Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

No.: **ICC-01/04-01/06**
Date: **19 August 2011**

TRIAL CHAMBER I

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge René Blattmann

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

CONFIDENTIAL – *EX PARTE,* only available to the Registry and the Defence
With confidential, *ex parte* annexes only available to the Registry and the Defence

Defence Application for a Review of the 22 July 2011 Decision of the Registry on the Legal Assistance Granted to Mr Thomas Lubanga

Source: **Defence team for Mr Thomas Lubanga**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju-Duval
Mr Marc Desalliers
Ms Caroline Buteau

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Counsel Support Section
Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. In anticipation of any decision that the Registrar may issue on the legal assistance granted to Mr Thomas Lubanga, Counsel for the Defence has sought a meeting with the Chief of the Counsel Support Section on numerous occasions since June 2011, but to no avail.

2. On 22 July 2011, the Chief of the Counsel Support Section wrote a letter to Ms Catherine Mabille, Lead Counsel for Mr Thomas Lubanga, to inform her of new modalities concerning the legal assistance for Mr Thomas Lubanga which would come into effect after the closing arguments of 25 and 26 August 2011 until such time as Trial Chamber I issues its verdict (Annex 1).

3. The letter was sent exclusively to Lead Counsel for Mr Thomas Lubanga, via her Court e-mail address, during judicial recess, and without consulting her beforehand.[1]

4. Lead Counsel was thereby informed as follows:

   – The payment of fees to members of the Defence team, save for those of Lead Counsel, shall cease as of Tuesday, 30 August 2011. The Registry considers that two days suffice for the Defence to store its effects and vacate its offices and complete the check-out procedure;

   – Remuneration of Lead Counsel shall be based on an hourly rate and a maximum working day of seven and a half hours, and shall not exceed €10,832 per month; Counsel's fees shall be determined "on the basis of the reasonably necessary activities to be carried out during that period";

   – During such period, Lead Counsel shall not receive any reimbursement for professional charges;

   – Access for members of the Defence team shall be extended if they agree to work on a *pro bono* basis;

[1] On numerous occasions since June 2011, both verbally and in writing, Lead Counsel has sought in vain a meeting with the signatory of the letter of 22 July 2011, Mr Esteban Peralta Losilla, in order to discuss the matters raised in the letter.

- Lead Counsel must request the assistance of the Office of Public Counsel for the Defence (OPCD) and *pro bono* assistants for any task which she has to perform;
- Should an appellate phase commence, resources allocated to the Accused shall consist of one lead counsel, one legal assistant and one case manager;
- The Defence team may retain only one of the two offices allocated to it by the Court.

5. The Registry grounds this decision in the "Report on the operation of the Court's legal aid system and proposals for its amendment" submitted at the sixth session of the Assembly of States Parties in 2007.[2]

6. Upon receipt of the decision, Lead Counsel again requested a meeting with the Chief of the Counsel Support Section, but to no avail.

7. In view of the urgency of the situation, on 17 August 2011, Lead Counsel sought a meeting with the Registrar to request her to reconsider her 22 July 2011 decision, and to discuss the fundamental issue of retaining the Defence team throughout the trial. The meeting was held on 18 August 2011 and the Registrar asked Lead Counsel to provide her with a non-exhaustive list of <u>examples</u> of tasks which the team envisages performing pending the decision on the innocence or guilt of the Accused (Annex 2).

8. At no time has the Defence framed its endeavours in this matter as a request for additional resources. Moreover, at the meeting, the Registrar never indicated that she viewed the Defence position as such.

9. However, on 18 August 2011 at 19:41, the Defence received the "Registrar's decision on the application for additional means submitted by Counsel for Mr Thomas Lubanga Dyilo on 18 August 2011" (hereinafter "the

[2] ICC-ASP/6/4.

18 August 2011 Decision"). In that decision, the Registrar wrongly described the Defence actions as "an application for additional means", whereas the Defence was merely attempting to engage in dialogue with the Registry on a crucial issue whose application may seriously affect the rights of the Accused.

10. In her decision, the Registrar stated that, as additional means, she is granting five days of remuneration for the team's case manager (Annexes 3 and 4). However, it must be noted that at the meeting Lead Counsel had in fact informed the Registrar of the case manager's intention to leave the team as of 1 September 2011, and that Lead Counsel had decided not to seek extension of this post for the subsequent phases of the proceedings.

11. Pursuant to article 64(2) of the Statute and regulation 83(4) of the Regulations of the Court,[3] the Defence hereby prays the Chamber to review the 22 July 2011 decision of the Registry on legal assistance granted to Mr Thomas Lubanga for the period commencing on 31 August 2011. One of the effects of the Registrar's decision has been to dissolve the Defence team prior to the end of trial, in violation of the right of the Accused to a full and complete defence (article 67(1)).

1 – APPLICABLE LAW

– The founding texts of the Court

12. Article 67(1) makes provision for the right of the accused, in full equality, "[t]o have adequate time and facilities for the preparation of the defence", and "to be tried without undue delay".

13. A duty is cast on the Registrar to secure respect for the rights of the accused.[4] She must also uphold the rights of the defence in accordance with the fair trial

[3] Regulation 83(4): "Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance."
[4] Rule 20(1).

principle prescribed by the Statute, by, *inter alia*, affording help and assistance to counsel defending accused persons before the Court.[5] The Registrar must carry out her administrative functions in such a manner as to ensure the professional independence of defence counsel.[6]

– Administrative documentation on legal assistance paid by the Court

14. The "Report on the operation of the Court's legal aid system and proposals for its amendment" submitted at the sixth session of the Assembly of States Parties[7] and founding the impugned decision is a report of an administrative nature which merely constitutes "management oversight […] regarding the administration of the Court" provided by the Assembly of States Parties to the Registrar (article 112(2)(b) and (c)).

15. In 2005, it was specified that the development of a system for the payment of Defence team members should take account of the following criteria:[8]

- Equality of means: "The payment system must contribute to maintaining equilibrium between the resources and means of the accused and those of the prosecution."
- Continuity: "The payment system must provide for mechanisms that are flexible enough to adapt to situations as they arise in order to preclude any paralysis prejudicial to the interests of the due administration of justice." [Emphasis added]

16. The 2008 "Report on different legal aid mechanisms before international criminal jurisdictions"[9] states that, given the limited experience of the Court in

[5] Rule 20(2).
[6] Rule 20(2).
[7] ICC-ASP/6/4.
[8] "Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16)", ICC-ASP/5/INF.1, para. 22 (hereinafter "31 October 2008 Report").
[9] ICC-01/04-01/06-ASP/7/23, seventh session, 14-22 November 2008.

legal assistance matters, no definite benchmark can be set for future cases.[10] The report further emphasises the importance of continuing to monitor the current system so as to safeguard the rights of the Accused to an effective and efficient defence.[11]

17. Moreover, the 2008 Report supplements the report submitted to the Assembly of States Parties in December 2007 in several respects, by clarifying, *inter alia*, that:

- The Court's legal assistance system is based on a monthly lump-sum system;[12]
- The payments of these fees "remain constant throughout the proceedings, provided the appointment of the team member remains valid, and are payable even when judicial activity is minimal or non-existent, such as waiting for a decision to be delivered"[13] [emphasis added];
- Counsel and associate counsel are entitled to reimbursement of professional charges in an amount not exceeding 40 per cent of the legal fees payable, upon proof (receipts, etc.) of the professional charges incurred. This amount is automatically paid on a monthly basis in addition to the remuneration of the team member concerned;[14]
- Costs associated with missions to the Seat of the Court by lead and associate counsel are included in the monthly sum of €4,000 earmarked for the team's expenses;[15]

[10] 31 October 2008 Report, para. 9.
[11] 31 October 2008 Report, para. 9.
[12] 31 October 2008 Report, para. 27.
[13] 31 October 2008 Report, para. 29.
[14] 31 October 2008 Report, para. 38.
[15] 31 October 2008 Report, para. 41.

18. Lastly, these documents show that:

- The main pillars of the legal assistance scheme are equality of arms, objectivity, transparency, continuity and economy;[16]
- The legal assistance scheme must guarantee effective and efficient legal representation in accordance with the aforesaid pillars;[17]
- The trial phase commences when the Presidency assigns the case to the Trial Chamber and continues until the Chamber issues its final judgment;[18]
- The payment of fees to Defence team members must remain constant throughout the proceedings, even where judicial activity is minimal or non-existent, for example, pending the issuance of a decision.[19] The purpose of this is: (a) to allow defence teams to feel that they are an integral part of the Court by making their remuneration structure similar to that used for Court staff; (b) to remunerate defence team members on a regular basis; (c) to lighten the staff remuneration burden on counsel and avoid related disputes within the team; and (d) to simplify management of the periodical payments to different team members, who can thereby also rely on a regular monthly income. Remuneration of each team member is calculated on the basis of the scale applicable to teams in the Office of the Prosecutor.

19. The impugned decision is not only devoid of any statutory basis but is also antithetical to the principles set forth in the aforesaid administrative documents.

20. In any event, these documents, which are of an administrative nature, can under no circumstances take precedence over the fundamental rights of the

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[16] 31 October 2008 Report, para. 86.
[17] *Idem*.
[18] 31 October 2008 Report, Annex 2.
[19] 31 October 2008 Report, para. 29.

Accused set forth in article 67 of the Statute which guarantee him the means of having, in full equality, the resources necessary to mount his defence.

2 – THE IMPUGNED DECISION VIOLATES THE RIGHTS OF THE ACCUSED UNDER THE STATUTE OF THE COURT

21. The impugned decision violates the rights of the Accused articulated above, specifically for the following reasons:

- *The dissolution of the Defence team before the end of trial*

22. The impugned decision has occasioned the dissolution of the Defence team prior to the end of the trial phase. The Statute envisions the trial phase as concluding either by a decision of acquittal or by sentencing and a phase of reparations to victims in the event of a conviction (articles 75 and 76).

23. The payment of professional fees to members of the Defence team will cease as of 30 August 2011, forcing them to seek paid employment thereafter. It is wholly unacceptable for the Registry to suggest that team members' access can only be extended where they agree to work *pro bono* on the case.

24. The fact that the members of the Defence team are, at this stage, compelled to seek alternative employment necessarily means that they will no longer be available to continue working on the present case.

25. Counsel is therefore left alone to contend with all of the tasks associated with the defence of Mr Thomas Lubanga. The Registry's proposal that for such tasks Counsel avail herself of the assistance of the OPCD or *pro bono* assistants breaches the Registrar's duty to safeguard the professional independence of defence counsel.

26. Furthermore, in no way can the work of a defence team – which has an extensive understanding of the case and the confidential information, and which has forged a relationship of trust with the Accused – be performed by a Registry organ or *pro bono* assistants who have no knowledge of the case.

27. To compel Counsel to form a new Defence team for the subsequent stages of the trial phase would inevitably incur considerable delays to the proceedings. In June 2007, the formation of the current Defence team alone took approximately three months. The new members of the defence team would, moreover, have to devote several months of work for the sole purpose of familiarising themselves with the instant case. In any event, they would never attain the level of the members of the current Defence team.

28. Yet, any proceedings and hearings on sentencing and in the event of a conviction, reparations, or any appellate phase, would require a thorough understanding of the facts of the case.

29. The Defence further underscores that no such restriction is imposed on the Office of the Prosecutor, which is able to afford continuity to the team it has tasked with the case.

30. Not only does the impugned decision fail to ensure economy for the aforesaid reasons, but it would also add to the considerable delays which the Accused has already had to endure in the present case.

31. Accordingly, to retain the Defence team in its current form is essential to providing the continuity necessary to an "effective and efficient" defence, to guaranteeing the independence of Defence Counsel, and to avoiding any undue delay ensuing from the appointment of a new defence team at a later phase in the proceedings.

32. Lead Counsel nevertheless wishes to inform the Chamber, as she already informed the Registrar on 18 August 2011, of her intention to maintain only the posts of Lead and Associate Counsel and two legal assistant posts in the subsequent phases of the proceedings.

– Remuneration of members of the Defence team prior to the end of the trial

33. The aforesaid documents[20] clearly establish that remuneration of members of the Defence team throughout the trial phases is on a lump-sum basis and "must remain constant throughout the proceedings, even when judicial activity is minimal or non-existent, such as waiting for a decision to be delivered".[21]

34. This principle enables a certain balance to be struck between those periods in which the Defence team's workload greatly exceeds that which may be considered as reasonable working hours, and those where the workload is less considerable.

35. It follows from this principle that remuneration of members of the Defence team must in no circumstances be contingent on the Registrar's assessment and approval of the tasks they perform.

36. In any case, the Defence considers that certain tasks will continue to be necessary pending a decision on the innocence or guilt of the Accused.

37. The Defence refers to Annex 2 of the present Application, which, at the Registrar's insistence, sets out non-exhaustive examples of the work which it expects to perform pending the decision on the innocence or guilt of the Accused.

38. It follows that to guarantee the Accused a fair trial, the payment of the Defence team's fees must remain constant throughout the proceedings, even where judicial activity is minimal or non-existent.

39. Accordingly, the Defence takes the view that the impugned decision must be reviewed in light of these submissions. The Defence therefore requests that:

   – The Defence team be retained in its current form, at least until the trial phase concludes;

[20] *Supra*, paras. 14-17.
[21] 31 October 2008 Report, para. 29.

- The lump-sum remuneration system be retained, including compensation for professional charges incurred by Lead Counsel and Associate Counsel and reimbursement of the costs of both Counsel's work at the Seat of the Court;
- Members of the Defence team retain access to the two offices currently allocated to them and privileged access to the Accused at the Detention Centre.

40. The Defence wishes to express its regret at having had to expend time and considerable resources on this matter instead of devoting its full attention to drafting the "*Réplique de la Défense à la* 'Prosecution's Reply to the '*Conclusions finales de la Défense*'' *datée du 1er août 2011*"[22] and preparing the Defence closing arguments, which are a crucial stage in the proceedings.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I TO:

REVIEW the Registrar's 22 July 2011 decision;

DIRECT as follows:

- That a team consisting of Lead Counsel, Associate Counsel and two Legal Assistants be retained, at least until the trial phase concludes;
- That the lump-system remuneration system be retained, including the compensation for professional charges incurred by Counsel and Associate Counsel and reimbursement of the work of these two Counsel at the Seat of the Court; and
- That members of the Defence team retain access to the two offices currently allocated to them and privileged access to the Accused at the Detention Centre.

[22] ICC-01/04-01/06-2786-Conf.

[signed]

Ms Catherine Mabille, Counsel

Dated this 19 August 2011

At The Hague, The Netherlands