

1 International Criminal Court
2 Trial Chamber II - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo
5 Chui - ICC-01/04-01/07
6 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra
7 and Judge Christine Van den Wyngaert
8 Delivery of oral decision
9 Monday, 18 June 2012
10 (The hearing starts in open session at 2.00 p.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 PRESIDING JUDGE COTTE: (Interpretation) Please be seated.
14 Good afternoon, everyone. Good afternoon, Mr Ngudjolo.
15 Before we begin, the Chamber would like to point out that it is urgent to respond to
16 the applications filed by Mr Jean-Pierre Kilenda and by Mr David Hooper.
17 The decisions of the Registry, which are the subject of the applications for review on
18 modification, come into effect on 30 June 2012, and the Chamber in light of the
19 timeline it set received the submissions of the Registrar only on 13 June 2012.
20 Considering the need for an urgent decision, which would enable the Defence teams
21 on the one hand and the relevant services of the Registry on the other hand,
22 compelled the Chamber to hand down an oral decision.
23 To begin with, the Chamber would like to request the Registry to reclassify as public
24 application number 3304 dated 5 June 2012 on which we will rule, and that is the
25 application of Mr Kilenda, as well as its annexes with the exception of Annex IV

1 which should remain confidential.

2 The Chamber also requests the Registry to reclassify as public the submissions of the
3 Registrar in filing number 3306 of 13 June 2012, which received a corrigendum on 15
4 June.

5 Background: By letter of 25 May 2012, that is a decision of 25 May 2012, the Registry,
6 specifically the counsel support system -- section, informed Mr David Hooper and
7 Mr Jean-Pierre Kilenda, lead counsel for Mr Germain Katanga and Mathieu Ngudjolo
8 respectively, that the remunerations for the work of its members would cease as from
9 30 June 2012 and that the monthly fixed remunerations that both counsel had been
10 receiving so far would be reviewed and calculated on the basis of the reasonably
11 necessary activities performed in the case to ensure effective and efficient defence .

12 The Registrar relied on paragraph 29 and Annex IV of the report on the operation of
13 the Court's legal aid system and proposals for amendment: ICC-ASP/6/4 of
14 31 May 2007, which we will refer to as "the adjustments."

15 The Registrar stated that he also relied on Regulation 831 of the Regulations of the
16 Court and the fact that there had been a substantial reduction of judicial activities in
17 the Katanga/Ngudjolo case as from 24 May when the closing arguments were
18 concluded.

19 The Registrar pointed out that, as a result, from that date legal aid would cover the
20 remunerations of legal fees and expenses for counsel only for the reasonably
21 necessary activities in the case that they have performed between the closing
22 statements and the delivery of the judgment by the Trial Chamber.

23 The Registrar further invited the two counsel to submit to him any request that might
24 be made necessary by the intervention of any relevant objective factors which might
25 significantly increase their work-load during the period of reduced judicial activities

1 and to justify the need for additional means without which they would not be able to
2 continue to ensure an effective and efficient defence of their clients.

3 By letters of 31 May 2012, the two lead counsel requested the Registry to kindly
4 review the decision of 25 May 2012 and to comply with the decision handed down on
5 30 August 2011 on the same subject in the Thomas Lubanga case, and we will refer to
6 this as "the Lubanga decision." Mr Kilenda pointed out for his part that the letter
7 had to be considered as a formal application for review.

8 By letters addressed respectively on 1 June 2012 to Mr Kilenda and on 5 June 2012 to
9 Mr Hooper, the Registry confirmed its decision of 25 May 2012.

10 By filing number 3304 of 5 June 2012 Mr Kilenda, relying on Regulation 83(4) of the
11 Regulations of the Court and Regulation 135 of the Regulations of the Registry,
12 applied to the Chamber for the purpose of a review of the decision of 25 May 2012.
13 Mr Hooper for the same purpose filed a similar application to the Chamber, and that
14 is filing 3305 of 8 June 2012.

15 The applicants' submissions, while appreciating that the Registry has to ensure
16 appropriate management of the Court's resources and the fact that there can be a
17 reduction of activities during that period, the two lead counsel drew the attention of
18 the Registry to the consequences that may be caused to the accused of such a drastic
19 reduction of the remunerations of the members of the Defence teams.

20 Relying mostly on Articles 64(2), 67(1) and 67(1)(b) of the Statute, which stipulate that
21 the trial must be fair with full respect for the rights of the accused, who shall be
22 entitled to a fair hearing conducted impartially, and also to the fact that the accused
23 shall have adequate time and facilities for the preparation of their defence, both
24 counsel put forward various arguments that are common to them. These relate
25 mainly to the date at which the trial ends.

1 The two lead counsel both dispute the procedure adopted by the Registry, which
2 could give the impression that the trial ends at the end of the presentation of the
3 closing arguments. They refer to the Lubanga decision and point out that the trial
4 commences by the assignment of the case to a Trial Chamber and ends only after the
5 decisions provided for by Article 74, 75 and 76 of the Statute have been rendered.
6 On the absence of the break-down of equality between the Office of the Prosecutor
7 and the Defence teams, which according to them has resulted from the decision of
8 25 May 2012, the two lead counsel state that during the future stages of the case,
9 possible reopening of the proceedings, appeal and reparation, the Defence teams,
10 which so far have been made up of lawyers that each have specialist functions in the
11 teams, those Defence teams will have to be fully reconstituted with members that are
12 not familiar with the case, whereas the Prosecutor will continue to benefit from his
13 experienced collaborators.

14 Apart from the delays that will inevitably arise as a result of this situation, such a
15 break-down of equality will be a violation of Article 6 of the European Convention on
16 Human Rights, as well as Article 8 of the International Convention of Human Rights.
17 According to Mr Hooper, who once again refers to the Lubanga decision, it is
18 absolutely necessary not to treat the accused persons of the first two cases before the
19 Court differently and in a discriminatory manner, adding that the Katanga and
20 Ngudjolo seems to him to be even far more complex than the Lubanga case.

21 For Mr Kilenda, he states that we should take into consideration the fragility of a
22 Defence team that might be reduced to a single person. The same applies to the
23 indispensable independence that the Defence must benefit from which, contrary to
24 the proposal of the Registry in a decision of 25 May 2012, does not make it possible
25 according to the Defence teams to compensate for the loss of personnel using an

1 application to the Defence Support Section pursuant to Article 77(5) of the
2 Regulations of the Court.

3 Relying once again on the Lubanga decision, Mr Kilenda submits that the
4 adjustments of 2007, on which the Registry decision is based, are contrary to the
5 reports issued previously, one on 31 October 2008 and the other on 21 March 2012,
6 and they do not take into consideration the specificities of the trial.

7 As for Mr Hooper, he points out that the position adopted by the Registry should not
8 be contrary to the principle of non-retroactivity as defined by Article 24(2) of the
9 Statute and that the position of the Registry was published at a particularly delicate
10 and tense time for the accused persons.

11 Furthermore he proposes what he refers to as a reasonable alternative, consisting in
12 the reduction of 25 per cent of the financial outlay of his team.

13 In conclusion, the two Defence teams request that the decision of 25 May 2012 should
14 be reviewed and that the two Defence teams should be maintained in their entirety
15 and with the current levels of remuneration. They also request for access to the
16 electronic systems for all the members of the teams. The lead counsel also requests
17 for access for the accused persons in the Detention Centre.

18 The Registrar's submissions: In response to a request from the Chamber in an email
19 of 7 June 2012, the Registrar filed his observations number 3306 jointly for the two
20 teams on 13 June 2012.

21 The Registrar points out that the management of the legal aid system of the Court is
22 his responsibility, and that while taking into consideration the rights of the Defence it
23 is his duty to ensure that the resources allocated for this purpose are used in a
24 responsible and judicious manner.

25 After having pointed out that the Lubanga decision was rendered on the basis of a

1 timeline for the deliberations on guilt, which was not complied with, which led to a
2 remuneration of the team in question over a long period, the Registrar states that this
3 decision cannot be applied *mutatis mutandis* given that each case has its own
4 specificities.

5 The Registrar also points out that the arguments of the two lead counsel, in reality,
6 tend to put into question the very authority of the Court's legal aid system as defined
7 in the various reports, including the adjustments and the report of the March 2012
8 mentioned above.

9 He points out that these reports are the results of several high-level consultations and
10 meetings and which made it possible both for the CBF and the ASP to arrive at a
11 decision on this issue. He also draws attention to the fact that the solutions adopted
12 take into account both financial constraints and the necessity to ensure an adequate
13 Defence.

14 The Registry further insists on the fact that safeguard mechanisms for the rights of the
15 Defence have also been put in place granting counsel the possibility to request
16 additional resources based on a detailed request in order to adjust as need be the level
17 of their resources.

18 The Registry further challenges the grievances of a legal nature put forth by the
19 applicants relating to the notion of trial on the lack of familiarity with the rights of the
20 Defence and fair trial and on a breach in the equality of arms.

21 Registry further asserts that it is concerned about ensuring "continuity,"
22 quote-unquote, in the trial with a basic team which may receive additional resources
23 in order to enable the Defence teams to remain, "operational and effective."

24 Registry further observes that during the appeal phase, Annex IV or in the
25 adjustments, provides that a counsel will be present as well as a legal assistant and a

1 case manager in order to -- or with the possible reinforcement of the team.

2 The Registry further submits to the Chamber that in May and June 2009 each of the
3 two Defence teams received a second legal assistant to handle the alleged work-load
4 at the time, given that the additional resources would be available after the final
5 arguments, after laying out the amounts of money paid out monthly where the
6 Defence teams to be maintained in their current state, and after indicating that such
7 amounts were very high and that it would not be commensurate to the activities that
8 Defence would be expected to maintain at subsequent stages of the trial, and
9 therefore prays the Chamber to dismiss the motions as baseless.

10 According to Mr Hooper, who applied for a reduction of 25 per cent of the -- or who
11 made suggestions relating to the 25 per cent reduction in resources to his team, the
12 Registry is unable to come to a position on a request which according to the Registry
13 is in line with his analysis. However, the Registry remains ready to proceed with
14 further consideration of these requests and recalls that no modification has been
15 introduced to the procedures relating to the electronic files.

16 Analysis of the Chamber: Regarding the admissibility of the motion on -- under
17 Regulation 83(4) of the Court, the Chamber points out that in his motion Mr Hooper
18 underscored the importance of the stakes relating to the Defence and its rights. He
19 refers to Article 64(2), 67(1)(e), (c) and (d) of the Statute already mentioned above and
20 several other international instruments already mentioned above except Article 11 of
21 the Universal Declaration of Human Rights.

22 The Chamber recalls that by its decision number 3277 of 23 April 2012, on a motion
23 from the representative of the main group of victims, requesting a review of the
24 Registrar's decision on legal aid, the Chamber recalls that it laid down the necessary
25 criteria to proceed for a reconsideration based on Article 83(4) of the Regulations of

1 the Court.

2 On that occasion, the Court opted for flexibility as the main criteria and pointed out
3 specifically in paragraph 9 that whenever the Chamber is asked to review a crucial
4 decision from the Registry, for example the decision affecting the composition of
5 Defence teams, it will therefore be appropriate for the Chamber to substantively
6 appropriate the -- examine the basis of the decision based on the fairness of procedure
7 and the need for the Chamber to ensure that all accused persons are adequately
8 represented.

9 Before speaking to the substance of the motions, the Chamber would ask the prior
10 point indicate that it clearly understands the concerns relating to the proper
11 management of the resources of the Court which underlie the decision of 25 May 2012
12 which the Registrar referred to in her observations.

13 The Chamber is also aware that the activity of Defence teams is likely to be reduced
14 without such a reduction, however, being easily quantifiable during that period when
15 it has to consider the final submissions of parties and participants, look at the content
16 of their final submissions, deliberate and proceed to drafting its decision.

17 These concerns relating to management, however legitimate they may be, cannot
18 affect the rights of the Defence, and there is thus need to seek a solution that
19 reconciles both considerations. In that regard, and substantively, the Chamber also
20 intends to refer, at least in part, to the Lubanga decision, the substance and analysis of
21 which it upholds.

22 Regarding the duration of trial, the Chamber agrees with Trial Chamber I that the
23 trial cannot come to an end at the end of the final submissions but that it continues
24 until the decisions called for by Article 74, either guilt or acquittal, decision under 76,
25 sentencing, and in case of guilt and reparations under Article 75, until all those

1 decisions have been handed down.

2 Until such decisions have been granted the Chamber, under Articles 64 and 67 of the
3 Statute, must continue to function and shall -- and its duties shall be fully upheld.

4 The Chamber may be seized of new events and in such case filings will have to be
5 made and hearings organised. It therefore cannot upfront exclude the possibility of
6 related litigation that may arise, and in line with the position of the lead counsel of
7 Germain Katanga, the Court believes that the two accused must continue to maintain
8 frequent contact with their counsels during the phase of the deliberation.

9 The Court further points out that the issue of the applications for asylum by three
10 witnesses called jointly by the three Defence teams is still before the Court and that
11 there may be subsequent developments in that connection, and that in that matter the
12 submissions of the Defence teams will be absolutely necessary.

13 The Trial Chamber agrees with the analysis of Trial Chamber I and considers that
14 adjustments or any other reports on legal aid put forth by the Assembly of States
15 Parties, although they may be useful indicators for the Court, which the Court will
16 take into account to the extent possible, that such will not and should not in any way
17 even partially compromise the full right of the exercise of the Defence rights which is
18 a statutory obligation.

19 In that connection, the Chamber underscores that the solution proposed by the
20 Registry unquestionably breaches the equality that must exist between the parties, as
21 has been indicated by each of the lead counsels, whereas the Prosecutor continues to
22 have sufficient staff which and who may be redeployed and who are familiar with the
23 case and therefore are in a position to effectively and efficiently deal with their case in
24 case of new developments.

25 Clearly, therefore, the position in which the two lead counsels find themselves

1 whereby they may have to recruit a new team of collaborators in this final phase of
2 the trial, as well as deal with any other developments, will be prejudicial -- will be
3 seriously prejudicial to the Defence teams. We must also be aware that newly
4 constituted teams will need some time to familiarise themselves with the case file,
5 and this could only lead to delays in the trial which, as at now, must be handled with
6 the greatest diligence. It therefore is necessary to bear all of this in mind.

7 The Chamber has taken note of the plan of work put forth by one of the teams for
8 June to December 2012. Failing the ability to mobilise all the members of this team,
9 that work cannot be done by the lead counsel alone. The Chamber also thinks that
10 the other team is faced with similar difficulties as it must perform the same tasks.

11 For these reasons, it is necessary for a solution to be found which takes into
12 consideration the legitimate concerns of management put forth by the Registry as
13 well as the various concerns that have just been mentioned.

14 It, therefore, appears equitable and fair for the Court to enable the two lead counsels
15 to continue to have a legal assistant and, were that solution to be preferable, to have
16 two part-time legal assistants paid accordingly, whose names will be submitted to the
17 competent services of the Registry.

18 By this solution, it will be possible to ensure continuity without which the
19 Defence would not be in a position to fully perform its duties. This decision will
20 also make it possible to maintain a permanent base of knowledge which enables at
21 least two persons who are familiar with the case to be present. Furthermore, were
22 any developments to occur in this case and as required, lead counsels - the lead
23 counsels - may apply to Registry for additional resources and justify such
24 applications.

25 For these reasons, and mindful of Regulations 83(4) of the Rules of the Court, the

- 1 Chamber cancels the decision of 25 May 2012, asks Registry to continue to provide for
2 each Defence team the services of one legal assistant or two part-time legal assistants
3 under the same remuneration conditions as obtained currently.
- 4 The Chamber asks the Registry to ensure that the two Defence teams have full access
5 to the electronic files and are in a position to have access to the accused persons at the
6 Detention Centre as a matter of privileged relations.
- 7 Thank you for your kind attention.
- 8 This sitting is adjourned.
- 9 THE COURT USHER: All rise.
- 10 (The hearing ends in open session at 2.31 p.m.)