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N° : ICC-01/04

Date : 3 January 2008

PRE-TRIAL CHAMBER I

Before : Judge Ekaterina Trendafilova, Duty Judge

Registrar : Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

Public Document

Request for leave to contact *ad hoc* Counsel for the Defence

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Trial Lawyer

Legal Representatives of Victims

Me Carine Bapita Buyagandu
Me Patrick Baudouin
Me Emmanuel Daoud
Me Bisimwa Ntakobajira Sylvestre
Me Michel Shebele
Me Michael Verhaeghe
Me Joseph Keta

Ad hoc Counsel for the Defence

Me Joseph Tshimanga

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

**Office of Public Counsel for
Victims**

Ms Paolina Massidda

Procedural History

1. On 22 September 2006, the Honourable Pre-Trial Chamber issued 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’,¹ in which the *ad hoc* Counsel for the Defence, Maître Joseph Tshimanga, was authorised to file observations in connection with these applications to participate in the situation of the Democratic Republic of Congo (DRC).
2. On 29 September 2006, the Honourable Pre-Trial Chamber issued 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’,² in which the *ad hoc* Counsel for the Defence was authorised to file observations in connection with applications a/0072/06 to a/0080/06 and a/0105/06.
3. On 28 November 2006, the *ad hoc* Counsel for the Defence filed his confidential observations.
4. On 24 August 2007, the Honourable Single Judge issued an ‘Order concerning the transmission of further information on victims’ applications’,³ 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).

¹ ICC-01/04-228

² ICC-01/04-241

³ ICC-01/04-376

5. 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.
6. On 29 August 2007, the OPCD filed a request seeking access to all prior confidential filings which related to these applications.⁴
7. On 11 September 2007, the Honourable Single Judge rendered her ‘Decision on the request by the OPCD for access to previous filings’,⁵ 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”.⁶
8. On 25 September 2007, the OPCD filed its observations concerning the additional information submitted in connection with applicants a/0009/06, a/0018/06, a/0026/06, and a/0038/06.⁷
9. On 24 December 2007, the Honourable Single Judge issued an omnibus decision, in which the Single Judge “DÉCIDONS que la qualité de victimes autorisées à participer à la procédure au stade de l'enquête sur la situation en RDC est accordée aux demandeurs a/0016/06, a/0018/06, a/0021/06, a/0022/06, a/0023/06, a/0024/06, a/0025/06, a/0026/06, a/0028/06, a/0030/06, a/0031/06, a/0032/06, a/0033/06, a/0034/06, a/0040/06, a/0041/06, a/0042/06, a/0044/06, a/0045/06, a/0046/06, a/0053/06, a/0055/06, a/0056/06, a/0057/06, a/0058/06, a/0060/06, a/0061/06, a/0062/06, a/0063/06, a/0071/06, a/0072/06, a/0105/06, a/0106/06, a/0107/06, a/0108/06, a/0109/06, a/0128/06, a/0129/06, a/0132/06, a/0133/06, a/0134/06,

⁴ Request for access to previous filings, and an extension of the page limit and time limit, ICC-01/04-379

⁵ ICC-01/04-389

⁶ At paragraph 7.

⁷ ICC-01/04-398-Conf

a/0135/06, a/0140/06, a/0141/06, a/0142/06, a/0145/06, a/0146/06, a/0147/06, a/0148/06, a/0149/06, a/0150/06, a/0151/06, a/0152/06, a/0161/06, a/0162/06, a/0199/06, a/0209/06 et a/0228/06, ainsi qu'aux demandeurs ayant introduit les demandes de participation a/0007/06 et a/0008/06; a/0130/06, a/0131/06 et a/0136/06 ; et a/0137/06, a/0138/06 et a/0139/06' (Decision of 24 December 2007).

10. On the same day, Single Judge issued an ancillary decision to the effect that in light of the occurrence of several public holidays during this period, the deadline for filing a request for leave to appeal would commence to run on 31 December 2007.⁸
11. It appears from the email notifications of these decisions that due to technical problems that occurred on 24 December 2007, these decisions were not directly notified to the *ad hoc* Counsel for the Defence on 24 December 2007. The OPCD has however been advised by the Registry that the decisions were subsequently notified to him by email on 2 January 2008.⁹
12. In consideration of the pending deadline for filing a request for leave to appeal, this request is being filed on an urgent basis before the duty judge.

Submissions

13. The OPCD respectfully requests the leave of the Honourable Duty Judge to contact the *ad hoc* Counsel for the Defence for the purpose of consulting and coordinating with *ad hoc* counsel in relation to non-confidential legal and procedural issues arising from the decision of 24 December 2007.
14. Applications a/0016/06, a/0021/06, a/0022/06, a/0023/06, a/0024/06, a/0025/06, a/0028/06, a/0030/06, a/0031/06, a/0032/06, a/0033/06, a/0034/06, a/0040/06 , a/0041/06, a/0042/06, a/0044/06, a/0045/06, a/0046/06, a/0053/06, a/0055/06, a/0056/06, a/0057/06, a/0058/06, a/0060/06, a/0061/06, a/0062/06, a/0063/06, a/0071/06, a/0072/06, a/0105/06 fall solely within the mandate of the *ad hoc* Counsel for the Defence, and as such, the OPCD has no standing to file an appeal as regards these applications. Nonetheless, in accordance with regulation 77(5) of the

⁸ Decision on the Starting date of the Timelimit provided for in Rule 155 of the Rules in relation to the Decision Issued on 24th December 2007, ICC-01/04-424

⁹ Telephone communications of 2 January 2008.

Regulations of the Court, the OPCD shall provide support and assistance to defence counsel. In terms of the practical operation of this obligation as regards external *ad hoc* Counsel, in general, the OPCD contacts *ad hoc* Counsel to ensure firstly that they are aware of any pending deadlines, to communicate any relevant (public) legal or procedural research that may be of use to the *ad hoc* Counsel, and finally, to offer its assistance to conduct any further legal or procedural research which the *ad hoc* Counsel may require to perform his or her mandate. Whilst it falls within the discretion of *ad hoc* Counsel as to whether he or she wishes to avail themselves of this assistance, it is necessary to take into consideration that *ad hoc* Counsel are not assisted by Co-Counsel or any legal assistants, and as such, the structural support provided by the OPCD can be an important component of equality of arms for these proceedings.

15. With respect to applications a/0018/06 and a/0026/06, the *ad hoc* Counsel for the Defence had been mandated by the Honourable Pre-Trial Chamber to file observations concerning the original, redacted format of the applications, whereas the OPCD was subsequently mandated by the Chamber to file observations concerning the additional information submitted by VPRS in relation to these applications. It is therefore necessary for the OPCD to communicate with *ad hoc* Counsel for the Defence to coordinate a prospective request for leave to appeal regarding these applications, which ensures that the general interests of the defence are protected in a consistent manner.

16. From the context of the ‘Decision on the request by the OPCD for access to previous filings’,¹⁰ it is arguable that the Single Judge’s order that the OPCD should abstain from directly contacting the *ad hoc* Counsel was intended to encompass communications encompassing the substantive, confidential aspects of the applications. In contrast, the OPCD is hereby seeking leave to communicate with the *ad hoc* Counsel in relation to public legal and procedural aspects of the decision of 24 December 2007.

¹⁰ See for example, paragraph 7: “only the Chamber can decide whether to allow parties to disclose confidential information regarding victims and witnesses”.

Relief Sought

17. For the reasons set out above, the OPCD respectfully requests the Honourable Duty Judge to grant the OPCD, on an urgent basis, leave to communicate with the *ad hoc* Counsel for the Defence in relation to the public legal and procedural aspects of the Decision of 24 December 2007.



Mr Xavier-Jean Keïta,
Principal Counsel for OPCD

The 3rd day of January 2008

At The Hague, The Netherlands