

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 22 September 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 THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

Public

**Prosecution's Response to Thomas Lubanga Dyilo's 21 September 2006 Request for
Leave to Appeal, Request for a Preliminary Ruling and Subsidiary Request for an
Extension of Time.**

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Introduction

1. On 21 September 2006, Counsel for Thomas Lubanga Dyilo filed a document entitled "Request for Leave to Appeal the First Decision on the Prosecution's Requests and Amended Requests for redactions Under Rule 81" (hereinafter, the "Application").¹ The Prosecution, after careful consideration, has concluded that the document has been filed outside the mandatory time-limit provided for in Rule 155, and accordingly cannot be considered by the Pre-Trial Chamber. Out of considerations of fairness to the Defence, the Prosecution is filing this document one day after the notification of the Application,² in an effort to allow the Defence to timely decide what steps to take, if any, in relation to these and any other related matters.³ The Prosecution is only addressing here the confined issue of whether the Application was filed within the time-limit or not, and is accordingly requesting a preliminary finding of the Pre-Trial Chamber on this matter. If the Pre-Trial Chamber is of the view that the Application was filed in time, or can otherwise be entertained by the Chamber, then the Prosecution respectfully requests an extension of time to address the merits of the Application.

Discussion

2. The Single Judge's "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81"⁴ was notified in the afternoon of 15 September 2006 to both parties.⁵

¹ ICC-01/04-01/06-456.

² The Prosecution was notified of the Application on 21 September 2006 at 16:34.

³ The Prosecution has further already informed counsel for the Defence orally of the Prosecution's initial conclusions pertaining to the Application and its obligation to raise these matters with the Chamber.

⁴ ICC-01/04-01/06-437 (hereinafter, the "Decision").

⁵ The Prosecution confirmed with the Registry's Court Management Section that the Defence was properly notified of the Decision the same day as the Prosecution.

3. Under Rule 155, a party wishing to seek leave to appeal a decision under Article 82(1)(d) must file an application for leave to appeal "within five days". The time limit for filing an application for leave to appeal therefore expired on 20 September 2006. However, the Defence filed its Application, seeking leave to appeal the Decision, on 21 September 2006. The Defence did not provide any reasons for its failure to file within the applicable time-limit, or seek an extension of time under Regulation 35.

4. The Prosecution recognizes, however, that any application for an extension of time would have been futile, to the extent that under the applicable jurisprudence of this Court "neither rule 155, sub-rule 1, of the Rules, nor any other provision of the Statute, the Rules or the Regulations vests the Chamber with discretion to vary the time-limit" established in that Rule. This lacuna cannot be filled either by Rule 101 (1) or by Regulation 35, since the former "concerns the criteria for time-limits to be set by order of the Court, and cannot be interpreted as conferring upon the Chamber any specific power to vary the time-limits set forth in the Statute or the Rules", while the latter "applies only in respect of time-limits prescribed in the Regulations or ordered by a Chamber".⁶ Thus, in relation to the specific time-limit enshrined in Rule 155 (1), there appears to be no possibility for a participant to seek a variation.

5. As a variation of the time-limit excluded as a possibility, the only other conceivable avenue whereby the Application could be deemed to have been validly filed would be an expansive reading of Regulation 33, pertaining to the

⁶ Pre-Trial Chamber II, Situation in Uganda, "Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155", ICC-02/04-01/05-18-US-Exp, 18 July 2005 (unsealed pursuant to Decision no. ICC-02/04-01/05-52), pp. 6-7.

calculation of time limits, and in particular the specific wording of sub-regulation (1) (b). It is respectfully submitted that such a reading would effectively amount to a judicial amendment of the Regulation, beyond the scope of a proper exercise of the Chamber's interpretative authority. Regulation 33 (1) (b) states that "the day of notification of a document or the day of filing of *a response or a reply* by a participant to that document" shall not be considered for the purposes of calculating the applicable time limit.⁷ The provision does not refer to *any document*, but expressly circumscribes its scope to a response and a reply. Both "response" and "reply" are terms of art, and are clearly distinguishable from other documents. Regulation 22, expressly distinguishes between "motions", "applications", "requests", "responses", "replies", "observations", and "representations". In turn, Regulation 24 regulates the specific regime pertaining to the entitlement of participants to file *responses* and *replies*, further supporting the conclusion that the terms are used in the context of the Regulations in a specific and technical manner.⁸

6. Thus, the extra day provided by Regulation 33 (1) (b) can only apply to responses or replies filed by participants, and not to court documents generally. Presumably the fact that responses and replies are reactive and generally subject to shorter time-limits was one of the considerations behind the adoption of this particular language. Be it as it may, and leaving aside any discussion as to its

⁷ Emphasis added.

⁸ The "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 And VPRS 6", ICC-01/04-135-tEN, 31 March 2006, para. 9 is consistent with this position. In that decision, the Chamber stated that under regulation 33 (1) (b) of the Regulations of the Court "neither the day of notification of a document *nor* the day of filing of a response are taken into consideration for the calculation of the time period available to file a document" (Para. 9; emphasis in the original).

merits and/or efficiency, this is the legal framework governing the calculation of time-limits before this Court, and is binding on both participants and Chambers.

7. Under the consistent language of the Rules and the Regulations, the document filed by the Defence on 21 September 2006 is neither a response nor a reply, but an *application* (see Rule 155 (1) and Regulation 65 (1)), clearly distinguishable from other documents, including responses and replies, as enumerated in Regulation 22. Accordingly, the document filed is *not covered* by the language of Regulation 33 (1) (b) allowing for an extra filing day, and cannot benefit from that provision. Thus, Regulation 33 (1) cannot serve as a basis to consider the Application as validly filed, either.
8. In light of the foregoing, it is respectfully submitted that the Application is not properly before the Chamber and cannot be entertained by it. The Prosecution recognizes that the Court's applicable regime for filings of documents, and in particular applications for leave to appeal, is a stringent and rigid one, and that the parties must make substantial efforts to meet the deadlines involved. However, while those reasons might militate in favour of amending the system or introducing better regulatory powers for Chambers, they cannot *de facto* amend the governing provisions or cure defective filings made by participants.
9. The Prosecution accordingly requests the Pre-Trial Chamber to address the confined question of whether the Application was filed within the applicable time-limit or not, and to do so in a manner preliminary to any analysis of the merits of the Application.

Request for an Extension of Time

10. The Prosecution has filed this document in an effort to provide adequate notice of the Defence of the arguable technical defects of its Application, allowing it to determine, for instance, whether to take any other steps aimed at obtaining the relief sought in the Application. The Prosecution has not, and could not have within the available time, addressed the merits of the Application.

11. The Prosecution's position is that the Application, having been filed outside the applicable time-limit, must be rejected on technical grounds. If the Chamber is of the view that the Application can somehow be considered to have been validly filed, then the Prosecution requests a modest variation of the time limit established in Regulation 65 (3), which the Chamber can provide by virtue of Regulation 35. The Prosecution requests that it be allowed to file supplementary submissions on the merits of the Application within two days after any decision allowing for the Application to be entertained by the Chamber is notified to the Prosecution. The Prosecution respectfully submits that the interests of fairness amply justify such a request and that the reasons underpinning the procedure chosen by the Prosecution in this instance constitute "good cause" for an extension of time to be granted under Regulation 35 (2).

Conclusions

12. For the above referred reasons, the Prosecution respectfully requests the Chamber to:
 - (a) Consider as a preliminary matter whether the Application was filed on time;
 - (b) Reject the Application, as it has been filed outside the applicable time-limit;
 and

- (c) Were the Chamber of the view that the Application has been validly filed, grant the requested variation of the time-limit for the Prosecution to respond to the merits of the Application.



Luis Moreno-Ocampo
Prosecutor

Dated this 22nd day of September 2006
At The Hague, The Netherlands