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No.: ICC-01/04-01/06

Date: 17 April 2007

THE APPEALS CHAMBER

Before: Judge Georgios M. Pikis, Presiding Judge
Judge Philippe Kirsch
Judge Navi Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

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

Public document

Response to the "Registrar's observations in accordance with rule 20(1)(d) of the Rules of Procedure and Evidence on the document entitled "Clarification", filed with the Presidency of the Court on 3 April 2007 by Mr Thomas Lubanga Dyilo" dated 5 April 2007

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Mr Thomas Lubanga Dyilo

Counsel for the Victims

Mr Luc Walley & Mr Franck Mulenda
Ms Carine Bapita Buyangandu

BACKGROUND

1. On 20 February 2007, Counsel for the Defence, Mr Jean Flamme, filed an “Application for leave to withdraw submitted by the Counsel for the Defence”¹ before Pre-Trial Chamber I, in which he requested that the Chamber inter alia grant him leave to withdraw from the case, and stay all acts or proceedings likely to affect or be prejudicial to the rights of the Defence.
2. That same day, the Defence filed identical versions of this Application before the Appeals Chamber² and the Presidency.³
3. On 21 February 2007, Pre-Trial Chamber I granted this Application and suspended the time limit for the Defence Response to the Application for Leave to Appeal from the decision confirming the charges against Mr Thomas Lubanga Dyilo filed by the Prosecutor, until a new Counsel for the Defence is assigned.⁴
4. On 23 February 2007, the Appeals Chamber rendered its own decision and gave the future Counsel for the Defence until 23 March 2007 both to respond to the Directions of the Appeals Chamber of 5 February and to file a supplementation to its response of 7 February 2007 regarding the admissibility of the appeal.⁵
5. On 20 March 2007, Mr Thomas Lubanga Dyilo informed the Registry that he had chosen Ms Catherine Mabilile as his Defence Counsel.
6. On 22 March 2007, Pre-Trial Chamber I decided that the suspended time-limit should start running again and instructed the Defence to respond to the Prosecutor’s Request by 5 April 2007.⁶

¹ ICC-01/04-01/06-829-Conf

² ICC-01/04-01/06-830-Conf

³ ICC-01/04-01/06-831-Conf

⁴ ICC-01/04-01/06-833-Conf

⁵ ICC-01/04-01/06-838-OA8

⁶ ICC-01/04-01/06-848

7. On 3 April 2007 the Appeals Chamber also decided that the time-limit should start running again and authorised the Registrar to assign a Duty Counsel to Mr Thomas Lubanga Dyilo pursuant to rule 73(2) of the Regulations of the Court if these documents could not be filed in the time-limit allocated, should a Counsel for the Defence continue to be unavailable.⁷
8. That same day, as Mr Thomas Lubanga Dyilo was still without Counsel to represent him before the Court, he filed a document entitled “Clarification” before the Appeals Chamber⁸, Pre-Trial Chamber I⁹, the Trial Chamber¹⁰ and the Presidency¹¹, requesting a further suspension of the time limits.
9. On 5 April 2007, Pre-Trial Chamber I¹² noted that although Ms Catherine Mabilille had been designated as Defence Counsel by Mr Thomas Lubanga Dyilo on 20 March 2007, she had still not accepted the said position and the Chamber therefore decided to again suspend the proceedings until a new Counsel for the Defence is assigned.
10. On the same day, the Registrar submitted his observations¹³ on the document entitled “Clarification”, filed by Mr Thomas Lubanga Dyilo before the Appeals Chamber¹⁴, Pre-Trial Chamber I¹⁵, the Trial Chamber¹⁶ and the Presidency¹⁷.
11. Mr Thomas Lubanga Dyilo hereby wishes to inform the Chamber that:
 - i. He has not yet submitted a request for additional means to either the Registry or the Chamber;

⁷ ICC-01/04-01/06-857: The Appeals Chamber set 4 May 2007 as the time limit for responding to the Directions of the Appeals Chamber of 5 February 2007 (ICC-01/04-01/06-805) and for filing a supplementation to his response of 7 February 2007 on the admissibility of the appeal (ICC-01/04-01/06-812).

⁸ ICC-01/04-01/06-861

⁹ ICC-01/04-01/06-859

¹⁰ ICC-01/04-01/06-858

¹¹ ICC-01/04-01/06-860

¹² ICC-01/04-01/06-862

¹³ Registrar’s observations in accordance with rule 20(1)(d) of the Rules of Procedure and Evidence on the document entitled “Clarification”, filed with the Presidency of the Court on 3 April 2007 by Mr Thomas Lubanga Dyilo

¹⁴ ICC-01/04-01/06-865

¹⁵ ICC-01/04-01/06-859

¹⁶ ICC-01/04-01/06-864

¹⁷ ICC-01/04-01/06-863

- ii. He will submit immediately to the Registry a request for additional means pursuant to Regulation 83(3);
- iii. As a consequence he asks the Chamber not to take into account the observations and requests dated 5 April 2007 filed by the Registry, because they are premature and irrelevant.

I. Substance of the Clarification filed on 3 April 2007

- 12. In his Clarification filed on 3 April 2007, Mr Thomas Lubanga Dyilo wished to inform the Chamber and all the participants in the proceedings unequivocally that, although he had decided to appoint Ms Mabilile to represent him pursuant to article 67 of the Statute, Ms Mabilile had not yet accepted her appointment, and, as a result he requested the Chamber to again stay any acts or proceedings which could have an impact on or prejudice the rights of the Defence until the effective appointment of a Counsel.
- 13. Such are the terms of the request, which at this stage cannot be interpreted as concerning the application of the legal assistance scheme paid for by the Court, given that Mr Thomas Lubanga Dyilo has not yet had the opportunity either to exercise his right to file an application for additional means with the Registry pursuant to regulation 83(3) of the Regulations of the Court, or to submit any such application to the Chambers.
- 14. Mr Thomas Lubanga Dyilo is of the opinion that the observations filed by the Registry are moot and also premature, given that Mr Thomas Lubanga Dyilo has not yet had the opportunity to express a formal opinion on the issue of whether the legal assistance scheme applies by filing a reasoned request based on the same regulation 83(3) of the Regulations of the Court before the Registry or the Court.

15. Consequently, if a decision were to be rendered by a Chamber on the issue of whether legal assistance applies at this stage in the proceedings, Mr Thomas Lubanga Dyilo would be deprived of his most fundamental right to be heard on that issue.
16. Regulation 83 of the Regulations of the Court states in paragraphs 1 and 3 that:
 1. Legal assistance paid by the court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence.
 - [...]
 3. A person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case.
17. Given that the role of the Registrar is to organise the work of the Registry so that the rights of the defence are protected in accordance with the principle of a fair trial as set out in the Statute,¹⁸ Mr Thomas Lubanga Dyilo wishes to inform the Chamber that in the present context he feels that it is necessary to exercise the right afforded to him by regulation 83(3) of the Regulations of the Court with immediate effect, and that he will present a request to the Registry to this effect, in order to request additional means for his defence, despite the fact that the Registry, in its letter dated 13 April 2007 addressed to Mr Thomas Lubanga, stated without foundation that: “as matters now stand with the proceedings currently pending before the Appeals Chamber regarding your “clarification” filed on 3 April 2007 and the observations of the Registry pertaining thereto, the Registrar will not make a decision regarding a possible

¹⁸ Rule 20 of the Rules of Procedure and Evidence.

request for additional means from you until the Appeals Chamber has rendered a decision on this request".¹⁹

18. In the document entitled "Clarification", filed with the Appeals Chamber on 3 April 2007, Mr Thomas Lubanga Dyilo requested from it, only a further stay of "all acts or proceedings which could have an impact on or prejudice the rights of the Defence until the effective appointment of a counsel."²⁰ Furthermore, since the Appeals Chamber had already extended the time limits that same day;²¹ Mr Thomas Lubanga's application, as of became moot.

19. Accordingly, it is appropriate to consider the Registry's observations as premature and its interpretation of regulation 83(3) of the Regulations of the Court set out in its letter of 13 April 2007, as erroneous, since, from this regulation, it cannot be deduced that the person receiving legal assistance is subject to any schedule.

20. Mr Thomas Lubanga Dyilo reiterates that he has not waived his right to be assisted by a counsel of his choosing, and wishes to inform the Chamber of his concern at being unable to make his defence fairly. This state of affairs risks diverting court proceedings from their clearly defined goal which is to assess fairly and in a reliable manner, the innocence or guilt of the accused.

21. The pre-trial stage experience exposed the defence team's lack of human resources. Mr Thomas Lubanga Dyilo observed that the composition of the defence team was inadequate for the defence to operate effectively and efficiently in relation to the breadth, volume and complexity of the case.

22. Since this response does not address the issue of the scope of legal assistance paid by the Court (regulation 83 of the Regulations of the

¹⁹ See attached annex, ex parte.

²⁰ ICC-01/04-01/06-861-tEN paragraph 18.

²¹ ICC-01/04-01/06-857

Court), Mr Thomas Lubanga Dyilo would inform the Chamber that, pursuant to this same regulation, he is taking the initiative to submit an application for additional resources to the Registry. This application will be reasoned explicitly and in depth because Mr Lubanga Dyilo is convinced that, following recent events, the total amount of available resources and the potential composition of the defence team will impact upon any potential counsel's decision will undoubtedly depend on the response to the main issue which is to know whether the appointed counsel will have sufficient means to implement everything in order to achieve the objective of effective representation and to diligently take on the responsibilities with regard to the code of professional conduct, given that article 13(b) of that code requires that counsel shall refuse an agreement where Counsel is incapable of dealing with the matter diligently.

23. Admittedly, as Mr Thomas Lubanga Dyilo acknowledges, unless the Chamber decides otherwise, a person who chooses a counsel to represent him or her must act through this counsel pursuant to regulation 74(2) of the Regulations of the Court. However, in the current situation **and for reasons which are independent of his will**, Mr Thomas Lubanga Dyilo does not have a counsel to represent him in these proceedings.
24. Since the Court has a legitimate interest in the trial being held with respect for the time limits, free from interruptions, adjournments or disruption, Mr Thomas Lubanga Dyilo, hereby wishes to state that by filing his application with the Registry, he **has no intention to delay, obstruct or interfere with current proceedings**, but that his intervention is dictated by the fact that he realises that it is in the interests of justice to resolve this issue as expeditiously as possible. In this respect, Mr Thomas Lubanga Dyilo would emphasise that, until now, he has always adhered to the

procedures for appointing the counsel of his choosing and that he will continue to do so in the future.

25. Mr Thomas Lubanga Dyilo is fully aware of the complexity of the legal and procedural issues and also the issues regarding the administration of evidence in a case of this importance. He acknowledges that these issues might be beyond his abilities, as he is not a lawyer, and that as he is in detention, he does not have access to all the facilities he might need. Consequently he would like to emphasise that his application filed with the Registry under regulation 83(3) of the Regulations of the Court, must in no way prevent any future application by a counsel appointed *by Mr Lubanga Dyilo*, who, upon acquaintance with the case-file, would consider it necessary in light of the nature of the instant case and other relevant aspects not grasped by Mr Lubanga Dyilo due to his inexperience, to in turn, file a similar application under regulation 83.

26. However, in light of the seriousness of the charges against Thomas Lubanga Dyilo, he would not wish his defence team to be faced with the dilemma of having to choose between: responding to applications from the Office of the Prosecutor or from Victims, which relate to the **substance of the case**; and responding to applications or observations from the Registry which impact upon the means with which the Defence can respond to the **substance of the case**.²²

27. Accordingly, Mr Thomas Lubanga Dyilo informs the Chamber that he is requesting the Registry to consider his application as not only related to

²² We recall that during the pre-trial phase, the Defence found itself obliged to file an application with Pre-Trial Chamber I one month before the “scheduled” start of the confirmation hearing (which was then postponed) – (See “*Requête conformément à la norme 83.4 du règlement de la Cour*” 15 September 2006 ICC-01/04-01/06-439). Moreover, during the confirmation hearing, the Registry filed its observations calling for the Chamber to set aside the single judge’s oral decision of 12 October 2006 which allocated additional resources to the Defence (see transcript of 12 October 2006 and “*Observations du Greffe en application de la règle 20-1-d du Règlement de procédure et de preuve relatives à la requête de la Défense aux fins d’obtenir des ressources supplémentaires datée du 10 octobre 2006*”, 29 November 2006, confidential, *ex-parte*, ICC-01/04-01/06-740).

the present pre-trial phase which is nearing its end, but also as pertaining to the resources allocated by the legal assistance system for the trial phase. To consider otherwise, would be artificial and would entail a loss of resources and means as a result of the need to submit a further application under regulation 83(3) of the Regulations of the Court at the end of the first status conference to request the same measures.

28. Considering that proceedings have been stayed for more than two months, and whilst expressing his concern and profound regret at this delay which is extremely harmful to him as it prolongs his painful uncertainty of remaining in prison without knowing for how long, Mr Thomas Lubanga Dyilo would like to settle this issue before the start of the trial and the effective exercise of the new counsel, *whoever that may be and chosen by him*, so that the remainder of the proceedings is no longer contaminated and delayed by this recurring issue of legal assistance.

FOR THESE REASONS

29. Mr Thomas Lubanga Dyilo requests that the Chamber:

- i. disregard the Registry's observations; and
- ii. take no action in relation to the Registrar's applications by conforming to the Trial Chamber's decision of 13 April 2007.

30. However, Mr Thomas Lubanga would like to once more reiterate that the present representation, which he believes to be his only means of effective access to the Chambers in the absence of a legal representative, can in no way be interpreted as an act expressing any desire on his part to represent himself alone. Furthermore, this application addresses solely how the legal

system is applied in the context of the present case, and is not intended to call into question the entire system.

[*signed*]

Thomas Lubanga Dyilo

Done this 17 April 2007.

At The Hague.