

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 February 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

Order

on the filing of a reply under regulation 60 of the Regulations of the Court

Order 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 Mabilie
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

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 “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 relative à l’appel à l’encontre de la ‘Décision relative à la peine, rendue en application de l’article 76 du Statute’ rendue par la Chambre de première instance I le 10 juillet 2012” », déposés le 4 février 2013”, filed on 15 February 2013 (ICC-01/04-01/06-2979),

Issues the following

ORDER

Mr Thomas Lubanga Dyilo shall file, by 16h00 on 28 February 2013, a consolidated reply of no more than 20 pages to the Prosecutor’s responses to his documents in support of the above-mentioned appeals.

REASONS

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

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2901.

of his appeals against both the Conviction Decision (A 5) and the Sentencing Decision (A 6).³

2. On 4 February 2013, the Prosecutor filed her responses to the documents in support of the appeals filed by Mr Lubanga⁴ (hereinafter: "Responses to the Documents in Support of the Appeals"), having requested and been granted an extension of the page limit for her response in relation to the appeal against the Conviction Decision by 20 pages.⁵ In the response to the document in support of the appeal against the Conviction Decision (A 5), she also addressed Mr Lubanga's request of 26 November 2012 for the submission of additional evidence⁶ (hereinafter: "Request for Additional Evidence"), adducing one item of evidence in response.⁷

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 (hereinafter: "Request to Reply").⁸ Mr Lubanga submits that this would allow him to respond to the item of evidence adduced by the Prosecutor, noting that this item was only disclosed to him on that occasion.⁹ Furthermore, he wishes to complete and correct information contained in the Responses to the Documents in

³ "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).

⁴ "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 relative à l'appel à l'encontre de la 'Décision relative à la peine, rendu [sic] en application de l'article 76 du Statute' 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).

⁵ "Decision on the 'Prosecution's Urgent Request for an Extension of the Page Limit'", 1 February 2013, ICC-01/04-01/06-2965 (A 5), para. 9.

⁶ "Defence application to present additional evidence in the appeals against the Judgment pursuant to Article 74 of the Statute and the Decision on sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06-2942-Conf-tENG (A 5 A 6) with a public redacted version in French ICC-01/04-01/06-2942-Red (A 5 A 6).

⁷ Annex 2 to the "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-Anx2 with a public redacted version ICC-01/04-01/06-2969-Anx2-Red; See "Directions under regulation 62 of the regulations of the Court", 21 December 2012, ICC-01/04-01/06-2958 (A 5 A 6), para. 9.

⁸ "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 relative à l'appel à l'encontre de la 'Décision relative à la peine, rendue en application de l'article 76 du Statute' rendue par la Chambre de première instance I le 10 juillet 2012'", déposés le 4 février 2013", ICC-01/04-01/06-2979 (A 5 A 6), para. 16.

⁹ Request to Reply, paras 8-11.

Support of the Appeals.¹⁰ He states that, in the reply, he would not repeat any of his previous submissions.¹¹ Noting the potential impact of the Appeals Chamber's findings in these appeals on him, Mr Lubanga submits that it is "necessary in the interest of justice", as stipulated in regulation 60 of the Regulations of the Court, to grant him leave to file a brief reply.¹²

4. On 20 February 2013, the Prosecutor responded to the Request to Reply, opposing it.¹³ The Prosecutor submits that, based on the Appeals Chamber's jurisprudence in respect of ordering replies in interlocutory appeals,¹⁴ "an applicant must provide adequate and compelling reasons to justify filing additional written argument before the Appeals Chamber".¹⁵ In respect of the additional evidence she adduced, the Prosecutor argues that Mr Lubanga has not shown that additional submissions are needed for the Appeals Chamber to assess the probative value of this evidence and submits that the Appeals Chamber can, in any case, make such an assessment without having received responsive arguments from Mr Lubanga.¹⁶ In respect of completing and correcting certain information contained in the Responses to the Documents in Support of the Appeals, the Prosecutor submits that the Request to Reply is "vague and general" in that it does not identify which arguments it seeks to address, thus providing an "insufficient basis to conclude that a reply will be necessary or even helpful".¹⁷

5. Regulation 60 of the Regulations of the Court provides that:

(1) Whenever the Appeals Chamber considers it necessary in the interests of justice, it may order the appellant to file a reply within such time as it may specify in its order.

(2) Any reply filed in accordance with sub-regulation 1 shall not exceed 50 pages. To the extent possible, it shall be set out and numbered in the same order as in the documents described in regulations 58 and 59.

¹⁰ Request to Reply, paras 12-13.

¹¹ Request to Reply, para. 14.

¹² Request to Reply, para. 15.

¹³ "Prosecution's Response to Thomas Lubanga's Request to File a Reply", ICC-01/04-01/06-2980 (A 5 A 6) (hereinafter: "Response to Request to Reply"), para. 12.

¹⁴ See Response to Request to Reply, para. 8.

¹⁵ Response to Request to Reply, para. 8.

¹⁶ Response to Request to Reply, para. 10.


¹⁷ Response to Request to Reply, para. 11.

6. The Appeals Chamber notes that ordering the filing of a reply lies within its discretion. Although not specifically mentioned in regulation 60 of the Regulations of the Court, an appellant may request, and accordingly, trigger the powers of the Appeals Chamber to order the filing of a reply under said regulation.¹⁸

7. In the specific circumstances, and, in particular, given the potential impact on Mr Lubanga, the Appeals Chamber considers it in the interests of justice to order him to file a consolidated reply to the Responses to the Documents in Support of the Appeals. In this regard, the Appeals Chamber recalls that the Prosecutor has adduced evidence in response to the Request for Additional Evidence, to which Mr Lubanga should be given an opportunity to respond. The Appeals Chamber further notes that, with respect to the substantive arguments made in the Responses to the Documents in Support of the Appeals, Mr Lubanga wishes to correct alleged inaccuracies and provide additional submissions. As to the Prosecutor's argument that Mr Lubanga did not provide sufficient justification for the filing of a reply and that by granting Mr Lubanga's request, the filing of a reply would become an automatic right, the Appeals Chamber notes that the ordering of a reply is always discretionary and should be decided on a case-by-case basis. The Appeals Chamber also recalls that the present proceedings constitute the first appeal under article 81 (1) (b) and (2) of the Statute, and that it has granted extensions of the page limits to the participants on three occasions.¹⁹ Ordering the filing of a reply is consistent with this approach.

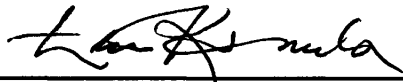
8. As stated by Mr Lubanga, the reply must not repeat submissions made previously and must not exceed 20 pages.

¹⁸ See *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168 (OA 3), para. 20; *Prosecutor v. Germain Katanga*, "Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-476 (OA 2), para. 18; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the 'Prosecution's Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused'", 13 October 2008, ICC-01/04-01/06-1476 (OA 12 OA 13), para. 3.

¹⁹ See "Decision on Mr Lubanga's request for an extension of the page limit", 28 November 2012, ICC-01/04-01/06-2946 (A 5); "Directions under regulation 62 of the Regulations of the Court", 21 December 2012, ICC-01/04-01/06-2958 (A 5 A 6), in which the Appeals Chamber, *inter alia*, extended the page limit by 25 pages for each of the Prosecutor's responses to Mr Lubanga's documents in support of his appeals and extended the page limit by 10 pages for the consolidated observations on Mr Lubanga's documents in support of the appeals of the Legal Representatives of Victims V01 and Victims V02; "Decision on the 'Prosecution's Urgent Request for an Extension of the Page Limit'", 1 February 2013, ICC-01/04-01/06-2965 (A 5). 

9. The Appeals Chamber notes the “Requête de la Défense aux fins de récusation de M. le juge Sang-Hyun Song”, which was filed before the Presidency on 20 February 2013²⁰ and upon which no decision has yet been taken. The Appeals Chamber does not consider that this filing should prevent it from issuing the present order.

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



Judge Erkki Kourula
Presiding Judge

Dated this 21st day of February 2013

At The Hague, The Netherlands

²⁰ ICC-01/04-01/06-2979.