
Public Annex

***PROPOSED BRIEF BY THE
THE INTERNATIONAL CRIMINAL BAR AS
AMICUS CURIAE IN RELATION TO THE *PRO SE* REQUEST FOR
REVIEW
OF A REGISTRY DECISION BY THOMAS LUBANGA DYILO***

A. An abbreviated summary of relevant procedures.

1. Mr. Thomas Lubanga Dyilo first appeared before the Pretrial Chamber I on 20 March 2006, represented by Jean Flamme as Duty Counsel ("*conseil de permanence*").¹
2. Mr. Flamme was subsequently appointed as Defence Counsel on 13 April 2006.²
3. An evidentiary hearing on confirmation of charges was held from 11 to 28 November 2006.
4. On 29 January 2007, the Pretrial Chamber confirmed the charges against Mr. Lubanga Dyilo.³
5. Counsel was granted leave to withdraw from representing Mr. Lubanga Dyilo on the basis of reasons related to health on 21 February 2007.
6. On 22 February 2007, the Lubanga Defence filed a public redacted application for leave to appeal the Decision on confirmation of charges.⁴
7. On 6 March 2007, the Presidency issued its *Decision constituting Trial Chamber I and referring to it the case of The Prosecutor v Thomas Lubanga Dyilo*.⁵
8. On 20 March 2007 Mr. Lubanga Dyilo designated new Defence Counsel.⁶
However, the designated Counsel declined the appointment when the Registry would not assure a minimum level of legal aid that Counsel felt was necessary.

¹ ICC-01/04-01/06-40.

² ICC-01/04-01/06-77.

³ ICC-01/04-01/06-803.

⁴ *Version publique expurgée de la requête de la Défense en autorisation d'interjeter appel de la Décision de la Chambre Préliminaire I du 29 janvier 2007 sur la confirmation des charges en conformité avec les décisions de la Chambre Préliminaire du 7 et 16 février 2007*, ICC-01/04-01/06-836. An English version of the application is contained in an Annex to the original French motion.

⁵ ICC-01-04-01-06-842.

⁶ ICC-01/04-01/06-847.

The Presidency held that designated Counsel may not negotiate minimum legal aid resources prior to accepting an appointment.⁷

9. Mr. Lubanga Dyilo is now acting *pro se* and without assistance of counsel.
10. On 24 May 2007, the Pretrial Chamber I filed its *Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges* denying the defence and the prosecution applications to appeal.⁸
11. On 3 May 2007, Mr. Lubanga Dyilo filed on his own behalf a request pursuant to Court Regulation 83 for additional legal aid resources.⁹
12. On 14 May 2007, the Registrar denied Mr. Lubanga Dyilo's request.¹⁰
13. Mr. Lubanga Dyilo filed the present request for review on 25 May 2007.¹¹

B. The Pretrial Chamber I is the appropriate forum for review of the Registry's Decision.

14. Following a Pretrial Chamber's confirmation of charges pursuant to Article 61(11) of the Rome Statute, that Chamber remains seized of the case until the Presidency constitutes a Trial Chamber to be responsible for the conduct of subsequent proceedings.
15. In this case, although a Trial Chamber was constituted by order of the Presidency, that Order was suspended pending appointment of Defence Counsel to replace the previous Defence Counsel who has been granted leave to withdraw. Replacement Counsel has been designated, and that Counsel indicated her basic willingness to

⁷ *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 , 2 May 2007, ICC-01/04-01/06-874, para. 17. This ruling was expressly made without prejudice to Mr. Lumbanga's ability to himself submit a request for additional resources pursuant to Court Regulation 83. Id.*

⁸ ICC-01/04-01/06-915.

⁹ ICC-01/04-01/06-880.

¹⁰ ICC-01/04-01/06-916-Anx2.

¹¹ ICC-01/04-01/06-916.

represent the accused, but refused the appointment because the resources available would not allow her to do a minimally competent job in the circumstances of Mr. Lubanga Dyilo's case.

16. . Although the Presidency has ruled that designated Counsel may not negotiate for additional resources prior to accepting an appointment, this ruling was without prejudice to Mr. Lubanga Dyilo making such a request. Because, without having meaningfully considered the merits of the proposal and without having sought the advice of the Legal Aid Commission that has been created for such a purpose, the denial of Mr. Lubanga Dyilo's request for additional resources will have the effect of denying him his right to be represented by his Counsel of choice, it is appropriate for the Pretrial Chamber I to review the denial of Mr. Lubanga Dyilo's request at this time *de novo*.

17. In addition, a request for leave to submit an interlocutory appeal challenging the confirmation of charges is also pending before the Appeals Chamber, which is an additional reason for the delay in transfer of the proceedings to the Trial Chamber.

18. We are not privy to the details of the plan which Mr. Lubanga Dyilo has presented to the Registrar, but we very much fear that the resources provided to his Defence team thus far appear to fall short of what is reasonably necessary to effectively address all of the public demands that have been made upon Defence counsel.

19. The apparent failure of the Registry to consider the merits of Mr. Lubanga Dyilo's request, or to refer the request to the Legal Aid Commission for advice and consultations, is deserving of immediate judicial review. Because transfer to the Trial Chamber I will not be accomplished until after Counsel is appointed, the Pretrial Chamber I should undertake a substantive review of Mr. Lubanga Dyilo's request at this time.

C. The Decision of the Registrar on the present request pursuant to Court Regulation 83(3) should be subject to *de novo* judicial review.

20. Under Rome Statute Article 67, the accused “shall be entitled”, *inter alia*:

“(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;

[...] [and]

(d) ... to conduct the defence in person or through legal assistance of the accused’s choosing, ... to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.”

21. Article 64 of the Rome Statute mandates that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused” However, the right to cross examine witnesses and to present evidence is also accorded to persons brought before the pre-trial chamber, and now that the charges have been confirmed, the Defence investigation and preparations for trial should be progressing, just as such investigations and preparations are in progress for the prosecution.¹² It is therefore incumbent upon the Pretrial Chamber I to ensure that the right to counsel of choice is protected in relation to proceedings in the Pretrial Chamber I, and that timely measures are taken to effectuate Mr. Lubanga Dyilo’s choice of counsel.

22. In contrast, the Registry is “responsible for the *non-judicial* aspects of the administration and servicing of the Court ...”¹³ (Emphasis added). Therefore, the Decision of the Registry, which impacts directly on the fundamental rights of the

¹² The right of the Prosecution to carry out continuing investigations will result in the continuing disclosure of incriminatory material. Following the decision of the Appeals Chamber, the Prosecution is permitted to continue investigations throughout the confirmation of charges period and following an eventual confirmation of charges. In determining that the Prosecution could continue to investigate after a confirmation of charges, the Appeals Chamber emphasised that this possibility presupposed the defence would dispose of adequate time and facilities in order to prepare for trial: " In relation to the second ground of appeal, the Appeals Chamber determines that, for the reasons given below, the Pre-Trial Chamber erred in finding that the Prosecutor's investigation in respect of Mr. Lubanga Dyilo must be brought to an end before the confirmation hearing, barring exceptional circumstances that might justify later isolated acts of investigation." Paragraph 50 Appeal's Chamber "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence" ICC-01/04-01/06-853.

¹³ ICC Statute, Art. 43(1).

accused, should require *de novo* review, as opposed to a more deferential administrative standard of review which appears to be proposed by the Registrar.

23. The Registrar has cited in its observations the decision of the ICTY Trial Chamber in the *Hadzihasanovic* case,¹⁴ to the effect a request concerning the legal aid system *per se* is not subject to review. The Registry has omitted, however, to refer to the fact that similar requests were found to be admissible.¹⁵ Indeed, in the *Ojdanic* case, the Chamber seised itself of a similar request based on the same arguments which were raised in the *Hadzihasanovic* case; namely, whether the legal allotments set out in the pre-trial payment lump sum system, as approved by the Registry and Judges in plenary, could be exceeded.
24. The *Hadzihasanovic* Trial Chamber expressly referred to the fact that “a similar motion for additional resources was denied by Trial Chamber II, ruling that the relief sought could not be granted by the Trial Chamber as the Defence’s request for additional resources amounted to a challenge of the entire payment system itself, a system adopted by the Judges and implemented by the Registrar”,¹⁶ *but nonetheless declined to follow this approach*. It is also notable that in a filing before that Chamber, the Registry conceded that it had exercised its discretion to exceed the maximum allotment by granting an additional 200 counsel hours to the Hadzihasanovic defence team.¹⁷
25. Moreover, subsequent appellate jurisprudence of the ICTY expressly overturned the legal rationale of the *Hadzihasanovic* decision cited by the Registry. In the *Ojdanic* case, the Appeals Chamber was seised itself of a similar request based on the same arguments which were raised in the *Hadzihasanovic* case; namely,

¹⁴ *Decision on Urgent 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*, 17 June 2003, <http://www.un.org/icty/hadzihas/trialc/decision-e/030617.htm>

¹⁵ In both the *Ojdanic* and *Strugar* cases, the Trial Chambers seised themselves of the issue, although they rejected the requests on the merits, finding that the defence had failed to demonstrate exceptional circumstances which would justify a review of the legal aid allotment. Prosecutor v. Strugar, ‘*Decision On Defence Request For Review Of Registrar’s Decision And Motion For Suspension Of All Time Limits*’ 19 August 2003, <http://www.un.org/icty/strugar/trialc1/decision-e/030820.htm>; and Prosecutor v. Ojdanic, *Decision on Motion for Additional Funds*, 8 July 2003, <http://www.un.org/icty/milutinovic/trialc/decision-e/030708.htm>

¹⁶ At footnote 8.

¹⁷ At footnote 7.

whether the legal allotments set out in the pre-trial payment lump sum system could be exceeded.

26. Notably, the Appeals Chamber in a previous decision concerning the representation of counsel, in which the Appeals Chamber had held that where the Directive expressly provides for a review of the Registrar's decision, held that the Trial Chamber cannot interfere in the Registrar's decision, and its only option is to stay the trial until that procedure has been completed.¹⁸ The Chamber therefore noted that contrary to the position of the Chamber in *Hadzihasanovic*, the defence expressly possessed the right to seek review of the legal aid allotments. However, such a request for review should be directed to the Presidency since the Directive expressly referred to such a procedure. If the instruments of the Court do not provide for an express right to review the Registrar's decision, then the Chamber would retain an inherent right to review the Registrar's decision if it impacted on the fairness of the trial. The Appeals Chamber thus expressly recognised that such issues are subject to judicial scrutiny either pursuant to an express mechanism set out in the legal texts, or further to the Chamber's inherent power to ensure the fairness of the proceedings.

27. ICC Court Regulation 83(3) provides that "[a] person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case." ICC Court Regulation 83(4) provides that "[d]ecisions 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. "

28. It can be extrapolated from the above that if the defence has an express right to a remedy, it should be entitled to exercise such a right. Thus, since regulations 83.3 and 83.4 expressly permit the person to seek a decision from the Registrar, and subsequently before the Chamber, the Registrar must consider such a request, and any request for a review of the subsequent decision cannot be rejected *in limine*

¹⁸ *Prosecutor v. Blagojevic*, IT-02-60-AR73.4, Ex Parte and Confidential Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003, para. 7.

litis. Moreover, whilst the issue is being resolved, the Chamber should stay the proceedings pending a resolution of the outcome.

D. The Registry’s Decision does not meaningfully address Mr. Lubanga Dyilo’s request for additional resources, denying him an opportunity for meaningful review, and arbitrarily denying him sufficient resources to allow an effective Defence.

29. Regardless of the standard of review of the substance of a Registrar’s decision, such a decision will always be amenable to the same grounds of procedural review in accordance with general principles of law drawn from the principle legal systems.¹⁹

30. For example, the policy of the Registrar not to consider granting additional resources for the trial until the ‘decision on the confirmation of charges is definitive’ infringes the fair trial rights of the accused.²⁰ This is especially true where proceedings are suspended pending appointment of a replacement Defence Counsel, and where the granting of additional resources may well have the effect of allowing an already designated counsel to be able to in good conscience accept appointment.

31. In paragraph 13 of the Registrar’s Decision, he concludes that the bulk of the work of the Defence plan has been completed. We are unable to assess this assertion as we do not have access to the Defence plan that has been submitted, but we are familiar with the proceedings, and we are not convinced at all that designated Counsel or any other replacement Counsel will have limited work in

¹⁹ “A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which Registrar reached the particular decision and the manner in which he reached it. The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material[...].” Appeals Chamber of ICTY, *Prosecutor v Kvočka, Radic, Zigic and Prcac*, 7 February 2003 *Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Zigic*’

²⁰ See Registry Decision at p. 12.

order to represent Mr. Lubanga Dyilo. Had the Registrar submitted the plan to the Legal Aid Commission as is envisaged under Registry Regulation 136, we would feel more comfortable with this assertion. However, given the present circumstances, the Registry's assertion is questionable.

32. In paragraph 15 of the Registrar's Decision, he again minimizes the work necessary at this point of the proceedings. We note that the procedural posture has already (and foreseeably so) advanced, and the failure to take steps in assessing the legal aid requested will inevitably delay the identification of replacement counsel, and unless steps are taken, will result in the permanent denial of Mr. Lubanga Dyilo's right to be represented by Counsel of his choosing.
33. We note that the Registry Decision which was filed in Annex 2 of Mr. Lubanga Dyilo's request for review does not appear to be in any way redacted, so that we have the entire decision before us. If this is true, the lack of specificity in the Decision is quite troubling and raises the issue of whether meaningful review is possible.

E. The Registrar is improperly limiting his own discretion.

34. It appears from paragraph 3 of the Registrar's Decision that the Registrar is limiting his own discretion without a sound legal basis. There is no provision in any of this Court's basic texts that states that the Registrar's power is so restricted. This is a policy that the Registrar purports to introduce *proprio motu*. Such a policy constitutes an unlawful fettering of administrative discretion.
35. We understand that Mr. Lubanga Dyilo is *not* challenging the legal aid system *per se*, and neither does the ICB. Mr. Lubanga Dyilo is only seeking additional resources within the existing system. With that understanding, we nonetheless suggest that a recent proposal by the Registrar provides additional evidence that he may not be considering the full range of factors which are relevant to a determination of what legal aid funds are necessary to ensure an effective defence, but is instead arbitrarily limiting his own discretion in an improper manner.

36. The Registry has recently submitted proposals addressing, *inter alia*, when additional resources will be granted beyond the basic legal aid package.²¹ The new scheme includes the use of a mathematical formula for determining what additional resources will be granted.²² It is these factors which we believe may cast a light on possible errors committed by the Registry in its consideration of Mr. Lubanga's specific requests.

37. The Registrar's proposal is that there should be a calculation which accrues "full time equivalents" or FTE, as follows:

- (i) For every charge presented by the Prosecutor: 0,025 FTE
(1 FTE = 40 charges)
- (ii) For each person applying to participate in the proceedings::
0,005 FTE (1 FTE = 200 persons)
- (iii) For each victim or group of victims whose application to participate has been accepted by the Chamber: 0,02 FTE
(1 FTE = 50 victims)
- (iv) For each 3000 pages filed by other participants: 0,1 FTE
(1 FTE = 30.000 pages)
- (v) For each 3000 pages disclosed by the Prosecutor: 0,1 FTE
(1 FTE = 30.000 pages)

38. In addition, under the proposed scheme, Defence teams are limited to no more than one additional counsel and one additional legal assistant, regardless of the number of FTE's accumulated.

39. Although there is no objection in principal to the creation of a modular system for assessing the need for additional resources, the factors contained in the Registry's proposal are unrealistic and create an arbitrary ceiling on the number of additional resources that may be accrued by a Defence team. In other words, they are further

²¹ ICC-ASP/6/4 . The full proposal can be accessed at http://www.icc-cpi.int/library/asp/ICC-ASP-6-4_English.pdf.

²² Id., pp. 7-8.

evidence that the Registrar believes he can limit his own discretion is evaluating the need for additional resources.

40. In Mr. Lubanga Dyilo's case, it is necessary to assess the impact of, *inter alia*, (1) the position of the accused; (2) the geographic scope of the indictment, (3) the nature of the counts, including mode of responsibility and the elements of the crimes alleged, (4) whether there are novel issues that must be addressed; (5) the complexity of the issues; (6) number of motions and submissions filed by victims; (7) any modes of participation granted to victims; and (8) the number of pages of disclosure and the quality of the information provided in connection with each prosecution witness. There is no indication in the present case that the Registry considered these factors.

41. We note that no referral has been made to the Legal Aid Commission established by Registry Regulation 136 for the purpose of assessing whether "action plans are reasonably necessary for the effective and efficient representation" of an accused. The Legal Aid Commissioners possess a great deal of experience in legal aid matters, and their opinion would be a valuable aid in the proper determination of the needs in this case. The manner in which the Registrar seeks to limit his discretion may well be a barrier to consultations with the Commission. Any deference accorded to the Registrar's evaluation of a legal aid request should be diminished when he fails to make use of the Commission as envisaged by the regulations.

CONCLUSION

42. The present case represents the first case to be prosecuted before the International Criminal Court. As such, it is truly a new experience in law. The rules and procedures which apply to these proceedings are unlike any other criminal proceedings in the world. Their complexity extends far beyond those known to Counsel in any national jurisdiction, and the experience of representing a client before the Court is therefore wholly new. The number of motions and novelty of the issues, combined with the complexities of the procedures and the manner in

which time is computed exacts a toll on Counsel that is alarming. The prosecution, faced with the same motions and time constraints, has sufficient staff and resources to share the workload and avoid burnout. This seems emphatically not the case with the Defence.

43. We do not suggest there will ever be full financial equality between the parties, because their roles are very different. But the situation existing today is such that the Defence bears a burden that is both unreasonable and unfair, and undermines the right to equal justice and a fair trial. The Registry's approach to assessing Mr. Lubanga Dyilo's request for additional legal aid only exacerbates this situation.
44. For the foregoing reasons, we respectfully request that sufficient resources be granted to assure Mr. Lubanga Dyilo effective assistance of Counsel and a fair trial. In the alternative, we ask that the matter be returned to the Registry on an expedited basis for consultation with the Legal Aid Commission and the issuance of a decision which explains in detail the basis for the decision so as to allow for a meaningful review of the decision.