

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 June 2014

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 CONGO

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

Public with Confidential Annex A

**Public redacted Version of “Prosecution’s Response to [REDACTED]
Observations (ICC-01/04-01/06-3059 A5 A6)”, 31 January 2014, ICC-01/04-01/06-
3061-Conf**

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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Other

Submissions

1. On 24 January 2014, the legal representatives of the groups of [REDACTED] and V02 provided their observations to Mr Thomas Lubanga's ("the Appellant") request to admit new evidence on appeal and to add a new ground of appeal ("Request").¹
2. The Prosecution's response is limited to [REDACTED] as these raise points that, in the Prosecution's view, require further submissions by the Prosecution. [REDACTED].² [REDACTED].³
3. The Prosecution disagrees with this submission. Although Regulation 62 is framed in general terms, the Appeals Chamber should adopt a restrictive interpretation of this provision in light of the corrective nature of the appeal proceedings⁴ and the principle of finality.⁵ Restrictive criteria limiting the admission of evidence on appeal need to be set out; otherwise, to permit the liberal admission of such material would amount to a fresh trial.⁶
4. As the Prosecution has already submitted,⁷ it is perfectly appropriate that the Appeals Chamber's interpretation and application of Regulation 62 be guided by the requirements set out in ICTY/R Rule 115, which governs the admission of

¹ [REDACTED] and ICC-01/04-01/06-3060-Conf A5 A6 (Victims' 02 Observations).

² [REDACTED]

³ [REDACTED]

⁴ See, *inter alia*, ICC-02/05-03/09-295 OA2, para.20.

⁵ See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para.35, emphasizing the importance of the "principle of finality" (hereinafter, "Tadic Decision"). See also *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Appeals Chamber, Decision, 31 May 2000, paras. 40-41. The Prosecution has already submitted that the exception to the principle of finality, namely that a miscarriage of justice would occur unless the evidence is admitted, is not present in the instant case. On the principle of finality, albeit in another context, see : *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Trial Chamber II, Judgement and Sentence, 30 September 2011, para. 27 (citing *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (e)", 15 June 2004, at para. 7): "The Tribunal has an interest in the certainty and finality of its decisions, in order that parties may rely on its decisions, without fear that they will be easily altered."

⁶ Tadic Decision, para.42. The Appeals Chamber has already rejected new evidence on appeal because the applicant failed to establish that the evidence was unavailable during the first instance proceedings. ICC-01/05-01/08-962 OA3, para.32.

⁷ ICC-01/04-01/06-2969-Red A5, paras.38-46; ICC-01/04-01/06-3058-Conf A5 A6, paras.13-15.

evidence on appeal in those *ad hoc* tribunals, and related jurisprudence.⁸ Notwithstanding the differences between the current versions of the two provisions, the first version of ICTY Rule 115 was framed in very general terms, not unlike Regulation 62.⁹ However, this did not prevent the ICTY Appeals Chamber from developing, in its first decision on additional evidence, the corrective requirements that have governed the admissibility of such evidence in the ICTY/R appellate proceedings since.¹⁰ Subsequent amendments to the rules simply codified the criteria previously set out by the Appeals Chamber.¹¹

5. [REDACTED].¹² As repeatedly noted by the ICTY Appeals Chamber, for additional evidence to be admitted on appeal, the applicant must demonstrate that the evidence “was not available to him at trial in any form, or discoverable through the exercise of due diligence”.¹³ This requirement is not met in the instant

⁸ On the Appeals Chamber’s authority to consider the practice and jurisprudence of *ad hoc* tribunals, see ICC-01/04-01/06-1433 OA11, para.78; ICC-01/09-02/11-425 OA4, para.37 and ICC-01/09-01/11-414 OA3 OA4, para.31.

⁹ “(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing. (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.” The first version of the ICTR Rule 115 contained the same wording.

¹⁰ See Tadic Decision.

¹¹ The current version of ICTY Rule 115 was brought in as part of the 12 July 2002 amendments (with a difference in the time limit in sub-section A): “(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material. (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117. (C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing. (D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.” On 27 May 2003, the Thirteenth Plenary Session of the ICTR amended Rule 115 to provide an almost identical version to the ICTY provision.

¹² [REDACTED].

¹³ *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Decision on Vujadin Popović’s motion for admission of additional evidence on appeal pursuant to Rule 115, 20 October 2011 para.7 and authorities cited in fn.13 (“Popović Decision”); *Prosecutor v. Šainović et al.*, Case No. IT-05-87A, Appeals Chamber, Decision on Sreten Lukić’s motions for admission of additional evidence on appeal and for extension of word limit, Nebojša Pavković’s motions to join and to call Dick Marty as a witness before the Appeals Chamber, and Prosecution’s motion to strike, 12 May 2011, para.7 and authorities cited in fn.16 (“Šainović Decision”).

case.¹⁴ Counsel acting with due diligence could have obtained the information contained in those documents at trial by simply asking the Appellant or enquiring with other available sources who would know or have access to such information, such as the Appellant's investigator at the time of trial, a high-ranking UPC member himself, and witnesses D-0011 and D-0019, who regularly visited the Appellant and claimed to know the age of his bodyguards. Moreover, the Appellant certainly had access to UPC and FPLC documents, as he tendered several at trial, which were not in the possession of the Prosecution.¹⁵

6. The ICTY Appeals Chamber has further noted that an applicant is "expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question".¹⁶ The Appellant has also failed to discharge this burden. At trial, he never indicated that he was not aware of the composition of his guard or that he had difficulties accessing relevant documentation. To the contrary, in the cross-examination of P-0299, a member of the Appellant's guard, when the Presiding Judge required the Appellant to put to that witness whether he was or not part of his guard,¹⁷ he did just so, and challenged the fact that the witness belonged to his guard at the time of the charges. At no time did he indicate that he was not aware of such information.¹⁸
7. In any event, and as already argued, the remaining criteria that the Prosecution deems determinative to guide the admission of evidence on appeal are not met: even assuming that the evidence is credible, the information enclosed in the two documents is not relevant to a material finding, and could not have an impact on the Judgment such as to render the verdict unsafe.¹⁹

¹⁴ See ICC-01/04-01/06-3058-Conf A5 A6, paras.23-26.

¹⁵ See DRC-D01-0003-2176 (EVD-D01-0109), DRC-D01-0003-5894 (EVD-D01-01096), DRC-D01-0003-5896 (EVD-D01-01097), DRC-D01-0003-5900 (EVD-D01-01098).

¹⁶ Popovic Decision, para.7 and authorities cited in fn.15; Sainovic Decision, para.7 and authorities cited in fn.18. The ICTR Appeals Chamber has established the same requirement see: *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006, para.5.

¹⁷ ICC-01/04-01/06-T-122-CONF-ENG CT, page 42, line 16 to page 43 line 3; page 44, lines 2 to 20.

¹⁸ ICC-01/04-01/06-T-122-CONF-ENG CT, page 45, lines 7-20. See page 49, line 5 to page 50, line 15.

¹⁹ ICC-01/04-01/06-3058-Conf A5 A6, paras.33-35.

Confidential Filing

8. The Prosecution files this document confidentially because it responds to a document with the same level of confidentiality.

Relief Sought

9. For all the above-stated reasons, the Prosecution requests that its submissions in response to the [REDACTED] Observations be considered by the Appeals Chamber.



Fatou Bensouda, Prosecutor

Dated this 10th June 2014

At The Hague, The Netherlands