

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 30 August 2011

TRIAL CHAMBER I

**Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann**

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE
OF THE PROSECUTOR *v.* THOMAS LUBANGA DYILO***

Public

**Decision reviewing the Registry's decision on legal assistance for Mr Thomas
Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

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REGISTRY

Registrar

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Mr Esteban Peralta Losilla

Victims and Witnesses Unit

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Detention Section

Victims Participation and Reparations Other Section

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision reviewing the Registry’s decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry.

I. Background

1. The defence requests the Chamber to review the 22 July 2011 decision of the Registry of the Court modifying the legal assistance paid by the Court to the accused from 30 August 2011 onwards, following the final oral submissions in this case (“Registry’s Decision of 22 July”). As will be described in more detail below, the Registry’s Decision of 22 July purports substantially to reduce the resources available to the accused’s defence team in the future. Specifically, the Registry proposes to cease all payments to the defence team as of 30 August 2011, save for lead counsel. In addition, the Registry has instructed the defence team to vacate one of the two offices it has been using at the Court.
2. On 5 August 2011, defence counsel informed the Chamber of the Registry’s Decision of 22 July and simultaneously requested the Chamber’s permission to file a request for review under Regulation 135 of the Regulations of the Registry by 19 August 2011.¹
3. Bearing in mind the defence obligation to submit its final written reply to the closing brief of the Office of the Prosecutor (“prosecution”) by 15

¹ Email communication from the defence to the Chamber through a Legal Officer of the Trial Chamber on 5 August 2011.

August 2011, on 5 August 2011 the Chamber granted leave to the defence to file any request for review no later than 19 August 2011.²

4. On 19 August 2011, the defence filed its request for review of the Registry's Decision of 22 July pursuant to Regulation 135 of the Regulations of the Registry.³ This is analysed in detail below.
5. On 23 August 2011, the Registrar submitted her observations in reply to the defence request.⁴
6. The Registrar suggests that the defence request involves a misdescription, as well as a partial and selective representation, of the material facts, the relevant documents and the applicable legal texts. The Registrar submits that the defence request constitutes an "assault on the legal aid system of the Court as a whole as established and approved by the Assembly of State Parties" ("ASP"). The Registrar argues that the request, if granted, will pose significant risks for the finances, the reputation and the organisation of the Court, and it is suggested it is in any event unjustified and unreasonable. The Registrar contends that her decision was *intra vires*, and it was taken with full respect for due process, in accordance with the Court's established procedures.⁵

² Email communication from the Chamber to the defence through a Legal Officer of the Trial Chamber on 5 August 2011.

³ Requête de la Défense sollicitant le réexamen de la décision du Greffe du 22 juillet 2011 relative à l'aide judiciaire accordée à M. Thomas Lubanga, 19 August 2011, ICC-01/04-01/06-2790-Conf-Exp and confidential *ex parte* Annexes. The cover filing and annex 1 were reclassified as public and annex 4 was reclassified as confidential on instruction of the Chamber on 29 August 2011.

⁴ Observations of the Registrar pursuant to Regulation 24 *bis* of the Regulations of the Court on the "Requête de la Défense sollicitant le réexamen de la décision du Greffe du 22 juillet 2011 relative à l'aide judiciaire accordée à M. Thomas Lubanga" dated 19 August 2011, 23 August 2011, ICC-01/04-01/06-2793-Conf-Exp and confidential *ex parte* annexes A and B. The cover filing and annex B were reclassified as public on instruction of the Chamber of 29 August 2011.

⁵ ICC-01/04-01/06-2793, paragraphs 1-3.

7. The Registrar indicates that at the beginning of July 2011, the case manager of the defence team contacted the administrative assistant of the Counsel Support Section ("CSS") to request a meeting with the Chief of Section. The case manager was informed that a meeting could be arranged with the "Acting Head of the Legal Aid Unit". Counsel for Mr Lubanga sent an email on 26 July 2011 to the Section Chief and received an "out-of-office" message with the dates of his absence as well as the contact details of the staff in charge during this period. On 15 August 2011, on his return, the Section Chief repeated the offer of a meeting. The Registrar contends that despite repeated invitations by the Section to discuss the letter of 22 July 2011, the defence failed to contact the "Acting Head of the Legal Aid Unit" on this or any other matter. On 16 August 2011, defence counsel was contacted to arrange a meeting with Acting Head of the Legal Aid Unit, but defence counsel indicated her preference to meet with the Registrar in person on 17 August 2011.⁶

8. The Registrar submits that the Decision of 22 July does not add a new dimension to the legal aid regime for cases before the Court, but "simply entails the application to the present case of the texts and policies which regulates the Court's legal aid system".⁷ The Registrar refers to Annex 2 of the Report to the Assembly of States Parties on the options for securing adequate defence counsel for accused persons ("First Legal Aid Report"), which contains the "Payment details of the ICC legal aid scheme", and the Report on the operation of the Court's legal aid system and proposals for its amendment ("Adjustments").⁸ The Registrar suggests that, contrary to the defence submissions, these documents have been prepared by the

⁶ ICC-01/04-01/06-2793, paragraphs 5-9.

⁷ ICC-01/04-01/06-2793, paragraph 10.

⁸ ICC-01/04-01/06-2793, paragraph 10, referring to documents ICC-ASP/3/16 and ICC-ASP/6/4.

Court and endorsed by the ASP and “form the basis upon which the legal aid system operates to date and which has not been amended since”.⁹

9. The Registrar observes that in accordance with these documents, as submitted to the ASP, the trial stage of the case is divided into three phases: 1) the first status conference before the Trial Chamber up until the commencement of the trial; 2) the commencement of trial through to the closing submissions; 3) closing submissions up until the Chamber’s decision(s).¹⁰

10. The Registrar contends that any additional resources by way of legal assistance to be paid to a defence team outwith the established scheme need to be the subject of a request for additional resources, under Regulation 83 of the Regulations of the Court (“Regulations”). The Registrar argues that she has no power to authorise payments in this context in the absence of such a request. The Registrar submits that legal assistance is not an automatic, *ad infinitum* entitlement. Instead, the scheme is governed by established procedures, rules, regulations and limitations. Legal assistance paid by the Court covers only those costs that “are reasonably necessary as determined by the Registrar for an effective and efficient defence” (Regulation 83(1) of the Regulations). The Registrar suggests that the resources requested by defence counsel are “above and beyond the resources foreseen for this interim period under the Court’s legal aid system, and in any event, on the bare facts simply not necessary for an effective and efficient defence”.¹¹ The Registrar contends that her obligation to manage judiciously the funds allocated to the Court by the ASP for the purpose of legal assistance is consistent with the general

⁹ ICC-01/04-01/06-2793, paragraphs 12-14.

¹⁰ ICC-01/04-01/06-2793, paragraph 11.

¹¹ ICC-01/04-01/06-2793, paragraph 17.

obligation, under Article 67(1)(b) and (d) of the Rome Statute ("Statute"), Rule 20(1)(b) and (c) and (2) of the Rules of Procedure and Evidence ("Rules") and Regulation 83(1) of the Regulations, to ensure that all accused before the ICC receive appropriate legal assistance and support. The Registrar indicates that she has been willing to grant additional resources to the defence teams when these have been justified and are reasonably necessary, in accordance with the relevant legal texts and rules. In the present case, she has issued four additional funding decisions amounting to a total of 441,161.35 Euros, and she has ensured that the defence team has been able to function at full capacity during the lengthy suspensions of the case, to the extent that this has been possible.¹²

11. As regards the composition of the defence team proposed by Me Mabilie (lead counsel, associate counsel and two legal assistants) for the period between the closing submissions and the Article 74 Decision, the Registrar observes that the letter of appointment (Annex A to her filing) of the additional legal assistant clearly stipulates that this extends only to the end of the "closing arguments". The Registrar contends that the defence request violates the "concrete and well established components of the legal aid system" and "the express terms of the appointment of the additional legal assistant".¹³

12. The Registrar submits that the resources allocated for the period between the closing submissions and the Trial Chamber's Article 74 Decision is "correlated and adjusted in response to the reduced amount of work that is required of the defence team as compared to the trial phase". The Registrar notes that the resources requested by Me Mabilie would amount

¹² ICC-01/04-01/06-2793, paragraphs 15-18.

¹³ ICC-01/04-01/06-2793, paragraphs 20-21.

to 38,951.95 Euros per month for counsel, associate counsel and two legal assistants, along with “compensation” for certain professional charges for counsel and associate counsel.¹⁴

13. Compensation is paid to counsel and associate counsel who incur professional charges arising from the management of their offices (if these sums are not already met by the existing arrangements) when counsel’s presence at the seat of the Court for a period of more than 15 days is necessary because of judicial activity. This Registrar pays up to a maximum of 40% of the individual’s fees. The Registrar argues that in the present situation, she cannot “liberally release funds under this head of payment in contravention of the legal aid system when the judicial calendar or the realities and circumstances of the case do not justify such payment, as is the case for the interim payment between the closing arguments and the decision of the learned Trial Chamber I on the guilt or innocence of the accused”.¹⁵ She indicates that compensation for professional charges will resume in accordance with the Court’s scheme for legal assistance if there is an appeal (at which stage the team will be composed of counsel, one legal assistant and one case-manager).¹⁶

14. In response to the “tasks that the defence team may perform after the closing arguments”, as submitted by Me Mabile, the Registrar suggests that requests for any additional resources submitted pursuant to Regulation 83(3) of the Regulations (beyond what is established in the legal aid system) will be determined on their merits. The Registrar argues that the tasks described by Me Mabile do not justify the extent of the team proposed by the defence. The Registrar submits that defence counsel is

¹⁴ ICC-01/04-01/06-2793, paragraphs 22-25.

¹⁵ ICC-01/04-01/06-2793, paragraph 31.

¹⁶ ICC-01/04-01/06-2793, paragraphs 26-31.

attempting to extend legal assistance “above and beyond what is foreseen under the Court’s legal aid system on questionable, unfounded and premature grounds”.¹⁷ The Registrar contends that many of the tasks listed by the defence counsel in her submission of 18 August 2011 fall outside the Court’s legal aid system; some are premature and speculative, in relation to the interim period between the closing arguments and the judgment; and the list contains tasks that experienced counsel should reasonably be expected to undertake. As to the request of the defence team to maintain two offices (while all other defence teams have a single office), given the increasing number of defence teams at the Court, the Registrar argues that it is reasonable for the defence team in the present case to forgo one of their offices.¹⁸

15. The Registrar submits that the defence request amounts to a cost of at least 42,951.95 Euros per month and it is suggested it falls outside the parameters envisaged by the Court’s legal aid system.¹⁹

16. The Registrar characterises the request as a challenge to the Court’s legal assistance scheme, by attempting to create a funding entitlement where none reasonably exists (within the context of the established framework).²⁰ The Registrar contends that the principles governing the legal aid system (equality of arms, objectivity, transparency, continuity and economy in implementing the legal aid scheme) should “not [...] be read selectively and in vacuum to advance an interest when in [sic] suits, but rather collectively and in line with the applicable legal texts and policies

¹⁷ ICC-01/04-01/06-2793, paragraph 37.

¹⁸ ICC-01/04-01/06-2793, paragraphs 32-39.

¹⁹ ICC-01/04-01/06-2793, paragraph 40. The sum includes 4000 Euro for expenses of the defence team in addition to the costs specified in paragraph 12 of this Decision.

²⁰ ICC-01/04-01/06-2793, paragraph 42.

concerning the legal aid scheme of the Court”.²¹ The Registrar suggests that if the request is granted, it would create a precedent undermining the “black letter of the law” that would be “inconsistent with the policies and practices of the Registrar concerning legal aid, and would entail an interference with an ASP sanctioned legal aid scheme”.²² The Registrar argues that there is “simply no defensible legal or factual basis to support the Request”,²³ and that legal assistance paid to defence teams “should not be allowed to be exceeded by beneficiaries, who might use the mantle and threat of pseudo violations of the rights of the defence to coerce and extract additional funds from a publicly funded legal aid system when none are justifiably payable”.²⁴

II. The Registry’s Decisions

17. By way of a letter dated 22 July 2011 from the Chief of the Defence Support Section, the Registry provided defence counsel with details of the extent of the legal assistance that it suggested should be provided by the Registry following the closing submissions in the present case on 25 and 26 August 2011.²⁵

18. The Registry set out that the current level of payments would be very significantly reduced after 30 August 2011. The Registry referred to the Adjustments²⁶ and highlighted paragraph 29 and Annex IV, which indicated that following the closing submissions only the costs of intervention by counsel will be paid by the Court. As a result, the Registry

²¹ ICC-01/04-01/06-2793, paragraph 44.

²² ICC-01/04-01/06-2793, paragraph 45.

²³ ICC-01/04-01/06-2793, paragraph 45.

²⁴ ICC-01/04-01/06-2793, paragraph 48.

²⁵ ICC-01/04-01/06-2790-Anx1.

²⁶ ICC-ASP/6/4 of 31 May 2007.

indicated that it intended to cease all payments to the defence team, save for lead counsel (Me Mabile), following the closing submissions. However, in order to facilitate the organisation of the defence case files, the decision would only take effect on 30 August 2011.²⁷

19. Furthermore, for lead counsel in the period following the closing submissions up until the Trial Chamber's Article 74 Decision, rather than issuing automatic monthly payments of 10,832 Euros, remuneration will be determined on the basis of the work that counsel reasonably needs to undertake during that period. This will be paid by way of an hourly rate, not exceeding 7 hours 30 minutes per day or 10.832 Euros per month. Furthermore, the Registry indicated that professional "compensation" will not be paid during this period.²⁸

20. The Registry indicated that defence counsel is able to seek the assistance of the Office of Public Counsel for Defence ("OCPD") if necessary.²⁹

21. If an appeal is lodged by either party, legal assistance will be limited to one lead counsel, a legal assistant and a case manager.³⁰

22. The Registry set out that it will extend electronic access to any members of the defence team who choose to act *pro bono*. The defence was asked to vacate one of its two offices.³¹

23. On 18 August 2011, the Registrar issued a further decision "Décision du Greffier sur la demande de ressources additionnelles présentée par le

²⁷ ICC-01/04-01/06-2790-Anx1, page 2.

²⁸ ICC-01/04-01/06-2790-Anx1, page 3.

²⁹ ICC-01/04-01/06-2790-Anx1, page 3.

³⁰ ICC-01/04-01/06-2790-Anx1, page 3.

³¹ ICC-01/04-01/06-2790-Anx1, page 3.

Conseil de M. Thomas Lubanga Dyilo le 18 août 2011” (“Registry’s Decision of 18 August”), which was based on a “non-exhaustive list of tasks” that the defence team could undertake while awaiting the Chamber’s Article 74 Decision, that the defence had provided to the Registry (see below).³² The Registry treated this list as an application for additional means under Regulation 83(3) of the Regulations. It analysed each of the proposed tasks and rejected the request on the basis, *inter alia*, that some of the tasks do not require the presence of the defence team at the seat of the Court; others should have been dealt with during the proceedings; various of them can be undertaken by or with the assistance of representatives of the internal organs of the Court, such as the Victims and Witnesses Unit or the OPCD; and a number were not covered by the legal assistance scheme. The Registrar only authorised the costs of a case manager for 5 days. She refused other additional resources but reminded counsel that these could be requested if there was an objectively justified need.³³

III. The Defence Application

24. The defence submits that it has attempted and failed since June 2011 to meet with the Chief of the Counsel Support Section in order to discuss legal assistance for Mr Lubanga. In the event, the Registry’s Decision of 22 July was transmitted to Me Mabilie alone, during the judicial recess, without prior consultation.³⁴

25. It is submitted that following receipt of the Registry’s Decision of 22 July, Me Mabilie once again requested, without success, a meeting with the

³² ICC-01/04-01/06-2790-Conf-Exp-Anx3.

³³ ICC-01/04-01/06-2790-Conf-Exp-Anx3.

³⁴ ICC-01/04-01/06-2790, paragraphs 1-3.

Chief of the Counsel Support Section. Given the urgency of the matter, she also requested to meet with the Registrar in order to seek a review of the Registry's Decision of 22 July. A meeting was held on 18 August 2011 at which the Registrar requested Me Mabilie to provide a non-exhaustive list of the tasks the defence team will undertake prior to the Chamber's Article 74 Decision.³⁵ The defence complied on the same day, and the list is attached as Annex 2 to their request.³⁶ The defence contends that it was not meant to constitute a "request for additional resources" and the Registrar had not suggested that it would be treated in this way.³⁷ However, as set out above, the Registry's Decision of 18 August (attached as Annex 3 of their request), treats the defence's document of the same date as a "request for additional resources".³⁸

26. The defence observes that although the Registrar in her Decision of 18 August 2011 authorised additional means for the case manager for a period of 5 days from 1 September 2011, Me Mabilie had told the Registrar during the meeting that the case manager of the defence team intended to resign on 1 September 2011 and lead counsel would not seek a replacement.³⁹

27. In these circumstances, the defence applies to the Chamber for a review of the Registry's Decision of 22 July 2011, pursuant to Article 64(2) of the Statute and Regulation 83(4) of the Regulations in order to prevent the dissolution of the defence team, in violation, it is submitted, of Article 67(1) of the Statute.⁴⁰

³⁵ ICC-01/04-01/06-2790, paragraphs 6-7.

³⁶ ICC-01/04-01/06-2790-Conf-Exp-Anx2..

³⁷ ICC-01/04-01/06-2790, paragraph 8.

³⁸ ICC-01/04-01/06-2790, paragraph 9 and ICC-01/04-01/06-2790-Conf-Exp-Anx3.

³⁹ ICC-01/04-01/06-2790, paragraph 10 and ICC-01/04-01/06-2790-Conf-Exp-Anx3.

⁴⁰ ICC-01/04-01/06-2790, paragraph 11.

28. The defence emphasises the rights of the accused to adequate time and facilities for the preparation of his defence and to be tried without undue delay under Article 67(1) of the Statute. It suggests that pursuant to Rule 20 of the Rules, the Registrar has the duty to uphold the rights of the accused to a fair trial and particularly his right to a defence, *inter alia*, by providing support and assistance to defence counsel. It is said that the Registrar must exercise her administrative functions so as to ensure the professional independence of counsel.⁴¹

29. The defence refers to an ASP report of 2008,⁴² in which it is suggested that in light of the limited experience of the Court regarding legal aid it is not possible to determine precise benchmarks for future cases. It is set out in the report that the present system ought to be continuously reviewed in order to guarantee the rights of the accused to an efficient and effective defence.⁴³

30. Additionally it is observed that the legal aid system of the Court is based on monthly payments that are made throughout trial, even when judicial activity is minimal or nonexistent, for example pending a decision.⁴⁴ The defence relies on the observations about the professional costs, and the costs of missions, for lead and associate counsel.⁴⁵

31. The defence argues that this report provides support for the following propositions, namely that: ⁴⁶

⁴¹ ICC-01/04-01/06-2790, paragraphs 12-13.

⁴² ICC-ASP/7/23.

⁴³ ICC-01/04-01/06-2790, paragraph 16.

⁴⁴ ICC-01/04-01/06-2790, paragraph 17.

⁴⁵ ICC-01/04-01/06-2790, paragraph 17.

⁴⁶ ICC-01/04-01/06-2790, paragraph 18.

- the fundamental principals of legal aid are equality of arms, objectivity, transparency, continuity and economic need;
- the legal aid program must guarantee efficient and effective legal representation in accordance with these principles;
- the “trial” begins when the case is transmitted to the Trial Chamber by the Presidency and concludes with the final judgment by the Trial Chamber;
- the payment of fees to the defence team members should remain constant throughout trial, even if judicial activity is minimal or nonexistent;
- the defence team should be remunerated on a regular basis throughout the course of the trial, even if judicial activity is minimal or non-existent, for example when a decision is pending; this serves several purposes, including putting the pay structure of its members on the same footing as those of other members of the Court’s staff; lead counsel should not be burdened with issues and conflict concerning the remuneration of the members of her team; and the system should be simplified so that members of the defence team are able to rely on regular monthly payments that are based on the prosecution’s pay scale.⁴⁷

32. The defence contends that the Registry’s Decision of 22 July 2011 is not based on any provision that has the force of law, and it is suggested it is contrary to the principles referred to above. In any event, the defence argues that administrative texts do not take precedence over the

⁴⁷ ICC-01/04-01/06-2790, paragraph 18.

fundamental rights of the accused, as enshrined in Article 67 of the Statute.⁴⁸

33. The defence submits that the Registry's Decision of 22 July effectively dissolves the defence team prior to the end of the trial (*viz* when the accused is acquitted or convicted, and when any sentencing or reparations phase is concluded: Articles 74, 75 and 76 of the Statute).⁴⁹

34. The defence avers that following 30 August 2011, the members of the defence team will be obliged to take up other professional engagements. It is suggested that it is unacceptable for the Registry to determine that their continued assistance (save for one lead counsel) will only be possible if they act *pro bono*. Given the defence team will be otherwise employed after 30 August 2011, they will in any event be unavailable to assist in the present case, save for one lead counsel. It is suggested that the Registrar's proposal that lead counsel should work with the OPCD and *pro bono* assistants is a violation of her obligation to guarantee the professional independence of defence counsel.⁵⁰

35. The defence argues that the OPCD and other lawyers or assistants who have not been involved in the case, whether acting *pro bono* or otherwise, will not have the necessary knowledge of the case generally, and the extensive confidential information in particular, and they will not have a relationship of trust with the accused. Recruiting a new team for any potential later phase in the case (sentence, reparations or an appeal) will inevitably lead to considerable delays to the proceedings, and the defence

⁴⁸ ICC-01/04-01/06-2790, paragraphs 19-20.

⁴⁹ ICC-01/04-01/06-2790, paragraph 22.

⁵⁰ ICC-01/04-01/06-2790, paragraphs 23-25.

observes that compiling the present team in 2007 took approximately 3 months.⁵¹

36. The defence observes that the Office of the Prosecutor is not subject to an equivalent compulsory winding up of their team. It is suggested that the Registry's Decision of 22 July will not only fail to save money over the long term, given the likely need to recruit new counsel, but it will lead to additional considerable delays in this case. Thus, the defence submits that the defence team as presently constituted should be retained in order to guarantee the necessary continuity of an "efficient and effective" defence, to secure the independence of counsel and to avoid delays in the present case.⁵²

37. Lead Counsel requests that a reduced team should remain in place, as already indicated to the Registrar, consisting of lead counsel, an associate counsel and two legal assistants for the subsequent phases of the trial.⁵³

38. Finally, the defence submits that bearing in mind the inevitable variations in the intensity of the work that the defence team has to undertake during the course of a trial, it would be unfair to reduce the remuneration of the team members during the period between the closing submissions and the next phase of the case. It is suggested that the guiding principle is that the remuneration of the defence should remain constant throughout the trial.⁵⁴

⁵¹ ICC-01/04-01/06-2790, paragraphs 26-28.

⁵² ICC-01/04-01/06-2790, paragraphs 29-31.

⁵³ ICC-01/04-01/06-2790, paragraph 32.

⁵⁴ ICC-01/04-01/06-2790, paragraphs 33-36.

39. In any event, the defence submits that certain tasks will need to be undertaken whilst awaiting the Article 74 Decision, as set out in their non-exhaustive list (Annex 2).⁵⁵

40. Finally, the defence requests that they retain their offices and access to the accused (on a privileged basis) in the detention centre.⁵⁶

IV. Applicable law

41. In accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions:

Article 21 of the Statute

Applicable Law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

⁵⁵ ICC-01/04-01/06-2790, paragraphs 36-37 and ICC-01/04-01/06-2790-Conf-Exp-Anx2.

⁵⁶ ICC-01/04-01/06-2790, paragraphs 38-40.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(e) Provide for the protection of the accused, witnesses and victims, and

(f) Rule on any other relevant matters.

8. [...]

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

[...]

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(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;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and 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;

[...]

Article 11 of the Universal Declaration of Human Rights:

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. [...]

Article 14 of the International Covenant on Civil and Political Rights

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- [...]

Article 6 of the European Convention of Human Rights

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and the facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- [...]

Article 8 of the American Convention on Human Rights

[...]

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;

[...]

c. adequate time and means for the preparation of his defense;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; [...]

Regulation 83 of the Regulations

General scope of legal assistance paid by the Court

1. Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.

2. The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.
3. 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.
4. Decisions 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.

Regulation 130 of the Regulations of the Registry

Management of legal assistance paid by the Court

1. The Registrar shall manage the legal assistance paid by the Court with due respect to confidentiality and the professional independence of counsel.
[...]

Regulation 133 of the Regulations of the Registry

Fees paid to counsel

The fees paid to counsel shall consist of a scheme of payment based on a fixed fee system comprising a maximum allocation of funds for each phase of the proceedings, including, where applicable, fees for assistants to counsel as referred to in regulation 68 of the Regulations of the Court and for professional investigators as referred to in regulation 137.

Regulation 135 of the Regulations of the Registry

Disputes relating to fees

1. The Registrar shall take a decision on any dispute concerning the calculation and payment of fees or the reimbursement of expenses at the earliest possible juncture and notify counsel accordingly.
2. Within 15 days of notification, counsel may request the Chamber to review any decision taken under sub-regulation 1.

V. Analysis and Conclusions

42. The questions that arise on this application are:

- i) What are the rights of the accused to legal assistance during the trial?
- ii) What constitutes the end of “the trial”?

- iii) Do the Registrar's planned reductions to the size of the defence team, and the resources available to it, between the closing submissions and the Article 74 Decision, infringe the accused's right to an effective defence, pursuant to Article 67 of the Statute?

A. The right of the accused to an effective defence

43. Throughout the entirety of the trial, the accused is entitled to certain inviolable rights that are enshrined in Article 67 of the Statute, including the right to adequate time and facilities for the preparation of his defence and to legal assistance assigned by the Court if the interests of justice so require, including without payment should the accused lacks sufficient means (Article 67(1)(b) and (d) of the Statute).

44. The Court is bound by these fundamental human rights of the accused, as set out in Article 67 of the Statute and various international human rights instruments. Consequently, any decision taken by the Court as regards legal assistance provided to the accused should be founded primarily on these fundamental human rights, along with the basic principle of fairness.

B. The right to counsel during the trial proceedings

45. The accused has had the benefit of an effective defence throughout the entire trial to date. Part VI of the Rome Statute, entitled "THE TRIAL", commences the assignment of the case for trial to a Trial Chamber, pursuant to Article 64(3) of the Statute, and it ends with the sentence that is imposed if the accused is convicted (Article 76 of the Statute) and any award of reparations (Article 75 of the Statute). During the trial there are

many separate stages (at least potentially) that the Trial Chamber will need to address, such as the proceedings that would follow an admission of guilt (Article 65 of the Statute); the presentation of the evidence in the case (Article 69 of the Statute); the participation by victims (Article 68(3) of the Statute); and the Trial Chamber's Article 74 Decision.

46. It is to be noted that under Article 81 of the Statute, the Trial Chamber's Article 74 Decision may be appealed by the prosecution or the accused (if convicted). Furthermore, any sentencing decision taken by the Trial Chamber under Article 76 of the Statute equally may be appealed by either the prosecution or the individual convicted. Finally, pursuant to Article 82(4) of the Statute, an order made by the Trial Chamber under Article 75 of the Statute is susceptible to an appeal by the legal representatives of any relevant victims, the convicted person or *bona fide* owner of property affected by the order.

47. In the judgment of the Chamber, as reflected in the Rome Statute framework, the "Trial", the "Trial Procedure" or the "Trial Proceedings"⁵⁷ only comes to an end when the Article 74, 75 and 76 Decisions have been delivered, as appropriate. It is only then that the Trial Chamber will have ceased its substantive work. Any further proceedings are dealt with by the Appeals Chamber under Part VIII of the Statute.

48. Without prejudice to the rights of the accused during any appellate stage, at least until the end of the trial (as defined above), he is protected by Article 67 of the Statute, and his rights thereunder should not be undermined simply because a particular stage of the trial proceedings

⁵⁷ See Chapter 6 of the Rules of Procedure and Evidence, and particularly Rule 143.

(such as the presentation of evidence or the closing statements) has concluded.

49. It is of significance that Trial Chamber I determined at an early stage that the Chamber would hold a separate sentencing hearing if the accused is convicted on any charge. In arriving at this decision, the Chamber addressed Article 76 of the Statute in the following way:

In our view, flexibility and fairness are the guiding principles in this regard. We will consider each and every application as to when evidence that relates to sentence should be given on its own merits if it is suggested that it should be introduced during the trial rather than during a separate sentencing hearing, and we will investigate case by case the circumstances of each particular witness. We will bear in mind the suggestion that we should try to avoid the unnecessary duplication of evidence or repeat visits to The Hague from individuals who ordinarily live in the Democratic Republic of the Congo whilst ensuring that the interests of the accused and his right to a fair trial are not undermined. There will, in any event, be a separate sentencing hearing if the accused is convicted on one or more charges, and accordingly, this issue only arises if it is proposed that evidence that would ordinarily be advanced at that separate sentencing stage should be given instead during the trial.⁵⁸

50. In addition, Article 75(3) of the Statute gives the Chamber the discretion to invite representations from or on behalf of the convicted person, victims and other interested persons or States.

51. It follows that if the accused is convicted, additional hearings will occur for the purposes of sentencing and reparations.

52. Reviewing the outline of the ICC Legal Aid System provided by the Registrar, there is no explicit reference to the possibility of any additional sentencing and reparations hearings following the Article 74 Decision.⁵⁹ The Registry's Decision of 22 July refers to paragraph 29 of the Report

⁵⁸ Transcript of hearing on 25 November 2008, ICC-01/04-01/06-T-99-ENG ET WT, page 39, line 11 – page 40, line 1.

⁵⁹ ICC-01/04-01/06-2793-AnxB.

ICC-ASP/6/4 dated 31 May 2007, which is part of a document describing the existing system of legal aid and certain proposed amendments thereto. Although a reparations phase is addressed in the context of legal aid for the legal representatives of victims, the position of the defence is not touched on. Furthermore, here also there is no reference to a possible sentencing stage of the case. Annex IV (as referred to by the Registrar) similarly does not provide for a sentencing and reparations phase of the trial. Therefore, given that these documents relied on by the Registrar in seeking to justify her decision to reduce legal assistance to the accused do not include any consideration or analysis of these potentially critical parts of the trial, it necessarily limits the extent to which the Chamber is prepared to rely on them.

C. The resolution of the present application

53. The Chamber accepts that the Registrar has a mandate to ensure that the Court's limited resources, to the extent that they are her responsibility, are managed carefully. In this regard, it is of importance that the sections of the Registry that have authority in this area should ensure that the Court's funds are not squandered. However, the overarching consideration in this context is the accused's right to a fair trial under Article 67 of the Statute.

54. Furthermore, it is necessary to observe that the guarantee of a fair trial is, in essence, an indispensable element of international justice. This fundamental, internationally-recognized human right, as enshrined in the Statute and in international human rights instruments cannot be infringed and certainly not on the basis of a Report prepared for the Assembly of State Parties (the Adjustments). If the accused's right to an effective defence is infringed, a fair trial for the accused is no longer possible.

55. These decisions on the allocation of resources need to be case specific. At one extreme, if the gap between the closing submissions and the Article 74 Decision is likely to be long (*e.g.* approximately 12 months), it is probable that the legal assistance provided to the defence should, at least for a period, be significantly reduced during what will be something of a “fallow” period for all the legal teams in this part of the trial. However, even in this situation, the Registrar must bear in mind that identifying the future members of an enhanced defence team for the period following the Article 74 Decision is in itself likely to take two to three months (see above).
56. At the other extreme, if the Chamber is likely to take only a short period of time to deliver the Article 74 Decision following the closing submissions (*e.g.* approximately four months), the Registrar needs to weigh the financial advantage of saving resources by dissolving the defence team as against the disruption that will be caused to the later proceedings once the Article 74 Decision is handed down. This is not to suggest that proceedings following an Article 74 Decision – whether under Articles 75, 76 or 81 of the Statute – will inevitably necessitate the same level of defence resources as required during the phase prior to the Article 74 Decision. In many cases, the opposite will be true. The level of resources to be allocated to the defence after the Article 74 Decision is rendered will inevitably be a fact-specific determination to be made on a case by case basis.
57. In weighing the possible savings from dissolving the defence team against the disruption to later proceedings, Rule 150 of the Rules is critical. If a decision of the Trial Chamber under Article 74 of the Statute is to be appealed by the prosecution or the accused, the notice must be filed

within 30 days. It would in all likelihood be wholly unfair to the accused to dissolve his defence team following the closing submissions, leaving one lead counsel, a legal assistant and a case manager, who would – depending on the outcome of the Article 74 Decision – have to recruit a new team and file the accused's appeal in 30 days. It is of note that the prosecution will inevitably be in a far more advantageous position in this regard, since the Prosecutor is not under any obligation to lay off staff following the concluding submissions.

58. It follows that before any decision is taken by the Registrar, she should consult with the Chamber so that an approximate schedule can be determined, which undoubtedly will need to be reviewed and updated as the work of the Chamber develops. The core ingredients are i) that the Registrar ensures that a team of sufficient size remains in place to deal with any outstanding work during this period (this may vary, depending on the length of time involved); ii) if the defence team and legal assistance is reduced, on the basis of full consultation with the Chamber, the Registrar must ensure that leading counsel is given sufficient warning of the approximate date of the Article 74 Decision so that additional members of the team (to the extent that they are likely to be necessary) can at least be identified and, to the extent appropriate, recruited in advance; and iii) in any event, the defence must not be placed in the position of having to prepare submissions on sentence, reparations or for an appeal brief within an unreasonably short period of time (e.g. within 30 days for an appeal) with an inadequate legal team.

59. There are a variety of tasks that the defence will need to undertake between closing arguments and the Article 74 Decision. Particularly the review of the case record that needs to occur in order to issue public

versions of the filings and the transcripts, is likely to be a time-consuming exercise. In addition, and without prejudice to the outcome of the Article 74 Decision, the Chamber is of the view that any conscientious defence team in these circumstances will give careful attention – to the extent possible – to the next stages of the trial proceedings. Although it is difficult to predict with precision, as an estimate the Chamber is of the view that in order for the defence properly to fulfil these tasks, it will require approximately the same length of time as it will take the Chamber to issue the Article 74 Decision (although this estimate is provisional and subject to revision).

60. Accordingly, as requested, the accused is to be represented by a team comprising one lead counsel, an associate counsel and two legal assistants for the period leading up to the Article 74 Decision. Therefore, the potential disruption to the proceedings and the difficulties that would be caused to any appellate stage if the Registrar's alternative proposal is implemented are moot.

61. The Chamber anticipates that the Article 74 Decision will be issued in the timeframe specified in paragraph 56 above. In the event that this schedule is subject to change the matter will be raised with the Registrar and the defence.

62. The Registrar will need to reappraise the defence requirements for office space in light of this Decision.

63. The Chamber, pursuant to Regulation 83(4) of the Regulations of the Court, therefore reverses the Registry's Decision of 22 July and instructs the Registry to:

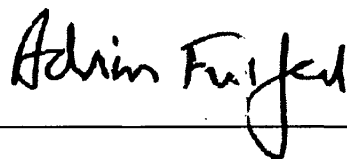
- a. retain the defence team of Mr Lubanga to the extent proposed by Me Mabilie, namely lead counsel, associate counsel and two legal assistants, until the Chamber has rendered its Article 74, 75 and 76 Decisions, as appropriate;
- b. ensure that all members of the defence team continue to have full electronic access to their own files and the evidence in the case;
- c. reappraise the defence team's office requirements; and
- d. ensure that the defence team continues to have access to the accused in the detention centre on a privileged basis.

POSTSCRIPT

64. The Chamber deprecates the inappropriate language used in parts of the Registrar's submissions, of which an example is her contention that legal assistance paid to defence teams "should not be allowed to be exceeded by beneficiaries, who might use the mantle and threat of pseudo violations of the rights of the defence to coerce and extract additional funds from a publicly funded legal aid system when none are justifiably payable".

65. Not only does this submission come close to alleging bad faith on the part of the present defence team (for which, on the material before the Chamber, there is no evidence) but the extreme nature of the language tends to obscure the real issues: the Chamber has to look behind the hyperbole to establish if an argument of merit is being advanced. Submissions instead should be restrained, to the point and appropriately persuasive.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 30 August 2011