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No.: **ICC-01/04-01/07**

Date: **24 June 2008**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Akua Kuenyehia, Presiding Judge  
Judge Sylvia Steiner  
Judge Anita Ušacka

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO  
IN THE CASE OF  
THE PROSECUTOR  
*v. GERMAIN KATANGA AND MATHIEU NGUDJOLO***

**Public Document**

**OPCD report on the implementation of the oral decision dated 10 June 2008**

**Source:** Office of Public Counsel for the Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo  
Mr Eric Macdonald

**Counsel for the Defence of Germain  
Katanga**

Mr David Hooper  
Ms Caroline Buisman

**Counsel for the Defence of Mathieu  
Ngudjolo**

Mr Jean-Pierre Kilenda Kakengi Basila  
Ms Maryse Alié

**Legal Representatives of Victims**

Ms Carine Bapita Buyangandu  
Mr Joseph Keta  
Mr Jean-Louis Gilissen  
Mr Hervé Diakiese  
Mr Jean-Christostome Mulamba  
Nsokoloni

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

Mr Xavier-Jean Keïta

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

### 1. Procedural History:

1. On 10 June 2008, the Honourable Single Judge issued an oral order, in which she stated that:

*[I]n relation with the manner -- in relation to the manner in which the Office of Public Counsel for Victims and the Office of Public Counsel for the Defence shall assist the two Defence teams and the four Legal Representatives of Victims during these hearings, the Single Judge, on the basis of the oral submissions made at the last status conference, decides that, one, the Office of Public Counsel for Defence shall commit a different member of the office to assisting each Defence team for the purpose of the confirmation hearing if the assistance of the office is requested by the respective Defence teams.<sup>1</sup>*

*[...]*

*The members of the Office of Public Counsel for Defence and the members of the Office of Public Counsel for Victims assisting the Defence teams and the Legal Representatives of Victims shall be given the same level of access to the record of the case and the transcripts of the hearing, including realtime transcripts as the Defence teams or the legal representatives that they represent -- they are assisting. The members of the Office of Public Counsel for the Defence and the members of the office of the public counsel for victims shall assist the Defence teams and legal representatives of the victims during hearings from outside the courtroom via access to realtime transcripts and e-mail communication with the relevant groups.<sup>2</sup>*

2. Moreover, during a subsequent hearing of 19 June 2008, the Single Judge observed that:

*In the hearing held by Judge Akua Kuenyehia on 10 June 2008, a decision was issued according to which the Office of Public Counsel for Victims and the Office of Public Counsel for the Defence were directed to appoint one distinct member of their respective offices to assist each specific*

<sup>1</sup> Transcript of 10 June 2008, page 14, lines 14-21.

<sup>2</sup> Transcript of 10 June 2008, page 15 lines 2-12.

*Defence or Victims Legal Representatives team which specifically requests the assistance of their respective offices. In other words, one and only one member of the OPCD or of the OPCV will be assigned to assist any given team requesting assistance. Moreover, the extent of the assistance will be confined to the request of the relevant team. Furthermore, both the OPCD and the OPCV as a whole have access to public materials in Ringtail and in LiveNote. However, in relation to confidential materials, access will only be given to the specific member the OPCD or the OPCV assisting to a specific Defence or Victims Representative which has the right to access such confidential materials and has so expressly requested. The Single Judge observes that OPCV apparently did not comply with this decision when it assigned four staff members of the Office of Public Counsel for Victims to assist Maitre Bapita. Moreover, the Single Judge would like to have a report from the OPCV and the OPCD on the implement of the decision issued by Judge Akua Kuenyehia at the 10th June 2008 hearing, and the Single Judge wants this report and the observations on the matter referred above, the assigning of four representatives to one Legal Representatives of Victims by Tuesday, 24 [June] 2008, at 4.00.<sup>3</sup>*

3. The Office of Public Counsel for the Defence hereby respectfully informs the Honourable Single Judge of the measures taken in conformity with the Single Judge's order of 10 June 2008, and practical issues concerning the feasibility of implementing the strict terms of this order in an effective manner.

**2. The scope of assistance requested by the Defence teams of Germain Katanga and Mathieu Ngudjolo is limited to legal and procedural research on non-confidential matters**

4. As noted above, the Single Judge has ordered that the assistance provided by the OPCD should be confined to the request of the respective Defence teams.

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<sup>3</sup> Transcript of 19 June 2008, page 4 line 9 to page 5 line 10.

5. At this point in time, both the Defence of Germain Katanga and the Defence of Mathieu Ngudjolo have indicated that they will request some form of legal assistance from the OPCD in connection with the overall process for the confirmation hearings.
6. However, both Defence teams have also indicated firstly, that in their view, it will not be necessary for the OPCD to have access to confidential transcripts or confidential exhibits in order for the OPCD to effectuate this assistance, and secondly, that the topics on which they have requested the assistance of the OPCD will not give rise to any conflicts of interests between the two defendants.
7. In this regard, the form of assistance requested by the Defence could most accurately be characterized as legal and procedural analysis, rather than factual or evidential analysis.
8. As stated by Me Kilenda during the hearing of 19 June 2008,

*During the confirmation hearing, we will not need the presence of the OPCD or a staff member of that office at the hearing. However, our cooperation will focus solely on legal researches that we may ask the OPCD to conduct on our behalf through a formal request beforehand.*

*Furthermore, we agreed that the OPCD will not have access to confidential documents at this stage in the proceedings. We do not think that there will be any conflict of interest with the neighbouring Defence team [...]<sup>4</sup>*

9. It should also be noted that neither of the two Defence teams have indicated that they wish to have one person assigned solely to their team, nor that they would object to the OPCD disseminating any legal research prepared initially for their team to another Defence team.

### **3. Practical issues concerning the modalities for implementing the 10 June 2008 order**

#### *3.1 OPCD access to information which is integral to the court hearings*

10. The OPCD has engaged in discussions with the relevant sections of the Registry in order to determine the practical modalities of the implementation of the Single Judge's order.

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<sup>4</sup> Transcript of 19 June 2008, page 24 lines 1-25.

11. Whilst the provision of transcripts in real time is an extremely valuable tool, due to the nature of the confirmation hearing, it will not be possible to fully understand and follow the parties' submissions unless it is possible to view at the same time the relevant exhibit which is being discussed in Court.
12. To this end, the OPCD inquired with the Registry as to whether it would be possible to simultaneously receive access to the live feed of the in-court document display. The OPCD was informed in response that the system currently being used by the Court (FTR) does not permit the Registry to distinguish between the different levels of confidentiality. As such, it is not feasible to transmit this to persons outside the courtroom, as it may inadvertently result in their viewing confidential *ex parte* information.
13. The Registry therefore proposed the following solutions. In terms of access to the public case file, it is possible for the Registry to create an OPCD ringtail database which is populated by the documents comprising the public version of the case file, and which could then be viewed by all staff members within the OPCD.
14. However, if the OPCD (or designated OPCD staff members) were required to access confidential exhibits, the only method of implementing this would be to grant the relevant OPCD staff member access to the Defence ringtail database.
15. The OPCD has no objection to the first arrangement concerning access to public exhibits, subject to the following considerations. Whilst the database will contain all relevant public exhibits, the ringtail system will not automatically display the exhibit which is being displayed in the courtroom. In light of the fact the OPCD is not familiar with the case file, it is highly probable that the various persons within the OPCD may need to call on the assistance of the OPCD case manager, in order to assist them to locate in ringtail and load the relevant exhibit being discussed in Court.
16. In terms of the second possibility, the OPCD respectfully notes the following concern. If an OPCD staff member were granted access to the Defence version of their ringtail database, it would be possible for this person to view all Defence comments and evidential analysis. It might also be possible to view documents which the Defence have chosen to store in ringtail, notwithstanding the fact that the Defence does not present intend to submit them as Defence exhibits during the confirmation process. The Defence team would not have the ability to regulate which evidence and which Defence analysis could be viewed by the relevant person in the OPCD. This would contravene the right of the lead Counsel to determine the relevant security level of privileged Defence analysis.

*3.2 Resource issues, which affect the ability of the OPCD to designate separate persons to each Defence team*

17. The OPCD is presently staffed with three legal positions.<sup>5</sup> Whilst the OPCD is obliged, both pursuant to its mandate under regulation 77(5) and the terms of the Single Judge's order, to fulfill its commitments to the Katanga and Ngudjolo teams, it respectfully requests that it to be permitted to do so in a manner which is consistent with its obligation under regulation 77(5) to provide assistance to all other Defence teams, suspects, and *ad hoc* counsel for the Defence.
18. In this connection, whilst the Thomas Lubanga Dyilo case has been stayed, in light of the recent Prosecution request for leave to appeal, the OPCD anticipates that there may be further legal issues which could trigger a request for assistance.
19. Similarly, whilst Jean-Pierre Bemba Gombo is currently within the custody of Belgian authorities, it cannot be excluded that he may be transferred to the custody of the ICC during the time period of the confirmation process. In light of the unique legal framework of the ICC, it is reasonable to expect that any duty counsel appointed to represent Mr. Bemba might call on the OPCD to assist them to expeditiously familiarize themselves with the practices and procedures before the ICC.
20. The OPCD further notes that in light of the current appellate activity in the Uganda situation and Kony et al case, it is possible that the ad hoc counsel for the Defence may request assistance in connection with her pending response to the request of victim applicants to participate in the appeal concerning victim participation.
21. Finally, the OPCD refers to the fact it has recently been ordered by the Appeals Chamber to respond to the observations of the legal representatives for victims in the Darfur situation by 3 July 2008.
22. In light of its significant workload, the OPCD attempts to harness and utilize its resources in the most effective manner possible. The OPCD generally achieves this by prioritizing the urgency of Defence requests, and harnessing its resources to focus on the issues which require immediate resolution. It is therefore imperative that during time periods of intense Court activity, the OPCD retains the discretion to reassign OPCD staff members to focus on either the tasks with the most pressing deadlines, or issues which have the greatest impact on the rights of the Defence.

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<sup>5</sup> One P5, one temporary GTA P4 (which was very recently established through contingency funds), and 1 P2. The P2 is in the process of being recruited, and is therefore presently staffed by a temporary GTA P1.

23. In the present circumstances, the assignment of two different staff members to each team would not be an efficient use of resources, as it would create a high degree of duplication as concerns the research conducted by each person.<sup>6</sup>
24. The OPCD would also face difficulties if it were necessary to utilize one of these staff-members to either contribute to the OPCD filing of 3 July 2008, or to respond to requests for assistance emanating from other teams. In this regard, the OPCD has two possibilities. Under the first possibility, if it were to assign the P5 and P4 to assist the two Defence teams, the P1 would face difficulties to respond to the appellate filing and requests from other Defence teams without seeking the assistance of one of the other legal staff members. However, if either the P5 or P4 were to provide such assistance, it would immediately create a discrepancy between the level of assistance being provided to each team; one team would be assisted on a full time basis whereas the other would only be assisted on a part time basis.
25. If, on the other hand, the OPCD were to reserve the P5 for the purpose of responding to all non-confirmation hearing related activity, the OPCD would be forced to discriminate between the quality of assistance assigned to each team, in violation of the right of each defendant under article 67(1) to be treated with full equality. This would be particularly problematic since under a strict interpretation of the Single Judge's order, the P1 were assigned to a particular team would be unable to seek advice or supervision from the other OPCD staff members.

**4. In the absence of any objective basis for limiting the number of persons which may assist a Defence team, a strict interpretation of the terms of the Honourable Single Judge's order could potentially create an inequality of arms vis-à-vis the Prosecution**

26. Finally, the OPCD observes that under regulation 77(5) of the Regulations of the Court, the Office as an entity has a mandatory obligation to provide support and assistance to each Defence counsel, or person entitled to legal assistance. This obligation exists independently of the terms of the Single Judge's order, but is nonetheless also subject to the underlying principles set out in the Code of

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<sup>6</sup> At this stage, it appears from the Defence teams submissions at the most recent Status Conferences that the Defence teams will not be putting forward positive defences during the confirmation hearing. As such, it can be anticipated that their submissions will be reactive, in the sense that they may respond to Prosecution and alleged victim submissions. As such, it is reasonable to expect that each team will have the same *prima facie* interest in receiving legal research from the OPCD in relation to the same legal and procedural issues raised by the Prosecution and alleged victims.

Professional Conduct for Counsel that the OPCD must take measures to avoid conflicts of interest. As noted above, the OPCD has actively verified that no conflicts of interests are likely to arise through its provision of legal and procedural advice to the Defence teams for the purposes of the confirmation hearing.

27. In this connection, whilst the principle of equality of arms does not automatically equate to equality of means, it is arguable that the creation of the OPCD, and the existence of this regulation 77(5) obligation aims to counteract the structural advantage which the Prosecution enjoys by virtue of the fact that each prosecution and investigations team benefits from the legal assistance of a separate legal advisory section, and appellate section which can assist with interlocutory appeals.
28. The OPCD observes that in the present circumstances, the Honourable Single Judge has not imposed any reciprocal limitation on the ability of the Prosecution to harness its internal resources. The two Defence teams are therefore procedurally disadvantaged in terms of their ability to seek legal advice on non-confidential issues arising from the confirmation hearing. For example, should a potential appealable issue arise during the hearing, the Defence must formulate its response within the same time period as the Prosecution, but unlike the Prosecution team, which may consult with other prosecution teams, the legal advisory section and the OTP appellate section, the Defence team may only consult with one OPCD staff member who might not possess any specific expertise in that particular issue.

## 5. Conclusions

29. The OPCD respectfully submits that the scope of the assistance requested by the two Defence teams does not fall within the type of assistance which would generate the need to impose the type of safeguards referred to by the Honourable Single Judge.<sup>7</sup>
30. The OPCD further observes that it would appear that the underlying intention of the Honourable Single Judge was to ensure that the two defendants could benefit from the right to effective representation for the purposes of the confirmation hearing. In contrast, if the OPCD were to interpret and apply the terms of the Honourable Single Judge's order in a strict manner, such that it would be necessary to designate one and only one person to each team notwithstanding the scope of the assistance requested by

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<sup>7</sup> Should however one or both of the defence teams indicate that they wish to receive the assistance of the OPCD in connection with a potentially sensitive issue, the need to impose such safeguards would be triggered, and the OPCD would endeavour to assign a separate person to assist that particular defence team with the request in question.

the Defence teams, this underlying intention might be frustrated as the OPCD would be hindered from complying with Defence requests for assistance in an efficient and expeditious manner.

## **6. Relief Sought**

31. For the reasons set out above, the OPCD respectfully requests to be permitted to fulfill its mandate under regulation 77(5) to provide support and assistance to the Defence teams of Germain Katanga and Mathieu Ngudjolo in a manner which promotes both efficiency and effectiveness, and which is consistent with its obligation to protect itself from potential conflicts of interest.



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Xavier-Jean Keïta  
Principal Counsel of OPCD

Dated this Tuesday, 24 June 2008

At The Hague, the Netherlands