

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 13 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**

**Decision and order in relation to the request of 23 December 2013 filed by Mr  
Thomas Lubanga Dyilo**

**No: ICC-01/04-01/06 A 5 A 6**

**1/10**



**Decision and order 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 Mabilie  
Mr Jean-Marie Biju Duval

**Legal Representatives of Victims V01**  
Mr Luc Walley  
Mr Franck Mulenda

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

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeals of Mr Thomas Lubanga Dyilo against Trial Chamber I's decisions entitled "Judgment pursuant to Article 74 of the Statute" of 14 March 2012 (ICC-01/04-01/06-2842) and "Decision on Sentence pursuant to Article 76 of the Statute" of 10 July 2012 (ICC-01/04-01/06-2901),

Having before it 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" of 23 December 2013 (ICC-01/04-01/06-3056-Conf), in which Mr Thomas Lubanga Dyilo requests the admission of six documents as additional evidence (Section I) and the addition of a new ground to his appeals (Section II),

*Issues* the following

## DECISION AND ORDER

- (1) The variation of Mr Thomas Lubanga Dyilo's grounds of appeal as set out in Section II of the above-mentioned request is granted.
- (2) The Prosecutor may file, by 16h00 on 17 January 2014, a document, not to exceed 20 pages, containing
  - a. a response, pursuant to regulation 61 (6) of the Regulations of the Court, to the legal and factual reasons in support of Mr Thomas Lubanga Dyilo's additional ground of appeal as set out in Section II of the above-mentioned request and
  - b. a response, pursuant to regulation 62 (2) (b) of the Regulations of the Court, to the request to present additional evidence as set out in Section I of the above-mentioned request.
- (3) The Legal Representatives of Victims V01 and V02 may each present the victims' views and concerns in respect of their personal interests affected by the issues raised in Mr Thomas Lubanga Dyilo's request and the Prosecutor's response thereto, which must be filed by 16h00 on 24

January 2014 and are not to exceed 10 pages. The Prosecutor and Mr Thomas Lubanga Dyilo may each file a response thereto, which is not to exceed 10 pages each, and which is to be filed, for the Prosecutor, by 16h00 on 31 January 2014 and, for Mr Thomas Lubanga Dyilo, by 16h00 on 3 February 2013.

## REASONS

1. On 14 March 2012, Trial Chamber I (hereinafter: “Trial Chamber”) rendered the “Judgment pursuant to Article 74 of the Statute”<sup>1</sup> (hereinafter: “Conviction Decision”), and, on 10 July 2012, the “Decision on Sentence pursuant to Article 76 of the Statute”<sup>2</sup> (hereinafter: “Sentencing Decision”). On 3 October 2012, Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) filed appeals against both the Conviction and the Sentencing Decisions.<sup>3</sup>
2. On 23 December 2013, Mr Lubanga filed 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”,<sup>4</sup> in which he requests authorisation to present additional evidence in relation to his appeals against the Conviction and the Sentencing Decisions,<sup>5</sup> as well as to add a new ground of appeal<sup>6</sup> (hereinafter: “23 December 2013 Request”).
3. In the 23 December 2013 Request, Mr Lubanga first seeks the admission of six documents as additional evidence pursuant to regulation 62 of the Regulations of the Court.<sup>7</sup> Four of the documents are correspondence between the parties in relation to

<sup>1</sup> ICC-01/04-01/06-2842.

<sup>2</sup> ICC-01/04-01/06-2901.

<sup>3</sup> “Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I’s Judgment pursuant to Article 74 of the Statute of 14 March 2012”, ICC-01/04-01/06-2934-tENG (A 5); “Notice of Appeal lodged by the Defence for Mr Thomas Lubanga against Trial Chamber I’s Decision on sentence pursuant to Article 76 of the Statute of 10 July 2012”, ICC-01/04-01/06-2935-tENG (A 6).

<sup>4</sup> ICC-01/04-01/06-3056 (A 5 A 6) with a public redacted version filed on 7 January 2014, ICC-01/04-01/06-3056-Red (A 5 A 6).

<sup>5</sup> ICC-01/04-01/06-3056 (A 5 A 6), para. 11, p. 13.

<sup>6</sup> ICC-01/04-01/06-3056 (A 5 A 6), para. 11.

<sup>7</sup> 23 December 2013 Request, paras 11-12, p. 15.

the request for disclosure of two documents,<sup>8</sup> one containing a list of names of members of the presidential guard of the *Union des Patriotes Congolais* (hereinafter: “UPC Presidential Guard”)<sup>9</sup> and the other containing photos and names of members of the UPC Presidential Guard.<sup>10</sup> Mr Lubanga alleges that both documents were in the possession of the Prosecutor since 2004, but only disclosed in December 2013.<sup>11</sup> Mr Lubanga seeks to have this additional evidence admitted in relation to certain grounds of his appeals, specifically in relation to alleged breaches by the Prosecutor of her duty to investigate pursuant to article 54 of the Statute,<sup>12</sup> alleged breaches by the Prosecutor of her disclosure obligation,<sup>13</sup> and alleged factual errors with regard to the age of individuals in the UPC Presidential Guard.<sup>14</sup>

4. Second, Mr Lubanga requests permission to add a new ground of appeal,<sup>15</sup> namely that the non-disclosure of these two documents prejudiced his ability to defend himself<sup>16</sup> and that the appropriate remedy for such prejudice is the invalidation of certain factual findings relevant to Mr Lubanga’s use of individuals under the age of 15 “within his personal escort and as his bodyguards”.<sup>17</sup>

5. The Appeals Chamber notes that the 23 December 2013 Request contains two separate sections and in essence two separate requests, i.e. one relevant to additional evidence (Section I) and one adding a ground of appeal (Section II). However, the entirety of the 23 December 2013 Request appears to be brought pursuant to regulation 62 of the Regulations of the Court<sup>18</sup> and the request to add a ground of appeal is not separately set out as a requested relief. The Appeals Chamber recalls that

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<sup>8</sup> Annexes 1-4 to the 23 December 2013 Request, ICC-01/04-01/06-3056-Conf-Anx-1 to ICC-01/04-01/06-3056-Conf-Anx-4. On 7 January 2014, Mr Lubanga filed public redacted versions of these annexes. ICC-01/04-01/06-3056-Anx1-Red, ICC-01/04-01/06-3056-Anx2-Red, ICC-01/04-01/06-3056-Anx3-Red, ICC-01/04-01/06-3056-Anx4-Red.

<sup>9</sup> 23 December 2013 Request, para. 15; Annex 6 to the 23 December 2013 Request, ICC-01/04-01/06-3056-Conf-Anx-6. This is document DRC-OTP-0014-0280.

<sup>10</sup> 23 December 2013 Request, para. 14; Annex 5 to the 23 December 2013 Request, ICC-01/04-01/06-3056-Conf-Anx-5. This is document DRC-OTP-0003-0032.

<sup>11</sup> 23 December 2013 Request, paras 16, 18.

<sup>12</sup> 23 December 2013 Request, paras 11, 34-38.

<sup>13</sup> 23 December 2013 Request, paras 11, 19-33.

<sup>14</sup> 23 December 2013 Request, paras 11, 39-42.

<sup>15</sup> 23 December 2013 Request, paras 11, 43-53.

<sup>16</sup> 23 December 2013 Request, paras 44-47.

<sup>17</sup> 23 December 2013 Request, paras 48-53.

<sup>18</sup> See 23 December 2013 Request, para. 12. The Appeals Chamber notes that both the request for the admission of additional evidence and to add a new ground of appeal are laid out in the immediately preceding paragraph of the Request.

regulation 62 of the Court, entitled “Additional Evidence presented before the Appeals Chamber”, provides that:

1. A participant seeking to present additional evidence shall file an application setting out:

(a) The evidence to be presented;

(b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

2. The Appeals Chamber may:

(a) Decide to first rule on the admissibility of the additional evidence, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to address the issue of admissibility of the evidence in his or her response, and to adduce any evidence in response only after a decision on the admissibility of that evidence has been issued by the Appeals Chamber; or

(b) Decide to rule on the admissibility of the additional evidence jointly with the other issues raised in the appeal, in which case it shall direct the participant affected by the application filed under sub-regulation 1 to both file a response setting out arguments on that application and to adduce any evidence in response.

6. The Appeals Chamber considers that regulation 62 of the Regulations of the Court is not applicable to requests to add a new ground of appeal once a party has filed his or her document in support of the appeal pursuant to regulation 58 of the Regulations of the Court. Therefore, the Appeals Chamber must determine if a new ground of appeal can be added after the filing of the document in support of the appeal and, if so, pursuant to which provision of the Court’s legal texts.

7. In this respect, the Appeals Chamber notes that regulation 61 of the Regulations of the Court addresses “Variation of grounds of appeal presented before the Appeals Chamber”. Regarding whether a “variation” includes the addition of a new ground, the Appeals Chamber notes that the Appeals Chambers of the International Tribunals for the former Yugoslavia and for Rwanda (hereinafter: “ICTY/ICTR”) interpret the term “variation” in their respective Rules of Procedure and Evidence<sup>19</sup> to include both “*new or amended*” grounds of appeal, provided that good cause is shown why “those

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<sup>19</sup> See rule 108 of the ICTY/ICTR Rules of Procedure and Evidence.

grounds *were not included* (or were not correctly phrased)”<sup>20</sup> (emphasis added). The Appeals Chamber considers that the term “variation” (“modification” in French) in regulation 61 of the Regulations of the Court should be interpreted in the same manner. The Appeals Chamber therefore holds that Section II of the 23 December 2013 Request should be understood as a request for variation of Mr Lubanga’s grounds of appeal by the addition of a new ground and that regulation 61 of the Regulations of the Court is applicable to this section of the 23 December 2013 Request.

8. The Appeals Chamber notes that the time period laid down in regulation 61 (3) of the Regulations of the Court for the Prosecutor to respond to the request, namely within seven days of the application for variation, has expired. The Appeals Chamber will therefore proceed pursuant to regulation 61 (5) of the Regulations of the Court and assess the request to add a new ground as it is presented in Section II of the 23 December 2013 Request.

9. The Appeals Chamber notes that regulation 61 (1) and (2) of the Regulations of the Court requires the requesting party to set out the reasons in support of the variation, as well as to request the variation “as soon as the reasons warranting it become known”. The Appeals Chamber considers that the 23 December 2013 Request sufficiently sets out the reasons in support of the requested variation, i.e. the discovery

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<sup>20</sup> ICTR Appeals Chamber, *Ferdinand Nahimana et al. v. the Prosecutor*, “Decision on appellant Jean-Bosco Barayagwiza’s motions for leave to submit additional grounds of appeal, to amend the notice of appeal and to correct his appellant’s brief”, 17 August 2006, ICTR-99-52-A, para. 10. *See*, in this same respect, ICTY, Appeals Chamber, *Prosecutor v. Miroslav Bralo*, “Decision on Miroslav Bralo’s motion for leave to supplement appeal brief in light of new information concerning ex parte portion of the trial record”, 9 January 2007, IT-95-17-A, paras 9-10; ICTY, Appeals Chamber, *Prosecutor v. Nikola Šainović et al.*, “Decision on Nebojša Pavković second motion to amend his notice of appeal”, 22 September 2009, IT-05-87-A, para. 15; ICTY, Appeals Chamber, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, “Decision on Dragan Jokić’s request to amend notice of appeal”, 14 October 2005, IT-02-60-A, para. 7; ICTY, Appeals Chamber, *Prosecutor v. Astrit Haraqija and Bajrush Morina*, “Decision on Bajrush Morina’s Application for a Variation of the Grounds of Appeal”, 19 March 2009, IT-04-84-R77.4-A, paras 5-6; ICTY, Appeals Chamber, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, “Decision on Johan Tarčulovski’s motion for leave to present appellate arguments in order different from that presented in notice of appeal, to amend the notice of appeal, and to file sur-reply, and on prosecution motion to strike”, 26 March 2009, IT-04-82-A, para. 17; ICTR, Appeals Chamber, *Ferdinand Nahimana et al. v. the Prosecutor*, “Decision on appellant Jean-Bosco Barayagwiza’s motion for clarification and guidance following the Decision of the Appeals Chamber dated 16 June 2006 in *Prosecutor v. Karemera et al.* Case and Prosecutor’s motion to object to the late filing of Jean-Bosco Barayagwiza’s reply”, 8 December 2006, ICTR-99-52-A, para. 13; ICTR, Appeals Chamber, *Tharcisse Renzaho v. the Prosecutor*, “Decision on Renzaho’s motion to amend notice of appeal”, 18 May 2010, ICTR-97-31-A, para. 9.

of the allegedly non-disclosed documents on which the new ground of appeal is based, and that the Request was made within a reasonable time, namely within approximately three weeks<sup>21</sup> from when Mr Lubanga became aware of this alleged non-disclosure.

10. The Appeals Chamber notes that, beyond the formal requirements cited above, regulation 61 of the Regulations of the Court contains no further guidance regarding any applicable standards for *granting* a request for variation. The Appeals Chamber therefore considers that it is within its discretionary authority to grant or deny the request. The Appeals Chamber considers that the new ground of appeal, namely the non-disclosure of material potentially relevant to the finding of the use of children under the age of 15 years within the UPC Presidential Guard, seeks to call into question the reliability of a considerable part of the findings upon which Mr Lubanga's conviction is based. Further, the addition of this new ground would not significantly delay the proceedings or prejudice the rights of Mr Lubanga, as the Appeals Chamber has procedural means to avoid lengthy and time-intensive submissions on this issue. Accordingly, the Appeals Chamber considers it appropriate to grant the request.

11. The Appeals Chamber notes that Mr Lubanga's legal and factual reasons in support of the additional ground of appeal are already contained in the 23 December 2013 Request.<sup>22</sup> The Appeals Chamber recalls that under regulation 61 of the Regulations of the Court, an appellant must first file an application for variation of grounds to appeal; the amended document in support of the appeal may only be filed once the Appeals Chamber has granted the variation. Nevertheless, in the circumstances of the present case, the Appeals Chamber does not consider it

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<sup>21</sup> Mr Lubanga argues that he only became aware of the non-disclosed documents on 2 December 2013, which is when they were provided by the Prosecutor. The Appeals Chamber notes that, according to the timeline provided by Mr Lubanga, he was aware that the documents were in the possession of the Prosecutor and that the Defence of Mr Bosco Ntaganda considered that they should be disclosed to Mr Lubanga as of 13 November 2013. The Appeals Chamber accepts that during the time period between 13 November and 2 December 2013, Mr Lubanga did not have access to the actual documents and therefore considers that the relevant beginning point of his knowledge of the non-disclosure is 2 December 2013, when he was actually in receipt of the documents and able to assess any prejudice allegedly suffered from their non-disclosure.

<sup>22</sup> See 23 December 2013 Request, paras 43-53.



necessary to receive an additional document from Mr Lubanga pursuant to regulations 58 and 61 (4) of the Regulations of the Court. The Prosecutor may therefore directly respond, pursuant to regulation 61 (6) of the Regulations of the Court, to Section II of the 23 December 2013 Additional Evidence Request.

12. Regarding Mr Lubanga's request for the admission of additional evidence (Section I of the 23 December 2013 Request), the Appeals Chamber decides, in line with its prior decision on this matter and incorporating the reasoning therein,<sup>23</sup> to proceed pursuant to regulation 62 (2) (b) of the Regulations of the Court.

13. The Appeals Chamber considers that it would be more efficient to receive the Prosecutor's responses to a) Mr Lubanga's new ground of appeal and b) his request for the admission of additional evidence in one consolidated document. The Appeals Chamber therefore orders that the Prosecutor may submit such a consolidated document, not exceeding 20 pages, by 17 January 2014. The Appeals Chamber stresses that, while both responses should be contained in one consolidated document, they, and the arguments corresponding thereto, should be clearly separated in that document.


14. Finally, the Appeals Chamber directs the Legal Representatives of Victims V01 and Victims V02 to set out the victims' views and concerns in respect of their personal interests affected by the issues raised in the abovementioned filings in observations, not to exceed 10 pages, by 24 January 2014. Mr Lubanga and the Prosecutor may each respond thereto by 31 January 2014 in a consolidated filing not to exceed 10 pages.

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<sup>23</sup> See "Directions under regulation 62 of the Regulations of the Court", 21 December 2012, ICC-01/04-01/06-2958 (A 5 A 6), para. 8.



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



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**Judge Erkki Kourula**  
**Presiding Judge**

Dated this 13th day of January 2014

At The Hague, The Netherlands