



Barreau Pénal **International** Criminal Bar

PRESS RELEASE

23 April 2007

**STATEMENT OF CONCERN REGARDING
COUNSEL FOR THOMAS LUBANGA DYILO**

The Executive Committee of the International Criminal Bar notes with deep concern the situation which has developed over the past two months concerning the representation of Thomas Lubanga Dyilo in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06.

Withdrawal of prior counsel and suspension of proceedings. Mr. Lubanga's prior counsel, Mr. Jean Flamme, was permitted by the Pre-Trial Chamber to withdraw as Mr. Lubanga's counsel for health-related reasons on 21 February 2007. In a decision dated 6 March 2007, the Presidency decided to "suspend transmission of the record of proceedings" of the Pre-Trial Chamber to the Trial Chamber, "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 case." On 9 March 2007, the Appeals Chamber likewise suspended proceedings in the appeal of the confirmation decision pending assignment of replacement Counsel for Mr. Lubanga.

Selection of new counsel. On 20 March 2007, the Registry publicly filed Mr. Lubanga's designation of Catherine Mabilie as his choice of Counsel. Subsequently, the Pre-trial Chamber resumed functions by issuing a decision on 22 March 2007, granting the defence until the 5th of April to file a response to the Prosecution's application for leave to appeal the Confirmation of Charges decision. However, on 3 April 2007, Mr. Lubanga Dyilo himself filed a "Clarification", revealing that although he had indicated his choice as to new counsel, designated counsel had not yet filed a power of attorney with the Registrar due to questions concerning the level of legal aid resources that would be made available following acceptance of the assignment as Counsel. On 5 April, the Registry filed "Observations" before the Trial Chamber, the Appeal Chamber and the Presidency, asking them to formally enter a finding "To say that the requests for additional resources cannot be studied at this stage of the procedure where the indicated counsel did not accept designation yet" and "To invite the Counsel designated by Mr. Thomas Lubanga Dyilo to conform to the applicable procedure before the Court and to decide without delay" whether to accept the designation as Mr. Lubanga's Counsel.

On 13 April 2007, Trial Chamber I affirmed that "all procedures before Trial Chamber I are suspended in due consideration of the decision of the Presidency of 6 March 2007." On 17 April 2007, Mr. Lubanga filed a Response to the Registry's Observations in which he notified the various chambers that in an effort to expedite proceedings, he will formally submit a request on his own behalf for additional resources. He expressed his concern that any potential counsel would be confronted with the legal aid issue in his case and asked that he be allowed to resolve the matter in

order to allow for an expeditious trial, pointing out to the Chamber that the ICC Code of Conduct for Counsel, art 13-2-b, requires that Counsel “has a duty to refuse an agreement where ... Counsel is incapable of dealing with the matter diligently”. He asked that his request for additional legal aid resources be acted upon so as to facilitate acceptance of assignment by his counsel of choice.

Appointment of “duty counsel.” On 19 April 2007, Pre-Trial Chamber I ordered the Registrar to appoint a duty counsel for Mr. Lubanga Dyilo “limited to the sole purpose of responding to” the Prosecution’s request to appeal the “*Décision sur la confirmation des charges.*”

Position of ICB Executive Committee. Article 67(d) of the Rome Statute gives Mr. Lubanga Dyilo the right to be represented by counsel of his choosing, and Article 67(b) guarantees the right to adequate facilities for the preparation of the defence. See also Court Regulation 83(1), which provides that “the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence”; Court Regulation 83(3), which permits “a person receiving legal assistance paid by the Court” to “apply to the Registrar for additional means”; and Registry Regulation 136, which creates a Legal Aid Commission to assist the Registrar in evaluating the reasonableness of the means requested by the defence. Under the current legal aid system, legal aid resources should be “proactively negotiated as soon as the counsel is assigned and handed the case file”. (ICC-ASP/3/16 at para. 15).

We suggest that in the case of replacement Counsel who has notice of prior proceedings in the case, if there are concerns as to whether available legal aid resources will impact upon replacement counsel’s ability to act diligently in a case, such negotiations are sensibly entered into prior to assignment, and the Regulations anticipate that the accused may himself make requests for additional resources. Without adherence to these provisions, an initial round of legal aid appeals will likely result in further delay in the proceedings or could even result in the unnecessary denial of the right to counsel of choice.

This is a critical time in the proceedings. It appears that the Registry and Mr. Lubanga Dyilo have both acted promptly and in good faith to identify replacement counsel, and that designated Counsel has acted in good faith in attempting proactive negotiations to ensure her ability to act diligently upon acceptance of the assignment. However, although it seems the Registry did not refuse to consult with counsel and Mr. Lubanga directly, delay is resulting because the Registry refuses to negotiate at this stage with designated counsel or even with the accused himself, as to the level of resources available, until after designated counsel has irreversibly accepted assignment as permanent counsel.

The imposition of a duty counsel in the midst of these proceedings, even for the limited purpose of responding to the prosecution’s motion for leave to appeal the confirmation decision, appears to be contrary to Mr. Lubanga Dyilo’s express wishes and causes great concern. The Prosecution’s request to appeal the confirmation decision is a substantial and important undertaking. It should be addressed by Mr. Lubanga Dyilo’s counsel, after such counsel has been given sufficient time to respond appropriately.

The Executive Committee of the International Criminal Bar expresses its concern and urges the Court take all reasonable steps, pursuant to Article 67 and Court Regulation 83, to permit Mr. Lubanga Dyilo his counsel of choice and that such counsel be provided assurance of the level of legal aid that will be available prior to having to irreversibly commit to accepting assignment.

Additionally, we urge that Mr. Lubanga' counsel of choice should be allowed to represent him in all phases of the proceedings, including the prosecution's request for leave to appeal the confirmation decision.

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The ICB's membership consists of nearly 400 individuals, bar associations, NGO's, human rights organizations and lawyers groups from every part of the world. The secretariat of the ICB is located in The Hague (also the seat of the ICC) in the same building as the Netherlands Bar Association. The ICB welcomes any lawyer from any country to become a member. Bars, law societies, associations of counsel and NGO's are also encouraged to join.

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