

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoC85-01/09

Date: 1 April 2010

THE PRESIDENCY

Before:

Judge Sang-Hyun Song, President

Judge Fatoumata Dembele Diarra, First Vice-President

Judge Hans-Peter Kaul, Second Vice-President

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

Confidential

***Ex parte* only available to the Legal Representatives and the Registry**

Decision on the “Demande de réexamen de la décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maîtres Walley, Mulenda Diakiese et Mulamba dans l’affaire Le Procureur c/Thomas Lubanga Dyilo”

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

Legal Representatives of the Victims

Mr Hervé Diakiese

Mr Luc Walley

Mr Franck Mulenda

Mr Jean Chrysotome Mulamba

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims Participation and Reparations

Section

Ms Fiona McKay

The Presidency of the International Criminal Court (hereinafter "Court") has before it the application of victims in the case of *The Prosecutor v. Thomas Lubanga Dyilo* for judicial review of the decision of the Registrar on their application relating to legal assistance paid by the Court.

The application is inadmissible.

I. PROCEDURAL HISTORY

1. On 15 and 18 December 2008, victims a/0001/06, a/0002/06, a/0003/06, a/0007/08, a/0155/07, a/0156/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 a/0149/07 and a/0162/07 were granted participatory status in the proceedings in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter "applicants").¹ They are represented by Messrs Luc Walley, Franck Mulenda, Hervé Diakiese and Jean Chrysotome Mulamba (hereinafter "counsel"). The Registrar provisionally deemed the applicants to be wholly indigent, pending the outcome of an investigation into their property and assets, and thus provisionally eligible for legal assistance paid by the Court.²
2. On 30 January 2009, pursuant to regulation 134(1) of the Regulations of the Registry, counsel submitted an action plan to the Registrar (hereinafter "action plan").³ The action plan, *inter alia*, requested the Registrar to approve funding for three missions in the Democratic Republic of the Congo (hereinafter "DRC"), each for a period of 10 days and each with two counsel. The action plan also sought the provision of insurance to counsel practising in the DRC for medical and repatriation costs in the event of accident or illness befalling them whilst in the Netherlands.
3. On 25 February 2009, the Registrar, *inter alia*, decided that the cost of the field missions could be borne by the legal assistance scheme on the basis of mission plans to be assessed on a case-by-case basis. She also held that it did not appear reasonably

¹ Decision on the applications by victims to participate in the proceedings, ICC-01/04-01/06-1556-Corr-Anx1 and Decision on the applications by 3 victims to participate in the proceedings, ICC-01/04-01/06-1562 respectively.

² Registrar's Decision on the Indigence of Victims a/0001/06, a/0002/06 and a/0003/06, ICC-01/04-01/06-1383-tENG, 9 June 2008; Registrar's Decision on the Indigence of Victim a/0007/08, ICC-01/04-01/06-1572-tENG, 22 December 2008; Registrar's Decision on the Indigence of Victims a/0155/07, a/056/07, a/0404/08, a/0405/08, a/0406/08, a/0407/08 and a/0409/08, ICC-01/04-01/06-1597, 9 January 2009.

³ ICC-RoC85-01/09-3-Conf-Exp-Anx1.

necessary for two counsel to meet with the applicants at the same time.⁴ The Registrar further held that medical and repatriation costs were to be borne by counsel (hereinafter “Impugned Decision”).⁵

4. Also on 25 February 2009, the Victims Participation and Reparation Section (hereinafter “VPRS”) notified counsel of the determination of the Registrar in the Impugned Decision (hereinafter “Impugned Determination”).⁶ In relevant part, the VPRS authorised funding for two field missions with one counsel for each trip, rather than three trips with two counsel for each trip, as requested; and declined to fund medical insurance and repatriation costs.
5. On 11 March 2009, the applicants sought judicial review of the Impugned Decision and Impugned Determination (hereinafter “Application”).⁷ On 16 March 2009, the Presidency ordered the Registrar to transmit to it the record of proceedings before the Registry,⁸ which was received on 18 March 2009.⁹ On 1 April 2009, the Registrar submitted observations on the Application, pursuant to regulations 24*bis* and 34(b) of the Regulations of the Court (hereinafter “Observations”).¹⁰ On 14 April 2009, the applicants responded to the Observations.¹¹ On 17 April 2009, the Registrar requested leave to respond to those submissions.¹²

II. RELIEF SOUGHT

⁴ Décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maîtres Walley, Mulenda, Diakiese et Mulamba dans l’affaire *Le Procureur c/ Thomas Lubanga Dyilo*, ICC-RoC85-01/09-3-Conf-Exp-Anx2, pages 4-5.

⁵ Impugned Decision, pages 4-5.

⁶ ICC-RoC85-01/09-3-Conf-Exp-Anx3.

⁷ Demande de réexamen de la décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maîtres Walley, Mulenda, Diakiese et Mulamba dans l’affaire *Le Procureur c/ Thomas Lubanga Dyilo*, ICC-RoC85-01/09-1-Conf-Exp.

⁸ Order concerning the “Demande de réexamen de la décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maîtres Walley, Mulenda, Diakiese et Mulamba dans l’affaire *Le Procureur c/ Thomas Lubanga Dyilo*”, ICC-RoC85-01/09-2-Conf-Exp.

⁹ Mise en œuvre de l’ordonnance [*sic*] de la Présidence ICC-RoC85-01/09-2-Conf-Exp, ICC-RoC85-01/09-3-Conf-Exp.

¹⁰ Observations of the Registry in accordance with regulation 24 bis of the Regulations of the Court relating to the “Demande de réexamen de la décision du Greffier sur la demande d’aide judiciaire aux frais de la Cour déposée par Maîtres Walley, Mulenda, Diakiese et Mulamba dans l’affaire *le Procureur c/Thomas Lubanga Dyilo*” dated 11 March 2009, ICC-RoC85-01/09-4-Conf-Exp.

¹¹ Réponse aux observations du Greffier ICC-RoC85-01/09-4-Conf-Exp dans l’affaire *Le Procureur c/ Thomas Lubanga Dyilo*, ICC-RoC85-01/09-5-Conf-Exp.

¹² Request for leave to present observations to the «Réponse aux observations du Greffier ICC-RoC85-01/09-4-Conf-Exp dans l’affaire *Le Procureur c/ Thomas Lubanga Dyilo*» filed by the Legal Representatives on 14 April 2009, ICC-RoC85-01/09-6-Conf-Exp, page 4.

6. The applicants request the Presidency to review the Impugned Decision and the Impugned Determination and rule that the following costs be borne by the scheme of legal assistance paid by the Court:
1. the cost of three missions to the DRC, each with two counsel; and
 2. the provision to counsel practising in the DRC of insurance for medical and repatriation costs whilst in the Netherlands.¹³

III. THE SUBMISSIONS OF THE PARTIES

A. The arguments of the applicants

7. In relation to the request that funding be provided for the cost of three missions to the DRC, each with two counsel, the applicants submit that the number of missions allowed was only contained in the Impugned Determination, whereas in the Impugned Decision the Registrar agreed to the principle of three missions. As such, the applicants argue that the authorisation of funding for only two missions constitutes an additional restriction introduced by the VPRS without justification which must be dismissed.¹⁴ They argue that restricting the number of approved missions and the number of counsel conducting them may conflict with articles 14 and 15 of the Code of Professional Conduct for counsel as one counsel would be unable to meet his clients during the period to which the action plan pertains.¹⁵ The applicants state that allowing two counsel per mission would increase the safety of both the applicants and counsel and divide the associated logistical burden.¹⁶
8. Regarding the request that funding be provided for medical insurance and repatriation costs, the applicants submit that the Court may request an extension to its collective insurance policy to cover counsel practising in the DRC in the event of accident or illness in the Netherlands.¹⁷ Noting that three of the four counsel are of Congolese nationality,¹⁸ the applicants state that this issue actually arose during the first week of the trial when one counsel required urgent hospital treatment and was forced to bear the resulting costs, since “les conseils congolais ne bénéficient d’aucune couverture médicale pendant la durée de leur séjour à La Haye”.¹⁹ It submitted that the request

¹³ Action plan, paragraphs 3 and 6 respectively; Application, page 11.

¹⁴ Application, paragraph 14.

¹⁵ Application, paragraph 15.

¹⁶ Application, paragraphs 19 and 22.

¹⁷ Application, paragraph 27.

¹⁸ Application, paragraph 13.

¹⁹ Application, paragraphs 25-26.

does not exclude the possibility of a contribution from counsel who stand to benefit from the extension of the policy.²⁰

B. The Observations of the Registrar

9. The Registrar requests the Presidency to reject the Application and confirm the Impugned Decision,²¹ recalling the duty incumbent upon her “to ensure that the funds that are allocated by the States Parties to legal aid are managed in a balanced and judicious manner” and “to ensure that the legal assistance paid by the Court is managed with great prudence in order to avoid abuse and contain costs”.²²
10. The Registrar submits that the Impugned Decision did not agree to the principle of three missions, but simply indicated that requests for missions would be considered on a case-by-case basis.²³ The Registrar notes the “lack of sound justification” for the proposal to conduct three missions and notes that she took into account the assumption that counsel would have consulted with their clients prior to the commencement of the trial.²⁴ She further submits, regarding the number of counsel per mission, that counsel form a common legal representation, entered into at their own initiative, which she understands to mean “that each legal representative represents the group of victims, and each of the victims individually”.²⁵
11. In relation to the issue of medical insurance and repatriation costs, the Registrar submits that no arguments were advanced as to why the scheme of legal assistance should support such costs.²⁶ She notes that there exists no provision requiring the Court to cover the costs of medical insurance for counsel or other external personnel who have a relationship with the Court but are not staff of the Court.²⁷ She links this approach to the independent status of counsel as members of a “profession libérale” who are assumed to have a practice outside of the Court and “take it upon themselves to make arrangements such as medical insurance, which are not costs that would normally be billed to clients”.²⁸

²⁰ Application, paragraph 27.

²¹ Observations, page 9.

²² Observations, paragraph 3.

²³ Observations, paragraph 8.

²⁴ Observations, paragraph 9.

²⁵ Observations, paragraph 10.

²⁶ Observations, paragraph 13.

²⁷ Observations, paragraph 14.

²⁸ Observations, paragraph 15.

IV. DETERMINATION BY THE PRESIDENCY

12. The admissibility of the Application has not been challenged by the Registrar, who expressly directed the applicants to seek judicial review from the Presidency in the event of dissatisfaction with the Impugned Decision.²⁹ Nonetheless, the Presidency must be satisfied that it has jurisdiction to decide upon the matter before it, namely that funding be provided within the scheme of legal assistance paid by the Court for:

1. three missions, each with two counsel; and
2. the provision of insurance for medical and repatriation costs whilst in the Netherlands for counsel based in the DRC.

13. Legal assistance paid by the Court is governed, *inter alia*, by regulations 83, 84 and 85 of the Regulations of the Court. Pursuant to these regulations, the Presidency and Chambers are each empowered to review distinct elements of the Registrar's administration of the legal assistance scheme.

14. Regulation 83 of the Regulations of the Court governs the general scope of legal assistance paid by the Court. Regulation 83(2) states that "[t]he scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate". By way of guidance in the exercise of her discretion with regard to the scope of legal assistance payable to victims, the Registrar has regard to regulation 83(1), which states that legal assistance available to the defence "shall cover all costs reasonably necessary...for an effective and efficient defence".³⁰

15. Pursuant to regulation 83(4), decisions of the Registrar on the scope of legal assistance paid by the Court may be reviewed by the relevant Chamber on application by the person receiving legal assistance.

16. Pursuant to regulations 84 and 85, the Presidency may hear challenges to the assessment of the Registrar on the payment of legal assistance, including interim, final or revised determinations on means and on provisional, final or revised determinations on the full or partial payment of legal assistance.

17. The Presidency considers that it does not have jurisdiction to decide upon the Application. Whereas, by the Impugned Decision, the Registrar confirmed her decision to grant legal assistance to the applicants provisionally, she also ruled on the extent of such assistance. The number of funded field missions, the number of counsel

²⁹ Impugned Decision, page 5. Whereas the Registrar makes reference to regulation 85(4) in the Impugned Decision, the Presidency takes this to mean regulation 85(3) since the former provision could not be applicable in the instant case.

³⁰ Observations, paragraph 5.

per mission and the provision of insurance for medical and repatriation costs are properly characterised as matters pertaining to the *scope* of legal assistance paid by the Court and are, pursuant to regulation 83(4) of the Regulations of the Court, within the purview of the relevant Chamber.

The Application is inadmissible.

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


Judge Sang-Hyun Song
President

Dated this 1 April 2010

At The Hague, The Netherlands