

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: **ICC-01/04-01/06**
Date: **3 April 2007**

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

Registrar: Mr Bruno Cathala

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

Public

Clarification

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Mr Thomas Lubanga Dyilo

BACKGROUND

1. On 20 February 2007, Counsel for the Defence, Mr. Flamme, filed with Pre-Trial Chamber I a “Request for the Withdrawal of Defence Counsel”¹ in which he applied, *inter alia*, to the Chamber to grant him leave to withdraw from the case and stay all acts or proceedings which could have an impact on or prejudice the rights of the Defence, including the transmission of the record of case from Pre-Trial Chamber I to the Trial Chamber.
2. On that same day, the Defence submitted an identical application to the Appeals Chamber.²
3. On 21 February 2007,³ Pre-Trial Chamber I granted Defence Counsel leave to withdraw from the case of *The Prosecutor v. Thomas Lubanga Dyilo* in light of the serious grounds for withdrawal advance by Defence Counsel, and in light of article 67 of the Statute, rules 20, 21, 22, 129 and 130 of the Rules of Procedure and Evidence and regulation 78 of the Regulations of the Court. Furthermore, the Chamber decided to suspend the time-limit for a response by the Defence to the Prosecutor’s application for leave to appeal the decision confirming the charges pending the appointment of a counsel for the Defence, as this response required the presence of a Defence Counsel.
4. On 23 February 2007, the Appeals Chamber in turn rendered its decision⁴ granting future Defence Counsel until 23 March 2007 to respond to the order of the Appeals Chamber of 5 February and to file additional material

¹ ICC-01/04-01/06-829-Conf.

² ICC-01/04-01/06-830-Conf.

³ ICC-01/04-01/06-833-Conf.

⁴ ICC-01/04-01/06-838-OA8.

in support of its response of 7 February 2007 regarding the admissibility of appeal.⁵

5. On 20 March 2007, Thomas Lubanga Dyilo informed the Registry that he had chosen Ms. Catherine Mabilille to fill the position of Counsel for the Defence. On the same date, the Division of Victims and Counsel prematurely informed the Chambers and all the participants of the appointment of Ms. Catherine Mabilille as Counsel for the Defence.⁶
6. Apprised of this information, Pre-Trial Chamber I rendered a decision on 22 March 2007 to reactivate the suspended time-limits and ordered the Defence to respond to the Prosecutor's application by 5 April 2007.⁷
7. Apprised of this same information, the Prosecutor filed the "Prosecutor's submission in anticipation of a Status Conference"⁸ on 29 March 2007.
8. In the meantime, the Registry made an *ex-parte* filing of its correspondence with Ms. Catherine Mabilille in which Ms. Mabilille states that she has not yet agreed to take the case.⁹

OBSERVATIONS

I. On the appointment of the new counsel

⁵ In the document titled *Reasons for the Decision of the Appeals Chamber on the Defence application Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense filed on 20 February 2007* issued on 23 February 2007 – ICC-01/04-01/06-OA8 - 9 March 2007. The Appeals Chamber provides the following grounds: "envisioning, as well as the Appeals Chamber can, the length of time reasonably necessary for the choice of counsel and sequentially preparation for the filing of the expected submissions of the appellant on the two subjects under consideration (supplementation of the submission of 7 February 2007 and submitting a response as directed by the Appeals Chamber on 5 February 2007) the Appeals Chamber considers that a period of 20 days is sufficient for the purpose. Hence, the corresponding intervals of time for the submission of the addresses will be extended, as determined and recorded in the Decision of 23 February 2007."

⁶ ICC-01/04-01/06-846+Annex.

⁷ ICC-01/04-01/06-848.

⁸ ICC-01/04-01/06-852-Conf.

⁹ "Filing in the record of the correspondence between Ms. Catherine Mabilille and the Registry", filed on 22 March 2007 at 17.45 hours and notified on 23 March 2007. ICC-01/04-01/06-851-Conf-Exp, ICC-01/04-01/06-850-Conf-Exp, ICC-01/04-01/06-849-Conf-Exp.

9. It seems necessary to Thomas Lubanga Dyilo, in light of the implications for his defence arising from the persistent error and inaction of the Registry in regard to elucidating this state of affairs, to unequivocally inform the Chambers and all the participants in the proceedings that:

- i. Article 67(1)(d) of the Statute grants the accused has the right to legal assistance of his choosing;¹⁰
- ii. The Rules of Procedure and Evidence of the Court, the Regulations of the Court and the Regulations of the Registry provide for the process of appointment of Counsel as follows:

10. Regulation 75 of the Regulations of the Court provides that:

“If the person entitled to legal assistance chooses a counsel included in the list of counsel, the Registrar shall contact that counsel. If the counsel is willing and ready to represent the person, the Registrar shall facilitate the issuance of a power of attorney for this counsel by the person.”

11. Rule 22 (1) of the Rules of Procedure and Evidence states that:

“Counsel for the defence engaged by a person exercising his or her right under the Statute to retain legal counsel of his or her choosing shall file a power of attorney with the Registrar at the earliest opportunity.”

12. According to regulation 123 of the Regulations of the Registry:

“The Registrar shall acknowledge the issuance of power of attorney or the appointment of counsel in writing, stating that he or she has been included in the list. The acknowledgment shall be notified to the person who has chosen the

¹⁰ See also “Reasons for the Decision of the Appeals Chamber on the request of Counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007” issued on the 16 February 2007”, of the Appeals Chamber of 21 February 2007. The Appeals Chamber provides the following grounds: “the right of the accused to legal representation by counsel as well as the corresponding right of a person against whom charges have been laid is safeguard as his/her fundamental right under the provisions of article 67(1)(d) of the Statute and rule 121(1) of the Rules of Procedure and evidence. Such a right is universally recognized human right (see article 21(3) of the Statute) that finds expression in international and regional treaties and conventions. Under the Statute, the rules of Procedure and Evidence and the Regulations of the Court the choice of counsel lies with the person and once appointed, counsel can conduct the defence of the individual”. ICC-01/04-01/06-0A8, para. 12.

counsel, to the counsel, to the Chamber and to the competent authority exercising regulatory and disciplinary powers over counsel in the national order.”

10. Further to this right, Mr Thomas Lubanga Dyilo chose Ms Catherine Mabilille.

11. However, Ms Catherine Mabilille has not yet taken the case by stating that she is willing and ready to represent Thomas Lubanga Dyilo. This is evidenced by the fact that the person appointed by Mr Thomas Lubanga Dyilo has not yet filed a power of attorney with the Registrar attesting to her appointment pursuant to rule 22 (1). Furthermore, none of the emails between the Registry and this person transmitted to the Chamber on 22 March 2007 note any such power of attorney being filed.

12. Accordingly, given the current state of affairs, Ms Catherine Mabilille cannot be considered to be principal counsel to Mr Thomas Lubanga Dyilo.

II. Standstill in the appointments procedure

13. It is the role of the Registry to promote the rights of the Defence with respect for the documents governing its powers.

14. Regulation 83 (1) of the Regulations of the Court states that legal assistance paid by the Court shall cover all costs reasonably **necessary** as determined by the Registrar **for an effective and efficient defence**.

15. Article 67 of the Statute entitles the accused to **adequate time and facilities** for the preparation of the defence.

16. The previous counsel was on numerous occasions obliged to raise the issue of the lack of resources and the needs of the Defence in terms of manpower – resources which were **reasonably necessary for the effective and efficient representation of his client**. This lack of resources, and also the conflictual relationship undermining relations between the previous counsel and the

Registry throughout the entire preliminary phase, seriously disadvantaged Mr Thomas Lubanga Dyilo's defence.

17. Now, given the reluctance shown by Ms Mabilie to accept her appointment, Mr Thomas Lubanga fears the same scenario may repeat itself. It is without doubt that current proceedings have been blocked and that the Court's legal assistance – such as it currently functions in the context of this case, the complexity of which has been acknowledged, – has an **adverse effect on the fairness** of proceedings both future and under way.

FOR THESE REASONS

18. Mr Thomas Lubanga Dyilo requests that the Presidency again stay all acts or proceedings which could have an impact on or prejudice the rights of the Defence until the effective appointment of a counsel.

19. However, Mr Lubanga would emphasise that the present representation, which he believes to be his only means of effective access to 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 on 3 April 2007

At The Hague