

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-01/06**

Date: **28 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

Prosecution's Response to the Observations of Legal Representatives Group V01

Source: Office of the Prosecutor

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

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REGISTRY

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Procedural History

1. On 14 March 2012, the Trial Chamber convicted the Appellant of three counts of war crimes.¹ On 10 July 2012, the Trial Chamber rendered a decision on sentence ("Sentencing Decision").² Both parties filed notices of appeal.³
2. On 26 November 2012, the Appellant submitted a request to present additional evidence for the first time on appeal.⁴ On 3 December 2012, the Appellant filed documents in support of both his appeal against conviction⁵ and sentence⁶.
3. On 13 December 2012, the Appeals Chamber ruled that only those victims who participated at trial and whose right to participate was not withdrawn by the Trial Chamber may submit observations on the appeals against conviction and sentence - to which submissions the Prosecution and Thomas Lubanga were permitted to file responses of no more than 100 pages each by 4 April 2013.⁷
4. On 4 February 2013, the Prosecution filed its response to the Appellant's appeals against conviction⁸ and sentence⁹ and addressed his proffered new evidence.
5. On 4 February 2013, legal representative teams V01 and V02 each filed consolidated observations on the appeals against conviction and sentence.¹⁰
6. On 15 February 2013, the Appellant requested permission to file a reply to the Prosecution's responses to his appeals,¹¹ which the Chamber granted on 21 February 2013.¹² On 28 February 2013, the Appellant filed his reply.¹³

¹ ICC-01/04-01/06-2842.

² ICC-01/04-01/06-2901.

³ ICC-01/04-01/06-2933 OA4; ICC-01/04-01/06-2934 OA5; ICC-01/04-01/06-2935 OA6.

⁴ ICC-01/04-01/06-2942-Conf.

⁵ ICC-01/04-01/06-2948-Conf.

⁶ Sentencing Appeal Brief.

⁷ ICC-01/04-01/06-2951.

⁸ ICC-01/04-01/06-2969-Conf.

⁹ ICC-01/04-01/06-2968-Conf.

¹⁰ ICC-01/04-01/06-2966 and ICC-01/04-01/06-2976-Conf-Corr (corrigendum filed 7 February 2013).

¹¹ ICC-01/04-01/06-2979.

¹² ICC-01/04-01/06-2982.

¹³ ICC-01/04-01/06-2989-Conf and ICC-01/04-01/06-2989-Red.

7. The Prosecution hereby files its response to the submissions of legal representatives group V01.

Prosecution's Observations

8. The Prosecution presents two principal observations to the submissions of the legal representatives group V01.
9. First, in paragraph 106 of its submissions, legal representatives group V01 question whether "foreseeability" is a criterion for linking resulting harm to the underlying crime in determining an appropriate sentence, as it is not found in the Court's basic texts. They argue that indirect consequences of a crime, or consequences that the convicted person did not necessarily foresee, could also be considered.
10. The Prosecution supports an application of the Statute and Rules of Procedure and Evidence that gives a Chamber the broadest discretion in assessing the harm caused to victims of crimes under the Statute for the purposes of imposing a fitting sentence against convicted persons. In its document in support of appeal, the Prosecution advanced the test set out in the existing international jurisprudence, principally from the ICTY and SCSL, according to which harm can be treated as an aggravating factor only if it is a direct and foreseeable consequence of the crime.¹⁴ The Prosecution asserts that the Trial Chamber erred in additionally requiring that the convicted person must intend those consequences or know that they would occur in the ordinary course of events in order for them to be considered in aggravation of the sentence.
11. Second, in paragraph 108 of its observations on Thomas Lubanga's appeal against sentence, legal representatives group V01 argues that the Trial Chamber did not err in considering as part of gravity - or as aggravating and mitigating

¹⁴ ICC-01/04-01/06-2950, paras.73-75.

circumstances - factors (harm, conduct, acts) that are not themselves crimes under the jurisdiction of the Court.

12. The Prosecution agrees with this observation and notes that in his document in support of his appeal against sentence,¹⁵ Thomas Lubanga contends that the Trial Chamber erred in holding that it can admit evidence at the sentencing stage that exceeds the facts and circumstances of the Confirmation Decision (such as sexual violence) and because Thomas Lubanga had not been charged with this crime.¹⁶ None of the Court's basic texts restricts the factors that a Trial Chamber can consider in reaching an appropriate sentence to the facts and circumstances in the Confirmation Decision.
13. The Trial Chamber is perfectly entitled to consider conduct not expressly addressed in the Confirmation Decision when determining an appropriate sentence. Article 76(2) explicitly empowers a Chamber to consider "additional" evidence or submissions not presented at trial, at a subsequent sentencing hearing.¹⁷ Rule 145 refers to aggravating factors and circumstances that clearly are not an integral part of the charges, such as prior criminal convictions for crimes under the Court's jurisdiction or crimes of a similar nature and the effect of the crime on a victim and his or her family.¹⁸

¹⁵ ICC-01/04-01/06-2949-tENG, paras.97-108.

¹⁶ ICC-01/04-01/06-2901, para.29.

¹⁷ The drafting history of Article 76 reveals that the drafters envisaged that *additional*, relevant evidence could be considered for sentencing purposes. *See e.g.* 1996 Report of the preparatory Committee, U.N.Doc A/51/22 (1996) Vol.1, Vol.11. Draft Article 46, Sentencing: "...the Trial Chamber shall hold a further hearing ...to hear any evidence relevant to the sentence." *See also* 1998 Report of the Preparatory Committee, Draft Statute, A/Conf.183/2/Add.1, draft Article 74, Sentencing: "...the Trial Chamber may...hold a further hearing to hear any additional evidence or submissions relevant to sentence, in accordance with the rules."

¹⁸ *See* Archbold, *International Criminal Courts, Practice, Procedure and Evidence*, Thomson Sweet & Maxwell, 2003, ("Archbold"), p.490. The physical and mental consequences of a crime upon its victims constitute an aggravating circumstance. Citing rule 145(1)(c) of the Rules. Also citing *Prosecutor v Delalic et al.*, Judgement, 20 February 2001, paras.1226, 1260, 1273; *Prosecutor v Krnojelac*, Judgement, 15 March 2002, para.512: the Trial Chamber held that the consequences of the crime upon the victim who is directly injured is always a relevant consideration in assessing sentence.

14. Rule 145(2)(b) further enables a Chamber to consider as aggravating circumstances the commission of the crime where the victim is particularly defenseless,¹⁹ as well as the fact that the crime was committed with particular cruelty.²⁰ These factors have also been recognized by international criminal tribunals as appropriate for determining sentence.²¹ They are not dependent on the facts and circumstances of the charging document. As the ICTY Appeals Chamber confirmed in *Prosecutor v Jelusic*, a Trial Chamber has a “broad discretion as to which factors it may consider in sentencing and the weight to attribute to them”.²²
15. Nor does considering the harm suffered by victims - such as sexual violence and cruel treatment - as aggravating factors or as part of the gravity of the crimes violate the Appellant’s rights under Article 67 of the Statute. These factors must be linked to the charges, in that they are directly connected to the crimes charged and constitute foreseeable consequences, but they do not need to be explicitly described as an integral part of the charges.
16. Critically, the limitations of Article 74(2), in particular that “[t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges”, do not apply to sentencing decisions.²³ A plain textual reading of Article 74 makes it clear that it sets out the requirements for a

¹⁹ Rule 145(2)(b)(iii).

²⁰ Rule 145(2)(b)(iv).

²¹See Archbold, p.489. As regards cruelty as an aggravating factor, Archbold cites e.g. *Prosecutor v Blaskic*, Judgement, 3 March 1998, para.783, in which the ICTY Trial Chamber declared that the ‘extreme cruelty of the beatings, the sadism with which they were inflicted and the especial humiliation which ensued’, were significant considerations in determining sentence. As regards vulnerability of the victim, Archbold observes: “the status of the victims as civilians, women and children, may constitute an aggravating factor.” Citing e.g. *Prosecutor v Furndzija*, Judgment, 10 December 1998, para.283; *Prosecutor v Kunurac*, Judgement, 22 February 2001, para.879, where the Trial Chamber considered the young age of the victim to be an aggravating factor.

²²*Prosecutor v Jelusic*, Judgement, 5 July 2001, para.100. See also *Prosecutor v Kambanda*, para.30: “as far as the individualisation of penalties is concerned, the judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and the Rules...their unfettered discretion to evaluate the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent”.

²³ICC-01/04-01/06-2949, paras.97-108.

decision in relation to conviction or acquittal,²⁴ and does not relate to the decision on sentencing, the parameters of which are dealt with by Articles 76 and 78 and Rule 145 of the Rules.

17. Finally, and as stressed by the Trial Chamber, the Appellant's rights were protected in this process, since he was given a reasonable opportunity to address the evidence.²⁵ He had ample opportunity in written submissions and during the sentencing hearing to address Prosecution evidence and arguments on the aggravating nature of sexual violence and cruel treatment of children within the UPC/FPLC.²⁶ He was also on notice since January 2008 that the parties and the legal representatives of victims could adduce evidence during the trial that related to sentencing,²⁷ and he had every opportunity to challenge that evidence during trial.



Fatou Bensouda
Prosecutor

Dated this 28th day of March 2013
At The Hague, The Netherlands

²⁴ See e.g. Triffterer, "Article 74", in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Second Edition, Beck.Hart.Nomos, 2008, p.1391: "The purpose of regulations like article 74 in international and national law is to establish certain corner stones as the indispensable requirements for the final decision."

²⁵ Sentencing Decision, para.29.

²⁶ See e.g. ICC-01/04-01/06-2891-Conf-Exp, paras.43-85.

²⁷ T-99-ENG, p.39, line 11-p.40, line 4; See also IC-01/04-01/06-1140, para.32 and ICC-01/04-01/06-2360, para.38.