

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04
Date: 10 December 2007

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Decision on the Requests of the OPCV

The Office of the Prosecutor

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

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

Mr Xavier-Jean Keïta, Principal Counsel

Legal Representatives for the Applicants

Mr Emmanuel Daoud
Mr Luc Walley
Mr Frank Mulenda
Ms Catherine Bapita Buyangandu
Mr Michel Shebele
Mr Patrick Baudoin
Mr Michael Veraeghe
Mr Sylvestre Bisimwa
Mr Joseph Keta

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda, Principal Counsel

I, Judge Sylvia Steiner, judge at the International Criminal Court (the “Court”);

NOTING the “Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation”,¹ issued by the Chamber on 17 August 2007 (“Decision of 17 August 2007”) in which Pre-Trial Chamber I (“the Chamber”) directed the Registrar to automatically appoint the Office of Public Counsel for Victims (“the OPCV”) as a legal representative for unrepresented applicants in the Situation in the Democratic Republic of Congo (“the DRC Situation”);²

NOTING Annex 2 of the “*Enregistrement d'un courrier du représentant légal retirant sa demande d'anonymat et d'autres documents relatifs à la représentation légale de demandeurs aux fins de participation*”,³ filed on 31 August 2007 by the Registry, in which the Registrar appointed the OPCV as the legal representative for applicants a/0019/06 to a/0024/06, a/0026/06 to a/0027/06, a/0029/06 to a/0030/06, a/0033/06 to a/0036/06, a/0039/06 to a/0043/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0144/06 to a/0147/06, a/0149/06, a/0151/06 to a/0157/06, a/0159/06 to a/0162/06, a/0166/06, a/0178/06, a/0180/06, a/0184/06, a/0203/06, a/0209/06, a/0220/06, a/0222/06 and a/0240/06 to a/0241/06;

¹ ICC-01/04-374.

² ICC-01/04-374, paras. 43-44: “However, the Chamber observes that of the persons applying at the investigative stage of the situation, a large number of those applicants may be without legal representation prior to a decision of the Chamber on whether to grant them victim status. Moreover, considering that under regulation 86(4) of the Regulations, the Registry will automatically request additional information for all incomplete Applications, the Chamber deems it appropriate to appoint the OPCV to provide support and assistance to the unrepresented applicants. Thus, pursuant to regulation 116 of the RoR, the Registry shall automatically transfer to the OPCV all information regarding unrepresented applicants simultaneously with the notification of the Applications to other participants. The OPCV should therefore be available to provide support and assistance to applicants until such time as the procedural status of victim is granted to them and a legal representative is chosen by him or her or appointed by the Court ”

³ ICC-01/04-380-Conf-Exp.

NOTING Annexes 1 and 2 of the “Registration of appointment of the OPCV and amendment to appointment”,⁴ filed on 27 September 2007 by the Registry, in which the Registrar appointed the OPCV as the legal representative for applicants a/0004/06, a/0005/06 to a/0008/06, a/0047/06 to a/0052/06, a/0073/06 to a/0080/06, and a/0110/06, but withdrew the appointment as to applicants a/0034/06, a/0042/06, a/0239/06 and a/0241/06;

NOTING the “Request of the OPCV to access documents in the situation record related to applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06” (“the OPCV Request”),⁵ filed by the OPCV on 18 October 2007;

NOTING the “Prosecution’s Response to the ‘Request of the OPCV to access documents related to applicants a/0004/06 to a/0008/06, a/0019/06, a/0020/06, a/0022/06 to a/0024/06, a/0026/06, a/0027/06, a/0029/06, a/0030/06, a/0033/06, a/0035/06, a/0036/06, a/0039/06 to a/0041/06, a/0043/06, a/0046/06 to a/0052/06, a/0072/06 to a/0080/06 and a/0110/06’”, filed by the Prosecution on 8 November 2007;⁶

NOTING articles 57(3)(e) and 68(3) of the *Rome Statute* (“the Statute”), rules 86 and 89 of the *Rules of Procedure and Evidence* (“the Rules”), and regulation 86(2)(e) of the *Regulations of the Court* (“the Regulations”);

⁴ ICC-01/04-401-Conf-Exp.

⁵ ICC-01/04-407.

⁶ ICC-01/04-413-Conf-Exp.

I. The OPCV Request

1. In the OPCV Request, the Principal Counsel requests (i) access to the index of the Situation record, which lists the confidential, ex parte, and under seal documents in the Situation record; (ii) the right to thereafter request any documents which the Principal Counsel believes are necessary for the fulfilment of her mandate, and (iii) two confidential documents filed in the record of the Situation in the DRC, namely the observations (relating to applicants a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06, and a/0105/06) submitted by both the former Ad Hoc Counsel for the Defence and the Prosecution pursuant to rule 89(1) of the Rules (“rule 89(1) observations”).⁷

II. The Observations of the Prosecution

2. In its response to the OPCV Request, the Prosecution argues that access to confidential portions of the record “should be granted in highly exceptional situations and only after an applicant has established a compelling case that the material in question directly affects his or her interests” and that the OPCV has not established a compelling case for the items requested.⁸ The Prosecution further argues that there is “no legal justification to grant access to the index of the situation” to the OPCV, and therefore that the OPCV “is not entitled to any supplementary access rights that would not otherwise be granted to any other rule 89(1) applicant.”⁹

3. Finally, the Prosecution submits that further requests by the OPCV to receive additional specific documents may be dealt with on “a case by case basis.” The Prosecution therefore requests the Chamber “(i) to deny the OPCV’s request to be granted access to the index of the Situation record, (ii) to decide further requests for

⁷ These two documents are registered as ICC-01/04-314-Conf and ICC-01/04-01/06-315-Annex-Conf-Exp.

⁸ ICC-01/04-413, para. 3.

⁹ ICC-01/04-413, para. 4.

access to documents by the OPCV on a case by case basis and (iii) to order the Registry to notify the two documents explicitly listed by the OPCV.”¹⁰

III. Discussion of the Requests

4. As a preliminary matter, the Single Judge notes that nowhere in its request does the OPCV cite any legal authority from the Statute, Rules or Regulations which obligate the Single Judge to grant access to the items in question. Nevertheless, the OPCV Request has highlighted an inconsistency in the practice of notification of rule 89(1) observations. The Single Judge therefore takes this opportunity to correct the notification process.

a. Request item (i)

5. With respect to item (i), the Single Judge firstly recalls the Chamber’s “Decision on the Application by Applicants a/0001/06 to a/0003/06 for Leave to Respond to the Observations of the Prosecutor and Ad Hoc Counsel for the Defence”, issued on 7 July 2006.¹¹ The Chamber considered that, pursuant to article 68(3), those granted the procedural status of victim may present their views and concerns to the Chamber, but prior to a decision by the Chamber which grants this procedural status, the Chamber would not consider requests from applicants.¹²

6. The Single Judge further notes that the OPCV is requesting information that even those who have been granted the procedural status of victim have to date not been entitled to receive. In its decision of 17 January 2006, the Chamber stated that in granting the procedural status of victim in the Situation in the DRC to VPRS 1-6, the victims would “for the time being” only be given access to public documents.¹³ Thus, even persons to whom the procedural status of victim has been granted before the Chamber have not been entitled to a list of all documents which have been filed in

¹⁰ ICC-01/04-413, para. 6.

¹¹ ICC-01/04-164-tENG.

¹² ICC-01/04-164-tENG.

¹³ ICC-01/04-101, p. 49.

the record of the Situation, including any under seal or confidential documents. They have only been entitled to public information concerning the proceedings. Having noted that those granted the procedural status of victim are not given access to the full index of the record of the Situation in the DRC, including confidential information, the Single Judge is not persuaded by the OPCV's assertion that it requires the index in order to adequately represent the *applicants*.¹⁴

b. *Request item (ii)*

7. Having found that the OPCV shall not have access to the full index of the record of the Situation in the DRC, the Chamber considers that the OPCV Request in item (ii) to reserve its right to petition for access to non-public documents in the index is moot.

c. *Request item (iii)*

8. In considering item (iii), for notification of rule 89(1) observations of the Prosecution and the Defence, the Single Judge reminds the OPCV that the application process is limited in scope. The Single Judge has previously held in its decision of 7 December 2007 that:

[T]he process to decide upon applications for the procedural status of victim in situation and case proceedings before the Pre-Trial Chamber ("the application process") is a specific procedural feature provided for in rule 89 of the Rules and regulation 86 of the Regulations. Its object and purpose is limited to the determination of whether such procedural status should be granted to the applicants.¹⁵

9. Since the application process is limited, the role of the OPCV in providing "support and assistance" during the application process is also limited. This principle was previously explained by the Single Judge in its decision of 7 December 2007 in relation to the role of the OPCD in the application process:

¹⁴ The same approach was taken by Pre Trial Chamber II in its decisions of 7 February 2007 (ICC-02/04-01/05-152, p. 5), and 16 March 2007 (ICC-02/04-01/05-222, p. 6).

¹⁵ ICC-01/04-417, para 5.

“In the view of the Single Judge, the limited object and purpose of the application explains why (a) regulation 86(2)(e) of the Regulations only requires that the applicants use standard forms and that their applications contain the enumerated items, including any relevant supporting documentation ‘to the extent possible’; and (b) that the Chamber’s ‘only obligation under rule 89(1) of the Rules is to order the Registry to provide the Prosecution and the Defence with copies of the applications¹⁶ [...] This is consistent with the fact that the role of the OPCD in the application process is confined by rule 89(1) of the Rules to the submission of observations on the applications.”¹⁷

10. The Single Judge recalls that in the Chamber’s decision of 17 August 2007, the Chamber explained that the reason for appointing the OPCV was that “a large number of [the victim] applicants may be without legal representation prior to a decision of the Chamber on whether to grant them victim status.” Consistent with the object and purpose of the application process, the OPCV’s role was limited to providing support and assistance in the few instances in which the “Registry automatically request[s] additional information for [any] incomplete Applications.”¹⁸

11. Turning now to item (iii) in the OPCV Request, the Principal Counsel maintains that she should receive two confidential documents, namely the rule 89(1) observations of the Prosecution and the former Ad Hoc Counsel for the Defence relating to some of the applicants represented by the OPCV. The OPCV explains that “in the practice of Pre-Trial Chambers I and II, the submissions under rule 89(1) of the Rules have always been notified to the legal representative of the applicants.”

12. Nevertheless, the Single Judge notes that notification to the legal representatives of the applicants of rule 89(1) Prosecution and Defence observations has not always been the practice before this Chamber. For example, with respect to the Prosecution’s rule 89(1) observations of 30 November 2006¹⁹ which the OPCV now requests, the main submission was notified to the legal representatives, but the annex, which contained confidential information about the applicants, including

¹⁶ ICC-01/04-479, para. 15.

¹⁷ ICC-01/04-479, para. 16.

¹⁸ ICC-01/04-374, para. 43

¹⁹ ICC-01/04-315.

their full names, was filed with the restriction: "confidential, *ex parte*-prosecution only."²⁰

13. While the Single Judge acknowledges that the legal representatives of the applicants will already have access to the confidential information about their own clients, the request of the OPCV has highlighted the fact that confidential information about all applicants in some of the parties' rule 89(1) observations has been notified to persons who are not connected to all of the applicants. For example, the Prosecution's rule 89(1) observations of 27 September 2007, which contained sensitive information about the applicants, including their names and villages of residence, was filed "confidential[ly]" and was notified, *inter alia*, to the legal representative, Mr Joseph Keta, as well as to the OPCV, despite the fact that some applicants were represented by Mr Joseph Keta and some by the OPCV.²¹ In this regard, the Single Judge notes that the two documents requested by the OPCV contain observations on applicants the OPCV has not been appointed to represent.

14. The Single Judge understands that, it may be helpful to the applicants to know the types of challenges directed at the applications. However, in the view of the Single Judge, the helpfulness of this information must also be balanced with the obligation of the Single Judge to provide, where necessary, for the protection and privacy of the victims and witnesses pursuant to article 57(3)(c) of the Statute and with the general principle prescribed in rule 86 of the Rules that the Chamber in making any order shall take into account the needs of all victims and witnesses in accordance with article 68.²²

15. The interest of the applicants in receiving the rule 89(1) observations should also be balanced with the further obligation of the Single Judge to ensure the

²⁰ The rule 89(1) observations of the Office of Public Counsel for the Defence (filed as confidential documents) have in fact been notified to all relevant legal representatives, but contained no *ex parte* annexes. See, for instance, ICC-01/04-347-Conf, ICC-01/04-398-Conf, and ICC-01/04-404-Conf

²¹ ICC-01/04-402.

²² See also ICC-01/04-72.

expeditiousness and effectiveness of the proceedings. For example, a system in which the legal representatives of the applicants receive redacted versions of the rule 89(1) observations which are specific to each applicant is not only impractical now, but will be extremely impractical as the number of applicants continues to increase.

16. Finally, the Single Judge observes that not notifying the rule 89(1) observations does not unduly prejudice the applicants. Pursuant to rule 89(2) of the Rules, applicants are entitled to submit new applications should their applications be rejected. However, they are neither entitled to reply to the observations of the Prosecution and the Defence nor to request leave to appeal the decision of the Chamber on the merits of their applications.

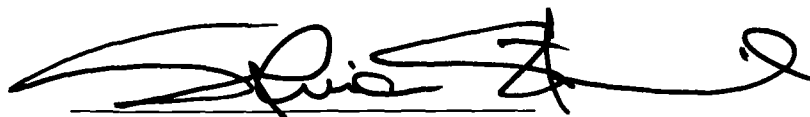
17. While the absence of notification of rule 89 (1) observations will prevent applicants from knowing the specific challenges made in the parties' observations, the Chamber's decision on their applications will indicate any further information required or the reasons for which the applications were rejected. Hence, notification of the Chamber's decision will place applicants in a position to re-apply under rule 89(2) of the Rules to correct any deficiencies.

FOR THESE REASONS,

REJECT the Request of the OPCV of 18 October 2007 in its entirety;

DECIDE that rule 89(1) observations on the applications for recognition of the procedural status of victim in situation or case proceedings shall not be notified to the applicants or to their legal representatives.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Sylvia Steiner', written over a horizontal line.

Judge Sylvia Steiner
Single Judge

Dated this Monday 10 December 2007

At The Hague, The Netherlands