

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

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

Date: 7 May 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***

Confidential

Ex parte: available only to the Defence

Urgent request pursuant to rule 21(3) of the *Rules of Procedure and Evidence*

Mr Thomas Lubanga Dyilo

I. FACTS

1. By letter dated 20 February 2007, Counsel for the Defence, Mr Flamme, sought leave from the Trial Chamber and the Appeals Chamber to withdraw from the case. He also requested a stay of all acts or proceedings which could be prejudicial to the Defence in order to enable the appointment of a new counsel.

2. By decision of 23 February 2007, the Appeals Chamber¹ denied any stay of the proceedings. Nevertheless, it extended to 23 March 2007 the time for filing the Appellant's response to the *Directions of the Appeals Chamber*, issued on 5 February 2007,² and the time for the filing the supplementation to the document filed by the Defence on 7 February 2007, entitled "Defence submissions on the scope of the right to appeal within the meaning of article 82(1)(b) of the Statute".³

3. However, by decision of 27 February 2007, Pre-Trial Chamber I granted Mr Jean Flamme leave to withdraw from the case.⁴

4. By decision of 3 April 2007,⁵ the Appeals Chamber decided again to further extend the time limits granted in the decision of 23 February 2007 to 4 May 2007, adding that in the event of failure to meet the time limit owing to non-representation of the Appellant by counsel, the Registrar would have to appoint duty counsel taking into account the Appellant's wishes. The Appeals Chamber added that the duty counsel's authority would be confined to representing the Appellant for the purposes of submitting the two documents in question. The time limit for submitting the documents by the appointed duty counsel was therefore extended to 11 May 2007.

¹ ICC-01/04-01/06-838.

² ICC-01/04-01/06-805.

³ ICC-01/04-01/06-810.

⁴ ICC-01/04-01/06-833-Conf.

⁵ ICC-01/04-01/06-857.

5. By decision of 19 April 2007, Pre-Trial Chamber I also ordered the Registrar or his representatives to appoint a duty counsel to represent Mr Lubanga in order to enable the Defence to respond to the Prosecution application for leave to appeal filed with Pre-Trial Chamber I on 5 February 2007.⁶ This decision made no mention of a time limit, but confined the authority of the duty counsel solely to the preparation of a response to the Prosecution application.⁷

6. On 24 April 2007,⁸ Mr Thomas Lubanga Dyilo received a letter from the Registry dated 20 April 2007 inviting him to forward a prioritised list of counsel on the list of counsel authorised to practise before the Court by 26 April 2007. A list of counsel was enclosed with the letter.

7. On 25 April 2007, Mr Thomas Lubanga Dyilo wrote to the Registry seeking additional information regarding the qualifications and availability of the counsel on the list (of more or less 200 counsel) issued by the Registry. Mr Lubanga insisted on certain objective criteria which he deemed essential notably under regulation 73, which would allow him to shorten the list of counsel by choosing those counsel best able to represent him and by avoiding any possibility of a conflict of interest.⁹ He also reiterated that pursuant to the same regulation, the Registry is duty bound to take the person's wishes into account.

8. In response to this letter, a meeting took place at the detention centre on 27 April 2007 with the representatives of the Registry. At that meeting, Mr Thomas Lubanga Dyilo mentioned the problems he was experiencing in making his choice given the fact that the information provided in the said list was insufficient having regard to regulation 73(2). He was told that the information on the list, though incomplete, was more than sufficient to enable him to make an appropriate choice

⁶ ICC-01/04-01/06-806.

⁷ ICC-01/04-01/06-870.

⁸ See *Enregistrement dans le dossier de la correspondance entre M Thomas Lubanga Dyilo et le Chef de la Division des Victimes et des Conseils*, of 25 April 2007, ICC-01/04-01/06-872-Conf-Exp + Conf-Exp-Anx.

⁹ See *Enregistrement dans le dossier de la correspondance entre M Thomas Lubanga Dyilo et le Chef de la Division des Victimes et des Conseils*, of 25 April 2007, ICC-01/04-01/06-872-Conf-Exp + Conf-Exp-Anx.

and that out of respect for the principle of the Registry's neutrality as an organ, and because the Registry was anxious to avoid influencing in any way the final decision by communicating a subjective assessment of the skills or competences of counsel, only objective information could be communicated to him. As a result, he had to draw up his list of pre-selected counsel alone.¹⁰

9. By letter dated 1 May 2007, the Registrar reminded him of the deadline of 4 May 2007 at 15:30 for the appointment of his chosen duty counsel for the purposes of the proceedings pending before the Appeals Chamber pursuant to its decision of 3 April 2007, together with the reasons for that decision dated 20 April 2007.¹¹

10. On 4 May 2007, the Registry filed its *Désignation de Maître Emmanuel Altit comme conseil de permanence conformément à la Décision de la Chambre Préliminaire I du 19 avril 2007*¹² with Pre-Trial Chamber I and its *Appointment of Ms Annick Mongo as duty counsel pursuant to the Decision of the Appeals Chamber of 3 April 2007* with the Appeals Chamber.¹³

11. Concomitantly, Mr Thomas Lubanga Dyilo filed his "Request for extension of time pursuant to regulation 35(1) of the Regulations of the Court", in which he informed the Appeals Chamber that "he [had] not been able to select an appropriate candidate due to lack of information about the persons on the list".¹⁴ In light of the various events which had occurred, Mr Thomas Lubanga Dyilo therefore sought a short extension of time from the Appeals Chamber, because despite his best efforts to find a duty counsel, he was not in a position as at 4 May to provide the Registry with the name of his chosen duty counsel.

¹⁰ This stance was confirmed in an e-mail addressed to one of Mr Thomas Lubanga's assistants. This correspondence is attached as confidential *ex parte* Annex A.

¹¹ This letter is attached as confidential *ex parte* Annex B.

¹² ICC-01/04-01/06-881.

¹³ ICC-01/04-01/06-882.

¹⁴ ICC-01/04-01/06-883, p. 4.

12. At the same time, Mr Thomas Lubanga Dyilo submitted the same application to the Registry, including a request that the Registry cooperate by sending him a shorter list from which the names of those counsel who did not meet the objective criteria set out in his letter of 25 April 2007¹⁵ would have been expunged. This shorter list would provide him with the necessary information to enable him to make his choice. The information would:

- guarantee that there is indeed no fear that a counsel included in the list would be tainted by a potential conflict of interest ;
- guarantee that the shortlisted counsel would have a proven track record in international criminal law and would be available.

13. At 16:47 on that same day, Mr Thomas Lubanga Dyilo's assistants asked the Defence Support Section for the CVs of seven counsel who met the criteria stipulated by Mr Lubanga.¹⁶

II. Legal basis for the request

14. According to rules 21(2) and 3 of the *Rules of Procedure and Evidence*:

1. The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list.
3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.

15. Under article 67(1)(d) of the accused, the accused has the right "to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of

¹⁵ This letter is attached as confidential *ex parte* Annex D.

¹⁶ This correspondence is attached as confidential *ex parte* Annex E,

this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.”

16. Pursuant to regulation 73(2) of the *Regulations of the Court*, in appointing counsel, the Registry must take into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel.

i. Refusal to assign counsel selected by counsel

17. Under rule 21(3) of the *Rules of Procedure and Evidence*, a person may seek from the Presidency a review of the Registry’s decision refusing to assign counsel of his or her choice.¹⁷

18. On 4 May 2007, the Registrar appointed Mr Emmanuel Altit and Ms Annick Mongo as duty counsel in the Thomas Lubanga case.

19. Mr Thomas Lubanga Dyilo neither chose nor appointed these persons as counsel of his choice.

20. Moreover, and for reasons which will be elaborated upon here, Mr Thomas Lubanga Dyilo has reason to believe that none of the two counsel appointed by the

¹⁷ “Another species of decisions of the Registrar liable to review by another body, the Presidency, are decisions of the Registrar refusing the assignment of counsel (see rule 21(3) of the *Rules of Procedure and Evidence*). The decision may be reviewed at the instance of the aggrieved party, while the decision of the Presidency on any such matter.” http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-873_English.pdf *Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007* ICC-01/04-01/06-873. In a recent decision, the Presidency observed: “According to article 38-3-a the Presidency, of which the President is a member, is responsible for the proper administration of the Court [...]” *Decision of the Presidency upon the document entitled "Clarification" filed by Thomas Lubanga Dyilo on 3 April 2007, the requests of the Registrar of 5 April 2007 and the requests of Thomas Lubanga Dyilo of 17 April 2007* ICC-01/04-01/06-874, para. 12. **Furthermore, in order to guarantee a fair hearing, the appointment process should be suspended until the situation before the Presidency is resolved. In this respect, see:** “The Appeals Chamber has already held that, where the Directive expressly provides for a review of the Registrar’s decision, the Trial Chamber cannot interfere in the Registrar’s decision, and its only option is to stay the trial until that procedure has been completed.” *Prosecutor v. Milutinović, Ojdanić, Šainović, Decision on Interlocutory Appeal on Motion for Additional Funds* of 13 November 2003, para. 17. <http://www.un.org/icty/milutinovic/appeal/decision-e/031113.htm> See also *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, *ex parte*, confidential decision on the appeal by Vidoje Blagojević to replace his defence team, 7 November 2003, para. 7. <http://www.un.org/icty/blagojevic/appeal/decision-e/031107.pdf>”

Registry meet the criteria set out by Mr Thomas Lubanga Dyilo for the post of duty counsel in his correspondence to Mr Preira dated 25 April 2007.

21. Accordingly, Mr Thomas Lubanga Dyilo considers that the appointment of Mr Emmanuel Altit and Ms Annick Mongo as duty counsel constitute refusal by the Registry to appoint a counsel of his choice for the following reasons:

- a) the imposition of duty counsel denies Mr Thomas Lubanga Dyilo the right to appoint a counsel of his choice; furthermore,
- b) Mr Thomas Lubanga Dyilo has made clear his wish to make a choice by setting out various objective criteria which duty counsel should meet: the simple act of appointing counsel who do not meet these criteria constitutes a refusal by the Registry to appoint counsel chosen by Mr Thomas Lubanga Dyilo.

ii. Failure to observe the rules of natural justice or the right to a fair hearing

22. Article 67 sets out the fundamental rights of the accused in the determination of the charges against him or her, including the right to be informed promptly and in detail [...] in a language which the accused understands (a); to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.

23. Mr Thomas Lubanga Dyilo is of the opinion that the lack of notification of decisions by the Registry affects his fundamental rights. This is all the more so because most of the decisions are rendered in English. This causes him great prejudice. Since he has always sincerely wished to respect the official procedure which must be followed for the appointment of his counsel. He has reiterated this on numerous occasions. However, to enable him to best cooperate, he still needs to

understand and be fully aware of the meaning of the proceedings and decisions which continue to follow their course.

24. Under regulation 32 of the *Regulations of the Court*, his counsel are entitled to receive applications and decisions on his behalf. However, since the Appeals Chamber noted that his legal assistants had no standing to represent him or to file applications on his behalf, in the absence of the lead counsel, he alone is therefore assuming the responsibility for the initiatives in the instant case.

25. Mr Thomas Lubanga Dyilo stated that the Registry is reluctant to provide him with the information necessary to enable him to make a quick choice by pleading the principle of neutrality of the Registry.

26. Consequently, this lack of notification of the decisions [], combined with the late delivery of the recent correspondence and e-mails from the Registry [], as well as the Registry's lack of effective cooperation in this selection process contributed [], *inter alia*, to the delay by Mr Thomas Lubanga Dyilo in appointing duty counsel of his choice, whereas the Registry was unaware that he was focussing his efforts on drafting the application based on regulation 83(3) filed on 3 May 2007, as well as dealing with a family visit.

iii. Lack of diligence on the part of the Registry

27. According to regulation 73(2):

If any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel, taking into account the wishes of the person, and the geographical proximity of, and the languages spoken by, the counsel.

28. As regulation 73(2) states, to appoint this counsel, the Registry must take into account the wishes of the person, as well as the geographical proximity of, and the languages spoken by, the counsel. This language is clear and requires no

interpretation. This notwithstanding, Mr Thomas Lubanga Dyilo notes that, in the current situation, the Registry has not been diligent in carrying out its duties. This lack of diligence is obvious in the fact that the Registry has failed to take into account the criteria set out in regulation 73(2).

a) *Taking into account the choice of Mr Thomas Lubanga Dyilo*

29. Mr Thomas Lubanga recalls that in disregard of his constant requests for clarification and simplification, as well as his request that the list of counsel be narrowed down so as to be consistent with the criteria which he listed in his letter dated 25 April 2007, and repeated at the meeting of 27 April 2007, he was not consulted in respect of the appointment of these two duty counsel.

30. Furthermore, bearing in mind the deadline of 4 May set by the Appeals Chamber, Mr Thomas Lubanga Dyilo, in spite of all his diligence and good faith, was placed in a position where he was forced to request a brief extension of time to make his choice in the appointment of duty counsel, who would have to address crucial matters of law in the case.

31. With the sole aim of avoiding the current state of affairs, that is, being represented on fundamental issues that would have an irreversible impact on the subsequent proceedings by counsel who do not have the trust of Mr Thomas Lubanga Dyilo, and being at odds with the Decision of the Pre-Trial Chamber of the International Criminal Tribunal for the former Yugoslavia which states that “[a] client should trust in and feel comfortable with his/her attorney’s conduct at any time, in any place”.¹⁸ Mr Thomas Lubanga Dyilo refuses to see his file segmented at the whim of the decisions of the various Chambers and managed by different counsel with different approaches. This would render even more difficult the

¹⁸ *Prosecutor v. Gotovina “Decision on the Conflict of interests of Attorney Cedo Prodanovic and Jadranka Slokovic”*, 5 April 2007, Trial Chamber I, para. 15.

transition in, and continuation of, the case by the future counsel chosen by Mr Thomas Lubanga Dyilo, who would have to handle the case until the end of the trial.

32. This counsel would not only inherit the case prepared and interrupted following the withdrawal of Mr Flamme and the part managed by the first duty counsel, but also the part managed by the second duty counsel.

33. This would only have the effect of complicating the already current difficult situation and the management of a case with wide-ranging and complex ramifications. This increases his doubts concerning the respect for his right to a fair and effective defence under such circumstances.

b) *The geographical proximity criterion*

34. Mr Thomas Lubanga Dyilo has doubts as to the appropriateness of appointing counsel coming from Congo in light of the geographical proximity criterion.

c) *The availability criterion*

35. Mr Thomas Lubanga Dyilo was informed that Mr Altit had a case that is commencing at the ICTR in the coming days.

36. This raises some concerns regarding this person's availability and ability to focus in order to meet the objectives of representation set out in article 13 of the *Code of Professional Conduct*.

37. This is because it is self-evident that duty counsel must be physically present in The Hague if they wish to have access to Defence documents that are not available on the ICC's public website, and because they cannot safely send emails from their place of residence.

iv. Lack of reasoning by the Registry

38. The decision of the Registry of 4 May 2007 offers no justification for the reasons which led to the appointment of two counsel who do not meet the few criteria set out in regulation 73(3). In this respect, Mr Thomas Lubanga Dyilo refers to the highly instructive jurisprudence of the ad hoc tribunals¹⁹ which clearly establishes that although the right of an indigent accused to counsel of his or her own choosing is not unlimited, in general, the choice of any accused regarding his or her Defence Counsel must be respected and, as noted by the Trial Chamber of the ICTY, "the choice of all accused should be respected unless there exist well-founded reasons not to assign Counsel of choice".²⁰

39. Accordingly, Mr Thomas Lubanga Dyilo submits that the decision of the Registry to appoint these two counsel, none of whom meets the qualitative criteria set out in regulation 83(2), must be reviewed.

III. Request to the Presidency:

40. Mr Thomas Lubanga Dyilo respectfully requests that the Presidency:

- i. admit this application and declare it to be founded;
- ii. review the decision of the Registry to appoint Mr Altit and Ms Mongo as duty counsel or, in the alternative, stay the decision of the Registry to appoint these two counsel;

¹⁹ ICTY: see *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stefan Todorović, Simo Zarić: Decision in the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarevi*, Case No. IT-95-9-PT2, 5 March 1999. ICTR: see *Prosecutor v. Gérard Ntakirutimana*, Case No. ICTR-96-10-T; ICTR-96-17-T, 11 June 1997; *Jean-Paul Akayesu v. The Prosecutor*, Appeals Chamber, Case No. ICTR-96-4-A, 27 July 1999; *Jean Kambanda v. The Prosecutor*, Appeals Chamber, ICTR-97-23-A, 19 October 2000, p. 6; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, 1 June 2002, p. 19.

²⁰ *Prosecutor v. Martić*, "Decision on Appeal Against Decision of Registry", ICTY Trial Chamber I, 2 August 2002, <http://www.un.org/icty/martic/trialc/decision-e/09122227.htm>. See also the decision of the President of the Tribunal of 20 August 2003 in *Prosecutor v. Šljivančanin*, "Decision on Assignment of Defence Counsel", at para. 25, in which the President points out the Registry's obligation to exercise its discretion on the appointment of counsel in a clear and transparent manner.

- iii. direct the Registry to consider the procedure for cooperation proposed by Mr Thomas Lubanga Dyilo with a view to appointing counsel of his choice;
- iv. grant a further brief extension of time to Mr Thomas Lubanga Dyilo to enable him to make his choice.

/signed/
Thomas Lubanga Dyilo

Dated this 7 May 2007

At The Hague.