



Original : English

No.: ICC-01/04
Date: 29 August 2007

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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Request for access to previous filings, and an extension of the page limit and time limit

The Office of the Prosecutor

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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

Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta, Principal Counsel

Office of Public Counsel for Victims

Ms. Paolina Massida, Principal Counsel

1. On 24 August 2007, the Honourable Single Judge issued an ‘Order concerning the transmission of further information on victims’ applications’, 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/009/06, a/0018/06, a/0026/06, a/0027/06, a/0038/06, a/00144/06, a/0144/06, a/0145/06, a/0148/06, a/0203/06, a/214/06, a/0020/06, a/0021/06, 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/024/06, 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 the a copy of the Applications concerned, within ten days from the notification of the decision.
3. The Honourable Single Judge also authorised the OTP and the OPCD to file observations on the applications for which further information had been sent, within ten days of notification.
4. The OPCD respectfully observes that sixty five of the applications concern prior proceedings for which the OPCD had not been requested to act as *ad hoc* counsel for the defence. Accordingly, the OPCD did not have access to any confidential filings concerning these applicants generated by these proceedings, such as the observations of the *ad hoc* counsel for the defence,¹ or the observations of the Prosecution.²
5. The OPCD therefore respectfully requests the Honourable Single Judge to order the Registry to disclose any previous filings concerning these applications to the OPCD.
6. In addition, the OPCD respectfully submits that in light of the fact that the OPCD has not previously been granted access to these applications, the allotted deadline of ten days will not be sufficient to enable it to review the applications and draft its observations. Accordingly, pursuant to regulation 35 of the Regulations of the Court, the OPCD respectfully requests an extension of time from ten days to thirty days.

¹ Observations du Conseil ad hoc de la Défense sur les demandes de participation à la procédure en qualité des Victimes, 28 November 2006, ICC-01/04-314-Conf, cited by the Single Judge at page 3 of the 24 August 2007 decision.

² 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, 30 November 2006, ICC-01/04-315, ICC-01/04-315-Conf-Exp-Ann, cited at page 4 of the 24 August 2007 decision; Prosecutor’s observations on the applications for participation a/0106/06 to a/0110/06, a/0128/06 to a/0162/06, a/0188

7. Finally, in light of the fact that the OPCD has not yet received the additional information from the VPRS, it is not in a position to assess the extent of the additional information, and the size of the applications which were not previously disclosed to the OPCD.
8. Nonetheless, since the OPCD will be tasked with filing observations in relation to ninety seven applications in total, the OPCD respectfully submits that the page limit of twenty pages will be insufficient to enable it to respond to the information provided.
9. The OPCD therefore requests the Honourable Single Judge to grant an extension of the page limit to forty pages.

2. Submissions

2.1 Request for access to prior filings concerning these applications

10. The OPCD submits that any court filings concerning the applications which are the subject of the Honourable Single Judge's 24 August 2007 order should be transmitted to the OPCD, since the OPCD is in effect, a party to the proceedings which concern those applications.
11. From a practical stand point, it would be unduly repetitive and a waste of resources for the OPCD to repeat factual or legal submissions which have already been raised by either the *ad hoc* counsel or the Prosecution.
12. From a legal perspective, in the first ICC decision which invited the OPCD to file observations concerning applications to participate as victims before the ICC, the Honourable Single Judge expressly cited regulation 77(4) of the Regulations of the Court as the legal basis for the OPCD filing such applications,³ and held that in light of this regulation, the OPCD "shall be entitled to reply to the application for participation of victims at this initial stage of the investigation".⁴
13. The OPCD further observes that regulation 77(4) of the Regulations of the Court has been cited as the legal basis for all subsequent occasions on which the OPCD has been invited to file observations in relation to applications to participate in both the Sudan situation and the DRC situation.⁵

³ "CONSIDERING that pursuant to regulation 77(4) of the Regulations, the Office of Public Counsel for the Defence is tasked, inter alia, with representing and protecting the rights of the defence during the initial stages of the investigation", Decision authorising the filing of observations on applications for participation in the proceedings a/0011/06 to a/0015/06, 23 May 2007, ICC-02/05-74 at page 3.

⁴ At page 3.

⁵ See for example, Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure ICC-01/04-329, 23 May 2007 at page 3.

14. Regulation 77(4) of the Regulations of the Court states that the “tasks of the Office of Public Counsel for the defence shall include representing and protecting the rights of the defence during the initial stages of the investigation”(emphasis added).
15. The reference to regulation 77(4) of the regulations of the Court therefore underscores that the OPCD is exercising a representative function vis-à-vis the general rights of the defence, as opposed to the ancillary support function envisaged by regulation 77(5). The OPCD therefore submits that its obligations and powers mirror those of a defence counsel appointed by the Chamber to represent the rights of the defence (or a particular suspect) in relation to applications to participate as victims in the proceedings.
16. Whilst this does not necessarily equate to an entitlement to access all filings in the situation phase, the OPCD submits that it does equate to an entitlement to receive any filings which are linked to the specific, court-ordered mandate of the OPCD.
17. In this regard, regulation 31 of the Regulations of the Court provides that “[s]ubject to the Statute, Rules, these Regulations, or any order of a Chamber, all participants in the relevant proceedings shall be notified of any document registered by the Registry or any decision or order, unless, with regard to a document, the participant submitting that document requests otherwise”.
18. Regulation 14(b) of the Regulations of the Registry defines confidential filings as filings which should not be disclosed to the public. The OPCD therefore submits that the combined effect of regulation 31 of the Regulations of the Court and Regulation 14(b) of the Regulations of the Registry is that in the absence of a court order or a request from the participant filing the document, all confidential filings concerning the applicants should be disclosed to the OPCD as a participant in these specific proceedings.
19. This conclusion is supported by the Decision Reclassifying Certain Documents in the Record of the Situation in the Democratic Republic of the Congo, dated 21 April 2006, in which the Single Judge concluded that “unless Pre-Trial Chamber I expressly orders, as it did in its decision of 17 January 2006, the classification of a document as either “under seal” or “confidential” does not deny access to any person or entity entitled to participate in any of the proceedings concerning the investigation of the situation in the DRC”.⁶

⁶ ICC-01/04-140 at page 5.

20. Of further relevance is article 18(5) of the Code of Conduct, which stipulates that if the mandate of a defence counsel is continued by another counsel, the first counsel shall transfer the case file to the replacement counsel.⁷
21. In accordance with the order of 24 August 2007, the OPCD is in effect, continuing the mandate of the former *ad hoc* counsel for the defence. The OPCD is therefore entitled to receive any documents which were conveyed to the *ad hoc* counsel for the defence pursuant to the ‘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/0071/06’⁸ and the ‘Décision autorisant le dépôt d’observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06’.⁹
22. 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.
23. In light of the above, the OPCD submits that it should be granted access from the Registry to all confidential filings pertaining to the applicants which are the subject of the 24th August 2007 order, which were previously notified to the *ad hoc* counsel for the defence.
24. Concerning the *ex parte* annex of the Prosecution, the OPCD observes that whereas the OTP were granted access to the unredacted applications, the *ad hoc* counsel for the defence was only granted access to the redacted versions. It is therefore highly probable that the annex of the Prosecution dated 30 November 2006 was filed on an *ex parte* basis due to the fact that the *ad hoc* counsel for the defence did not have the right to access any information concerning the identity of the applicants.
25. In contrast, the OPCD has been granted access by the Single Judge to the identities of the applicants. Accordingly, the rationale for the filing the annex on an *ex parte* basis in order to protect details concerning the identity of the applicants would not apply to the OPCD.
26. As held by the Single Judge in the 19 May 2006 decision in the Thomas Lubanga Dyilo case, *ex parte* hearings and filings should only be resorted to exceptionally,¹⁰ and that as an impediment to the rights of the defence, are subject to the requirements of necessity and proportionality.¹¹

⁷ Code of Professional Conduct for counsel, ICC-ASP/4/3/Res.1

⁸ ICC-01/04-228, 22 September 2006.

⁹ ICC-01/04-241, 29 September 2006.

¹⁰ Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, ICC-01/04-01/06-108-Corr at para 12.

¹¹ See footnote 10.

27. The OPCD therefore submits that in the absence of a compelling justification for withholding this information from the OPCD, the presumption of disclosure should also apply to this *ex parte* filing.
28. In 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. Such practical inconveniences are not justification in themselves for withholding relevant information from a party to the proceedings.
29. Finally, the OPCD submits that the new information provided by VPRS should include the date on which the applicant submitted the additional information to the Registry. This detail is relevant to both the overall timeliness of the application,¹² and the context in which the applicant was able to either supply or recall this additional information.¹³

2.2 Request for extension of the deadline

30. The order of 24 August 2007 stipulates that the Prosecution and the OPCD will have ten days from notification of the applications and the additional information to file their respective observations.
31. Even if the additional information relating to these applications is not substantial, it will be necessary for the OPCD to review the applications in their entirety in order to analyse the import of the additional information.
32. As noted previously, sixty five of the applications were originally notified in redacted format to the *ad hoc* counsel for the defence, and not the OPCD. Thus, whereas the

¹² In accordance with Regulation 86(3) states that applicants shall, to the extent possible, make their application to the Registrar before the stage of the proceedings in which they want to participant. In addition, the OPCD notes that the Single Judge in the Thomas Lubanga Dyilo case has taken into consideration the impact of late applications on the expeditiousness of the proceedings (“**CONSIDERING** that the confirmation hearing will be held on 09 November 2006; that in view of the imminence of this date, the Chamber will not be able to consider new applications for participation in the proceedings in the instant case before the said hearing” Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-601) The OPCD therefore submits that the extent to which applicants provide further documentation to the Registry in a timely and diligent manner is relevant to the Chamber’s assessment as to whether their participation is appropriate, and in particular, whether it would delay the proceedings.

¹³ As submitted at section 5.1.5 (pages 20-22) of the ‘Observation du Bureau du Conseil Public pour la Défense sur les demandes de participation à la procédure en qualité des Victimes’ (25 June 2007) the context in which an applicant supplies new additional information may be relevant to both their motive and the credibility of this additional information.

OTP have already reviewed and analysed the unredacted applications in 2006, the OPCD will be receiving the applications for the first time.

33. Accordingly, it is reasonable to expect that the OPCD will require more time than the OTP to review and analyse the applications, cross-reference the additional information to the original applications, and formulate its observations.
34. The OPCD also observes that in the original decisions pertaining to these applications, the Honourable Single Judge granted the OTP and the ad hoc counsel for the defence more than forty days to review the applications and file their observations.¹⁴
35. In addition, if the Honourable Single Judge grants the above request for access to confidential and *ex parte* filings, it would be necessary for the OPCD to receive and analyse these filings before the deadline for filing its own observations expires.
36. The OPCD therefore respectfully requests the Honourable Single Judge to grant the OPCD an extension of the deadline from ten days to thirty days, and secondly, to order that this deadline will not commence to run until the Honourable Single Judge has issued a decision concerning the OPCD's request for access to confidential and *ex parte* filings.

2.3 Request for extension of the page limit

37. The OPCD respectfully submits that in accordance with regulation 37(2) of the Regulations of the Court, there are exceptional reasons to grant an extension of the page limit from twenty pages to forty pages.
38. The OTP has already been provided with unredacted copies of these applications, and allotted twenty pages on two prior occasions. In effect, it will therefore have been granted a total of sixty pages within which to respond to these applications and the additional information.
39. In addition, the OPCD notes that in formulating his observations, the *ad hoc* counsel for the defence did not have the opportunity to present any arguments which may have been linked to the information redacted from the applications, or may have chosen to focus on issues which would have been rendered moot by the information which was redacted (or indeed, by the additional information which has been subsequently provided to the Registry).

¹⁴ 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 ICC-01/04-228, 22 September 2006, Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0072/06 à a/0080/06 et a/0105/06 ICC-01/04-241, 22 September 2006.

40. The OPCD therefore submits that regulation 37(2) of the Regulations of the Court must be construed in a manner which is consistent with the overriding statutory requirements of equality of arms.
41. The OPCD is aware that the Single Judge in the Sudan situation has held that the number of applications does not in itself constitute exceptional circumstances for granting an additional allotment of pages.¹⁵
42. Nonetheless, the OPCD respectfully submits that the right to respond to victim applications should be implemented in a manner such that it is a real and effective right, and not illusory. As such, even if the number of application does not in itself suffice to grant an extension of the page limit, it is at the very least, a highly relevant factor to be taken into consideration in determining whether the threshold for granting an extension of the page limit has been met. For example, it is self-evident that a party will require more pages to respond to 100 applicants than it would require to respond to one applicant.
43. Finally, the OPCD observes that in accordance with the express requirements of article 68(3) of the Statute, any proceedings relating to victim participation should not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial
44. In the present circumstances, the task which has been allocated to the OPCD relates to three separate groups of victim applications. Although it might be more effective to combine these groups, the OPCD respectfully submits that article 68(3) of the Statute requires the Chamber to adopt counterbalancing measures to ensure that measures aimed to promote efficiency do not infringe the right of the defence to heard, and to participate in an equal and effective manner.
45. The OPCD therefore submits that the fact that three separate groups (and three separate proceedings) have been combined as one also constitutes an exceptional circumstance.

3. Relief Sought

46. In light of the aforementioned submissions, the OPCD respectfully requests the Honourable Single Judge to:

¹⁵ Decision on the time limit to submit observations on applications for participation as victims a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 and on the extension of page limit, ICC-02/05-96, 22 August 2007.

- i. grant the OPCD access to all filings concerning the applications which are the subject of the order of 24 August 2007;
- ii. order the VPRS to include the date on which the additional information was provided to the Registry.
- iii. grant the OPCD an extension of the deadline from 10 days to thirty days;
- iv. order that this deadline will not commence to run until the Honourable Single Judge has issued a decision concerning the OPCD's request for access to confidential and *ex parte* filings; and
- v. extend the page limit to forty pages.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this 29th day of August 2007

At Cotonou, Benin