Cour
Pénale
Internationale

International
Criminal
Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **25 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 CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO

Public Document

Request for Leave to Reply to Prosecution Response dated 22 September 2006

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 Walleyn,
Mr. Frank Mulenda

Counsel for the Defence
Mr. Jean Flamme
Ms. Véronique Pandanzyla

1. Introduction

1. On Friday 15 September 2006, the Single Judge issued the First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81.[1] On Thursday 21 September 2006, the Defence filed its request for leave to appeal the decision in question.
2. The Defence predicated its calculation of the time limit on Regulation 33(1)(b), which provides that days should be understood as 'full days', and was thus of the belief that it was entitled to 5 full days to work on its request – those being Saturday, Sunday, Monday, Tuesday, and Wednesday - and that it would be obliged to file its request on the Thursday.
3. On Friday 22 September 2006, the Prosecution filed its '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', in which the Prosecutor requested that the Chamber:
    i. address the question as to whether the Defence request for leave to appeal was filed within the applicable time limit;
    ii. in so doing, reject the request as being filed outside of the applicable time limit; or in the event that the Chamber holds otherwise;
    iii. grant the Prosecution an extension of time to respond to the merits of the Defence request.
4. In light of the fact that the Prosecution response is seeking relief which is independent of the relief requested by the Defence, and addresses issues which did not directly arise from the merits of the Defence filing, the Defence submits that it would be in the interests of justice to accord the Defence an opportunity to be heard before the Chamber rules on this issue.
5. The Defence therefore respectfully requests the leave of the Honourable Pre-Trial Chamber to file a reply to the Prosecution's submissions concerning the timing of the Defence request.
6. In order to expedite the resolution of this threshold procedural issue (should the Chamber decide to grant leave to reply), the Defence is incorporating its reply submissions in the present filing. The Defence would like to stress, however, that it is not doing so in the presumption that leave will be granted.

[1] ICC-01/04-01/06-437

2. Submissions:

7. Essentially, the Prosecution argues that the Defence filing is out of time because the Defence did not request an extension of the 5 day time limit (although they concede that no such procedural remedy exists), and Regulation 33(1)(b) - which provides that for the purpose of calculating time limits, neither the day of notification nor the day of filing are counted - only applies to responses and replies.
8. The Defence strongly rejects the limited and strained interpretation of Regulation 33(1)(b) posited by the Prosecutor.
9. Regulation 33(1) is prefaced by the extremely broad statement "the calculation of time for the purposes of any proceedings before the Court shall be the made as follows". Thus, in contradistinction to Regulation 35, which only governs deadlines set out in the Regulations of the Court or judicial orders, it is clear that the drafters intended Regulation 33 to address all filings, irrespective of the governing article, rule or regulation.
10. Regulation 33(1)(b) also commences with the words "Days shall <u>only</u> (emphasis added) be understood as 'full days'". In the view of the Defence, the use of the word 'only' does not allow any deviation from this definition.
11. The Defence respectfully submits that the purpose of not calculating the day of notification and the day of filing is to ensure that the parties are able to avail themselves of full days (i.e. 9 -5.30pm or beyond) between these days, presumably, to offset the fact that the parties may receive decisions and responses quite late in the day,[2] and are also required to file documents at 4pm, which is before the normal close of a working day.
12. The Defence further submits that the phrase "the day of notification of a document or the day of filing of a response or a reply by a participant to that document" is merely to demonstrate the operation of this definition, by differentiating between the day pertaining to the filing of the first document, which is the trigger for the deadline in question, and the day of filing the second document, which is filed in reaction/response to the first document. Thus, when read together with the use of the word only, it is clear that this phrase was intended to clarify rather than limit the definition of 'full days'.
13. In this regard, a request for leave to appeal is in effect responding to a document (the impugned decision). It would have obscured the meaning of the regulation and

[2] In the present case, the Defence received the impugned decision by email at 5.17pm on a Friday evening.

complicated the text if, in the interests of being exhaustive, the drafters had included the word 'requests', because it would have been necessary to differentiate between requests for leave to appeal, leave to reply, and for extensions of time, and general requests for relief, which are not subject to any governing time limit. The same would hold true for observations which are filed in response to a court order, and observations filed *proprio motu.* However, response and reply in their general sense ensure that the relevant categories are included - that is, all filings which are filed in response to a decision or motion.

14. There is no other definition provided in the Statute, Rules or Regulations. Therefore, in the interests of legal certainty (which is crucial for matters pertaining to the deadline for filing documents) the only conclusion can be that Regulation 33(1) is the governing provision.
15. Consistent with the principle of *in dubio pro reo*, the Defence submits that it should not be procedurally penalised as a result of any ambiguity in the Regulations. The Defence therefore submits that it was entitled to rely on a good faith interpretation of the Regulation in question.
16. Finally, the Defence would like to note the inherent inconsistency of the Prosecution position. At paragraph 8, the Prosecution opines that "the 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, in an apparent about turn, at paragraph 10, the Prosecutor seeks an extension of time on the basis that the "Prosecution has not, and could not have within the available time limit, addressed the merits of the Application."
17. The Defence did indeed undertake such stringent efforts to file its request in time, despite its limited resources. The Defence therefore queries why the Prosecutor, which has the benefit of separate appeals and legal advisory sections, was not in a position to do so, or at least, why it does not hold itself to the same strict standard which it purports to impose on the Defence.
18. The Defence also observes that the Prosecution approach is fundamentally unfair to the extent that it is attempting to have 'two bites of the cherry'. Basically, rather than arguing on the procedural aspects and merits of the request in a contemporaneous filing (or relying purely on the strengths of its procedural arguments) the Prosecution appears to be seeking the right to first verify whether its strategy of questioning the validity of the filing on procedural grounds is successful, and than if not, the right to have additional time to adopt a different tact.

3. Relief Sought

19. For the reasons set above, the Defence request the leave of the Honourable Pre-Trial Chamber to reply to the Prosecution's Response.
20. Should leave be granted, the Defence respectfully requests that the Honourable Pre-Trial Chamber rule that the Defence request for leave to appeal was validly filed within the time limit, and reject the Prosecution request for additional time to file a response on the merits of the Defence request.

Defence counsel

Jean FLAMME

Dated this 25th day of September, 2006

At The Hague