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Date: 5 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 Document

Registrar's observations in accordance with rule 20(1)(d) of the Rules of Procedure and Evidence on the document entitled "Clarification", filed with the Presidency of the Court on 3 April 2007 by Mr Thomas Lubanga Dyilo

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial
Lawyer

Legal Representatives of Victims

a/0001/06 to a/0003/06 and a/0105/06
Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Ms Catherine Mabile

Mr Thomas Lubanga Dyilo

On 3 April 2007, Mr Thomas Lubanga filed a “Clarification”¹ with the Presidency (“Mr Lubanga’s application”).

In his application, Mr Lubanga again requests that the Chamber 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, and states that the application cannot be interpreted as an act expressing any desire on his part to represent himself alone, and that the 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.

As indicated by Mr Lubanga, the application concerns the manner in which the scheme of legal assistance paid by the Court is applied. It raises questions which must be clarified by the Registrar to allow the Presidency to better appreciate the facts and circumstances of the present matter.

Accordingly, the Registrar submits to the Presidency the following observations pursuant to rule 20(1)(d) of the Rules of Procedure and Evidence, under which the Registrar may, *proprio motu*, advise the Chambers on relevant defence-related issues.

I – Background

1. On 28 March 2006, Mr Thomas Lubanga Dyilo filed a request for legal assistance paid by the Court.
2. On 12 April 2006, Mr Jean Flamme was appointed by Mr Thomas Lubanga Dyilo to represent him in the proceedings before the Court.
3. By decision of 31 March 2006,² the Registrar provisionally deemed Mr Thomas Lubanga Dyilo to be wholly indigent under regulation 85(1) *in fine* of the Regulations

¹ ICC-01/04-01/06-860

of the Court and that the cost of his legal representation would be provisionally borne by the Court, in accordance with the fee schedule of the legal assistance scheme paid by the Court.

4. On 20 February 2007, Mr Jean Flamme filed a confidential application³ before Pre-Trial Chamber I for leave to withdraw from the case on medical grounds. Pre-Trial Chamber I granted that withdrawal by its decision of 21 February 2007.⁴

5. On 22 February 2007, that is, the day after Pre-Trial Chamber I's decision to grant Mr Jean Flamme leave to withdraw, the Registry transmitted to Mr Thomas Lubanga Dyilo the list of all counsel authorised to appear before the Court.

6. On 26 February 2007, Mr Thomas Lubanga Dyilo requested the Registry to disclose to him the files of three counsel on the list, which the Registry did that same day.

7. On 27 February 2007, the members of the Defence Support Section met at the detention centre at 9 am at Mr Thomas Lubanga Dyilo's request and, in the course of the meeting, informed him of his rights within the scheme of legal assistance paid by the Court. Minutes were taken of the meeting and kept by the Registry.

8. On 1 March 2007, Mr Thomas Lubanga Dyilo again requested the Registry to send him the file of a counsel on the list, which the Registry did that same day.

9. On 7 March 2007, Mr Thomas Lubanga Dyilo again requested the Registry to send him the file of a counsel on the list, which the Registry did the same day. That same day, Mr Thomas Lubanga Dyilo sought successively to consult the files of two counsel on the list and that of a further counsel on the list. The Registry responded promptly to the requests on the same day.

² ICC-01/04-01/06-63

³ ICC-01/04-01/06-829-Conf

⁴ ICC-01/04-01/06-833-Conf

10. On 12 March 2007, Ms Catherine Mabilille, whose file was one of those transmitted to Mr Thomas Lubanga Dyilo, went to the detention centre to meet with him at his request.

11. On 20 March 2007, the members of the Defence Support Section again went to the detention centre at 9:30 am at Mr Thomas Lubanga Dyilo's request and, in the course of the meeting, once more informed Mr Lubanga of his rights under the scheme of legal assistance paid by the Court. Minutes were taken of the meeting and kept by the Registry.

12. That same day, Mr Thomas Lubanga Dyilo appointed Ms Catherine Mabilille as his counsel in the proceedings before the International Criminal Court. Ms Mabilille was notified on 22 March 2007 that she had been appointed, and Chambers were so informed by the registration of a note in the record of the case.⁵

13. On 21 March 2007, Ms Catherine Mabilille indicated to the Head of the Division of Victims and Counsel that she would not accept Mr Thomas Lubanga Dyilo's appointment until she had had a meeting with the Division to discuss the arrangements for the "collaboration".

14. In response, the Head of the Division of Victims and Counsel sent Ms Mabilille a letter on 22 March 2007 clearly outlining the resources currently made available to the defence team at the current stage of proceedings and the possibility for the counsel who agrees to represent Mr Thomas Lubanga Dyilo to request additional means from the Registrar and the competent Chamber according to the provisions governing the scheme of legal assistance paid by the Court, notably regulation 83 of

⁵ ICC-01/04-01/06-845.

the Regulations of the Court. The exchange of correspondence was registered in the record of the case on 23 March 2007.⁶

15. The meeting requested by Ms Mabilie took place on 27 March 2007 in the presence of another counsel, at Ms Mabilie's request. During the meeting, Ms Mabilie communicated to the Registry the conditions under which she would accept her appointment as Mr Thomas Lubanga Dyilo's counsel before the International Criminal Court, by indicating what, in her opinion, the ideal composition of her team must be, that is, *inter alia*, three Counsel, four Legal Assistants and one Case Manager. While indicating to Ms Mabilie the Registrar's receptiveness to studying favourably any requests for additional means submitted to him under regulation 83 of the Regulations of the Court, the Head of the Division of Victims and Counsel reiterated to her, on the Registrar's behalf, the content of his correspondence of 22 March 2007 and the impossibility of entering into negotiations on the composition of the team at this stage of the proceedings when she has not yet accepted her appointment.

16. On 2 April 2007, the Head of the Division of Victims and Counsel addressed a letter to Ms Mabilie, reference no. DVC/2007/0034/DDP/am, reiterating the position expressed at the meeting of 27 March 2007, but also requesting her to notify him by 4 April 2007 at the latest of her final decision concerning her accepting or declining her appointment by Mr Thomas Lubanga Dyilo as his counsel before the Court, in order to ensure that his rights are exercised effectively. The letter of 2 April 2007 was registered in the record of the case.⁷

⁶ ICC-01/04-01/06-849-Conf-Exp

⁷ ICC-01/01-01/06-856-Conf-Exp

II – OBSERVATIONS:

17. The Registrar considers that he has provided Mr Thomas Lubanga Dyilo's defence team with the assistance required by the relevant Court documents and by the legal assistance scheme, particularly, by: i) allocating to the team for the entire proceedings the resources which are reasonably necessary to ensure effective and efficient defence; ii) subsequent to the leave granted to Mr Jean Flamme to withdraw, taking all the appropriate measures to enable and facilitate Mr Thomas Lubanga Dyilo's effective exercise of his right to appoint the counsel of his choice; and finally iii) exercising all due diligence to enable the appointed counsel, Ms Catherine Mabilille, to, on the one hand, have all the relevant information about Mr Thomas Lubanga's rights in relation to the legal assistance scheme, and, on the other, to inform the Registrar of her final decision on her appointment by Mr Thomas Lubanga Dyilo.

i) The assistance provided by the Registrar to Mr Thomas Lubanga Dyilo's former counsel

18. The Registrar would point out that he has provided the requisite assistance to the defence team, particularly by allocating to it the resources to which it is entitled, within the constraints of the legal assistance scheme and the flexibility of its implementation, by granting it additional resources (resource person and the services of interns recruited under the Court's Internship Programme or intervening on a pro bono basis) on the basis of a formal request submitted by the former counsel. These resources were increased by Pre-Trial Chamber I, which asked the Registry to equip the defence team with an additional assistant. In this respect, in its decision, the

Chamber emphasised that “the Registry was not privy to this information at the time it took a decision on the Defence request for additional resources”.⁸

19. The Registrar notes that requests for additional resources under the legal assistance scheme must be submitted in a formal application, with reasons provided by counsel, demonstrating that the requested resources are reasonably necessary for an effective and efficient defence and also that, apart from the above-mentioned formal application, Mr Thomas Lubanga Dyilo’s former counsel never submitted to the Registry a formal reasoned application for the allocation of additional resources. From this perspective, the Registrar recalls that, pursuant to the relevant Court documents, it is the responsibility of counsel to take all the appropriate measures to enable him to rule promptly on applications for additional resources and that, in the absence of such steps, he cannot on his own initiative take decisions regarding the resources available to teams, beyond what is provided for under the legal assistance scheme, without interfering in the work of the said counsel and exceeding the scope of his remit.

20. The Registrar emphasises that the confidential application for the withdrawal of the former counsel was in no way justified by a lack of means and that the Registry never had a conflictual relationship with that counsel, unless the requirement for respect for procedures pursuant to the documents per se is interpreted as a conflict.

ii) The Registrar’s measures in relation to Ms Catherine Mabilille’s appointment by Mr Thomas Lubanga Dyilo

21. The Registrar emphasises that he has exercised all the requisite due diligence, in accordance with his obligations and with respect for the rights of the Defence, in order to allow Mr Thomas Lubanga Dyilo to fully exercise his right to be assisted by

⁸ See Pre-Trial Chamber I “Decision on Defence Request pursuant to Regulation 83 (4)”, ICC-01/04-01/06, 22 September 2006.

the counsel of his choice. In this respect, subsequent to Pre-Trial Chamber I's decision granting Mr Jean Flamme leave to withdraw, the Registrar took all the appropriate steps to assist Mr Thomas Lubanga Dyilo in the process for appointing counsel to represent him before the International Criminal Court. Thus, as the table below shows, he responded promptly to all the requests from Mr Lubanga Dyilo seeking to consult the files of counsel, which he freely selected from the list of counsel authorised to appear before the Court in this capacity.

Date and time of the request to consult files	Number of files requested	Date and time of the Registrar's response
26/02/07 17:27	3	26/02/07 17:34
01/03/07 10:28	1	01/03/07 10:29
07/03/07 13:26	1	07/03/07 13:28
07/03/07 13:39	2	07/03/07 13:47
07/03/07 17:31	1	07/03/07 17:52

22. Moreover, upon Mr Thomas Lubanga Dyilo's request, the Registry's staff went to the detention centre on two occasions to acquaint themselves with his concerns and to communicate them to the appropriate persons, as well as to inform him of his rights under the scheme for legal assistance paid by the Court.⁹

23. Finally, upon receipt of Mr Thomas Lubanga Dyilo's appointment of Ms Catherine Mabilille, the Head of the Division of Victims and Counsel immediately contacted the selected counsel by letter of 22 March 2007, filed in the record of the case,¹⁰ and appending all the relevant texts and forms relating to the conditions surrounding the intervention of counsel within the framework of the legal assistance scheme. In order to enable the appointed counsel to make her final decision on Mr

⁹ Minutes were taken of the meetings on 27 February 2007 and 20 March 2007 and are kept by the Registrar.

¹⁰ ICC-01/04-01/06-849-Conf-Exp

Thomas Lubanga Dyilo's choice, the above-mentioned letter informed her of the following: her appointment by Mr Thomas Lubanga Dyilo as his counsel for proceedings before the Court, the conditions of her intervention within the framework of the scheme for legal assistance paid by the Court, the applicable method of remuneration, the composition of the defence team, the other forms of assistance and the option for counsel to submit applications for additional resources under regulation 83(3) of the Regulations of the Court.

24. Moreover, to respect Mr Thomas Lubanga Dyilo's choice, and mindful of the need to guarantee transparency in the process for appointing the new counsel, the Head of the Division of Victims and Counsel informed the Chambers of the appointment of Ms Catherine Mabilille by Mr Thomas Lubanga Dyilo, by registering Ms Mabilille's appointment in the record as "Appointment of Ms Catherine Mabilille as Counsel for the Defence for Mr Thomas Lubanga Dyilo" – including the "Appointment of Counsel" form – in which it is stated: **"Please find attached the appointment of Ms Catherine Mabilille as Counsel for the Defence, signed today by Mr Thomas Lubanga Dyilo"**.¹¹

25. This registration cannot be interpreted as a document taking note of Ms Catherine Mabilille's final decision as Mr Thomas Lubanga Dyilo's counsel, but *only* as the official Registry document which faithfully reiterates the appointment of Ms Mabilille made by Mr Lubanga Dyilo, whilst respecting Mr Thomas Lubanga Dyilo's freely made choice to appoint his counsel in accordance with the requirement for transparency in the process for appointing counsel before the Court.

26. The Registrar recalls that for the same reasons which justify his approach, counsel appointed by those eligible for legal aid must make known their final decision on their appointment by the relevant persons, by sending the Registrar a duly

¹¹ See, Head of the Division of Victims and Counsel, "Appointment of Ms Catherine Mabilille as Counsel for the Defence for Mr Thomas Lubanga Dyilo", ICC-01/04-01/06, 22 March 2007

completed form of acceptance or refusal of appointment which will then be transmitted to the Chambers and to all the participants in the proceedings by registering it in the record of the case concerned. The Registrar would clearly state that Ms Mabilie received this form.

iii) Regarding the conditions laid down by Ms Catherine Mabilie

27. Having been informed of her appointment by Mr Thomas Lubanga Dyilo, Ms Mabilie requested a meeting with the Registry on 28 or 29 March 2007. At the meeting held on 27 March 2007, Ms Catherine Mabilie informed the Registry of the conditions for the acceptance of her appointment of 20 March 2007 as counsel for Mr Thomas Lubanga Dyilo before the International Criminal Court, by indicating what, in her opinion, the ideal composition of her team must be, that is, *inter alia*, three Counsel, four Legal Assistants and one Case Manager. In a letter dated 2 April 2007, the Head of the Division of Victims and Counsel informed her of the following in this respect:

- The Registry considers that it is inappropriate at this stage to take a decision on proposals, given that she has not yet made known to the Registrar her final decision on her appointment by Mr Thomas Lubanga Dyilo as his counsel before the International Criminal Court.
- The Registry abstains from making any comment on the proposals for reasons of equal treatment of persons whose costs are covered by the Court's legal assistance scheme, and for the sake of consistency, uniformity and transparency in the implementation of the said scheme.
- At the current stage of the proceedings, the team defending Mr Lubanga consists of one Counsel (post vacant due to the withdrawal of the former counsel), two Legal Assistants, one Case Manager (vacant because none was recruited by the former counsel), and two legal interns.

- The Registrar is always mindful of the conditions surrounding counsel's intervention before the Court and will take all measures reasonably necessary to ensure that those persons whose costs are covered by the Court's legal assistance scheme have effective and efficient representation in accordance with the regulatory framework set by the Court's legal assistance scheme, as stated in the *Report to the Assembly of States Parties on options for ensuring adequate defense counsel for accused persons* (ICC-ASP/3/16), of 17 August 2004, together with the *Report to the Assembly of States Parties on options for ensuring adequate defense counsel for accused persons* ICC-ASP/3/16 – *Update to Annex 2: Payment details of the ICC legal aid scheme* (ICC-ASP/5/INF.1), of 31 October 2005.
- Any request for additional means other than those provided for by the legal assistance scheme could be granted by the Registrar only within the framework of regulation 83(3) of the Regulations of the Court, on the basis of reasons submitted by the counsel in support of his or her application, and, at the appropriate time, the Registrar will rule promptly on any application for additional means submitted by the counsel who agrees to represent Mr Lubanga.
- In order to guarantee the effective exercise of Mr Thomas Lubanga Dyilo's rights, the Registrar has invited Ms Mabile to inform him, no later than 4 April 2007, of her final decision on her appointment on 20 March 2007 by Mr Lubanga as his Counsel before the International Criminal Court, by returning the relevant form which has been sent to her.

28. The Registrar respectfully submits that the implementation of the legal assistance scheme paid by the Court is his responsibility and his alone.¹² The Chambers may intervene only when they decide that the facts of the case demonstrate that the decisions of the Registrar are unreasonable and impact on the fairness of the trial. Mr Thomas Lubanga Dyilo has not demonstrated that the actions of the Registry as detailed above are unreasonable and affect the fairness of the proceedings.

29. Furthermore, the Registrar would point out that Mr Thomas Lubanga Dyilo has not said how the position of the Registry, which requires the appointed counsel to request additional means in accordance with the procedure set out in the relevant texts – if counsel is of the opinion that those means currently available to the Defence team are insufficient or inappropriate – would have a detrimental impact on the fairness of the proceedings.

30. In addition, the Registrar notes that the attitude of the appointed counsel seeks to challenge the scheme for legal assistance paid by the Court, which was established to ensure the equal treatment of persons whose costs are covered by the Court's legal assistance scheme, as well as consistency, uniformity and transparency in implementing that scheme. This type of attitude calls into question the entire scheme of legal assistance paid by the Court. An examination of established case law indicates that such applications will not be admitted.¹³

31. The Registrar considers that as the correspondence between the appointed counsel and the Division of Victims and Counsel dated 22 March and 3 April 2007

¹² See e.g. *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, “Decision on Urgent Motion for *Ex Parte* Oral Hearing on Allocation of Resources to the Defence and Consequences for the Rights of the Accused to a Fair Trial” (17 June 2003). See also *Prosecutor v. Strugar, Decision on Defence Request for Review of Registrar's Decision and Motion for Suspension of all Time Limits*, Case No. IT-01-42-PT, T. Ch., 19 August 2003. See similarly article 43(1) of the Rome Statute, rule 21(1) of the RPE, and regulations 83 – 85 of the RoC.

¹³ See *Prosecutor v. Hadžihasanović et al., Trial Chamber II* which noted that **"the aim of the motion was to challenge the legal aid system itself (rather than its application and that it is not for the Chamber, in the context of a particular case, to take decisions leading to an alteration of it (which would affect all cases pending before the Tribunal)". In this particular case, the motion was deemed to be inadmissible.** See also *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, “Urgent Defence Motion for ex parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial”, 10 April 2003.

was registered in the case record, the Chambers were informed of the fact that, to date, Ms Mabilie has not accepted her appointment by Mr Thomas Lubanga Dyilo to represent him before the Court.

32. The Registrar respectfully draws the attention of the Presidency to the fact that, since her appointment on 20 March 2007, that is, just over two weeks ago, the appointed counsel has not yet said whether or not she would accept that appointment, despite the invitation to do so issued by the Registry.¹⁴ No further application to extend the period for reflection beyond 4 April 2007 has been submitted by the appointed counsel.

33. Finally, the Registrar respectfully submits that in order to avoid the timely administration of justice being hampered as a result of prolonged indecision by the appointed counsel, she ought to be invited to make a decision without delay on the basis of the information made available to her by the Registry.

Consequently, the Registrar respectfully requests the Presidency to:

- I- **State that the requests for additional means cannot be examined at this stage in the proceedings when the appointed counsel has not yet accepted the appointment.**
- II- **Invite the counsel appointed by Mr Thomas Lubanga Dyilo to comply with the procedure which applies before the Court and to make a decision without delay regarding her appointment.**

¹⁴ ICC-01/01-01/06-856-Conf-Exp

Bruno Cathala

Registrar

Done on 5 April 2007

At The Hague, The Netherlands