

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 December 2012

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

Directions

under regulation 62 of the Regulations of the Court

Directions 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

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

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

Having before it the "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*" of 26 November 2012 (ICC-01/04-01/06-2942-Conf-tENG),

Issues the following

DIRECTIONS

- (1) Pursuant to regulation 62 (2) (b) of the Regulations of the Court, the Prosecutor may set out arguments on the "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*" and refer to any evidence to be adduced in response in her responses to Mr Thomas Lubanga Dyilo's documents in support of his appeals (A 5 and A 6). The page limit for the Prosecutor's responses to Mr Thomas Lubanga Dyilo's documents in support of his appeals is extended by 25 pages.
- (2) The victims who participate in the appeals proceedings may present their views and concerns in respect of their personal interests affected by the issues raised in the "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*" in their consolidated observations on the documents in support of the appeals, which, pursuant to the "Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions" of 13 December 2012, must be filed by 16h00 on 4 February 2013. The page

limit for their consolidated observations and for Mr Thomas Lubanga Dyilo's and the Prosecutor's responses thereto is extended by 10 pages each.

REASONS

1. In the case of *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I (hereinafter: "Trial Chamber") rendered, on 14 March 2012, 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 October 2012, Mr Thomas Lubanga Dyilo (hereinafter: "Mr Lubanga") brought an appeal against both the Conviction and the Sentencing Decisions.³

2. On 26 November 2012, Mr Lubanga filed an application, pursuant to regulation 62 of the Regulations of the Court, to present additional evidence in relation to his appeals against the Conviction and the Sentencing Decisions⁴ (hereinafter: "Application"). Mr Lubanga requests the Appeals Chamber, first, to take into account, in the appeal against the Conviction Decision, evidence that was presented before the Trial Chamber in connection with the sentencing proceedings,⁵ and, second, to admit additional evidence in relation to his appeals against both the Conviction and the Sentencing Decisions.⁶

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2901.

³ "Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I's Judgment pursuant to Article 74 of the Statute of 14 March 2012", ICC-01/04-01/06-2934-t-ENG (A 5); "Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I's Judgment pursuant to Article 74 of the Statute of 14 March 2012", ICC-01/04-01/06-2935-t-ENG (A 6).

⁴ "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*" of 26 November 2012, ICC-01/04-01/06-2942-Conf-t-ENG; public redacted version filed on 4 December 2012, ICC-01/04-01/06-2942-Red.

⁵ Application, p. 17, listing (1) the Transcript of the examination of D-0040 (ICC-01/04-01/06-T-360-CONF-FRA) or that this witness appears before the Appeals Chamber if the Chamber considers it more appropriate; (2) D-0040's voting card (Annex 1); (3) D-0040's Diplôme d'état (Annex 2); and (4) Transcript of the examination of D-0039 (ICC-01/04-01/06-T-360-CONF-FRA).

⁶ Application, pp. 17-18, listing (1) an examination of D-0041 or the filing of the written statement of this witness (Annex 3); (2) D-0041's voting card (Annex 4); (3) a letter dated 29 June 2011 relating to witness P-0297 (Annex 5); (4) a series of photographs relating to witness P-0297 (Annex 6); (5) a list

3. On 28 November 2012, the Prosecutor filed a request for instructions by the Appeals Chamber pursuant to regulation 62 (2) of the Regulations of the Court⁷ (hereinafter: “Request for Instructions”). In the Prosecutor’s view, the Application does not sufficiently explain why the additional items of evidence could not be adduced before the Trial Chamber.⁸ She proposes that, because of the late filing of the Application,⁹ and “in the interest of the efficient conduct of this appeal”,¹⁰ the Appeals Chamber should “allow the Prosecution to respond to the Defence Application within 21 days, and resolve the issue of admissibility before the [Prosecutor’s] responsive brief is due to be filed on 4 February 2013”.¹¹ The Prosecutor further submits that she would be opposed to the Appeals Chamber proceeding pursuant to regulation 62 (2) (b) of the Regulations of the Court, because “[s]uch a process [...] would be inefficient and wasteful of prosecutorial and judicial resources. It would also complicate the appeal [...]”.¹² In particular, she notes that if the Appeals Chamber were to rule on the admissibility of the additional evidence only in the final decision on appeal, she would have to respond to Mr Lubanga’s arguments that are based on evidence that is not part of the record, while arguing, at the same time, that the evidence is inadmissible, and that this would also deny her “a fair opportunity to respond, in turn, with [her] own additional evidence”.¹³

4. On 3 December 2012, Mr Lubanga filed the documents in support of his appeals against the Conviction and the Sentencing Decisions.¹⁴

of FPLC names as of 11/12/2004 (Annex 7); and (6) correspondence between the Office of the Prosecutor and the Defence on disclosure of the list of FPLC names (Annex 8).

⁷ “Prosecution’s Request for Instructions under Regulation 62 of the Regulations of the Court”, ICC-01/04-01/06-2947-Conf.

⁸ Request for Instructions, para. 5, stating that the Prosecutor will elaborate that argument in her response to the Application.

⁹ Request for Instructions, para. 6.

¹⁰ Request for Instructions, para. 7.

¹¹ Request for Instructions, para. 11.

¹² Request for Instructions, para. 10.

¹³ Request for Instructions, para. 10.

¹⁴ See “Mémoire de la Défense de M. Thomas Lubanga relatif à l’appel à l’encontre du « *Judgement rendu en application de l’Article 74 du Statut* » rendu le 14 mars 2012”, 3 December 2012, ICC-01/04-01/06-2948-Conf (A 5); “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* » rendue par la Chambre de première instance I le 10 juillet 2012”, 3 December 2012, ICC-01/04-01/06-2949 (A 6).

5. At the outset, the Appeals Chamber notes that the Application complies with the formal requirements of regulation 62 (1) (a) and (b) of the Regulations of the Court because it sets out the evidence to be presented, the ground of appeal to which it relates and the reasons why it was not adduced before the Trial Chamber.

6. The Appeals Chamber recalls that regulation 62 (2) of the Regulations of the Court provides that:

The Appeals Chamber may:

(a) Decide to first rule on the admissibility of the additional evidence, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to address the issue of admissibility of the evidence in his or her response, and to adduce any evidence in response only after a decision on the admissibility of that evidence has been issued by the Appeals Chamber; or

(b) Decide to rule on the admissibility of the additional evidence jointly with the other issues raised in the appeal, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to both file a response setting out arguments on that application and to adduce any evidence in response.

7. The Appeals Chamber notes that under this provision, it has discretion as to which of the two procedures in relation to additional evidence it chooses. In this regard, the Appeals Chamber finds that it would be premature to take any decision on the Application before the Prosecutor has filed her responses under regulation 59 of the Regulations of the Court to Mr Lubanga's documents in support of his appeals¹⁵ against the Conviction and the Sentencing Decisions. This is because the Appeals Chamber considers it appropriate to gauge the relevance and importance of the proposed additional evidence only after having received and properly considered the Prosecutor's responses to Mr Lubanga's grounds of appeal.

8. In the case at hand, and without prejudice to its ruling on the admissibility of the proposed additional evidence, the Appeals Chamber deems it appropriate to act pursuant to regulation 62 (2) (b) of the Regulations of the Court, namely, to rule on the admissibility of the proposed additional evidence jointly with the other issues raised in these appeals. The Appeals Chamber does not consider that proceeding under this provision would be inefficient or delay the proceedings, as the Prosecutor

¹⁵ See paragraph 4.

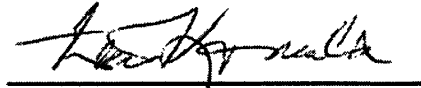
suggests. On the contrary, the Appeals Chamber finds that it is more efficient to hear the Prosecutor's submissions also in relation to those arguments of Mr Lubanga that are based on the proposed additional evidence, even if the Appeals Chamber has not yet ruled on the admissibility of that evidence. The Appeals Chamber notes in this regard that the amount of additional evidence proposed by Mr Lubanga is relatively limited. The Appeals Chamber also notes that proceeding in this way does not exclude, if necessary, the making of interlocutory decisions in relation to the proposed additional evidence.

9. Therefore, the Appeals Chamber directs the Prosecutor to set out her arguments on the Application, as well as references to any evidence she proposes to adduce in response, in her responses to Mr Thomas Lubanga Dyilo's documents in support of his appeals against the Conviction and Sentencing Decisions, to be filed pursuant to regulation 59 of the Regulations of the Court. A list of any additional evidence to be adduced in response, as well as the evidentiary material, shall be attached to those responses. To allow the Prosecutor to set out her arguments on the Application properly, the Appeals Chamber extends the page limit for the responses to the documents in support of the appeals by 25 pages each.

10. The Appeals Chamber recalls its "Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions"¹⁶ of 13 December 2012. In that decision, it *inter alia* directed that the Legal Representatives of Victims V01 and those of Victims V02 may file, by 4 February 2013, consolidated observations on the documents in support of the appeals. The Appeals Chamber directs that the respective consolidated observations may also set out the victims' views and concerns in respect of their personal interests affected by the issues raised in the Application. For that reason, the Appeals Chamber extends the page limit for the observations by 10 pages each. The page limit for Mr Lubanga's and the Prosecutor's responses to these observations is equally extended by 10 pages each.

¹⁶ ICC-01/04-01/06-2951 (A 4 A 5 A 6).

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



Judge Erkki Kourula
Presiding Judge

Dated this 21st day of December 2012

At The Hague, The Netherlands