



Original : English

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

Date: 2 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 CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public document

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

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I. The Applications

1. Mr Lubanga Dyilo requests the Presidency to stay all acts or proceedings that may affect or prejudice the rights of the Defence until the effective appointment of new Defence Counsel¹.
2. The Registrar requests the Presidency: first, to state that requests for additional means, under the scheme of legal assistance paid by the International Criminal Court ("the Court"), cannot be examined at this stage in the proceedings when appointed Counsel has not yet accepted the appointment², and; secondly, to invite the Counsel appointed by Mr Lubanga Dyilo to comply with the procedure which applies before the Court and make a decision regarding her appointment without delay³.
3. In reply, Mr Lubanga Dyilo requests the Presidency to dismiss the Registrar's application⁴.

II. The relevant facts

4. On 21 February 2007, Pre-Trial Chamber I issued a decision granting former Defence Counsel's request to withdraw from the case of *The Prosecutor v Thomas Lubanga Dyilo*⁵. On 6 March 2007, the Presidency issued its decision, constituting Trial Chamber I, referring to it the case against Mr Lubanga Dyilo and suspending transmission, to the aforementioned chamber, of the record of proceedings of Pre-

¹ See "Clarification", ICC-01/04-01/06-860, at para 18.

² In his Observations, the Registrar uses the term "appointed Counsel" to refer to Counsel who has been selected to represent a person in proceedings before the International Criminal Court but who has not yet accepted the appointment.

³ See "Observations du Greffier en application de la règle 20-1-d du Règlement de procédure et de preuve relatives au document intitulé « Clarification », déposé à la Présidence de la Cour le 3 avril 2007 par M. Thomas Lubanga Dyilo", ICC-01/04-01/06-863, at para 33.

⁴ See "Réponse aux 'Observations du Greffier en application de la règle 20-1-d du Règlement de procédure et de preuve relatives au document intitulé Clarification déposé à la Présidence de la Cour le 3 avril 2007 par M. Thomas Lubanga Dyilo' " du 5 avril 2007, ICC-01/04-01/06-869, at para 29.

⁵ ICC-01/04-01/06-833-Conf.

Trial Chamber I until such time as new Defence Counsel is assigned to Mr Lubanga Dyilo and it is determined that he/she has had adequate time to familiarise him/herself with the case⁶.

5. On 20 March 2007, Mr Lubanga Dyilo informed the Registry that he had selected Ms Catherine Mabilille to represent him. On 22 March 2007, the Registry publicly filed the "Appointment of Ms Catherine Mabilille as Defence Counsel for Mr Thomas Lubanga Dyilo" before Pre-Trial Chamber I, Trial Chamber I and the Appeals Chamber⁷.
6. The Registry subsequently filed before the abovementioned chambers, on a confidential *ex-parte* basis, its correspondence with Ms Mabilille revealing that the latter had not yet agreed to act as Defence Counsel for Mr Lubanga Dyilo and was purporting to negotiate additional resources, within the context of the legal assistance scheme of the Court, as a condition of her acceptance⁸.
7. The Registry informed Ms Mabilille that it could not entertain her request for additional resources given that she had not yet agreed to act as Counsel for the Defence. By correspondence dated 2 April 2007, Ms Mabilille was given until 4 April 2007 to make her decision on whether she would be willing to act as Defence Counsel for Mr Lubanga Dyilo known to the Registry and informed that upon expiration of that time limit she would be considered, by the latter, to have declined the position⁹. To the Presidency's knowledge, Ms Mabilille has not, to date, responded to the Registry, either to accept or reject the position or to request an extension of the time limit beyond 4 April 2007.

⁶ ICC-01/04-01/06-842.

⁷ See ICC-01/04-01/06-845-tEN and "*Désignation de Maître Catherine Mabilille comme conseil de la défense de M. Thomas Lubanga Dyilo*", ICC-01/04-01/06-846, ICC-01/04-01/06-847.

⁸ See the Registrar's Observations, *supra* note 3, at paras 13-16 and 27.

⁹ *Ibid.*

8. On 3 April 2007, Mr Lubanga Dyilo filed his “Clarification” before the Presidency stating that although he had selected Ms Mabilile to act as his Defence Counsel, she had not yet agreed to do so and, as such, he could not be considered to be represented by Counsel. On those grounds Mr Lubanga Dyilo requested the Presidency to stay all acts or proceedings that may affect or prejudice the rights of the Defence until the effective appointment of new Defence Counsel (“the Application”)¹⁰. Identical applications were filed before Pre-Trial Chamber I, Trial Chamber I and the Appeals Chamber¹¹.

9. On 5 April 2007, the Registrar filed before the Presidency, the Appeals Chamber and Trial Chamber I his “Observations” on the Application (“the Registrar’s Observations”), pursuant to rule 20(1)(d) of the Rules of Procedure and Evidence of the Court (“the Rules”)¹². It was explained, therein, that the registration in the case record of Mr Lubanga Dyilo’s selection of Defence Counsel was purely for information purposes and could not be interpreted as a document confirming Ms Mabilile’s official appointment¹³. In relation to Ms Mabilile’s request for additional resources as a condition of her acceptance of the position of Defence Counsel, the Registrar requested the Presidency, the Appeals Chamber and Trial Chamber I: i) to state that the requests for additional means could not be examined at this stage in the proceedings when Counsel had not yet accepted the appointment, and ii) to invite Ms Mabilile, as Counsel selected by Mr Lubanga Dyilo, to comply with the procedure which applies before the Court and to make a decision regarding her appointment without delay.

¹⁰ See the Application, *supra* note 1.

¹¹ ICC-01/04-01/06-858. ICC-01/04-01/06-859. ICC-01/04-01/06-861. By its decision of 5 April 2007, Pre-Trial Chamber I suspended its proceedings in relation to the requests for leave to appeal the Decision Confirming the Charges, ICC-01/04-01/06-862.

¹² See the Registrar’s Observations, *supra* note 3.

¹³ *Ibid.*, at paras 24-25.

10. On 17 April 2007, Mr Lubanga Dyilo filed his "Response" to the Registrar's Observations¹⁴, requesting the Presidency: first, to disregard the Registrar's comments on the application of the legal assistance scheme as premature and irrelevant, given that he had not, on the relevant date, applied for additional resources to either the Registrar or Chambers and had merely requested that the proceedings be stayed; secondly, to take no action in relation to the requests within the Registrar's Observations, pursuant to the decision of Trial Chamber I of 13 April 2007¹⁵. In his "Response", Mr Lubanga Dyilo disclosed to the Presidency his intention to apply to the Registrar for additional means in the absence of Defence Counsel, pursuant to regulation 83(3) of the Regulations of the Court¹⁶.

III. Requests of Mr Lubanga Dyilo

11. On the request of Mr Lubanga Dyilo to stay all acts or proceedings, the Presidency notes that he remains without Defence Counsel. As such, the Presidency reiterates its decision of 6 March 2007, in which it held that the transmission of the record of proceedings to Trial Chamber I is suspended until the appointment of new Defence Counsel for Mr Lubanga Dyilo has been confirmed and it is determined that he/she has had adequate time to familiarise him/herself with the case¹⁷.

12. On the request that the Presidency disregards the Registrar's Observations as premature and dismisses the requests contained therein, the Presidency notes article 43(2) of the Rome Statute of the Court ("the Statute"), which provides that the Registrar is the principal administrative officer of the Court, who exercises his functions under the authority of the President of the Court. According to article 38(3)(a) of the Statute, the Presidency, of which the President is a member, is

¹⁴ See Mr Lubanga Dyilo's "Response", supra note 4.

¹⁵ On 13 April 2007, Trial Chamber I affirmed that all proceedings before it remained suspended in due consideration of the Presidency's decision of 6 March 2007, suspending transmission to Trial Chamber I of Pre-Trial Chamber I's record of proceedings, ICC-01/04-01/06-866. On 27 April 2007, the Appeals Chamber dismissed the requests of the Registrar on the basis that it did not have jurisdiction to address them, ICC-01/04-01/06-873.

¹⁶ Supra note 4, at paras 11, 22, 25 and 27.

¹⁷ Supra note 6.

responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. Given that the issues raised in the Registrar's Observations relate to the proper administration of the Court, the Presidency considers it appropriate to address them in this decision for the reasons set out in the paragraph below.

13. The Registrar first applies to the Presidency to state that requests for additional means, under the scheme of legal assistance paid by the Court, cannot be examined at this stage in the proceedings when appointed Counsel has not yet accepted the appointment. The Presidency understands this request to be limited to the specific question of whether applications for additional means by Ms Mabilie, who has not agreed to represent Mr Lubanga Dyilo in the proceedings before the Court, may be examined by the Registrar before said Counsel has agreed to act. As such, the Presidency's consideration of the Registrar's first request is without prejudice to the admissibility or the merits of any application Mr Lubanga Dyilo may choose to make for additional means under regulation 83(3) of the Regulations of the Court. Secondly, the Registrar requests the Presidency to invite Ms Mabilie to comply with the procedure which applies before the Court and make a decision regarding her appointment without delay. The Presidency understands this request to relate to the Registrar's first request, as it concerns the responsibilities of the latter to assist Mr Lubanga Dyilo in obtaining the assistance of Defence Counsel.

IV. Requests of the Registrar

A. Preliminary observations

14. In relation to the Registrar's Observations, the Presidency notes that the requests contained therein were filed not only before the Presidency, but also before the Appeals Chamber and Trial Chamber I. The fact that the Observations put identical

requests to the Presidency and two Chambers was unhelpful as the requests concerned administrative issues that should have been addressed solely to the Presidency, in accordance with articles 38(3) and 43(2) of the Statute. Moreover, putting the same requests to the Presidency and two different Chambers might foreseeably have led to delay and/or conflicting decisions.

15. The Presidency further notes that, notwithstanding the Registrar's explanations concerning the registration in the record of the case of the document entitled "Appointment of Ms Catherine Mabilie as Defence Counsel for Mr Thomas Lubanga Dyilo"¹⁸, that document created the misunderstanding that Ms Mabilie had been confirmed as Counsel for Mr Lubanga Dyilo. Indeed, the Presidency observes that Pre-Trial Chamber I, on 22 March 2007, issued a decision reactivating previously suspended time limits due to the apparent appointment of Defence Counsel¹⁹. If filed at all, the Registry's filing should have made clear that Ms Mabilie's appointment remained unconfirmed.

B. Applications for additional means

16. The Presidency refers to its understanding of the Registrar's first request set out in paragraph 13 of this decision.

17. On the request that the Presidency makes a finding to the effect that applications for additional means by Ms Mabilie, who has not agreed to represent Mr Lubanga Dyilo in proceedings before the Court, may not be entertained by the Registrar prior to or as a condition of acceptance of the appointment to act as Counsel, the Presidency notes the following. It is the Registrar who has primary responsibility for managing the legal assistance scheme of the Court, in accordance with article 43

¹⁸ Supra note 7.

¹⁹ ICC-01/04-01/06-848.

of the Statute, rules 20-21 of the Rules, regulations 83-85 of the Regulations of the Court and regulations 130-136 of the Regulations of the Registry.

18. The Presidency considers that the Registrar is well within his right to determine that Ms Mabilille's request for additional means may not be entertained. There is no legal basis for Counsel who is not representing a person before the Court to make such a request, whether pursuant to regulation 83(3) of the Regulations of the Court or otherwise.

C. Communication with appointed Counsel

19. On the request that the Presidency invites Ms Mabilille to make a decision regarding her appointment as Defence Counsel for Mr Lubanga Dyilo without delay, the Presidency acknowledges that the Registrar has taken appropriate steps to assist Mr Lubanga Dyilo in exercising his right to be assisted by Counsel of his choice. In particular, the Registry has presented Mr Lubanga Dyilo with the list of Counsel and explained to him the scheme of legal assistance paid by the Court²⁰. This is in accordance with article 67(1)(d) of the Statute, rules 20(1)(c) and 21(3) of the Rules and regulation 75 of the Regulations of the Court.

20. The Presidency notes that, in its correspondence dated 2 April 2007, the Registry set Ms Mabilille the deadline of 4 April 2007 by which to communicate to the Registry her decision on whether she wished to act as Defence Counsel for Mr Lubanga Dyilo. The Registry clearly stated that if she did not respond by that date, she would be considered to have declined the position. The Presidency further notes that the deadline for Ms Mabilille to agree to act as Defence Counsel has long since past and, to the Presidency's knowledge she has not, to date, responded to the Registry, either to accept or decline the position or to request an extension of time

²⁰ See Registrar's Observations, *supra* note 3, at paras 21-27.

in which to do so. In these circumstances, the Presidency is unclear as to why the Registrar came before it with a request to invite Ms Mabilie to decide whether to accept the position of Defence Counsel, rather than proceeding in accordance with the clear terms delineated in the Registry's correspondence of 2 April 2007.

21. The Presidency affirms that the proceedings may not be unreasonably delayed, particularly having regard to article 67(1)(c) of the Statute. It is for the Registrar to continue to take all appropriate steps to facilitate the appointment of Defence Counsel without undue delay.

VI. Decisions

- i) The transmission of the record of Pre-Trial Chamber I to Trial Chamber I remains suspended;
- ii) The Registrar is requested to take all appropriate steps to facilitate the appointment of Counsel for Mr Lubanga Dyilo without undue delay.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, rounded initial 'P' followed by a series of loops and a long horizontal stroke extending to the right.

Judge Philippe Kirsch
President

Dated this 2 May 2007

At The Hague, The Netherlands