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

Date: 28 July 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

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

Public Document

**Request to file a reply to any observations filed by the Government of the
Democratic Republic of Congo and Victims**

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Ekkehard Withopf, Senior Trial
Attorney

**Counsel for the Victims a/0001/06 to
a/003/06**

Mr. Luc Walley
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Counsel for the Defence

Mr. Jean Flamme, Lead Counsel
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Assistant

1. Introduction¹

1. On 24 July 2006 the Honourable Pre-trial Chamber issued its 'Décision invitant la République démocratique du Congo et les victimes de l'affaire en cause à présenter leurs observations sur les procédures menées en vertu de l'article 19 du Statut' in which the Pre-trial Chamber firstly, characterised the Defence motion requesting the release of Thomas Lubanga Dyilo as falling under article 19(2)(a) of the Rome Statute, and secondly, in light of Rule 59 of the Rules of Procedure and Evidence, invited the Government of the Democratic Republic of Congo (DRC) and any victims relating to this case to submit observations in relation to the Defence request for the release of Thomas Lubanga Dyilo.
2. In terms of the scope of these observations, the Pre-trial Chamber further requested the DRC and victims to focus on the allegation that Thomas Lubanga Dyilo was illegally detained by the DRC authorities in the time period before 16 March 2006, and allegations regarding irregularities in the subsequent arrest, transfer to the ICC, and execution of the arrest warrant dated 10 February 2006.
3. Finally, the DRC and victims were ordered to file any such observations no later than 25 August 2006.
4. The decision did not expressly specify whether the Defence would be entitled to file a reply to these observations. The Defence therefore respectfully requests the authorisation of the Pre-trial Chamber to file a reply to the substance of any observations filed by the DRC and victims.
5. In terms of the timing and length of the reply, in view of the fact that the Defence might be faced with multiple submissions, which may in total, be twice or three times the page limit for a normal response, the Defence further requests that the deadline and page limit for the reply should be tailored to the number and size of the observations filed by the DRC and victims respectively.

2. Submissions

2.1 Request for Leave to File a Reply

¹ The legal arguments and substance of this motion were formulated and authorised by Jean Flamme, Defence Counsel for Thomas Lubanga Dyilo. The text of this motion was drafted in English by virtue of the assistance of the OPCD in physically typing the text of the arguments formulated and authorised by the Defence Counsel. Accordingly, the fact that this motion (and other motions) has been submitted in English should be without prejudice to any determination as to the proficiency of the Defence team in English.

6. The general legal regime for replies is set out in Regulation 24(5), which provides that participants may only file a reply with the leave of the Chamber. This procedure for replies presumably applies to any responses covered by Regulation 24; that is, responses filed by the Defence and Prosecutor (sub-regulation 1), responses filed by victims who have been permitted to participate in the proceedings (sub-regulation 2), and responses filed by States who are participating in the proceedings (sub-regulation 3).
7. Although the Defence filed its reply to the Prosecution response on 10 July 2006, the Defence submits that there is nothing in regulation 24 which limits the ability of participants to file multiple replies in relation to the various categories of responses. This is particularly the case if the Defence were not aware of the possibility that other participants might file observations, and thus was not in a position to request authorisation to file a consolidated reply to the respective responses. This interpretation is consistent with the wording of regulation 24(5) to the effect that participants may request leave to file a reply to “a response”, as opposed to a reply to all responses.
8. In the decision on the ‘Defence request for leave to file a reply’,² which pertained to the Prosecution response, the Pre-Trial Chamber acknowledged that “the Defence application refers specifically to the release of Thomas Lubanga Dyilo, raises complex issues, and that, accordingly, it is in the interest of the Defence to be in a position to respond to the arguments set out in the Prosecution’s response”.
9. The Defence submits that the rationale of these observations applies equally to any arguments set out in the filings of the DRC and victims.
10. In the initial motion filed by the Defence and its subsequent reply, the Defence alluded to the fact that information pertaining to the details of the detention and the modalities of the DRC process was within the control and custody of DRC authorities, and as such, the Defence did not have access to this information.
11. Accordingly, if the DRC was to file any information in relation to these matters, it would be first time that the Defence would be presented with this information.
12. Thus, if the Defence is not accorded with an opportunity to reply to the observations of the DRC, it will be deprived of the ability to challenge the accuracy and credibility of the information submitted by the DRC, or to use this information to assess the material relevance of other information or documents, which might have probative value for the Defence position.

² Dated 29 June 2006.

13. In terms of potential observations filed by victims, to the extent that such observations will be focussed on matters which go to the heart of the Defence application, and which might not have been addressed by the Prosecution in its reply, the Defence submits that granting leave to file a reply would be in the interests of ensuring that such a complex issue is fully litigated and that all relevant information and arguments are brought to the attention of the Pre-trial Chamber.

2.2 Request for extension of the deadline

14. Regulation 34(c) provides that if leave to file a reply is granted, the reply must be filed within 10 days of notification of the response.
15. The Defence considers that it would be in the interests of judicial economy to file one consolidated reply to all observations filed.
16. However, the deadline set out in Regulation 34(c) is arguably predicated on the idea that the participant will be replying to one response, as opposed to multiple responses.
17. In accordance with Regulation 35, a participant may request an extension of time, and must demonstrate good cause for the extension.
18. As noted above, the submissions of the DRC and victims might raise previously unforeseen issues and information. Since the Defence has not had access to the information within the possession of the DRC and can not anticipate the observations of victims, it has not had the opportunity to consider its stance or arguments with respect of the information and observations which might be filed. In this regard, the observations are more similar in nature to an initial motion than a response.
19. In addition, the Defence will effectively be addressing information on two or more fronts (the DRC and any observations filed by victims), and may therefore be forced to analyse and research several disparate legal and factual arguments.
20. Finally, since the deadline for the reply will fall within September, the Defence will be involved in intensive preparation for the confirmation hearing and will therefore not be in a position to dedicate 100% of its time and resources to drafting the reply.
21. For these reasons, the Defence respectfully submits that the deadline of 10 days would be insufficient to properly consider and respond to even the arguments of the DRC alone. The Defence therefore requests that the deadline should be extended to 21 days, which is the applicable deadline for responses.
22. In order to ensure that the Defence has had sufficient time to consider the contents of all observations, the Defence submits that its deadline should start to run from the date

of the last observation filed. Although the Defence presumes that this would be 25 August 2006, it is possible that the DRC or victims may seek an extension of time.

2.3 Request for an extension of the page limit

23. Regulation 37 stipulates that the page limit for documents filed with the Registry is 20 pages.
24. In theory, if the Defence sought leave and was granted authorisation to file individual replies to each observation filed by the DRC and victims, it would have a page limit of 20 pages for each reply.
25. It would therefore be contrary to the spirit of the regulation to impose a 20 page limit on a consolidated reply. It would also deter participants from seeking to promote judicial economy by filing consolidated replies.
26. Moreover, in the event that the combined observations of the DRC and victims exceed 20 pages, it will be necessary for the Defence to develop a more extensive reply to address these lengthy submissions.
27. The Defence therefore respectfully requests the Pre-trial Chamber to grant the Defence authorisation to file a reply which is the greater of 20 pages, or the combined length of the filings of the DRC and victims.

2.4 Timing of the request

28. In terms of the timing of this request, although it might be standard practice to wait until the response is filed before filing a request to reply, the Defence respectfully submits that given the tight time line for these proceedings, this request is not premature. The observations of the DRC and victims are due approximately one month before the confirmation hearing. The Defence anticipates that it will be faced with several decisions, motions, and outstanding disclosure issues in the month preceding the hearing, as will presumably the Prosecutor and the Pre-trial Chamber. It is therefore of the position that it is in the interests of judicial economy and expeditious proceedings to file this request before the observations have been filed, in order to ensure that if the request is granted, the Defence can immediately react and prepare its reply.
29. If the Defence is informed in advance that it is permitted to file a reply, it can commence preparing its reply as soon as the observations are filed, without being concerned that its work is for nought if leave is not granted, or delaying its preparation

of the reply until authorisation is granted, which is likely to occur during the crucial days leading up to the confirmation hearing.

30. Even if the Pre-trial Chamber wishes to reserve its decision on the request until after any observations of the DRC and victims have been filed, by filing this request now, the Defence will have more time in September to focus on drafting its reply (if leave is granted) and its preparation for the confirmation hearing.

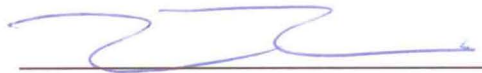
4. Relief Sought

31. In light of the afore-mentioned, the Defence respectfully requests the Pre-Trial Chamber to:

- i. Grant leave to the Defence to file a reply to any observations filed by the DRC and victims;

and if leave to reply is granted,

- ii. Extend the deadline for the reply to 21 days;
- iii. Order that the deadline will start to run from the date on which the last observation is filed; and
- iv. Order that the page limit shall be whichever is greater of 20 pages or the combined page-count of all observations filed.



On behalf of Jean Flamme, Defence Counsel,
Melinda Taylor, Associate Counsel OPCD

Dated this 28th day of July, 2006

At The Hague