

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 5 October 2011

APPEALS CHAMBER

Before: Judge Anita Ušacka, President of the Appeals Division
Judge Sang-Hyun Song, President of the Court
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko

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

PUBLIC

**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**

Source: Registrar

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THE REGISTRAR of the International Criminal Court (the “Court”),

CONSIDERING 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”, issued by Trial Chamber I on 30 August 2011 (the “Decision”),¹

CONSIDERING the “Requête de la Défense sollicitant le réexamen de la décision du Greffier du 22 juillet 2011 relative à l’aide judiciaire accordée à Mr. Thomas Lubanga”, filed by the Defence for Mr. Lubanga Dyilo on 19 August 2011,²

CONSIDERING the “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 Greffier du 22 juillet 2011 relative à l’aide judiciaire accordée à Mr. Thomas Lubanga’ dated 19 August 2011”, filed by the Registrar on 23 August 2011 (the “Registrar’s Observations before Trial Chamber I”),³

NOTING Articles 21, 67, 74, 75, 76, 83 and 112 of the Rome Statute, Rules 20 and 21 of the Rules of Procedure and Evidence (“RPE”), Regulations 24*bis*(1) and 83 of the Regulations of the Court (“RoC”),

RESPECTFULLY SUBMITS THE FOLLOWING OBSERVATIONS:

¹ ICC-01/04-01/06-2800.

² ICC-01/04-01/06-2790.

³ ICC-01/04-01/06-2793.

(I) Legal Basis of the Present Observations

1. The present observations are filed under Regulation 24*bis* (1) of the Regulations of the Court ("RoC 24*bis* (1)").
2. RoC 24*bis* (1) provides that "[t]he Registrar, when necessary for the proper discharge of his or 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."
3. RoC 24*bis* (1) allows the Registrar to make submissions before "a Chamber". The reference to "a Chamber" encompasses the Appeals Chamber, as confirmed by consistent case law of the Appeals Chamber admitting the filing of RoC 24*bis* submissions before it: for instance, in its "Reasons for the 'Decision on 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation' and Prosecution's request for leave to file a response to 'Victims and Witnesses Unit's considerations on the system of witness protection and the practice of 'preventive relocation'"" of 11 July 2008, the Appeals Chamber found that "the filing of the Registrar [under RoC 24*bis* (1)] was legitimately made".⁴
4. The Appeals Chamber also admitted and considered submissions filed by the Registrar on issues that were unrelated to any pending proceedings before the Appeals Chamber. In its "Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007" of 27 April 2007,⁵ the Appeals Chamber admitted and considered the Registrar's requests in relation to the payment of legal assistance

⁴ ICC-01/04-01/07-675, par. 4.

⁵ ICC-01/04-01/06-873

and the appointment of counsel filed in the absence of pending appellate proceedings related to these issues. The Appeals Chamber rejected the requests on the merits because it found that the remedies sought had no legal basis,⁶ but the fact that the Appeals Chamber considered the Registrar's requests shows that the Registrar is allowed to make submissions before it without any connection to pending appellate proceedings, like in the present case.

5. The Registrar further observes that the Appeals Chamber considers that guidance may be sought in the case law of other International Criminal Tribunals for the interpretation of equivalent statutory provisions.⁷ The wording of the Court's RoC 24*bis* (1) is very similar to Rule 33(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), of the International Criminal Tribunal for Rwanda ("ICTR") and of the Special Court for Sierra Leone ("SCSL"). Rule 33(B) of the ICTY and ICTR reads:

"The Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary."

6. Rule 33(B) of the SCSL retains the same wording, but the words "the President or".
7. The ICTY Appeals Chamber consistently:⁸

⁶ Ibid, par. 6.

⁷ ICC-01/04-01/06-1433, par. 78.

⁸ ICTY, Appeals Chamber, *Prosecutor v. Šešelj*, IT-03-67-R33B, 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, par. 16. See also ICTY, Appeals Chamber, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on the Registry Submission pursuant to Rule 33(B) Following the President's Decision of 17 December 2008, 9 April 2009; ICTY, President, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on Urgent Registry Submission pursuant to Rule 33(B) Seeking Direction from the President on the Trial Chamber's Decision of 27 November 2008, 17 December 2008, par. 9.

“allowed the Registrar to seek appellate review under Rule 33(B) of the Rules of a trial chamber decision where the decision is directed at the Registry [...]. Accordingly, the Appeals Chamber is satisfied that it has jurisdiction to consider the Registry submissions”.

8. So did the ICTR Appeals Chamber.⁹

9. So did the SCSL Appeals Chamber.¹⁰

10. There are thus consistent authorities from the respective Appeals Chambers of sister International Criminal Tribunals interpreting a provision similar to the Court’s RoC 24*bis* (1) in a way allowing the Registrar to seek appellate review of Trial Chambers’ decisions impacting on the proper discharge of her functions. These authorities support the Court’s Appeals Chamber precedents in favor of the admissibility of Registrar’s submissions before the Appeals Chamber in the absence of pending appeal proceedings.

11. The Registrar respectfully submits that the Decision issued by Trial Chamber I has a major impact on the discharge of her functions with respect to the management of the Court’s legal aid under, *inter alia*, Rules 20(2) and 21(1) of the RPE. This impact is more specifically detailed below in the next section.

12. The Registrar therefore respectfully requests the Appeals Chamber to admit the present submissions and consider the issues developed in the next section. As to the timing of the present submissions, the Registrar observes that RoC 24*bis* does not provide any time frame. The decision to make the present submissions was

⁹ ICTR, Appeals Chamber, *Prosecutor v. Rwamakuba*, ICTR-98-44C-A, Decision on the Prosecution’s Notice of Appeal and Scheduling Order, 18 April 2007, par. 7.

¹⁰ SCSL, Appeals Chamber, *Prosecutor v. Brima, Kamara, Kanu* (“AFRC case”), SCSL-04-16-AR73, 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 2008, par. 143.

taken after careful consideration of the impact of the Decision on the discharge of her functions by the Registrar.

(II) Impact of the Decision on the Discharge of the Registrar's Functions

13. The Decision reviews the Registrar's decision rejecting the request for additional resources under RoC 83(4) and instructs the Registrar to retain the defence team of Mr. Lubanga to the extent proposed by the lead Counsel, namely the lead counsel, the associate counsel and two legal assistants until the Chamber has rendered its Article 74, 75 and 76 decisions as appropriate.

14. In her observations before the Trial chamber, the Registrar had submitted that the additional resources sought by the Defence were going beyond the Court's legal aid scheme, which provides for the payment of the fees of only one Counsel during the period running from the closing statements until the issuance of Article 74 decision.¹¹ The Registrar relied on the Court's legal aid scheme as defined in the *Report to the Assembly of States Parties ("ASP") on options for ensuring adequate defence counsel for accused persons*¹² and the *Report on the operation of the Court's legal aid system and proposals for its amendment*¹³ and endorsed by ASP Resolutions.¹⁴

15. The Decision essentially rejects these references to the Court's legal aid scheme on the essential ground of the limited "extent to which the Chamber is prepared to rely on them"¹⁵, as mere reports prepared for the ASP.¹⁶ The Decision further puts

¹¹ ICC-01/04-01/06-2793, par. 22-24.

¹² ICC-ASP/3/16.

¹³ ICC-ASP/6/4.

¹⁴ ICC-01/04-01/06-2793, par. 10-12.

¹⁵ Decision, par. 52.

¹⁶ Decision, par. 54.

in a balance the right of the accused to a fair trial and the Court's legal aid scheme, whereas the latter precisely aims at implementing the first.

16. The Registrar has identified three possible grounds for the intervention of the Appeals Chamber under Article 83(2) of the Rome Statute. The Registrar respectfully observes that the Decision (1) does not give sufficient consideration to the documents defining the Court's legal aid scheme, (2) improperly proceeds to a balancing exercise between the defendant's right to a fair trial and this scheme, whereas the latter is the implementation of the first and (3) revisits a decision of the Registrar that was final.

II.1. Insufficient Weight Given to the Documents Defining the Court's Legal Aid Scheme

17. The Decision did not give sufficient consideration to the documents defining the legal aid scheme. Under Article 112(2)(d), the ASP considers and decides the budget of the Court. The budget of the Court is decided based on the proposal submitted to the ASP. The budget proposal concerning legal aid is based on the legal aid scheme as defined in the documents referred to by the Registrar. When the ASP thus adopts the legal aid budget, it does so on the basis of this legal aid scheme. This implies that if the legal aid scheme does not provide for more than one Counsel for the stage of the proceedings running from the closing arguments until the issuance of Article 74 Decision, the budget approved by the ASP does not provide funds for more. The Financial Regulations and Rules of course provide some flexibility and the possibility of reallocating funds within the Registry's budget – for instance in order to face the allowance of additional resources under RoC 83(3) -, but this flexibility has a limit.

18. For the current year (2011), the total budget approved for legal aid is 1'099'400 € for the year. To date – end of September -, the total expenditures under legal aid amount to 1'549'398 €, that is to say an implementation rate of about 140%. To that amount, we can already add an additional amount of about 302'000 € which are already engaged but not paid yet, for a total of 1'851'837 €, that is to say an implementation rate of about 180%.
19. The difference between the amount approved by the ASP and the amount actually spent has to be absorbed within the budget of the Court. Considering that legal aid forms part of the Registry budget (Major Program 3) and that transfer of funds between the different Major Programs of the Court is prohibited, this differential has to be absorbed within the budget of the Registry alone. This has been done so far by reallocating funds from other sections (Detention, VWU, VPRS, CMS, STIC, etc.) to legal aid. The Registry has used its maximum flexibility so far to honor its obligations regarding legal aid, but, as said before, flexibility has a limit. This limit, without the efficient and scrupulous management of the Registry funds, would have been reached for a long time already. But the accumulation of new expenses under legal aid now reaches a point where the Registrar may not be in a position to discharge her functions any longer.
20. In her Observations to the Trial Chamber, the Registrar had shown that granting the Defence request for additional resources would incur an expense of 38'951.95 € per month, whereas the legal aid scheme afforded for 10'832.00 € only, that is to say an additional expense of 28'119.95 € per month. It is the Registrar's respectful submission that this additional expense has a substantial impact for the proper discharge of her functions, not only with respect to legal aid, but also, considering the obligation to absorb this amount within the budget of the Registry, with respect to other functions of the Registry.

21. The Decision thus disregarded the Court's legal aid scheme which forms the basis for the budget of legal aid as approved by the ASP under Article 112(2)(d).
22. The Registrar further observes that going beyond the budget of the legal aid in the present case was not justified by any specific workload that the Defence may have to face in the present phase. Before issuing her decision on the request for additional resources, the Registrar had invited the Defence team to submit a work plan in support of its request. In her assessment, the Registrar had considered the tasks proposed by the Defence, which are reproduced in her decision. In her observations before Trial Chamber I, the Registrar submitted that the tasks identified in the work plan submitted by the Defence (i) fall outside of the purview of the Court's legal aid system, (ii) are premature and/or speculative for the interim period between the closing statements and the judgment or (iii) constitute tasks that an experienced counsel admitted to the Court's list of counsels and paid at a rate of 10'832 € per month should reasonably be expected to assume and to bring to completion.¹⁷ These observations were not challenge in the Decision, which only adds "the review of the case record [...] in order to issue public versions of the filings and the transcripts".¹⁸ The Registrar respectfully observes that, even taking into account these additional tasks which were not identified by the Defence, these still do not justify the continuous payment of legal aid to the full team.

II.2. Inappropriate Balancing Exercise between the right to fair trial and the legal aid scheme

23. Under Rule 21(1) of the RPE, "[s]ubject to Article 55, par. 2(c) and article 67, par. 1(d), criteria and procedures for assignment of legal assistance shall be

¹⁷ ICC-01/04-01/06-2793, par. 35-39.

¹⁸ Decision, par. 59.

established in the Regulations, based on a proposal by the Registrar, following consultations with any independent representative body of counsel or legal associations, as referred to in rule 20, sub-rule 3.”

24. At par. 23 of her observations before Trial Chamber I, the Registrar stressed “that the legal aid system of the Court was conceived after extensive periods of consultation with experts and relevant stake-holders, including representatives of the legal profession, defence counsel as well as national and international legal associations and legal aid services”.

25. The establishment of the legal aid scheme thus fully takes into account from the beginning the requirements of the right to legal assistance under Article 67(1)(d). It was established in close consultation with relevant stake-holders, including representatives of the legal profession and constitutes the concrete implementation of the right to legal assistance, which is one aspect of the right to fair trial. As such, the legal aid scheme cannot be opposed to this right which it aims at implementing. These two imperatives cannot and should not be balanced against each other.

II.3. The Decision Revisits a Final Decision of the Registrar

26. At par. 21 of her observations, the Registrar reminded Trial Chamber I that, at least in the case of the legal assistant, the letter of appointment specified that their mandate would terminate at the end of the closing statements. Similarly, the letter of appointment of the co-counsel read that the appointment was made “until the end of the trial”. These decisions were never challenged and thus became final. The Defence application to request an extension of the appointment beyond the end of the closing statements thus constituted an out-of-time request for review of

the earlier decisions of the Registrar to appoint members of the legal team until that stage only. Such application was thus inadmissible and should have been rejected, instead of what the Decision granted the application.

(III) Remedy

27. Under Article 83(2) of the Rome Statute, the Appeals Chamber may reverse or amend the decision.
28. The Registrar respectfully request the Appeals Chamber to reverse the Decision and confirm her earlier decision rejecting the request for additional resources under RoC 83(4) for the period running from the end of the closing statements.
29. The Registrar refers to the Appeals Chamber earlier finding that remedies under Article 83 of the Rome Statute could be applicable in a case where the Registrar had directly seized the Appeals Chamber in the absence of pending appellate proceedings: the Registrar's requests were denied on the main ground that "the remedies sought [in this case were] not provided for in the Court's Statute, Rules of Procedure and Evidence or Regulations. Such remedies as the Appeals Chamber is authorized to grant are listed in Article 83 of the Statute and Rules 153 and 158 of the Rules of procedure and evidence".¹⁹ The Registrar further observes that the ICTY Appeals Chamber²⁰ already reversed decisions that it found materially affected by an error of law when it was seized by submissions of the Registry under Article 33(B) of the ICTY Rules of Procedure and Evidence.²¹

¹⁹ ICC-01/04-01/06-873, par. 6.

²⁰ See par. 5 of the present submissions on the guidance that may be sought from other sister Tribunals case law.

²¹ ICTY, Appeals Chamber, *Prosecutor v. Šešelj*, IT-03-67-T, Decision on the Registry Submission pursuant to Rule 33(B) Following the President's Decision of 17 December 2008, 9 April 2009, par. 21-22.

30. The Registrar respectfully submits that the Appeals Chamber is the only body that can issue an authoritative ruling on this matter. Given the significance of the issues involved, it is the Registrar's respectful submission that such a ruling is of a critical importance for the proper discharge of the functions of the Registrar and the functioning of the Court as a whole.

FOR THESE REASONS, the Registrar respectfully prays the Appeals Chamber to:

- (i) admit the present Submissions under RoC 24*bis*(1);
- (ii) reverse the Decision and confirm the Registrar's decision rejecting the request for additional resources under RoC 83(4) during the period running from the end.



Silvana Arbia,
Registrar of the International Criminal Court

Dated this 5 October 2011

At The Hague, The Netherlands