

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/04-01/06 A 5 A 6**

**Date: 26 March 2013**

**THE APPEALS CHAMBER**

**Before:**

**Judge Erkki Kourula, Presiding Judge  
Judge Sang-Hyun Song  
Judge Sanji Mmasenono Monageng  
Judge Anita Ušacka  
Judge Ekaterina Trendafilova**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO**

**Public document**

**Decision on the “Prosecution’s request to strike Thomas Lubanga’s Reply or,  
alternatively, for leave to respond to its new argument”**

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr Fabricio Guariglia

**Counsel for the Defence**  
Ms Catherine Mabile  
Mr Jean-Marie Biju-Duval

**Legal Representatives of Victims V01**  
Mr Luc Walley  
Mr Franck Mulenda

**Legal Representatives of Victims V02**  
Ms Carine Bapita Buyangandu  
Mr Paul Kabongo Tshibangu  
Mr Joseph Keta Orwinyo

**REGISTRY**

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**Registrar**  
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Thomas Lubanga Dyilo against the decision of Trial Chamber I entitled “Judgment pursuant to Article 74 of the Statute” of 14 March 2012 (ICC-01/04-01/06-2842), and against the decision of Trial Chamber I entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 10 July 2012 (ICC-01/04-01/06-2901),

Having before it the “Prosecution’s request to strike Thomas Lubanga’s Reply or, alternatively, for leave to respond to its new argument” of 6 March 2013 (ICC-01/04-01/06-2992),

*Issues* unanimously the following

## DECISION

The “Prosecution’s request to strike Thomas Lubanga’s Reply or, alternatively, for leave to respond to its new argument” is rejected.

## REASONS

### I. BACKGROUND

1. On 14 March 2012, Trial Chamber I delivered the “Judgment pursuant to Article 74 of the Statute”<sup>1</sup> (hereinafter: “Conviction Decision”) and, on 10 July 2012, the “Decision on Sentence pursuant to Article 76 of the Statute”<sup>2</sup> (hereinafter: “Sentencing Decision”). On 3 December 2012, Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) filed his respective documents in support of his appeals against both the Conviction Decision (A 5) and the Sentencing Decision (A 6).<sup>3</sup>

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<sup>1</sup> ICC-01/04-01/06-2842.

<sup>2</sup> ICC-01/04-01/06-2901.

<sup>3</sup> “Mr Thomas Lubanga’s appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute”, ICC-01/04-01/06-2948-Conf-tENG (A 5) with a public redacted version in French ICC-01/04-01/06-2948-Red (A 5); “Mr Thomas Lubanga’s appellate brief against Trial Chamber I’s 10 July 2012 Decision on Sentence pursuant to Article 76 of the Statute”, ICC-01/04-01/06-2949-tENG (A 6).

2. On 4 February 2013, the Prosecutor filed her responses to Mr Lubanga's documents in support of the appeals<sup>4</sup> (hereinafter: "Responses to the Documents in Support of the Appeals").
3. On 15 February 2013, Mr Lubanga requested leave to file a consolidated reply of no more than 20 pages to the Responses to the Documents in Support of the Appeals,<sup>5</sup> which the Appeals Chamber granted on 21 February 2013<sup>6</sup> (hereinafter: "Order of 21 February 2013").
4. On 28 February 2013, Mr Lubanga filed his reply<sup>7</sup> (hereinafter: "Reply").
5. On 6 March 2013, the Prosecutor filed the "Prosecution's request to strike Thomas Lubanga's Reply or, alternatively, for leave to respond to its new argument"<sup>8</sup> (hereinafter: "Request"). Noting that Mr Lubanga's Reply is 22 pages long, the Prosecutor submits that "[u]nder the applicable Appeals Chamber jurisprudence, when a page limit is set for 20 pages that page limit cannot be exceeded without prior authorisation" and, accordingly, requests that the Appeals Chamber "disallow the reply and require the appellant to file a brief that complies with the authorised page limits".<sup>9</sup> Additionally, the Prosecutor submits that the Reply "contains a new factual argument that was hitherto not raised in Thomas Lubanga's appeal documents" and which "goes beyond the scope of proper reply and also mischaracterizes the record on

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<sup>4</sup> "Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74", ICC-01/04-01/06-2969-Conf (A 5) with a public redacted version ICC-01/04-01/06-2969-Red (A 5); "Prosecution's Response to the 'Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Décision relative à la peine, rendu [sic] en application de l'article 76 du Statut' rendu [sic] par la Chambre de première instance I le 10 juillet 2012", ICC-01/04-01/06-2968-Conf (A 6) with a public redacted version ICC-01/04-01/06-2968-Red (A 6).

<sup>5</sup> "Requête de la Défense aux fins de solliciter l'autorisation de déposer une réplique à la 'Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74' et à la 'Prosecution's Response to the 'Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Décision relative à la peine, rendue en application de l'article 76 du Statut' rendu par la Chambre de première instance I le 10 juillet 2012'", déposées le 4 février 2013", ICC-01/04-01/06-2979 (A 5 A 6), para. 16.

<sup>6</sup> "Order on the filing of a reply under regulation 60 of the Regulations of the Court", 21 February 2013, ICC-01/04-01/06-2982 (A 5 A 6).

<sup>7</sup> "Réplique de la Défense à la « Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74 » et à la « Prosecution's Response to the 'Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la 'Décision relative à la peine, rendue en application de l'article 76 du Statut' rendu par la Chambre de première instance I le 10 juillet 2012' », déposées le 4 février 2013", ICC-01/04-01/06-2989-Conf and ICC-01/04-01/06-2989-Red (A 5 A 6).

<sup>8</sup> ICC-01/04-01/06-2992 (A 5 A 6).

<sup>9</sup> Request, para. 7.

a matter which the Prosecution has not had the chance to address”.<sup>10</sup> Accordingly, the Prosecutor requests that “the Chamber (a) allow the Prosecution to file a brief document, addressing the new factual allegation, which the Chamber can do by virtue of the general authority enshrined in regulation 28 of the Regulations of the Court; or (b) strike the supplementary factual allegations in question” (footnotes omitted).<sup>11</sup>

6. On 12 March 2013, Mr Lubanga filed his response to the Request<sup>12</sup> (hereinafter: “Response to Request”). Referring to two Appeals Chamber decisions in this case,<sup>13</sup> Mr Lubanga submits that only the pages containing the arguments are taken into consideration when calculating the page limit.<sup>14</sup> Mr Lubanga avers that the Reply is actually in compliance with the Appeals Chamber’s Order of 21 February 2013 because his actual submissions are limited to 20 pages, the other two pages being the cover page and the notification page, and because the document does not contain more words than permissible.<sup>15</sup> As regards the Prosecutor’s submission that his Reply contains a new factual argument, Mr Lubanga submits that he was simply replying to the Prosecutor’s new argument raised in her Responses to the Documents in Support of the Appeals.<sup>16</sup> Accordingly, Mr Lubanga requests the Appeals Chamber to reject the Request.<sup>17</sup>

## II. MERITS

7. The Appeals Chamber observes that Mr Lubanga’s Reply is 22 pages in length, as opposed to the 20 pages authorised by the Appeals Chamber in its Order of 21 February 2013.<sup>18</sup> Recent Appeals Chamber jurisprudence has clarified that, contrary to Mr Lubanga’s submissions, the 20 page limit in regulation 37 (1) of the Regulations of the Court has to be read as including both the cover and the

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<sup>10</sup> Request, para. 8.

<sup>11</sup> Request, para. 10.

<sup>12</sup> “Réponse de la Défense à la « Prosecution’s request to strike Thomas Lubanga’s Reply or, alternatively, for leave to respond to its new argument », déposée le 6 mars 2013”, ICC-01/04-01/06-2997 (A 5 A 6).

<sup>13</sup> “Decision on the re-filing of the document in support of the appeal”, 22 July 2008, ICC-01/04-01/06-1445 (OA 13); “Decision on the ‘Observations de la Défense relatives à l’irrecevabilité du « Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July to stay the proceedings for abuse of process », daté du 26 juillet 2010”, 30 July 2010, ICC-01/04-01/06-2543 (OA 18).

<sup>14</sup> Response to Request, para. 4.

<sup>15</sup> Response to Request, paras 5-7.

<sup>16</sup> Response to Request, paras 11-13.

<sup>17</sup> Response to Request, p. 5.

<sup>18</sup> Order of 21 February 2013, para. 8.

notification page.<sup>19</sup> However, the Appeals Chamber notes that regulation 60 of the Regulations of the Court provides for a page limit of 50 pages for a reply and recalls that the page limit set by the Order of 21 February 2013 was based on Mr Lubanga's assessment of the pages he would need to file a consolidated reply. Therefore, the Appeals Chamber does not find it necessary in the interests of justice to request Mr Lubanga to file a reply with 20 pages, but accepts, pursuant to regulation 29 of the Regulations of the Court, Mr Lubanga's Reply in its present form. Accordingly, the Request is rejected on this point.

8. As for the Prosecutor's request to be granted leave to respond to Mr Lubanga's new argument or, in the alternative, that the Appeals Chamber strike the supplementary factual allegations in question, the Appeals Chamber does not consider it necessary, at this juncture, to have further submissions on this point or to strike any part of Mr Lubanga's Reply. If deemed necessary, the Appeals Chamber will invite further submissions at a later stage in the proceedings. Accordingly, the remainder of the Request is also rejected.

Done in both English and French, the English version being authoritative.



**Judge Erkki Kourula**  
**Presiding Judge**

Dated this 26<sup>th</sup> day of March 2013

At The Hague, The Netherlands

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<sup>19</sup> "Decision on Observations submitted by OPCV on behalf of victims", 5 October 2012, ICC-02/11-01/11-256; "Decision on requests related to page limits and reclassification of documents", 16 October 2012, ICC-02/11-01/11-266 (OA 2), para. 8.