



Original: **French**

No: **ICC-01/04-01/06**
Date: **24 January 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 THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public document

**Observations of the V02 team of Legal Representatives of Victims pursuant to the
Appeals Chamber's decision ICC-01/04-01/06-3057 RH A5 A6**

Source: V02 team of Legal Representatives of Victims

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

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I - PROCEDURAL HISTORY

1. By application ICC-01/04-01/06-3056-conf-Anxs 1-6 A5 A6 for the admission of additional evidence,¹ the Appellant, Lubanga, seeks to add two documents as well as four e-mails exchanged between the Office of the Prosecutor and counsel for the co-accused, Bosco Ntaganda.
2. Both documents were disclosed by the Office of the Prosecutor to counsel for Bosco Ntaganda. The Counsel was formerly a member of the Appellant's defence team.
3. The Appellant contends that the two documents should have been disclosed to him during the trial phase pursuant to article 54(1) of the Statute, and that, in failing to do so, the Prosecutor breached her disclosure obligation and infringed the Appellant's right to investigate.
4. As to the merits, the Appellant argues that the two documents would suggest that there were children under the age of 15 among Mr Lubanga's bodyguards.
5. The Appellant recalls that on several occasions, the Trial Chamber found that he was guilty based on the fact that children under the age of 15 were among his bodyguards. Yet, in his previous submissions, the Appellant had demonstrated that the Trial Chamber erred in fact.²
6. The Appellant challenges the Trial Chamber's findings in their entirety because the core charges are based on the fact that children under the age of 15 appear on the list of Lubanga's bodyguards. The Appellant contends that it will be fair for the Appeals Chamber to adjudicate and rule that no conclusion should be drawn

¹ *Requête de la Défense aux fins d'admission d'éléments de preuve supplémentaires dans le cadre des appels à l'encontre du «Jugement rendu en application de l'Article 74 du Statut» et de la «Décision relative à la peine, rendue en application de l'article 76 du Statut» et aux fins de présentation d'un moyen nouveau au soutien de ces appels.* ICC-01/04-01/3056-Conf. 23-12-2013.

² ICC-01/04-01/3056-Conf, para. 39.

from the evidence presented by the Prosecutor to establish the presence of children under the age of 15 amongst Lubanga's guards.³

7. In Prosecution filing ICC-01/04-01/06-3058-Conf EC A5 A6,⁴ the Prosecutor dwells on the provisions of regulation 62 of the Regulations of the Court, which require that such an application must set out (a) the precise ground of appeal to which the evidence relates, and (b) the reasons why the evidence was not adduced before the Trial Chamber.
8. The Prosecutor submits that, a new ground of appeal need not be analogous to a new trial with new grounds. Under existing international practice, additional evidence is admissible in three circumstances:⁵
 - ✓ Unavailability of the evidence at trial and its particular quality;
 - ✓ It is relevant and credible;
 - ✓ It could have been a decisive factor in the decision.
9. The Prosecutor concludes that there was no violation of article 54(1)(a) of the Statute because, "the composition of the presidential guard was available to counsel at trial" and "the two documents do not affect the chamber's findings regarding the presence of children under 15 in presidential guard".

II - LEGAL ARGUMENTS

10. The arguments of the Defence are based on two legal grounds namely: a violation of the rights of the defence resulting from non-disclosure of evidence; and the invalidation of the Trial Chamber's findings which are grounded on such undisclosed evidence.
11. As to the relevance of the two disclosed documents pertaining to the age of some of Lubanga's bodyguards, the V02 team of Legal Representatives of Victims holds

³ ICC-01/04-01/3056-Conf, para. 54.

⁴ 'Prosecution's Response to the "Requête de la Défense aux fins d'admission d'éléments de preuve supplémentaires dans le cadre des appels à l'encontre du « Jugement rendu en application de l'Article 74 du Statut » et de la « Décision relative à la peine, rendue en application de l'article 76 du Statut » et aux fins de présentation d'un moyen nouveau au soutien de ces appels"', ICC-01/04-01/3058-Conf. 17-01-2014.

⁵ ICC-01/04-01/3058-Conf, para. 14.

the view that the interests of the victims it represents are affected as the Appellant's application for invalidation of the Trial Chamber's findings affects his guilt, on which the fate of the victims depends.

12. The V02 team submits that the non-disclosure by the Office of the Prosecutor, if established, is insufficient to justify invalidation of the Trial Chamber's findings;
13. In fact, the existence of children under the age of 15 in the UPC cannot be restricted to Thomas Lubanga Dyilo's bodyguard.

FOR THESE REASONS,

May it please the Appeals Chamber to:

- Rule on the admissibility of the Defence application;
- Declare the application unfounded.

Dated this 24 January 2014

In Kinshasa, Democratic Republic of the Congo

[signed]

Joseph Keta Orwinyo

[signed]

Paul Kabongo Tshibangu

[signed]

Carine Bapita Buyangandu

Legal Representatives of Victims