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Date: **8 June 2012**

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

**Public
With 6 Public Annexes**

**Defence Request for a Review of the Registry's Decision on the Modification of
Legal Aid**

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

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Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Background

1. The closing arguments in the case of Katanga and Ngudjolo concluded on the 23rd May 2012. These did not include issues of sentencing and reparations, which will be addressed, in the event of a conviction, after the Chamber has made its decision in terms of Article 74. The issue of reparations may be the subject of a hearing in the event of an acquittal, though the Statute is not clear in this respect.
2. Two weeks prior to the closing arguments, in the light of developments concerning the *Lubanga* defence team and victims representatives, lead counsel wrote to the Counsel Support Section (CSS) requesting clarification of the Registry's stance on remuneration of the *Katanga* defence team in the period of trial running from the end of the closing arguments until the Chamber's judgment, and subsequent resolution of issues of sentencing and reparations.¹ Lead counsel received no direct response.
3. However, on Wednesday 30th May 2012, lead counsel received a letter sent to his ICC e-mail address from the CSS.² This letter was dated Friday 25th May 2012, the day before Counsel left for London, and was not copied to any other team member. Moreover, no other team member, including associate counsel, has received any written notice of the Registrar's decision which directly affects them. Nor has any written notification been sent to Mr Katanga from the Registry of these developments in relation to his legal assistance. The letter states that legal aid shall only cover remuneration for counsel, and that as of the 1st July 2012, remuneration for all other team members shall cease. The letter does not expressly define counsel to exclude associate counsel, but it would appear from the paragraph mentioning the current fixed remuneration of counsel, that the term 'counsel' is intended to exclude associate counsel.
4. The letter is drafted in very similar terms to the letter sent to the *Lubanga* defence team towards the end of its final written pleadings in 2011, and does not appear to take

¹ Email, dated 10 May 2012, to Esteban Peralta, from Lead Counsel, entitled 're Legal Aid scheme'.

² Letter, dated 25 May 2012 to David Hooper, from the Chief of the Counsel Support Section, Reference CSS/2012/240, re Closing Statements before Trial Chamber II (Annex 1).

any account of the arguments and decision of Trial Chamber I when reviewing the Registry's decision in that case.³

5. Accordingly, on the 31st May 2012, lead counsel wrote to the Registry reminding it of the developments in the Lubanga case and urging a revision of the decision.⁴ In the light of the urgency of the matter a response was requested by Tuesday the 5th June. On that date, a response was received from the CSS, which maintains the Registry's position and suggests that counsel can always apply for additional means "in case any relevant objective factors might significantly increase your workload during this during this period of reduced judicial activities".⁵ On the 8th June 2012, the date of filing of this motion, lead counsel again reiterated that the issue was one of retention of the team for the purposes of the judgment and again invited the CSS to turn its mind to the *Lubanga* Decision.⁶ CSS promptly replied by email to similar effect to their earlier letter.⁷
6. The defence does not know whether the Registrar has taken the precaution of consulting with the Chamber on an approximate schedule before making its decision in the Katanga and Ngudjolo case, as prescribed in the *Lubanga* Decision.⁸

B. Power and standard of review

7. The issue of the provision of legal aid goes directly to the fairness of the trial for the accused, since it impacts on his ability to exercise his rights effectively in full equality with the Office of the Prosecutor and other accused, respectively. Thus, regulation 83(4) of the Regulations of the Court provides the Chamber with a power of review of the decisions of the Registry on this subject:

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.

³ ICC-01/04-01/06-2800, *Decision Reviewing the Registry's Decision on Legal Assistance for Mr. Lubanga*, 30 August 2011 ("*Lubanga* Decision").

⁴ Letter, dated 31 May 2012, to Esteban Peralta, from David Hooper (Annex 2).

⁵ Letter, dated 5 June 2012, to David Hooper, from Esteban Peralta (Annex 3).

⁶ Email, dated 8 June 2012, to Esteban Peralta, from David Hooper, entitled 'team' (Annex 5).

⁷ Email, dated 8 June 2012, to David Hooper, from Mbaye Abdoul, entitled 'team' (Annex 6).

⁸ *Lubanga* Decision, para. 58 (wherein the Trial Chamber held in that reduction by the Registry of the defence team and legal assistance must be made "[...] on the basis of full consultation with the Chamber").

8. It is submitted that the standard of review must be viewed in the light of the importance of the exercise of this power of review. The Statute grants the Trial Chamber extensive powers and duties to preserve the fairness of the trial, which by implication, allows the Trial Chamber to carry out an in depth review of any decision of the Registry that impacts on rights of an accused.
9. Article 64(2) of the Statute therefore directs the Chamber to ensure the fairness and expeditiousness of the trial and to ensure that it is conducted with full respect for the rights of the accused. Article 67 sets out the fundamental rights of the accused. These are described as minimum guarantees and are to be accorded “in full equality”. This must, it is submitted, include in full equality with other accused before the Court. Thus, not only does the Chamber have the right to intervene where any decision affects the right of an accused to a fair trial, but differential treatment by the Registry of accused before the Court, in terms of their right to legal assistance, also invokes the right of the Trial Chamber to intervene.
10. The specific guarantees under article 67 plainly cover the issue of the provision of legal aid and assistance to the accused. These rights include the right to adequate time and facilities for the preparation of the defence under article 67(1)(b), the right to be tried without undue delay under article 67(1)(c) and the right to legal assistance in terms of article 67(1)(d).
11. These rights are firmly entrenched in state practice and provisions of international instruments, such as article 11 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights, article 6 (a), (b) and (c) of the European Convention on Human Rights and Fundamental Freedoms, as well as article 8(2)(a), (c), (d) and (e) of the American Convention on Human Rights.
12. Additionally, Regulation 83(1) of the Regulations of the Court provides that “legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.” The expression “effective and

efficient defence” implies a direct and substantial link between legal aid and the fairness of the trial.

13. Although the question of the standard of review was not directly addressed in the decision in *Lubanga*, it is clear that the Chamber viewed its role as extensive. It determined whether the action of the Registrar was consistent with the rights of the accused to a fair trial, and replaced the Registrar’s decision on how the defence team should be composed by its own formulation.⁹

14. In the Katanga and Ngudjolo case, when faced with an application for review from the legal representatives for victims, this Chamber rejected the notion that the Presidency’s standard of review was the applicable standard, noting that a more flexible standard is appropriate, given the impact and importance of the Registrar’s decisions on legal aid. The Chamber stated that:

For example, when Chambers are asked to review crucial decisions affecting the composition of defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar’s decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation.¹⁰

15. This was contrasted with the position where a decision relating to legal aid concerned the day-to-day operating of a defence team or a legal representative, where the Chamber’s role was more limited.¹¹ The current situation falls squarely within the first category of crucial decisions affecting the composition of a defence team.

C. End of trial

16. Trial Chamber I in the *Lubanga* case held that the trial continues until the article 74, 75 and 76 decisions have been rendered, that is, until the resolution of sentencing and reparation issues that may arise.¹² During the course of the trial, the accused is entitled

⁹ See *Lubanga* Decision generally.

¹⁰ ICC-01/04-01/07-3277, *Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar’s Decision of 3 April 2012 regarding Legal Aid*, 23 April 2012 (“*Decision on Legal Representative of Victims regarding Legal Aid*”), para. 9.

¹¹ *Decision on Legal Representative of Victims regarding Legal Aid*, para. 9.

¹² *Lubanga* Decision, para. 47 (“In the judgment of the Chamber, as reflected in the Rome Statute framework, the ‘Trial’, the ‘Trial Procedure’ or the ‘Trial Proceedings’ only comes to an end when the Article 74, 75 and 76

to the minimum guarantees of a fair trial. This was based on a reading of the appropriate sections of the Statute. Indeed, Trial Chamber I held in this regard, that

Without prejudice to the rights of the accused during any appellate stage, at least until the end of the trial [as defined as until the article 74, 75, and 76 decisions have been reached], he is protected by Article 67 of the Statute, and his rights thereunder should not be undermined simply because a particular stage of the trial proceedings (such as the presentation of evidence or the closing statements) has concluded.¹³

17. It is submitted that this was a correct and logical finding. The fair trial rights of the accused continue throughout the trial.

D. The preservation of rights of the accused in full equality

18. The issues in this case and in the Lubanga case are in all material respects identical. In both cases, the Registrar has attempted to cease remuneration of all but one of the team members¹⁴ at the close of the final oral arguments on the merits of the prosecution case. One aspect that is distinct is that in the Lubanga case, this question was being addressed for the first time. However, in the Katanga and Ngudjolo case, the *Lubanga* Decision has already been reached such that the accused in that case benefitted from substantially the same team composition in the period following the closing arguments. This situation persists, since the issues of sentencing and reparations remain extant.

19. While in this instance, CSS has invited the *Katanga* team to apply for additional resources in case there are objective factors which might significantly increase the workload, this was not expected in the Lubanga case and the *Lubanga* request for review was not treated as a request for additional resources. The proper question is whether protection of the rights of the accused renders it appropriate to maintain the current application of resources, or a substantial part of them. The resources already in place are composed of means that represent the core requirements for a defence, or as

Decisions have been delivered, as appropriate. It is only then that the Trial Chamber will have ceased its substantive work. Any further proceedings are dealt with by the Appeals Chamber under Part VIII of the Statute”).

¹³ *Lubanga* Decision, para. 48.

¹⁴ Lead counsel of the Lubanga defence team informed the Registrar that the case manager intended to resign, and that lead counsel would not seek a replacement. *Lubanga* Decision, para. 26.

in the case of associate counsel, are automatically granted following confirmation, or as in the case of an additional legal assistant, have already been granted as necessary for an effective defence. The question of additional resources must remain a separate consideration. It should not be seen as an avenue for remedying an unwarranted dissipation of resources contrary to the rights of the accused. Otherwise, the Registry is renouncing its duty to the accused by placing an onus on him to justify his primary resources already accorded to him, in contravention of the letter and spirit of Rule 20 of the Rules of Procedure and Evidence, and that, in a discriminatory manner as against Thomas Lubanga.

20. It is submitted that legal aid should be applied in a consistent manner as between different accused appearing before the Court. The Lubanga and the Katanga and Ngudjolo cases are the first two cases before the Court. They are both at the stage falling between final arguments and the conclusion of decisions under articles 74, 75 and 76, save that in the Lubanga case, judgment has been delivered. In this instance, Lubanga and Katanga were fighting on opposite sides of the conflict in Eastern DRC. This renders the differential in the protection of their fair trial rights particularly unfair.
21. It is therefore submitted that the Registry's uneven treatment of these two accused constitutes a violation of article 67, and in particular, the right to the preservation of the minimum guarantees in full equality.
22. The other aspect to the respect for rights in full equality is that the accused should not be placed at a significant disadvantage as compared to the prosecution. The generously sized prosecution team will remain substantially intact, subject to the circumstances of particular individuals, and no new defence team members will be able to reach the same level of knowledge and experience of the case as these prosecution members. They will also not benefit from having lived through the presentation of evidence, giving a remarkable advantage in one's ability to recall and appreciate the impact of evidence, or indeed, how the judges may have perceived it.

E. The principle of non-retroactivity

23. It is not suggested by the Registry in its letter that a new regime is applicable to the *Katanga* defence team. In fact, CSS cites ICC-ASP/6/4 dated 31 May 2007¹⁵, noting that this has been applicable to the *Katanga* team. It is submitted that there has not been any effective amendment to the applicable rules and regulations that could adjust the position of the accused with respect to legal aid up until the decisions under articles 74, 75 and 76.

24. The Defence notes that any attempt to apply a regime different to that applicable would violate article 24(2) of the Statute, which provides that “in the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply”.

F. The obligation to ensure the professional independence of counsel

25. In terms of Rule 20(2) of the Rules of Procedure and Evidence, the Registry must, in providing legal assistance to the accused in terms of Rule 20, ensure the professional independence of counsel. In order for this obligation to be meaningful, the Registry must, it is submitted, respect the terms of the appointment of counsel. If the Registry can ignore the terms of appointment, which it has itself agreed to, with impunity, this creates uncertainty for counsel as to the security of his position, and militates against the maintenance of his professional independence.

26. The terms of appointment of associate counsel state quite clearly, that his position will be covered by legal aid. His mandate only comes to an end on the initiative of lead counsel, at the end of the proceedings, or in conformity with the provisions of the Statute. What the Registry is attempting violates the terms of this appointment, since it amounts to a constructive termination of the mandate or to a unilateral and fundamental change in the terms of that mandate.¹⁶

¹⁵ International Criminal Court, Assembly of States Parties, Report on the operation of the Court’s legal aid system and proposals for its amendment, ICC-ASP/6/4, 31 May 2007.

¹⁶ The same is said too, of the letters of appointment of the other team members: “Your appointment in the said capacity will take effect as of today and will remain valid until the end of the trial phase, unless Mr. Hooper decides to limit your intervention beforehand or in accordance with the pertinent legal texts of the Court.”

G. Implementation of the rights of the accused

27. In the *Lubanga* proceedings, it was held that in the event of a gap of three to four months between final arguments and judgment, the Registry must weigh the savings by dissolving the defence team as against the future disruption.¹⁷
28. The Registry's measure of ceasing the remuneration of all team members in the current case, save for lead counsel, will have the effect that members of the team may inevitably be obliged to seek alternative employment to sustain a living. The consequence may be that, in the course of these efforts, these team members exclude themselves from the possibility of continuing on the team at a later stage due to the location, or to other circumstances of such work. In the event of a conviction, sentence and reparations, appeals against conviction, sentence or reparation orders must be settled within 30 days, save where good cause is shown, in which case the Appeals Chamber may extend the time limit of one month.¹⁸ In cases of this nature, the process of identifying and drafting grounds is a complicated process. It makes sense to preserve the defence team in its entirety, each of whom has a particular knowledge of the case, for that purpose.
29. The Defence recognizes that the Registry must manage its resources with care and that the amount of work to be done during this period is reduced. However, the potential consequences for the accused of cutting team member's remuneration completely, or even reducing it drastically, do not warrant such a measure. A reasonable alternative, which would not necessarily lead to the dissipation of the team, would consist of a reduction in the region of 25 percent of the overall financial outlay on the team. There is already a saving resulting from the reduced need for presence of counsel in The Hague.
30. The Registry's stance of maximum savings also overlooks that this is a time of particular tension for any accused anxiously awaiting judgment. The team is also available to provide him with support. They can additionally address any issues that may arise, as they have in the past, as between the accused, the Registry and the

¹⁷ *Lubanga* Decision, para. 56.

¹⁸ Rule 150(1) and (2) of the Rules of Procedure and Evidence. See also *Lubanga* Decision, para. 58 ("[...] the defence must not be placed in the position of having to prepare submissions on sentence, reparations or for an appeal brief within an unreasonably short period of time (e.g. within 30 days for an appeal) with an inadequate legal team").

Presidency. This is not to say that there is no other work to do. As noted by the Trial Chamber I in *Lubanga*, without in any way anticipating the form the judgment will take, “[...] any conscientious defence team in the circumstances will give careful attention – to the extent possible to the next stages of the trial proceedings”.¹⁹

31. The circumstances are that the accused is charged with a range of serious offences, rather than the single category of offence in the *Lubanga* case, and that the trial involves charges against two, as opposed to one, accused. The parameters of Article 74 are not settled. It is therefore a case that is, in principle, of greater complexity than the *Lubanga* case. In such circumstances, it is predictable that it would take time to reconstitute the team. The confirmation of charges decision was rendered on the 26th September 2008. The current associate counsel was only appointed on 20th February 2009, some almost five months later. This was in part due to the difficulty of identifying a person who was both appropriate and inspired the confidence of the accused. It would further take any new team members months to get up to speed with the factual and legal complexities of the case.
32. These factors suggest that there may potentially be delays of a not insignificant nature when it comes to reconstituting a team. Even in such a case, such new members could not reasonably be expected to reach the same level of knowledge and experience as the existing members of the defence team, or even members of the prosecution team. Since the prosecution is not required to lay off their staff, the accused can be expected to be placed at a significant disadvantage in future proceedings.²⁰
33. Each member of the defence team has his or her own specialist function within the team and their individual knowledge and skills, built up over the past four years, are assets that it is reasonable to suggest should be maintained so far as possible.
34. The potential difficulties that may arise in the future are entirely avoidable at this stage, simply through the simple mechanism of retaining the existing team. It is submitted that the Registry’s proposed action violates the right to trial without undue delay, the right to adequate time and facilities for the preparation of one’s defence, as well as the right to the effective assistance of counsel.

¹⁹ *Lubanga* Decision, para. 59.

²⁰ See *Lubanga* decision, para. 57.

35. The Report cited by the Registry²¹ in its letter dated 25th May 2012 cannot have the effect of overriding the rights of the accused as properly interpreted. As held by Trial Chamber I in the case of Lubanga,

The guarantee of a fair trial is, in essence, an indispensable element of international justice. This fundamental, internationally-recognized human right, as enshrined in the Statute and in international human rights instruments cannot be infringed and certainly not on the basis of a Report prepared for the Assembly of State Parties (the Adjustments). If the accused's right to an effective defence is infringed, a fair trial for the accused is no longer possible.²²

36. Furthermore, since the report is dated 2007, it must also be looked at in the light of the developments in the Lubanga case. This report, being proposals for amendments of the legal aid programme, has no binding effect on the Chamber when considering the implementation of the rights of the accused to fair trial. Paragraph 29 referred to by CSS simply notes that there are no proposals for amendment to the existing system as envisaged, which includes an understanding on moments in the trial when counsel would work alone. From paragraph 6 of the same report, it would appear that the Committee is conscious of the need to ensure “that the criteria of equality of arms, objectivity, transparency, continuity and economy are met in a balanced and judicious manner”.

37. The report cited by the Registry must also be looked at in the light of other reports on the subject. The Report to the Assembly of State Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16)²³ recalls at paragraph 16 that the system of remuneration must contribute to preserving the equilibrium between the resources and means of which the accused has at his disposal, and those of the prosecution. It further notes the principle that the system must incorporate mechanisms that are sufficiently flexible to adapt to the situation at hand, so as to avoid a paralysis that would obstruct the proper administration of justice. It is also noted at paragraph 9 of the Report on different legal aid mechanisms before

²¹ International Criminal Court, Assembly of States Parties, Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4, 31 May 2007.

²² *Lubanga* Decision, para. 54.

²³ International Criminal Court, Assembly of States Parties, Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons, ICC-ASP/3/16, 17 August 2004.

international criminal jurisdictions, 7th session, 14-22 November 2008 (ICC-ASP/7/23)²⁴, that given the limited experience of the Court on the subject of legal aid, it is not possible to have a precise vision on all the aspects of legal aid in future cases.

38. The letter from CSS gives the impression that there is a settled regime that would allow it to dismantle the defence team. Yet, the Decision of the Bureau on Legal Aid of 22 March 2012²⁵ demonstrates that the issue of legal aid during less intensive periods is far from settled. The Bureau on Legal Aid states in the Decision that it:

2. Decides that the Registry's proposal on the composition of the legal teams [...] would merit further study [...]

[...]

4. Requests the Court to continue the elaboration of the legal aid system including the following aspects identified in (the proposed paper) and to present a report to the Committee of Budget and Finance at least 30 days in advance of its nineteenth session in September 2012 [...] with a view of having proposals reviewed by the Assembly at its eleventh session:

- a) Remuneration in the case of several mandates;
- b) legal aid travel policy; and
- c) remuneration during phases in which activities are considerably reduced.²⁶

Relief sought

IT IS ACCORDINGLY REQUESTED THAT THE TRIAL CHAMBER ORDER:

39. That the decision of the Registrar to cease remuneration of all team members save for counsel be reversed;

40. That the integrity of the *Katanga* team remain intact;

²⁴ International Criminal Court, Assembly of States Parties, Report on different legal aid mechanisms before international criminal jurisdictions, ICC-ASP/7/23, 31 October 2008.

²⁵ Decision of the Bureau on Legal Aid, 22 March 2012 (Annex 4).

²⁶ Decision of the Bureau on Legal Aid, 22 March 2012.

41. That any remuneration reflect the need to keep the team together for the period until the hearings on sentencing and reparations and subsequent appeal, and direct that for this purpose it should in no case represent an unreasonable overall reduction²⁷;
42. That, in any event, any regime of remuneration must not result in a discriminatory regime as between Lubanga, Katanga and Ngudjolo, all of whom currently fall within the same phase of the trial, that is the period between the end of the closing arguments and the conclusion of the article 74, 75 and 76 decisions;
43. That the Registrar ensure that all members of the defence team continue to have full electronic access to their own files and the evidence in the case; and
44. That the Registrar ensure that the defence team continues to have access to the accused in the detention centre on a privileged basis.

Respectfully submitted,



David HOOPER Q.C.

Dated this 8th day of June 2012

At London

²⁷ Suggested by the defence to be no more than 25 percent of the agreed overall remuneration for the team.