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No.: ICC-01/04-01/06
Date: 10 October 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

Defence observations on the admissibility of 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”

Source: Defence Team for Mr Thomas Lubanga Dyilo

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

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BACKGROUND

1. On 22 July 2011, the Registry transmitted to the Defence its decision on the legal assistance granted to Mr Thomas Lubanga.¹
2. On 5 August 2011, Trial Chamber I granted leave to the Defence to file, by 19 August 2011, its request for review of the Registry's decision of 22 July 2011.²
3. On 19 August 2011, the Defence filed its request for review of the Registry's decision of 22 July 2011.³
4. On 23 August 2011, the Registry filed its response to the Defence's request for review.⁴
5. On 30 August 2011, Trial Chamber I reversed the Registry's 22 July 2011 decision and instructed in the main that legal assistance and access for Mr Lubanga's counsel, co-counsel and two legal assistants be retained until the Chamber had rendered its article 74 decision.⁵
6. On 5 October 2011, the Registry submitted its observations to the Appeals Chamber requesting it to reverse the Trial Chamber's 30 August 2011 decision (hereinafter "the Registry's observations").⁶
7. Prior to any discussion on the merits, the Defence submits that the Registry's observations are inadmissible.

¹ See ICC-01/04-01/06-2790-Anx1-tENG.

² See ICC-01/04-01/06-2800 paras. 2 and 3.

³ ICC-01/04-01/06-2790-tENG.

⁴ ICC-01/04-01/06-2793.

⁵ ICC-01/04-01/06-2800.

⁶ ICC-01/04-01/06-2812.

1. OBSERVATIONS

1 – The inapplicability of regulation 24 *bis* of the Regulations of the Court

8. The sole purpose of regulation 24 *bis* of the Regulations of the Court is to authorise the Registry to make submissions to the Chamber seized of a situation or case in order to present its observations should the need arise.
9. The Registry may only make its submissions under this provision to the Chamber seized of the situation or case concerned; in particular, the provision does not authorise the Registry to submit observations to the Appeals Chamber relating to a case of which it is not already properly seized.
10. In the instant case, Trial Chamber I has sole jurisdiction over issues arising in the trial of Mr Thomas Lubanga, including those pertaining to his legal assistance, unless an appeal is properly lodged with the Appeals Chamber in accordance with the provisions of the Statute and of the Rules of Procedure and Evidence.
11. In the present proceedings, the Defence properly requested Trial Chamber I to review the Registry's 22 July 2011 decision; the Registry submitted its observations on 23 August 2011; Trial Chamber I ruled on the matters at issue in its decision of 30 August 2011; that decision was not appealed and is now final.
12. At the current stage of the proceedings, the Appeals Chamber is not seized of the case of *The Prosecutor v. Thomas Lubanga*. It follows that Trial Chamber I has sole jurisdiction to consider applications submitted by the Registry under regulation 24 *bis* of the Regulations of the Court.
13. Regulation 24 *bis* of the Regulations of the Court in no way provides for a remedy against the decisions of Trial Chamber I which would allow the

Appeals Chamber to be seized after expiry of the time limits for appeal provided in the Statute and the Rules of Procedure and Evidence.

14. It follows, in the instant case, that regulation 24 *bis* of the Regulations of the Court is manifestly inapplicable, since the Registry's observations unequivocally constitute an appeal against Trial Chamber I's decision of 30 August 2011.

2 – The inadmissibility of the appeal

15. The Registry relies on article 83(2) of the Rome Statute to request the Appeals Chamber to reverse Trial Chamber I's decision of 30 August 2011 and to confirm the Registry's decision of 22 July 2011.⁷
16. However, article 83(2) refers only to the procedure for appealing a Trial Chamber decision of acquittal or conviction or against sentence⁸ and cannot be applied in the instant case.
17. Article 82 of the Rome Statute lists the other decisions which may be appealed, namely: 1) a decision with respect to jurisdiction or admissibility (article 82(1)(a)); 2) a decision granting or denying release of the person being investigated or prosecuted (article 82(1)(b)); 3) a decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3 (article 82(1)(c)); or 4) a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings (article 82(1)(d)).
18. Since sub-paragraphs (a) to (c) of article 82 are not applicable in the instant case, Trial Chamber I's decision of 30 August 2011 could only have been

⁷ ICC-01/04-01/06-2812, para. 27.

⁸ Articles 83(1) and 81.

appealable if the Chamber had held, following submission of a request for leave to appeal, that the criteria of article 82(1)(d) had all been met.

19. Furthermore, rule 155 of the Rules of Procedure and Evidence provides that when a party wishes to appeal a decision under article 82(1)(d), that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

20. It follows from all of these provisions that, if it had wished to appeal the 30 August 2011 decision, the Registry would have had to submit a request for leave to appeal to Trial Chamber I within five days of receiving the decision, and to explain how the criteria of article 82(1)(d) had been met. This it failed to do.

21. Accordingly, the appeal lodged by the Registry under regulation 24 *bis* of the Regulations of the Court is manifestly inadmissible.

22. Furthermore, were the Court to decide that the issues raised by the Registry had been properly brought before it, the Defence reserves the right to submit its observations on the merits of the issues raised in the Registry's observations.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO DECLARE as inadmissible 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".

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 10 October 2011, at The Hague.