

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/06 A 4 A 5 A 6

Date: 06 May 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

Decision on the request of the Registrar relating to the transmission of applications for participation in the appeal proceedings and on related issues



Decision 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 Representative of the Applicants
Mr Joseph Keta Orwinyo

Legal Representatives of Victims V02
Ms Carine Bapita Buyangandu
Mr Paul Kabongo Tshibangu
Mr Joseph Keta Orwinyo

The Office of Public Counsel for Victims
Ms Paolina Massidda

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Thomas Lubanga Dyilo against the decision of Trial Chamber I entitled “Judgment pursuant to Article 74 of the Statute” of 14 March 2012 (ICC-01/04-01/06-2842), and

In the appeals of Mr Thomas Lubanga Dyilo and the Prosecutor against the decision of Trial Chamber I entitled “Decision on Sentence pursuant to Article 76 of the Statute” of 10 July 2012 (ICC-01/04-01/06-2901),

Having before it the “Request for guidance regarding applicants for participation in the appeal phase”, filed by the Registrar on 7 February 2013 (ICC-01/04-01/06-2977), and

Having before it the “Requête de la Défense relative aux procédures *ex parte*”, filed by Mr Thomas Lubanga Dyilo on 25 April 2013 (ICC-01/04-01/06-2023),

Renders the following

DECISION

1. The Registrar shall, by 16h00 on 20 May 2013, on a confidential and *ex parte* basis, transmit the 32 applications for participation in the appeal proceedings specified in its “Request for guidance regarding applicants for participation in the appeal phase” to the Appeals Chamber, together with a report thereon as provided for in regulation 86 of the Regulations of the Court.
2. In addition to the information referred to in regulation 86 of the Regulations of the Court, the report shall contain:
 - a. information as to whether and, if so, which protective measures were requested by the applicants, and the Victims and Witnesses Unit’s assessment of those requests, to be filed in a confidential, *ex parte* annex;
 - b. an assessment of whether the criteria of rule 85 of the Rules of Procedure and Evidence are fulfilled with respect to the new and previously rejected applicants;

- c. information as to the possible legal representation of the 32 applicants, pursuant to rule 90 (2) of the Rules of Procedure and Evidence.
3. The Registrar shall, by 16h00 on 27 May 2013,
 - a. notify Mr Lubanga Dyilo and the Prosecutor of the applications and of the above-mentioned report, redacting any information contained in the applications and the report that, in the view of the Registrar, should not be disclosed for protection purposes, and
 - b. file the reasons for any such redactions.
4. Mr Lubanga Dyilo and the Prosecutor may respond to the applications by 16h00 on 17 June 2013.
5. The “Requête de la Défense relative aux procédures *ex parte*” is granted insofar as the Office of Public Counsel for victims shall, by 16h00 on 13 May 2013, file a public version of document ICC-01/04-01/06-2984-Conf-Exp and a public redacted version of the Annex to that same document. The remainder of the request is rejected.

REASONS

I. REQUEST FOR GUIDANCE

A. Background

1. By her request of 7 February 2013¹ (hereinafter: “Request for Guidance”), the Registrar seeks the guidance of the Appeals Chamber on whether to transmit to it 29 applications for participation under article 68 (3) of the Statute in the present appeal proceedings that had not yet been assessed by either Pre-Trial Chamber I or by Trial Chamber I (hereinafter: “Trial Chamber”), and three applications that had previously been rejected by the Trial Chamber because they were, at that time, incomplete.

2. The 29 new applicants filed their applications for participation with the Registrar at a time when the trial proceedings were ongoing.² The three previously rejected applicants apparently also submitted their new information during the trial

¹ “Request for guidance regarding applicants for participation in the appeal phase”, 7 February 2013, ICC-01/04-01/06-2977 (A 4 A 5 A 6).

² See Request for Guidance, p. 3.



proceedings.³ On 2 November 2011, the Registrar filed before the Trial Chamber a “Request for instructions on victim’s applications for participation and reparations received by the Registry”,⁴ in which she referred to the fact that she had received new applications for participation. In its order of 27 January 2012,⁵ the Trial Chamber declined to consider those applications because there was “no opportunity for the victims who have applied to participate to express their views and concerns under Article 68(3) of the Statute”, given that the Chamber was at the deliberation stage.⁶ It held that, “if there is a sentencing and substantive reparations phase in this case, these applications by victims to participate are to be provided to the Chamber for those purposes”.⁷ Upon conviction, the Registrar did not transmit the applications for the purposes of the sentencing proceedings, nor did the Trial Chamber ask for their transmission. However, the applications for reparations were forwarded to the Trial Chamber.⁸ These applicants for reparations are currently parties to the appeals *Lubanga A, A 2, A 3*.⁹ Nearly all of the applicants now before the Appeals Chamber also applied for reparations.¹⁰

3. On 14 February 2013, after having received the Request for Guidance, the Appeals Chamber asked Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”), the Prosecutor, Mr Joseph Keta Orwinyo (hereinafter: “Mr Keta”) as legal representative of a number of the applicants, and the Office of Public Counsel for victims (hereinafter: “OPCV”), representing all other applicants, to submit observations on this matter.¹¹ Accordingly, on 25 February 2013, they submitted their respective observations.¹² While the OPCV and Mr Keta argue that the Appeals Chamber should

³ See Request for Guidance, p. 3.

⁴ ICC-01/04-01/06-2817.

⁵ “Order on the applications by victims to participate and for reparations”, 27 January 2013, ICC-01/04-01/06-2838 (A 4 A 5 A 6) (hereinafter: “Order of 27 January 2013”).

⁶ Order of 27 January 2013, para. 5.


⁷ Order of 27 January 2013, para. 6.

⁸ See “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of the proceedings”, 14 December 2012, ICC-01/04-01/06-2953 (A A 2 A 3 OA 21) (hereinafter: “Admissibility Decision”), paras 2-3.

⁹ Admissibility Decision, paras 69-72.

¹⁰ See Annex 1 to the “First Report of the Trial Chamber on applications for reparations”, 28 March 2012, ICC-01/04-01/06-2847.

¹¹ “Order on the filing of submissions on new applications to participate as victims in the proceedings”, 14 February 2013, ICC-01/04-01/06-2978.

¹² OPCV, “Submissions on whether the Appeals Chamber should consider the applications for participation at the appeals stage”, ICC-01/04-01/06-2984-Conf-Exp-tENG (A 4 A 5 A 6); Mr Keta, “Observations on the admissibility of 29 applications for participation in the appellate proceedings in 

receive the applications and consider them,¹³ Mr Lubanga and the Prosecutor aver that the applications would be transmitted too late in the appeal proceedings and that it is not appropriate to accept any such applications at this stage as this would delay the proceedings.¹⁴ The Prosecutor also argues that participation solely in an oral hearing, if any, would not be fair.¹⁵ In its observations¹⁶ (hereinafter: “OPCV Observations”), the OPCV also argues that the background of the concrete applicants should be considered and draws specific attention to the history of applicant a/0198/09 who filed an application for participation in as early as 2009, as well as to the procedural history before the Trial Chamber, which is set out above.¹⁷

B. Merits

4. The Appeals Chamber recalls that it does not provide guidance on the interpretation of the law to the Registrar or to the parties, as it is not an advisory body.¹⁸ However, the Appeals Chamber notes that, in essence, the question raised by the Registrar is not related to guidance, but to whether the Appeals Chamber should consider the 32 applications for participation under article 68 (3) of the Statute at the current stage of the proceedings.

5. The Appeals Chamber notes that the 32 applicants submitted or completed their applications to the Registrar during the trial proceedings. The Trial Chamber had not set a time limit for receiving new applications for participation in the proceedings and issued a decision, stating that the Trial Chamber would rule on the applications for the

the case of *The Prosecutor v. Thomas Lubanga*”, ICC-01/04-01/06-2986-tENG (A 4 A 5 A 6) (hereinafter: “Mr Keta’s Observations”); “Observations of the Defence for Mr Thomas Lubanga Dyilo pursuant to the Appeals Chamber’s Order No. ICC-01/04-01/06-2978”, ICC-01/04-01/06-2985-tENG (A 4 A 5 A 6) (hereinafter: “Mr Lubanga’s Observations”); “Prosecution’s Submissions on Victim Applications at Appeals Stage”, ICC-01/04-01/06-2987 (A 4 A 5 A 6) (hereinafter: “Prosecutor’s Observations”).

¹³ Mr Keta’s Observations, paras 8-12; OPCV Observations, paras 17-29.

¹⁴ Prosecutor’s Observations, paras 7-11; Mr Lubanga’s Observations, paras 7-13.

¹⁵ Prosecutor’s Observations, para. 7.

¹⁶ “Submissions on whether the Appeals Chamber should consider the applications for participation at the appeals stage”, 25 February 2013, ICC-01/04-01/06-2984-Conf-Exp-tENG (A 4 A 5 A 6), paras 30-40.

¹⁷ OPCV Observations, paras 30-40.

¹⁸ See “Decision of the Appeals Chamber upon the Registrar’s Request of 5 April 2007”, 27 April 2007, ICC-01/04-01/06-873 (OA 8), para. 6; *Situation in the Democratic Republic of the Congo*, “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007”, 30 June 2008, ICC-01/04-503 (OA 4 OA 5 OA 6), para. 30; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the ‘Urgent Request for Directions’ of the Kingdom of the Netherlands of 15 July 2011”, 26 August 2011, ICC-01/04-01/07-3132 (OA 12), para. 7.

purposes of the sentencing proceedings, if any. However, for reasons unknown to the Appeals Chamber, the Registrar did not re-submit the applications for the purposes of the sentencing proceedings, nor did the Trial Chamber rule on them. If the Trial Chamber had dealt with these applications, those applicants who would have been granted a right to participate in the trial proceedings would also have been granted the right to participate in the appeal proceedings from the start.¹⁹ The Appeals Chamber therefore considers that, by no fault of the applicants, the applications were not transmitted to the relevant Chamber. Therefore, in this specific case, it is in the interests of the proper administration of justice that the Appeals Chamber considers the applications in the present proceedings. However, the Appeals Chamber urges both the Registrar and the relevant Chambers to apply diligence in respect of ensuring that applications for participation are transmitted and considered properly and in a timely fashion.

6. The Appeals Chamber is not persuaded by the arguments of the Prosecutor and of Mr Lubanga that participation of the applicants is not appropriate and that the rights of the accused would be necessarily infringed upon by allowing any additional victims to make observations at this stage of the appeal proceedings. Should the Appeals Chamber allow any of the 32 applicants to participate in the proceedings, they may still be able to exercise several rights in respect of these appeals, including by being notified of documents, being given the opportunity to make additional submissions, and being heard at an oral hearing, if any. In this regard, it is recalled that the Appeals Chamber has not yet decided on the further conduct of the proceedings. Furthermore, the Appeals Chamber considers that only 32 applications will need to be assessed. The Appeals Chamber, however, points out that it will have to decide pursuant to rule 89 (1) and (2) of the Rules of Procedure and Evidence if and how the victims may participate in the appeal proceedings.

7. Considering these circumstances, the Appeals Chamber decides that the Registrar shall transmit the applications together with a report thereon to the Appeals Chamber in accordance with rule 89 (1) of the Rules of Procedure and Evidence and

¹⁹ See “Decision on the participation of victims in the appeals against Trial Chamber I’s conviction and sentencing decisions”, 13 December 2012, ICC-01/04-01/06-2951.

regulation 86 of the Regulations of the Court in order to allow the Appeals Chamber to assess the applications.

C. Directions on the report

The Appeals Chamber orders that the Registrar include the following additional information in the report that the Registrar must submit to the Appeals Chamber pursuant to regulation 86 (5) of the Regulations of the Court. First, taking note of the practice of some Chambers of the Court,²⁰ the report shall contain a preliminary assessment by the Registrar of whether the criteria of rule 85 of the Rules of Procedure and Evidence are fulfilled with respect to the new applicants. This assessment will not be binding on the Appeals Chamber.

8. Second, the report shall include an assessment by the Victims and Witnesses Unit of the need for protection of applicants who requested protective measures, and include any recommendations thereon to the Appeals Chamber. This information shall be filed in a separate confidential, *ex parte* annex.

9. Third, the report shall contain information about the Registrar's inquiry as to whether the new applicants would agree to be represented pursuant to rule 90 (2) of the Rules of Procedure and Evidence, if admitted, by either of the groups of legal representatives of victims who have already made submissions before the Appeals Chamber. In so doing, the Registrar should take into account the submissions before the Appeals Chamber of Mr Keta.²¹

10. In order to proceed expeditiously and to allow the Prosecutor and Mr Lubanga to respond to the applications pursuant to rule 89 (1) of the Rules of Procedure and Evidence, the Registrar shall, on a preliminary basis and subject to an order of the Appeals Chamber on that matter, redact any information that should not be disclosed to the parties and participants due to the Victims and Witnesses Unit's assessment of the need for protection of the applicants. The Registrar shall, pursuant to rule 89 (1) of the Rules of Procedure and Evidence transmit the (redacted) applications and the

²⁰ Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura et al.*, "First Decision on Victims' Participation in the Case", 30 March 2011, ICC-01/09-02/11-23, para. 21; Pre-Trial Chamber II, *Situation in Uganda*, "Decision on Victim's Participation in Proceedings Related to the Situation in Uganda", 9 March 2012, ICC-02/04-191, para. 27.

²¹ See Mr Keta's Observations, paras 13-17.

(redacted) report to Mr Lubanga and the Prosecutor. The Registrar shall transmit to the Appeals Chamber the reasons for the proposed redactions.

II. REQUEST FOR LIFTING CONFIDENTIALITY

11. In the “Requête de la Défense relative aux procédures *ex parte*”,²² Mr Lubanga requests that the confidential and *ex parte* character of a number of documents be lifted. However, these documents relate to the protection of specific persons and were filed, except for one, also *ex parte* from the Prosecutor.

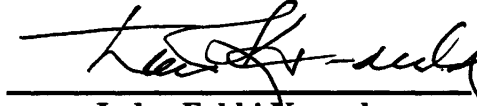
12. In the same document, Mr Lubanga further requests that the redactions at the end of paragraph 33 of the OPCV Observations as well as the annex thereto filed confidentially and *ex parte* be disclosed to Mr Lubanga. The OPCV made the redaction to paragraph 33 because it refers to “internal communications between the Registry and the OPCV”. Further, it classified the information in the annex because it refers to an e-mail exchange between the Registry and the OPCV.²³ The annex is the source of the information contained in paragraph 33 of the OPCV Observations.

13. The Appeals Chamber notes that the information referred to by the OPCV is essential to the procedural history of applicant a/0198/09. It explains why the applicant’s application form has not yet been transmitted to a Chamber until today. As the Appeals Chamber now orders that all applications be transmitted and as Mr Lubanga and the Prosecutor have a right to respond to such applications, he and the Prosecutor should know the reasons why the application form of applicant a/0198/09 was not transmitted to the Trial Chamber. The Appeals Chamber considers that this information is not relevant to the protection of the applicant in question. As the Appeals Chamber cannot discern why this information that stems from the Registry should be kept confidential, it orders the OPCV to file its Observations publicly and the annex thereto in a public redacted version, only redacting identifying information, such as email addresses and the names of persons to whom the emails were copied.

²² 25 April 2013, ICC-01/04-01/06-3023.

²³ OPCV Observations, para. 16.

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



Judge Erkki Kourula
Presiding Judge

Dated this 6th of May 2013

At The Hague, The Netherlands