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No.: ICC-01/04-01/06
Date: 24 November 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's Further Response

The Office of the Prosecutor

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

Counsel for the Defence

Mr. Jean Flamme
Ms. Véronique Pandanzyla

Introduction

1. On 7 November 2006, the Defence filed its ‘Request to exclude evidence obtained in violation of article 69(7) of the Statute’.¹ The Prosecution orally responded to this request on 9 November² and requested the Chamber to deny the Defence’s request.
2. The Pre-Trial Chamber addressed this issue in its oral decision on the Defence request to postpone the confirmation hearing. It stated in the following terms “the Chamber has decided to examine the matter -- the merits of the matter and thus examine the matter after the confirmation hearing.”³
3. However, after this decision of the Pre-Trial Chamber, the Prosecution filed a Further Response to the Defence Request.⁴
4. The Defence respectfully requests the Pre-Trial Chamber to disregard the Prosecution’s Further Response or in the alternative seeks leave to file a reply to this further response.

Submissions

5. The preliminary position of the Defence is that the Prosecution had already exhausted its right to respond to the Defence. As such, its further response dated 22 November 2006 should be disregarded.
6. Alternatively, under Regulation 24(5) of the Regulations of the Court, participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.
7. A previous request for leave to file a reply filed by the Defence was granted by this Pre-Trial Chamber as it “raises complex issues, and that, accordingly, it is in the interests of the Defence to be in a position to respond to the arguments set out in the Prosecution’s response”.⁵
8. The Defence submits that the same considerations apply to the filing of a reply to this further response of the Prosecution. The issues in relation to the exclusion of a significant amount of evidence relied upon by the Prosecution at the confirmation

¹ ICC-01/04-01/06-674-Conf

² At page 155, the Prosecution stated “The Prosecution is responding to the Defence written submissions orally today, and I orally request to deny the Defence request to exclude Prosecution's evidence.”

³ 10 November 2006, Oral Decision of the Pre-Trial Chamber, Livenote ICC-01-04-01-06-T-32-EN, at page 31.

⁴ Prosecution’s Further Response to the Defence “Request to exclude video evidence obtained in violation of article 69(7) of the Statute”, 22 November 2006, ICC-01/04-01/06-726-Conf, (hereafter Further Response)

⁵ See Decision on the Defence motion seeking leave to file a reply, 29 June 2006, ICC-01-04-01-06-173-tEnglish

hearing are both factually and legally complex. As such the Defence submits that they must be fully argued before the Chamber.

9. Furthermore, the Defence received this further response towards the end of the presentation of the Defence case. As a consequence, the Defence was not able to take into consideration the alternative evidence supporting the Prosecution's factual allegations in deciding which items of Prosecution evidence to focus on.
10. The Prosecution Further Response also includes new factual evidence of which the Defence has not had previous notice.⁶ This evidence was clearly not available to the Defence before making its original request. Therefore, the Defence submits that it is in the interests of justice for the Defence to be permitted to respond to this new evidence in its reply.
11. Finally, the Defence submits that the Prosecution is seeking to circumvent the procedure for introducing evidence at the confirmation hearing. The Defence will not address the merits of this issue in this request but will elaborate further if leave to reply is granted.

Relief sought

12. The Defence therefore respectfully requests the Pre-Trial Chamber to disregard the Prosecution's Further Response. In the alternative, the Defence respectfully seeks the leave of the Pre-Trial Chamber to file a reply to the Prosecution's Further Response.

⁶ See the Declaration attached as confidential annex I to the Prosecution's Further Response, dated 22 November 2006



Defence counsel
Jean FLAMME

Jean Flamme

Dated this 24th day of November, 2006

At The Hague