this regard, whilst the decision refers to the fact that the OPCD requested access to all documents conveyed to the *ad hoc* counsel pursuant to the two 2006 decisions, this request should have read in connection with the fact that the OPCD repeatedly stressed that it was not requesting access to the entire case file, but only those "filings which

² The OPCD informed the Registry that the two persons who are currently notified of court filings would not be in a position to access their ICC email accounts from the end of 23rd August until morning of 28th August 2007. The OPCD therefore expressly requested the Registry to notify any filings during this time period to other members of the OPCD. This request was not implemented.

³ Request of 29 August 2007 at para. 28.

are linked to the specific, court-ordered mandate of the OPCD”,⁴ and that it subsequently amended its request to make clear that it was only requesting access to those documents which were directly relevant to its mandate; namely, filings pertaining to the applications set out in the *dispositive* section of the Order of 24 August 2007.

14. It would have been completely illogical for the OPCD to have *proprio motu* referred to the differences in its mandate and the possible need for the Chamber to order that the confidential filings of the ad hoc counsel for the Defence and the confidential and *ex parte* filing of the OTP be redacted, if it had contemporaneously requested all documents directly from the *ad hoc* counsel.
15. Thirdly, in terms of the reference to the potential ability of the *ad hoc* counsel to communicate by a secure, email network, the OPCD simply wished to proactively draw the attention of the Single Judge to potential technical and security issues with receiving documents from the *ad hoc* counsel in order to address a possible ruling from the Chamber that the *ad hoc* counsel, as opposed to the Registry, should submit the filing of the ad hoc counsel (either in its entirety or partly redacted) to the OPCD.⁵
16. Moreover, as the Single Judge is aware, the OPCD has – in all filings concerning victim participation – filed all correspondence pertaining to disclosure requests before the Chamber. There is absolutely no reason why the OPCD would have deviated from this practice in this specific instance.
17. Finally, the OPCD strongly submits that the Prosecution should desist from this practice of making unfounded and unverified professional accusations in public filings. At no point in time did the OTP attempt to clarify with the OPCD as to whether it had in fact communicated with the *ad hoc* counsel nor did it request the Single Judge to invite the OPCD to address this possibility.⁶ Such unsubstantiated assertions concerning the ethics of an office dedicated to assisting the defence could

⁴ Request of 29 August 2007 at para. 16.

⁵ The OPCD is aware that the transfer of case materials between former counsel and new counsel at the ICTY has occasioned delays in the proceedings, and sometimes results in a haphazard record of the file: see Prosecutor v. Krajisnik, Decision On Defence Motion For Adjournment (Written Reasons), 21 September 2004, at page 1 (<http://www.un.org/icty/krajisnik/trialc/decision-e/040921.htm>); and further Prosecutor v. Blagojevic, Decision On Vidoje Blagojevic's Motion For Extension Of Time In Which To File His Notice Of Appeal And On Dragan Jokic's Motion For Extension Of Time In Which To File His Appeal Brief, 14 April 2005. The OPCD is also aware that ad hoc counsel at the ICC have previously brought to the attention of their respective Chamber the difficulties of receiving confidential filings by email, and the delays occasioned by utilising other methods: see for example, Decision on "Requête de la Défense en extension de délai afin de répondre aux 'Observations de la Défense sur les demandes de participation à la procédure a/0010/06, a/0064/06 à a/0070/06, a/0070/06, a/0081/06 à a/0104/06 et a/0111/06 à a/0127/06" ICC-02/04-01/05-211, 23 February 2007.

⁶ Indeed, the OTP filing simply states that “it seems to us that [...]”; with all due respect, prosecution filings inspire many thoughts which the OPCD does not necessarily deem warranted to put in a public filing before the Court.

impact on the integrity of the proceedings and have a chilling effect on the willingness of persons to either cooperate with the defence, or agree to the disclosure of their identities to the defence.

2.2 The order of the Single Judge that the “OPCD should directly abstain from contacting the former *ad hoc* Counsel for the defence”.

18. Even though the OPCD has not been in contact with the *ad hoc* counsel for the defence since March 2007,⁷ the OPCD submits that the direction that the OPCD abstain from contacting for *ad hoc* Counsel for the defence is unwarranted and overly broad. There is absolutely no rule of confidentiality or professional ethics which prevents one defence counsel from communicating with another defence counsel, provided they do not discuss confidential aspects of their respective cases. Any restriction on communications between defence counsel would hinder a fair exchange of practical expertise and legal resources (for example, exchange of case law and legislation), and would place the defence in a fundamentally unequal position vis-à-vis the institutional advantages enjoyed by the OTP.
19. In addition, it might be the case that the *ad hoc* counsel may request the assistance of the OPCD pursuant to the OPCD’s mandate under Regulation 77(5) of the Regulations of the Court, the OPCD may wish to proactively offer assistance to the *ad hoc* counsel for future filings, or the OPCD may wish to communicate general documents and correspondence to the *ad hoc* counsel by virtue of his inclusion on the list of counsel at the ICC. The positive obligation of the OPCD to provide support and assistance to all counsel would thus be frustrated by the Single Judge’s ruling.
20. Indeed, the OPCD respectfully submits that clarification of this direction of the Single Judge is warranted since its application as a legal precedent may prevent the OPCD from contacting any future defence counsel or *ad hoc* counsel to offer proactive legal assistance, simply because these counsel might happen to be in possession of confidential documents.

2.3 The scope of the statement “only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses”

⁷ The *ad hoc* counsel was present in The Hague to attend the ICC seminar for counsel.

21. The OPCD respectfully requests clarification from the Single Judge in relation to the scope of the statement “that, as observed by the Prosecution and contrary to what the OPCD indicated in its Request, only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses”.
22. Firstly, as regards disclosure of confidential information concerning victims and witness, the OPCD respectfully observes that the Rome Statute expressly provides for *inter partes* disclosure in different scenarios,⁸ and that there is not always a requirement that leave be sought from the Chamber prior to fulfilling such disclosure obligations. Indeed, if a party refuses to disclose documents falling under these categories unless ordered to do so, they could be sanctioned for failing to perform their disclosure obligations in a diligent manner.
23. There is also a clear distinction between requesting documents from within the same case, and a party requesting access to confidential filings in another case or proceedings. The OPCD respectfully submits that the legal submissions of the Prosecution were misconceived in the sense that they appear to have conflated the two different situations and failed to address the legal nuance as to when a counsel is seeking access to confidential filings within counsel’s own case.
24. Whereas a request for legal documentation in another case (such as a request from the Kony defence team for access to confidential filings in the Harun case) may require a judicial order if the documents do not fall under the *inter partes* disclosure obligations of the Prosecution,⁹ access to confidential and public documents within the same case is an automatic right (there is obviously an exception for *ex parte* documents) for defence teams.
25. Thus, once a person is arrested, the counsel for that person has an entitlement to all non-*ex parte* filings in that person’s case file. Similarly, in the case of a joined case, if a person is arrested after the proceedings against other persons have already commenced, that person’s counsel has a right to all prior public and confidential filings in the case file.
26. If counsel withdraws and is replaced by another counsel, article 18 of the Code of Conduct requires the former counsel to transfer the case file to the replacement counsel in order to ensure continuity of the proceedings and minimise the number of versions of confidential documents which are at large with different counsel; the latter

⁸ For example, Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence.

⁹ For an elaborate statement of law concerning access to filings in other cases, see Prosecutor v. Hadzihasnovic, Decision On Motion By Mario Cerkez For Access To Confidential Supporting Material, 10 October 2001, <http://www.un.org/icty/hadzihas/trialc/decision-e/11010AC216586.htm>.

replacement defence counsel cannot be expected to waste their time and resources requesting access to the defence case file through the Chamber, just as replacement OTP staff members would not be burdened by such an obligation.

27. In this connection, the practice of the *ad hoc* Tribunals clearly supports the fact that the Code of Conduct requirement to transmit a case file to another counsel who is continuing the mandate is not subject to a prior judicial order (although judicial intervention may be required in the event that the former counsel fails to comply with this obligation).¹⁰
28. As regards the ICC, the OPCD respectfully observes that in the various scenarios in which different counsel have been appointed to perform different mandates within the Thomas Lubanga Dyilo case,¹¹ this Pre-Trial Chamber has not made an express order concerning their right to access confidential documents within the case file, notwithstanding the fact that their eventual filings would have required access to at least some confidential filings.
29. Indeed, in its Decision on the Defence request for extension of time limit,¹² the Single Judge invited the OPCD to assume the responsibilities of the defence team as regards a confidential document of the defence; the underlying assumption being that either the OPCD could directly request the document in question from the defence in order to undertake its mandate or the OPCD had already has access to this document.
30. As regards the situation phase, the OPCD respectfully submits that the Honourable Pre-Trial Chamber has a clear obligation to regulate and clearly demarcate the proceedings in order to ensure that there are no legal lacunae concerning the rights of the defence and the principle of equality of arms.
31. The fact that the situation phase is amorphous and the proceedings therein can encompass several prospective cases, does not necessarily mean that it is not possible to isolate specific proceedings within the situation, which are analogous to a case. Indeed, the OPCD submits that in case of procedural ambiguity, the Rules and Regulations should be construed in a manner which is consistent with the rights of the

¹⁰ See Prosecutor v. Blagojevic, Decision On Vidoje Blagojevic's Motion For Extension Of Time In Which To File His Notice Of Appeal And On Dragan Jokic's Motion For Extension Of Time In Which To File His Appeal Brief, 14 April 2005; Prosecutor v. Krajisnik, Decision On Defence Motion For Adjournment (Written Reasons), 21 September 2004, at page 1 (<http://www.un.org/icty/krajisnik/trialc/decision-e/040921.htm>). <http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/a7a6d0b53b46ca55c12571b5003d409a/b0472d67cde1484ac12571fe004be44d?OpenDocument>

¹¹ Appointment of Duty Counsel 19 April 2007, ICC-01/04-01/06-870

¹² 8 February 2007 ICC-01/04-01/06-815

defence (such as the right to implement its mandate in an effective and independent manner).¹³

32. In the current circumstances, the OPCD was requested to present legal submissions concerning some of the same applications which pertained to the mandate of the *ad hoc* counsel. It also appeared from the Single Judge's decision that the Single Judge or Pre-Trial Chamber would eventually issue a single decision taking into account the submissions of the *ad hoc* counsel concerning the initial format of the applications, and the submissions of the OPCD concerning the additional information provided by the applicants. The Order of 24 August 2007 effectively joined the various proceedings concerning the applications which were notified to both the *ad hoc* counsel for the defence and the OPCD.
33. Accordingly, the OPCD respectfully submits that all filings concerning the specific applications which were notified to both the OPCD and the *ad hoc* counsel for the defence are necessary interlinked in the same manner as filings within a case. As such, these specific proceedings should be regulated in the same manner as a case.
34. Thus, the OPCD respectfully maintains its position that the legal principle enshrined in article 18(5) of the Code of Conduct (if not the modalities for transmitting documents between counsel) applied to those documents which were directly relevant to the overlapping components of the mandates of the *ad hoc* counsel for the defence and the OPCD, and further, seeks confirmation from the Honourable Single Judge that in circumstances in which there is a clear continuation of a mandate (for example, if *ad hoc* counsel fell ill and was replaced before the deadline for filing observations had elapsed, or additional information was received with respect to all applications transmitted to the former *ad hoc* counsel), article 18 of the Code of Conduct could apply in its entirety (barring technical issues concerning whether it would be possible to transmit the documents in question in a secure and timely manner).
35. Indeed, the fact that situation related activities does not readily fall within the provisions tailored for case-related proceedings is more of a reason to curb unnecessary legal activity during this phase (such as victim participation) than to curb the rights of the defence.

¹³ Fletcher and Olin for example write: "When there is a legality deficit in a criminal regime, you can assume this deficit exists to serve the interests of the prosecution. There is little doubt that a pro-prosecution mentality pervades the Rome Statute from the Preamble, stressing the suffering of the victims, to the abolition of the statute of limitations (Article 29). **Typically, a criminal statute provides for a strict rule of interpretation in order to protect the interests of the accused. [...] The interpretation should therefore favour the accused. It should reflect the principle in dubio pro reo [...]**" G.P.Fletcher and J.D; Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 Journal of International Criminal Justice 539, at 552 (emphasis added).

36. In this connection, proceedings are either fair or unfair: the rights of fair trial do not admit any distinctions in between. The Honourable Pre-Trial Chamber's obligation to ensure that all aspects of victim participation are conducted in a manner which is consistent with the rights of the defence and fair and impartial proceedings requires that the Pre-Trial Chamber (or the Single Judge) appoint a counsel who is able to avail themselves in an effective manner of the panoply of defence rights and obligations which are related to victim participation. To appoint a quasi-counsel with only limited powers who is constantly subject to unwarranted suspicion would simply demonstrate that the legal fiction of appointing a counsel to protect the general interests of the defence during the situation phase is not tenable, and that such an appointment could simply place a false fig-leaf of fairness on what could potentially be fundamentally unbalanced proceedings.

2.4 Clarification regarding the mandate of the OPCD

37. If the duties entrusted to the OPCD by virtue of the Order of 24 August 2007 are not a continuation of the mandate of *ad hoc* counsel vis-à-vis the specific applications transmitted to the OPCD, then the OPCD respectfully seeks guidance from the Single Judge as to what its precise perimeters of its mandate are.
38. In the event of a decision as to whether these specific applicants are entitled to participate as victims in the situation phase, who would be entitled to appeal this aspect of the decision; the OPCD, *ad hoc* counsel or both? In this connection, the decision of 11 September 2007 refers to the *ad hoc* counsel as former *ad hoc* counsel, which thus implies that the obligations of this counsel to file any submissions or take such measures which are necessary to protect the rights of the defence vis à vis these specific applicants have been transferred to the OPCD;¹⁴ to hold otherwise could create a legal vacuum as concerns the protection of the rights of the defence.
39. Alternatively, if the mandates of the *ad hoc* counsel and the OPCD co-exist as regards the specific applications which have been transmitted to the OPCD and the *ad hoc* counsel, it would be necessary for the *ad hoc* counsel and the OPCD to communicate on a confidential basis with each other in order to coordinate a prospective request for leave to appeal, that protected the general interests of the defence, and took into

¹⁴ Although the OPCD submits that the mandate of the *ad hoc* counsel remains operative concerning all other applications in order to ensure that there are no legal vacuums concerning the rights of the defence.

consideration the *ad hoc* counsel's submissions concerning the initial format of the applications and the OPCD's submissions concerning the additional information.

40. The aforementioned direction of the Single Judge could thus inhabit necessary collaboration as concerns the specific applications which have been transmitted to both the OPCD and the *ad hoc* counsel.
41. Accordingly, if as the Single Judge appears to have concluded, the mandate of the OPCD is not a continuation of the mandate of the *ad hoc* counsel for the defence as regards the specific applications which have been transmitted to both the *ad hoc* counsel and the OPCD, the OPCD respectfully submits that further judicial direction is required in order to address these issues and to ensure that it is clarified as to who has *locus standi* to file future submissions in relation these specific applications. .

3. Relief Sought

42. For the reasons set out above, the OPCD respectfully requests the Honourable Single Judge to clarify the scope of the following statements:
 - i. that the mandate of the OPCD is not a continuation of the mandate of the former *ad hoc* counsel for the defence (as regards the specific applications which were transmitted to the OPCD pursuant to the Order of 24 August 2007);
 - ii. “only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses”; and
 - iii. that the OPCD should abstain from directly contacting *ad hoc* counsel for the Defence.
43. In the event that the mandate of the OPCD is not a continuation of the mandate of the *ad hoc* counsel as regards the specific applications which were transmitted to the OPCD pursuant to the Order of 24 August 2007, the OPCD requests the Honourable Single Judge to clarify the scope and correlation between the respective mandates of the *ad hoc* counsel for the Defence, and the OPCD.



Xavier-Jean Keita
Principal Counsel of the OPCD

Dated this 12th day of September 2007

At The Hague

The Netherlands