

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 OA 20

Date: 21 November 2011

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, Presiding Judge

Judge Erkki Kourula

Judge Anita Ušacka

Judge Daniel David Ntanda Nsereko

Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public document

**Decision on the “Registrar’s Submissions under Regulation 24bis of the
Regulations of the Court In Relation to Trial Chamber I’s Decision ICC-01/04-
01/06-2800” of 5 October 2011**

Shs

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Ms Catherine Mabile
Mr Jean-Marie Biju-Duval

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

Having before it the “Registrar’s Submissions under Regulation 24*bis* of the Regulations of the Court In relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800” of 5 October 2011 (ICC-01/04-01/06-2812),

After deliberation,

Renders unanimously the following

DECISION

The “Registrar’s Submissions under Regulation 24*bis* of the Regulations of the Court In relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800” is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 30 August 2011, Trial Chamber I (hereinafter: “Trial Chamber”) issued the “Decision reviewing the Registry’s decision on legal assistance for Mr. Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry”¹ (hereinafter: “Impugned Decision”). In this decision, the Trial Chamber, acting pursuant to regulation 83 (4) of the Regulations of the Court and regulation 135 (1) of the Regulations of the Registry, reversed a decision of the Registrar reducing the legal assistance to be paid to Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) upon the completion of final oral submissions in the trial and ordered that Mr Lubanga’s legal assistance be maintained at the same level as prior to final submissions until the Trial Chamber issued its decisions pursuant to article 74 and, if applicable, articles 75 and 76 of the Statute.

2. On 5 October 2011, the Registrar filed the “Registrar’s Submissions under Regulation 24*bis* of the Regulations of the Court In relation to Trial Chamber I’s

¹ ICC-01/04-01/06-2800.

Decision ICC-01/04-01/06-2800”² (hereinafter: “Submissions”) in which she requests the Appeals Chamber to accept her Submissions and to reverse the Impugned Decision.

3. On 10 October 2011, Mr Lubanga filed the “Observations de la Défense relative à l’irrecevabilité de la ‘Registrar’s Submissions under Regulation 24bis of the Regulations of the Court In relation to Trial Chamber I’s Decision ICC-01/04-01/06-2800””³ (hereinafter: “Mr Lubanga’s Observations”) in which he requests the Appeals Chamber to find the Registrar’s Submissions inadmissible and reserves his right to comment on the merits of the Submissions until a decision is made on their admissibility.

II. ADMISSIBILITY OF THE REGISTRAR’S SUBMISSIONS

A. Arguments of the Registrar

4. The Registrar’s Submissions have been filed on the basis of regulation 24 *bis* (1) of the Regulations of the Court pursuant to which “[t]he Registrar, when necessary for the proper discharge of [her] functions, in so far as they relate to any proceedings, may make oral or written submissions to a Chamber with notification to the participants”.⁴ The Registrar’s argument that this provision provides a legal basis for the admissibility of her Submissions comprises four parts.

5. First, the Registrar argues that the reference to “a Chamber” in regulation 24 *bis* (1) of the Regulations of the Court includes the Appeals Chamber. The Registrar notes in this regard that the Appeals Chamber has previously confirmed that the Registrar may make submissions before it on the basis of regulation 24 *bis* (1) of the Regulations of the Court.⁵

6. Second, the Registrar argues that the scope of regulation 24 *bis* (1) of the Regulations of the Court is not limited to proceedings pending before the Appeals Chamber and that the Registrar may make submissions pursuant to regulation 24 *bis* (1) of the Regulations of the Court which are not connected to any pending appellate

² ICC-01/04-01/06-2812 (OA 20).

³ ICC-01/04-01/06-2814 (OA 20).

⁴ Submissions, paras 1-2.

⁵ Submissions, para. 3.

proceedings.⁶ The Registrar supports this claim with the statement that “[i]n its ‘Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007’ of 27 April 2007,⁷ the Appeals Chamber admitted and considered the Registrar’s requests in relation to the payment of legal assistance and the appointment of counsel filed in the absence of pending appellate proceedings related to these issues”.⁸

7. Third, the Registrar argues that the International Criminal Tribunal for the Former Yugoslavia (hereinafter: “ICTY”), the International Criminal Tribunal for Rwanda (hereinafter: “ICTR”) and the Special Court for Sierra Leone (hereinafter: “SCSL”) have all interpreted their respective Rules of Procedure and Evidence governing submissions by the Registrar of those institutions to allow the Registrar to appeal decisions of Trial Chambers affecting the discharge of his/her functions.⁹ The Registrar argues that, as the relevant provisions of those institutions’ Rules of Procedure and Evidence are similar to regulation 24 *bis* (1) of the Regulations of the Court, this jurisprudence should provide “guidance” to the Appeals Chamber as to how to interpret regulation 24 *bis* (1) of the Regulations of the Court.¹⁰

8. Finally, the Registrar argues that her Submissions meet the requirement of regulation 24 *bis* (1) of the Regulations of the Court that they be “necessary for the proper discharge of [her] functions”. She contends that the Impugned Decision “has a major impact on the discharge of her functions with respect to the management of the Court’s legal aid”.¹¹ More specifically, the Registrar argues that the Impugned Decision requires her to absorb within the budget of the Registry an additional €28,119.95 per month.¹² She submits that, as the legal aid budget is already significantly overspent, reallocating these funds from other programmes of the Registry will prevent the Registry from carrying out other necessary functions.¹³

⁶ Submissions, para. 4.

⁷ ICC-01/04-01/06-873 (OA 8).

⁸ Submissions, para. 4.

⁹ Submissions, paras 5-10.

¹⁰ Submissions, para. 5.

¹¹ Submissions, para. 11.

¹² Submissions, paras 19-20.

¹³ Submissions, para. 19.

B. Arguments of Mr Lubanga

9. Mr Lubanga argues that regulation 24 *bis* (1) of the Regulations of the Court permits the Registrar to submit observations solely before a Chamber which is seized with a situation or case and that it does not permit the Registrar to submit observations to the Appeals Chamber in relation to a case which is not before it.¹⁴ Mr Lubanga argues that, unless and to the extent that the Appeals Chamber is seized with an appeal pursuant to the relevant provisions of the Statute and Rules of Procedure and Evidence, only the Trial Chamber has competence to deal with questions related to the present case.¹⁵

10. Mr Lubanga notes that he sought review by the Trial Chamber of the Registrar's decision on the scope of his legal assistance, the Registrar submitted her observations on this matter to the Trial Chamber and the Trial Chamber pronounced upon this matter in the Impugned Decision which has not been appealed.¹⁶ As his case is not presently before the Appeals Chamber, he argues that the Trial Chamber has the exclusive competence to receive observations by the Registrar under regulation 24 *bis* of the Regulations of the Court.¹⁷

11. In addition, Mr Lubanga contends that regulation 24 *bis* of the Regulations of the Court does not provide an additional basis for bringing an appeal outside of articles 81 and 82 of the Statute.¹⁸ Mr Lubanga submits that, had the Registrar wished to appeal the Impugned Decision, she should have requested, within five days, that the Trial Chamber grant leave to appeal the Impugned Decision pursuant to article 82 (1) (d) of the Statute.¹⁹ As the Registrar did not do so, Mr Lubanga argues that the appeal is manifestly inadmissible.²⁰

C. Determination by the Appeals Chamber

12. Regulation 24 *bis* (1) of the Regulations of the Court permits the Registrar to make submissions to a Chamber "when necessary for the proper discharge of his or

¹⁴ Mr Lubanga's Observations, paras 8-9.

¹⁵ Mr Lubanga's Observations, para. 10.

¹⁶ Mr Lubanga's Observations, para. 11.

¹⁷ Mr Lubanga's Observations, para. 12.

¹⁸ Mr Lubanga's Observations, para. 13.

¹⁹ Mr Lubanga's Observations, paras 15-20.

²⁰ Mr Lubanga's Observations, para. 21.

her functions, in so far as they relate to any proceedings”. As such, the Appeals Chamber considers that the Registrar’s submissions must normally relate to extant proceedings before a Chamber. Regulation 24 *bis* (1) of the Regulations of the Court does not provide the Registrar with blanket authority to initiate what are effectively new proceedings before the Appeals Chamber.

13. The Appeals Chamber has stated that proceedings before the Appeals Chamber constitute “a separate and distinct stage of the proceedings” from the proceedings before the Trial Chamber and the two stages should not be conflated.²¹ The Registrar’s Submissions are made absent any connection to proceedings which have been or are pending before the Appeals Chamber. Rather, they seek to initiate what are in effect new appellate proceedings before the Appeals Chamber. As such, the Appeals Chamber finds that they go beyond the scope of regulation 24 *bis* (1) of the Regulations of the Court. To the extent that the Registrar argues that the “Decision of the Appeals Chamber upon the Registrar’s Requests of 5 April 2007”²² (hereinafter: “Decision on Registrar’s Requests of 5 April 2007”) “shows that the Registrar is allowed to make submissions before [the Appeals Chamber] without any connection to pending appellate proceedings”,²³ the Appeals Chamber disagrees. As is stated on its face, that decision was rendered in the context of the “Defence Appeal Against the Pre-Trial Chamber’s ‘Décision sur la confirmation des charges’ of 29 January 2007 (ICC-01/04-01/06-797)”.²⁴ As such, the Registrar’s observations in that instance were only considered *in the context of a pending appeal*. In addition, contrary to the Registrar’s assertion, the Appeals Chamber did not accept and consider the Registrar’s observations; rather, it dismissed the Registrar’s observations without addressing their merits.²⁵

²¹ See, e.g., *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’”, 28 July 2011, ICC-01/09-02/11-202 (OA), para. 11 (citing *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté [sic] provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824 (OA 7), para. 43).

²² 27 April 2007, ICC-01/04-01/06-873 (OA 8).

²³ Submissions, para. 4.

²⁴ Decision on Registrar’s Requests of 5 April 2007, p. 2.

²⁵ Decision on Registrar’s Requests of 5 April 2007, para. 6.

14. Even if regulation 24 *bis* (1) of the Regulations of the Court was considered to permit the Registrar to make submissions before the Appeals Chamber unconnected to any extant appellate proceedings, the Appeals Chamber notes that the Registrar does not merely seek to make submissions to the Appeals Chamber. Rather, she requests the Appeals Chamber to reverse the Impugned Decision.²⁶ As such, the Registrar's Submissions effectively constitute an appeal against the Impugned Decision. The fundamental issue before the Appeals Chamber, therefore, is whether regulation 24 *bis* (1) of the Regulations of the Court provides a legal basis for the Registrar to seek appellate review of the Impugned Decision. The Appeals Chamber considers that it does not. The Appeals Chamber has consistently held that its jurisdiction is clearly and exhaustively defined in the Statute and Rules of Procedure and Evidence and has equally consistently rejected any attempts to bring appeals outside of this defined scope of jurisdiction.²⁷ As stated repeatedly by the Appeals Chamber, "[t]he decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute. There is nothing in Part 8 [of the Statute] to suggest that a right to appeal arises except as provided thereunder".²⁸ As the Registrar's Submissions seek, through the use of regulation 24 *bis* (1) of the Regulations of the Court, to bring an appeal outside the scope of the Appeals Chamber's clearly-defined Statutory jurisdiction, they must be rejected.

15. Moreover, the Appeals Chamber notes that, with respect to decisions on the scope of legal assistance such as the Impugned Decision, regulation 83 of the Regulations of the Court provides a specific and exhaustive procedure for the determination and review thereof of the scope of legal assistance to which an accused may be entitled. This regulation provides neither for the Registrar to seek review of a

²⁶ Submissions, p. 13.

²⁷ See, e.g., *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 15 July 2011", 26 August 2011, ICC-01/04-01/07-3132 (OA 12), para. 6; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011", 26 August 2011, ICC-01/04-01/06-2799-Conf (OA 19), para. 7 (while this decision is to date confidential, the Appeals Chamber considers the limited reference is justified in the present instance); Decision on Registrar's Requests of 5 April 2007, para. 6; *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168 (OA 3), paras 35-39.

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011", 26 August 2011, ICC-01/04-01/06-2799-Conf (OA 19), para. 7 (quoting *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168 (OA 3), para. 35).

Trial Chamber's decision reviewing the scope of legal assistance nor for the Appeals Chamber to review the Trial Chamber's decision. As noted by the Appeals Chamber in its Decision on Registrar's Requests of 5 April 2007, which is cited by the Registrar in support of the admissibility of her Submissions,

[th]e authority of the Registrar is confined to the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor, as provided in article 43 (1) of the Statute. No jurisdiction is vested in the Appeals Chamber to review decisions pertaining to the administration and servicing of the Court except where specific authority to do so is conferred by the Statute, Rules of Procedure and Evidence or the Regulations of the Court. In connection with legal aid, only decisions of the Registrar on the scope of the payment of legal assistance are subject to review by the relevant Chamber, i.e. the Chamber dealing with the case, on the application of a legally aided person (regulation 83 (4) of the Regulations of the Court).²⁹

Given that regulation 83 (4) of the Regulations of the Court specifically confers authority on the Trial Chamber, as the Chamber dealing with this case for the purpose of the trial proceedings, to review the Registrar's decision while not conferring any authority on the Appeals Chamber to review the Trial Chamber's decision, the Appeals Chamber considers that such further review by it is impermissible, unless and only to the extent that such review may fall within the scope of an appeal properly brought under articles 81 or 82 of the Statute.

16. The Appeals Chamber finds the jurisprudence cited by the Registrar from the ICTY, ICTR and SCSL to be unpersuasive with respect to the admissibility of her Submissions. First, the Appeals Chamber notes that, contrary to the Registrar's assertions, neither the ICTR nor the SCSL, at least in the decisions cited, permitted their respective Registrars to seek appellate review of Trial Chamber decisions. In the decision cited from the ICTR, that Tribunal's Appeals Chamber allowed its Registrar to make submissions in the course of a *pending* appeal.³⁰ The decision cited from the SCSL had nothing to do with its Registrar's ability to seek appellate review; it concerned whether, in making submissions to a Trial Chamber under the relevant provision of the SCSL's Rules of Procedure and Evidence, the Registrar should have

²⁹ Decision on Registrar's Requests of 5 April 2007, para. 7.

³⁰ *André Rwamakuba v. Prosecutor*, "Decision on Prosecution's Notice of Appeal and Scheduling Order", 18 April 2007, ICTR-98-44C-A.

notified the parties to the proceedings.³¹ Second, the two decisions cited by the Registrar which do appear to be on point, both arising from the same case at the ICTY,³² contain little substantive discussion of the possible interpretations of the relevant rule of the ICTY Rules of Procedure and Evidence. As such, they provide little guidance as to why the interpretation adopted by that Tribunal's Appeals Chamber should be adopted also with respect to the interpretation of regulation 24 *bis* (1) of the Regulations of the Court. Third, and most important, the decisions cited from the ICTY address only the interpretation of the provision of that Tribunal's Rules of Procedure and Evidence which the Registrar asserts is equivalent to regulation 24 *bis* (1) of the Regulations of the Court. However, as set out above, the exhaustive nature of articles 81 and 82 of the Statute preclude the Registrar from appealing the Impugned Decision outside of the framework of these articles, irrespective of the content of regulation 24 *bis* (1) of the Regulations of the Court. Even if the ICTY's rule 33 (B) were identical to regulation 24 *bis* (1) of the Regulations of the Court and the Appeals Chamber were to adopt the ICTY's Appeals Chamber's interpretation of this provision, this would not address the fact that the present appeal is precluded by the limitations on the Appeals Chamber's jurisdiction.


17. The Appeals Chamber acknowledges the Registrar's concern that the Impugned Decision may affect the discharge of her functions. However, this does not permit the Appeals Chamber to circumvent the limits on its jurisdiction. Moreover, to the extent that regulation 24 *bis* (1) of the Regulations of the Court serves the purpose of enabling the Registrar to make submissions to the relevant Chamber when necessary for the discharge of her functions, the Appeals Chamber observes that this purpose has already been served. The Appeals Chamber notes that the Registrar had the opportunity to provide the Trial Chamber in advance with information related to the impact on the Registry of the Impugned Decision, that the Registry, in fact, provided such information to the Trial Chamber and that the Trial Chamber appears to have

³¹ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, "Decision on Brima-Kamara Defence Appeal Motion against Trial Chamber II Majority Decision on Extremely Urgent Confidential Joint Motion for the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara", 8 December 2005, SCSL-04-16-AR73.

³² *Prosecutor v. Vojislav Šešelj*, "Public redacted version of the 'Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence' rendered on 8 April 2011", 17 May 2011, IT-03-67-R33B; *Prosecutor v. Vojislav Šešelj*, "Decision on the Registry Submission Pursuant to Rule 33(B) Following the President's Decision of 17 December 2008", 9 April 2009, IT-03-67-T.

taken such information into account in reaching its decision. There is no need to raise the same issues before another Chamber.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 21st day of November 2011

At The Hague, The Netherlands