

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-01/06
Date: 3 February 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

Defence reply pursuant to the *Decision and order in relation to the request of 23 December 2013 filed by Mr Thomas Lubanga Dyilo, dated 13 January 2014*

Source: Defence team for Mr Thomas Lubanga Dyilo

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

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DEFENCE REPLY

1. On 23 December 2013, the Defence for Mr Lubanga confidentially filed its “Defence application for the admission of additional evidence within the context of 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 for the submission of a new ground supporting these appeals” (“the Application”).¹ The public version of the Application was filed on 7 January 2014.²
2. The Defence hereby replies to the Prosecution’s Response³ of 17 January 2014, the responses filed by the Legal Representatives of the V01 and V02 groups of victims on 24 January 2014,⁴ and the Prosecution’s Reply filed on 31 January 2014,⁵ pursuant to the Appeals Chamber’s order.⁶

1. The basis for the 23 December 2013 Defence Application

3. It is evident from the Defence Application that, on the one hand, it is seeking not merely the presentation of additional evidence (regulation 62) but also variation of the grounds of appeal (regulation 61) and that, on the other hand, the conditions set out under regulation 61 of the Regulations of the Court are met in the instant case.
4. That regulation 61 is not expressly cited in the Application is procedurally immaterial.

¹ ICC-01/04-01/06-3056-Conf-tENG.

² ICC-01/04-01/06-3056-Red-tENG.

³ ICC-01/04-01/06-3058-Conf, “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 74 du Statut*” et aux fins de présentation d’un moyen nouveau au soutien de ces appels”.

⁴ ICC-01/04-01/06-3059-Conf, ICC-01/04-01/06-3060-tENG.

⁵ ICC-01/04-01/06-3061-Conf.

⁶ ICC-01/04-01/06-3057.

2. The correspondence annexed to the Defence Application

5. At paragraphs 2, 18 and 21 of its Response, the Prosecution claimed that the Defence had not submitted the full correspondence between the Office of the Prosecutor and the Defence teams for Mr Lubanga and Mr Ntaganda to the Appeals Chamber.
6. Contrary to the Prosecution's assertion, the Defence for Mr Lubanga submitted all of the e-mails which it had received. The Defence for Mr Lubanga was not copied on the e-mails which the Prosecution annexed to its Response, in Annexes A, B and C. These communications were disclosed to the Defence for the first time when it was notified of the Prosecution's Response, on 17 January 2014.
7. In the Defence's opinion, Annex D does not provide any additional information.
8. The Defence is not opposed to the tendering in evidence of Annexes A to D in order to enable the Appeals Chamber to examine all of the correspondence relating to the documents covered by the Defence Application; the Appeals Chamber will note that the e-mails do not provide any relevant information clarifying why the Prosecution did not disclose them *sua sponte*, prior to the Defence's specific request, despite being duty-bound to do so under rule 77 and article 67(2).⁷

3. The Defence's inability to obtain the information contained in the impugned documents

9. The Prosecution claimed that the Defence should have carried out its own investigations into the membership of the presidential guard and the ages of its members;⁸ it essentially argued that notwithstanding the non-disclosure of the impugned documents, the Defence did indeed have the opportunity to

⁷ See Defence Application, ICC-01/04-01/06-3056-Red-tENG, paras. 19-33.

⁸ ICC-01/04-01/06-3058-Conf, para. 30.

identify the members by name and proceed to conduct investigations into their actual ages;⁹ this argument was rehearsed by the V01 group of victims.¹⁰

10. These arguments prompt the following observations:
11. **Firstly**, it bears recalling that, in contrast to the rules applicable at the ICTY and ICTR, the Statute of the Court (article 54(1)(a)) expressly obliges the Prosecutor to investigate “incriminating and exonerating circumstances”. Consequently, ICTY and ICTR case-law in the matter cannot be transposed as such to proceedings before the International Criminal Court; but above all, it is manifestly incorrect to argue that the conduct of further investigations into the ages of the members of the presidential guard, who are clearly identified in the impugned documents, which were not disclosed to the Defence, was not an investigative obligation of the Prosecution and was solely the responsibility of the Defence.
12. **Secondly**, it cannot seriously be argued that the Defence was in a position to obtain the documents when they had been withheld from it for nigh on ten years in the Office of the Prosecutor’s case-file, at MONUC’s request.
13. For one thing, as stated at paragraph 18 of its Application,¹¹ the Appellant was unaware of the existence of this document, being neither author nor recipient. No information in the record indicates that it had already been made aware of these documents.
14. For another thing, although these documents appear to come from the UPC/RP and specifically concern Mr Lubanga’s bodyguard, the only known copies of these documents remained in the possession of the Office of the Prosecutor and MONUC throughout the trial.

⁹ ICC-01/04-01/06-3058-Conf, paras. 25-26.

¹⁰ ICC-01/04-01/06-3059-Conf, para. 10.

¹¹ ICC-01/04-01/06-3056-Red-tENG.

15. The document was transmitted to the Office of the Prosecutor by MONUC in 2004. MONUC obstructed its disclosure to the Defence for Mr Lubanga until September 2013.¹² The Defence was unaware of the very existence of these documents and cannot be blamed for failing to make a specific request for them.
16. Consequently, these documents could not have been obtained other than through the Office of the Prosecutor.
17. **Thirdly**, one cannot seriously argue that several years after 2002 and 2003 the Appellant would be able to remember the information contained in these documents, that is, the exact identity of the members of his bodyguard.
18. Likewise the Defence resource person or Witnesses D-0011 and D-0019, who, contrary to the Prosecution's submission,¹³ at no time claimed to have known any of the Appellant's bodyguards by name.¹⁴
19. No information in the record indicates that the Appellant knew the identity of the 33 individuals who are mentioned in document DRC-OTP-0014-0280 or pictured in document DRC-OTP-0003-0032.
20. In any event, the documents themselves were essential to mount a defence, both at the investigation stage and during witness examination at trial.
21. Document DRC-OTP-0003-0032 enables certain bodyguards to be identified by name from their photograph, whilst document DRC-OTP-0014-0280 provides the full list of presidential bodyguards.
22. Thus, in the case of Witness P-0299, discussed by the Office of the Prosecutor at paragraph 25 of its Response, it should be noted that the document might have made it possible to challenge the witness's account claiming that he had

¹² See email of 15 November 2013, ICC-01/04-01/06-3056-Anx3-Red.

¹³ ICC-01/04-01/06-3061-Conf, para. 5, and ICC-01/04-01/06-3058-Conf, para. 26.

¹⁴ D-0019: T-345-FRA ET, p. 12, lines 7-9; T-341-FRA ET, pp. 11 and 36; and D-0011: T-347-FRA ET, p. 59, lines 13-17.

been a member of Mr Lubanga's bodyguard.¹⁵ The Prosecution was therefore duty-bound, on the basis of this information, to disclose the document to the Defence under article 67(2). If the Defence had been in possession of the document when cross-examining the witness, it would have been able to challenge him with it and demonstrate the inaccuracy or mendaciousness of his testimony.

23. Contrary to the Prosecution submission, the Trial Chamber did not refuse to permit D-0040's evidence.¹⁶ The Chamber considered the Defence submissions in this regard at paragraphs 10, 11 and 48 of its sentencing decision.¹⁷ In this connection, it bears noting that if the Defence had been in possession of the impugned documents, it could have presented them to Witness D-0040 both during its investigations and when he testified before the Chamber, in order for him to authenticate the documents and confirm the information contained therein.
24. Finally, the Prosecution presented Witness D-0040 as a child soldier under the age of 15 years without specifying his identity, even though it possessed a document containing his name and photograph. The non-disclosure of this document at the trial stage irremediably prejudiced the Defence, which was only able to identify and meet this person after the verdict in the present case.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

GRANT the Defence Application of 23 December 2013;

AUTHORISE the Defence to present the following additional evidence in the context of its appeal against the *Judgment pursuant to Article 74 of the Statute*

¹⁵ T-119-CONF-FRA CT, p. 13, lines 18-22; T-119-CONF-FRA CT, p. 41, lines 22-25; T-119-CONF-FRA CT, p. 55, lines 18-25; T-119-CONF-FRA CT, p. 57, lines 2-18. The Trial Chamber did not rely on this witness's evidence, and his right to participate in the proceedings was withdrawn (Judgment, para. 484 and footnote 1482).

¹⁶ ICC-01/04-01/06-3058-Conf, para. 29.

¹⁷ ICC-01/04-01/06-2901.

and its appeal against the *Decision on Sentence pursuant to Article 76 of the Statute*:

- Document DRC-OTP-0003-0032 (Annex 5);
- Document DRC-OTP-0014-0280 (Annex 6);
- The e-mails submitted in Annexes 1 to 4;

And,

Supplementing the grounds of appeal,

ADJUDGE AND DECLARE that the evidence introduced by the Prosecution to establish the presence of children under the age of 15 years amongst the Appellant's bodyguard cannot found any findings.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 3 February 2014, at The Hague