

INTERNATIONAL CRIMINAL COURT

Original: French
Date filed: 29 May 2007

No:

PRE-TRIAL CHAMBER I

Before:

Judge Claude Jorda
Judge Sylvia Steiner
Judge Akua Kuenyehia

Registrar:

Mr Bruno Cathala

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

Public Document

**Application for intervention in the proceedings as *amicus curiae* by the
Ordre des Avocats de Paris under rule 103 of the Rules of Procedure and
Evidence**

The Office of the Prosecutor

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Mr Ekkehard Withop

Mr Thomas Lubanga Dyilo

Counsel for the Victims

Mr Luc Walley
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Other Representatives:

L'Ordre des Avocats de Paris
Yves Repiquet, President of
the Bar

NOTING the *Demande de ressources additionnelles en vertu de la Norme 83-3 du Règlement de la Cour*, filed by Thomas Lubanga Dyilo on 3 May 2007 (ICC-01/04-01/06-878);

NOTING the application for intervention in respect of the *Demande de ressources additionnelles en vertu de la Norme 83-3 du Règlement de la Cour*, filed with Pre-Trial Chamber I by Thomas Lubanga Dyilo on 24 May 2007 (No.: ICC-01/04-01/06);

1. The *Ordre des Avocats de Paris* has the honour to submit to Pre-Trial Chamber I an application for intervention in the proceedings as *amicus curiae* under rule 103(1) of the Rules of Procedure and Evidence¹ pertaining to the question of resources reasonably necessary for the effective and efficient defence of Mr Thomas Lubanga Dyilo.²

Presentation of the Bar

2. Almost twenty thousand lawyers are members of the Paris Bar, which has the greatest proportion of foreign lawyers in Europe.

3. The Paris Bar is administered by the *Conseil de l'Ordre* [Council of the Association], which is made up of forty-two members and presided over by the Chairman of the Bar, who represents it in all matters relating to civil society. The *Ordre des Avocats de Paris* is a professional association which defends the general interest of the legal profession, with the vocation of

¹ Rule 103(1) of the *Rules of Procedure and Evidence*: "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."

² Regulation 83(1) of the *Regulations of the Court*.

public service. The *Ordre des Avocats de Paris*, at the instigation of the Chairman of the Bar, deals with matters pertaining to the legal profession – its structure and future – and also justice and the administration of justice, the defence of human rights and respect for fundamental freedoms. The *Ordre des Avocats de Paris* is also responsible for managing legal aid and to this end receives a comprehensive grant from the State which it channels to the lawyers.

4. The *Ordre des Avocats de Paris* has one hundred and seventy employees and twenty-nine departments to assist it in accomplishing its mandate.

5. The *Ordre des Avocats de Paris* also works in the development of defence issues in the arena of international criminal justice. It supported the process of creating the International Criminal Court from its inception, participating in the Preparatory Commissions and the Assemblies of States Parties to the Court. The *Ordre des Avocats de Paris* has invested particular efforts in all matters relating to the practice of lawyers before the Court – whether counsel for the defence or legal representatives of victims. Every year it organises training courses in international criminal justice, and encourages lawyers to be included in the list of counsel practising before the International Criminal Court. There are currently nineteen lawyers from the Paris Bar on this list. The *Ordre des Avocats de Paris* is also a founding member of the International Criminal Bar.

6. At national level, the *Ordre des Avocats de Paris* holds vice-presidency of the French Coalition for the International Criminal Court, and plays an active role in the necessary task of adapting French legislation to the Statute of the Court.

7. The *Ordre des Avocats de Paris* is an independent professional association whose mission it has always been to guarantee respect for the rights of the defence and in particular each individual's right to an effective and efficient defence. It is on this basis that the *Ordre des Avocats de Paris* seeks authorisation from Pre-Trial Chamber I for intervention in the proceedings under rule 103(1) of the Rules of Procedure and Evidence.

With leave from the Chamber, the Ordre des Avocats de Paris would argue the following:

D) *General considerations regarding the need to adjust the Court's legal aid system*

8. The distinctive nature of the cases before the International Criminal Court calls for exceptional resources to be allocated.

The composition of defence teams appearing before the International Criminal Court

9. Under the current system³, counsel for the defence acts alone, until the first appearance of the accused before the Court. Under this system, the defence team is composed of one counsel, a legal assistant, and a case manager (who does not get involved in the merits of the case) during the entire pre-trial phase. However this system fails to take account of the actual work of the defence. In fact, the defence team must be able to assume its full mandate as soon as it is assigned.

10. The defence's mandate encompasses two main spheres of intervention:

1) The defence's work itself, which deals with:

³ Proposed adjustment to the legal aid system put forward by the Registry on 13 February 2007.

- a. detention matters, both before the competent authorities of the arresting State and before the Court;
- b. analysis of the case file disclosed by the prosecution;
- c. analysis and discussion during the pre-trial phase of the details of the charges presented to the Pre-Trial Chamber;
- d. during the confirmation hearing, and subsequently during the trial, discussion of evidence tendered by the Prosecutor and tendering of exculpatory evidence;
- e. response to the applications for participation filed by victims and to their interventions in proceedings.

2) Investigation missions:

- a. search for documentary evidence: given the nature of the crimes being prosecuted, this sort of investigation needs to be undertaken with the authorities of the country in question and gives rise to complex manoeuvres which often come up against reticence on the part of the authorities in question;
- b. gathering testimonial evidence: this mission entails locating witnesses who very often are not in the same region or country.

The defence is responsible for all the above missions from the commencement of the proceedings, that is to say, as soon as counsel is assigned.

11. Following an internal audit during which questions were put to Paris lawyers practising before the international criminal courts, the *Ordre des Avocats de Paris* concluded that one counsel for the entire duration of the pre-trial phase is manifestly insufficient. Counsel cannot be in The Hague to

respond to applications for participation in proceedings from victims, be in the field to locate witnesses, and ensure the smooth-running of his or her chambers, all at the same time.

12. It is also clear that the defence team must be complete from the start of the proceedings so as to:

- allow the defence to fulfil all its missions;
- ensure the quality of representation of the person receiving legal aid;
- guarantee continuity of representation should counsel withdraw during the proceedings or should the lead counsel be unable to be present in Court.

13. A complete defence team would be composed of three counsel from the start of proceedings:

- one counsel to represent the defence in The Hague;
- one counsel to direct investigations;
- one counsel responsible for legal and factual analysis of the case file.

The team would also need two legal assistants and an investigator.

Financial resources for the defence teams appearing before the International Criminal Court:

1) Investigation costs

14. The current system allocates a ninety-day investigations budget. According to the Registry, this budget takes account of the need for investigations to take place during the pre-trial phase. It does not take account of the need to investigate after the pre-trial phase up to the end of the proceedings, or at least, up to the end of the trial proceedings. This compromises the equality of arms as the Prosecutor may investigate

throughout the entire proceedings with no time limits. Accordingly, the defence should be able to continue conducting investigations after the pre-trial phase.

15. A travel budget of thirteen thousand euros is allocated to investigations. However given the cost of travel to Africa, the amount allocated is manifestly insufficient, especially because in order to investigate in the field, at least two persons are needed, not only to take on the workload but also for obvious reasons of safety.

16. And lastly, the defence investigations budget was intended to cover an average of twenty-five to thirty witnesses. However this figure does not take account of preliminary steps that must be taken with very many potential witnesses beforehand. These witnesses are generally in exile, most often in different countries.

17. Investigations budgets should therefore be reconsidered using objective criteria that would allow for the effective exercise of the rights of the defence.

2) *Remuneration of counsel*

18. Rule 22 of the Rules of Procedure and Evidence stipulates that: “[a] *counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings*” and regulation 67 of the Regulations of the Court provides that the counsel must have at least ten years of experience.

19. The Court has therefore quite rightly chosen to call upon established and specialised lawyers to deal with the exceptional cases that will be brought

before the Court. If lawyers are to be encouraged to act before the Court, remuneration must be sufficient for counsel to take on a case without jeopardising their professional practice.

II) *Particular considerations with regard to the need for an adjustment to the legal aid allocated to the defence in the case of The Prosecutor v. Thomas Lubanga Dyilo*

20. The case of *The Prosecutor v. Thomas Lubanga Dyilo* is an exceptional one, therefore it is crucial for the defence to be afforded additional means.

The exceptional nature of the case of The Prosecutor v. Thomas Lubanga Dyilo:

21. The case of *The Prosecutor v. Thomas Lubanga Dyilo* is exceptional because:

- it is the first case before the International Criminal Court. There is therefore considerable work to be done interpreting texts and creating new and pioneering case law.
- for the first time before an international criminal court, the charges pertain to the use of child soldiers; there is no prior case law relating to this matter;
- it is the first case in which victims are able to participate;
 - Given such an unprecedented situation, the modalities of victim participation need to be discussed.
 - Because more parties are present, there are a greater number of requests and submissions.
- any future counsel to Thomas Lubanga Dyilo will have to take on a case file dating back more than eleven months. It will take a

considerable time for counsel to become acquainted with the entire case file. If the defence is afforded additional means, the new counsel will be able to take on the case with greater speed and avoid delaying or drawing out Court proceedings indefinitely.

22. The amalgamation of these elements – specific to the case of *The Prosecutor v. Thomas Lubanga Dyilo* – creates a considerable workload, as can be seen by the relentless pace of applications and decisions. Between May 2006 and March 2007, the Court rendered two hundred decisions and its website published four hundred and thirty applications, decisions and procedural documents, with an average of two to three applications per day. It would seem clear therefore that the case of the Prosecutor v. Thomas Lubanga Dyilo requires an exceptional amount of work from the defence.

Preparatory work needed before the start of a trial:

23. Workload is set to increase once the trial begins, for the following reasons:

- the victims are likely to have more freedom to intervene in the proceedings
- the number of disclosures is set to increase
- counsel for the defence will not receive support from the Office of Public Counsel for the Defence, which has made known that it cannot deal with matters relating to the merits nor join a defence team.⁴

Basic rights of the accused

⁴ ICC-01-04-01-06-823, 12 February 2007, “Observations of the Office of Public Counsel for the Defence on the Decision of Pre-Trial Chamber I entitled “Decision on the defence request for extension of time””.

24. Pursuant to article 67⁵ of the Statute of the International Criminal Court, it is incumbent upon the Court to ensure that no party is disadvantaged when it presents its case, and to guarantee sufficient resources to the defence to safeguard the right to a fair trial.

25. Accordingly, the *Ordre des Avocats de Paris* would like to provide a technical assessment of the actual means necessary to:

- guarantee the basic rights of the accused such as the right to a fair trial and equality of arms;⁶
- enable the defence to perform its work in line with the standard of quality required by the Court;
- avoid delays in the proceedings or in the proper conduct of the case as a whole.

26. The matter of what resources are needed to ensure an effective and efficient defence is crucial in the particular case of *The Prosecutor v. Thomas Lubanga Dyilo* as well as more generally for the administration of the International Criminal Court.

27. For these reasons, the *Ordre des Avocats de Paris* respectfully requests the Chamber to:

- entertain this application for intervention in the proceedings as *amicus curiae*;

⁵ Article 67 of the Statute of the International Criminal Court: “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence”.

⁶ Article 14 of the International Covenant on Civil and Political Rights, which entered into force on 23 March 1976 and article 67(1)(b) of the Statute of the International Criminal Court.

- grant the *Ordre des Avocats de Paris* leave to submit a brief on the financial, material and human resources indispensable to an effective and efficient defence in the case of The Prosecutor v. Thomas Lubanga Dyilo;

and, should Pre-Trial Chamber I deem it appropriate,

- grant the *Ordre des Avocats de Paris* leave to make oral submissions in support of its brief.

[*signed*]

Yves Repiquet

President of the *Ordre des Avocats de Paris*