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No.: ICC-01/04-01/06
Date: **12 February 2007**

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public Document

**Observations of the Office of Public Counsel for the Defence on the Decision of
Pre-Trial Chamber I entitled "Decision on the defence request for extension of
time"**

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BACKGROUND TO THE PROCEEDINGS:

1. On 7 February 2007, following a confidential application filed by the Defence for leave to appeal the decision confirming the charges, Pre-Trial Chamber I, with Single Judge Steiner presiding, rendered the "Decision Ordering the Defence to File a Public Redacted Version of its "Application for Leave to Appeal the Pre-Trial Chamber I's 29 January 2007 'Décision sur la confirmation des charges'" ordering the Defence to file a public redacted version of its application.
2. On 8 February 2007, Single Judge Steiner rendered a decision¹ entitled "Decision on the Defence request for a time limit" in which the Single Judge refers to the fact that the Defence submitted a "Demande de modification des délais en vertu de la norme 35 du Règlement de la Cour" on a confidential basis.
3. In response to this application, the Single Judge concluded that "the filing of a redacted version of its Defence Leave to Appeal Request is not a matter that requires the presence of the lead Counsel in the seat of the Court, since only a few redactions are needed in order to maintain consistency with the public redacted version of the "Décision sur la confirmation des charges"".
4. The Single Judge also notes that the Office of Public Counsel for the Defence, pursuant to regulation 77(5) of the Regulations of the Court, "is entitled to give assistance to the Defence Counsel and to proceed with the compliance of the Pre Trial Order without any prejudice to the rights of the Defence". Consequently, the Single Judge invited the OPCD to redact the Defence

¹ http://www.icc-cpi.int/library/cases/ICC-01-04-01-06815_English.pdf

application for leave to appeal and to file a redacted version of it by Monday, 12 February 2007, at 16:00 at the latest.

5. Taking into account its strictly limited remit defined by regulation 77, the Office of Public Counsel for the Defence considers it necessary to respectfully make the observations below on the nature of its remit.

The remit of the Office of Public Counsel for the Defence

6. The OPCD's functions are namely, through its expertise and experience, to represent and protect the rights of the Defence at the initial stage of the investigation (article 56(2)(d) and rule 47(2)) as well as to provide aid and assistance to Defence Counsel and persons entitled to legal assistance, on the one hand by carrying out research and giving legal opinions, and on the other by appearing before a chamber to address specific issues.
7. The substance of regulation 77 defines the precise role of the OPCD. Furthermore, regulation 76 allows the Chamber, following consultation with the Registrar, to appoint a member of the OPCD in the circumstances set out in the Statute and the Rules of Procedure and Evidence or where the interests of justice so require.
8. The Statute and the Rules of Procedure and Evidence do not specifically mention the appointment of a member of the OPCD in a case where a person would already have chosen his own Counsel.

9. By way of comparison, the Defence Office of the Special Court for Sierra Leone provides that the Defence Office accord advice, assistance and representation to suspects and accused persons².
10. It can therefore be deduced from this that the role of the OPCD is closer to that of the Criminal Defence Section (OKO) of the Court of Bosnia and Herzegovina, whose functions are, on the basis of its legal expertise, to provide legal and administrative assistance to lawyers appearing before the Court.
11. This Office drafts submissions and briefs on precise points of law to assist lawyers with a case.
12. It appears from this swift comparative analysis that it is not the remit of the OPCD to address substantive issues and to join a Defence team to replace a lawyer previously chosen by the person being prosecuted: that would imply taking a position as to the facts and the merits and sharing confidential information which would prevent the Office from providing, under the same conditions of equality and equity, the same assistance to another Defence team which might be given responsibility for differing and contrary interests. The conflicts of interest would paralyse the remit which would normally be that of the OPCD.
13. Addressing specific issues on an ad hoc basis does not amount to assuming a full and complete defence, as the Chamber respectfully seems to be inviting the Office to do.

² Rule 45: Defence Office (amended 1 August 2003)

14. It is important to recall that any replacement of a Counsel assumes the prior agreement of the person being prosecuted and/or a formal and express agreement on the part of his properly chosen Counsel³.

15. By way of comparison, the ICTY has already ruled that the Lead Counsel of the Defence team has full responsibility for the selection of co-counsel and the composition of the remainder of his team of counsel.⁴

16. In these conditions it appears difficult to imagine being able to appoint a counsel or to assign a co-counsel to the Lead Defence Counsel without having obtained his permission to the extent that he must remain responsible for and be the guardian of his client's interests and defence strategy.

General points above, in the present case that concerns us

17. It must be noted that the abovementioned texts are not such as to allow the OPCD to be Thomas Lubanga Dyilo's Counsel, to replace his Defence team or to become part of it.

18. As things now stand and as far as we know, Mr Lubanga Dyilo is still duly assisted by his Counsel who has constituted his Defence team.

19. The team did not request the OPCD to redact the application for leave to appeal the decision confirming the charges.

³Article 28 of the Code of Professional Conduct for Counsel, ICC-ASP/4/32

⁴Decision on Independent Counsel for Vidoje Blagojevic's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, at para 85, 3 July 2003, Prosecutor v. Vidoje Blagojevic, <http://www.un.org/icty/blagojevic/trialc/decision-e/030703.htm>

20. The OPCD notes that the Single Judge recalled that it is not strictly necessary to seek instructions on the part of the client or request the opinion of his lead Counsel in order to do so.

21. However, this situation raises purely technical problems with repercussions on the nature of the remit of the OPCD, which could prevent it from responding to the instruction of the Single Judge.

22. Indeed, the OPCD would like to highlight certain practical aspects which in its view constitute an obstacle to effecting the requested redactions:

- The Regulations of the Registry provide that the OPCD does not have a direct right of access to documents notified to the Court except when there is a decision of the Chamber with the agreement of the Defence team or when the OPCD has been officially assigned.
- The Registry has not notified to the OPCD either the confidential version of the confirmation of charges or that of the Defence application for leave to appeal. The OPCD is therefore not in a position to carry out the requested redactions.
- Finally the Court has already drawn the attention of participants in the proceedings to the importance and highly sensitive nature of protective measures. It is therefore clear that the OPCD cannot take the risk of jeopardizing measures aimed at protecting witnesses and victims, or of

incurring its own responsibility in accidentally disclosing confidential information.

23. From all of the above considerations it appears that the OPCD considers that it is not the most appropriate institution to effect the requested redactions, given the ethical, technical and practical difficulties that might arise.

24. Accomplishing this task assumes having a close and direct relationship with the person being prosecuted and his lead Counsel, which is why the OPCD respectfully suggests that an alternative solution be sought from Court Management Services.

25. Indeed, Court Management Services might be the best placed, given their competence with regard to such procedures and the experience that they have with regard to protective measures, to carry out this sensitive and specific task.

26. The OPCD remains available to provide assistance and advice in the framework of the texts that govern it,

For these reasons,

May it please Pre-Trial Chamber I

- to take into consideration the observations respectfully made herein by the OPCD
- to consider, if necessary, an alternative solution taking into account the rights of the Defence and the interests of all the participants in the proceedings

Mr Xavier-Jean Keïta
Principal Counsel

Dated this 12 February 2007

At The Hague