

**Cour
Pénale
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**International
Criminal
Court**

Original: **French**

No.: ICC-01/04-01/06
Date: **23 December 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 redacted version - with public redacted Annexes 1 to 4 and confidential
Annexes 5 and 6**

**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**

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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RELEVANT PROCEDURAL BACKGROUND

1. On 3 October 2012, the Defence filed Notices of Appeal against the Judgment on responsibility and the Decision on sentence.¹
2. On 5 December 2012, the Defence submitted Appellate Briefs against the Judgment and the Decision on sentence.²
3. On 22 March 2013, Mr Bosco Ntaganda, presented by the Prosecution as one of Mr Lubanga's co-perpetrators,³ was transferred to the seat of the Court.
4. On 18 April 2013, Mr Desalliers, who was a member of the Defence team for Mr Lubanga from September 2007 to April 2013, was appointed Mr Ntaganda's Lead Counsel.⁴ The Prosecution has been represented in both cases by the same members of the Office of the Prosecutor.
5. On 13 November 2013, Counsel for Mr Ntaganda informed the Office of the Prosecutor that he considered that two documents transmitted by the Prosecution to the Defence for Mr Ntaganda, numbered DRC-OTP-0003-0032 and DRC-OTP-0014-0280, should be disclosed immediately to the Defence for Mr Lubanga, and presented them as "seemingly of great importance to Mr Lubanga's case" (Annex 1). At that time, this correspondence was copied to Ms Mabilille, Lead Counsel for Mr Lubanga, to ensure that she was aware of this step and could, if necessary, take any appropriate measures.
6. In his letter dated 13 November 2013, Counsel for Mr Ntaganda referred to an email from the Prosecution dated 11 November 2013 in which the latter objected to forwarding a copy of the two documents to the Defence for Mr Lubanga. Counsel further informed the Prosecution that it seemed

¹ ICC-01/04-01/06-2934-tENG and ICC-01/04-01/06-2935-tENG.

² ICC-01/04-01/06-2948-tENG and ICC-01/04-01/06-2949-tENG.

³ See for example: "Submission of the Prosecution's Updated Summary of Presentation of Evidence", ICC-01/04-01/06-1354-Conf-AnxA, para. 173.

⁴ ICC-01/04-02/06-52.

essential to him, in the interests of justice, that the documents be disclosed as soon as possible to Mr Lubanga's Defence team.

7. On 14 November 2013, the Defence for Mr Lubanga reminded the Prosecution of its disclosure obligations provided for in article 67(2) and rule 77 and requested the transmission of the two documents specified in the email from Counsel for Mr Ntaganda dated 13 November 2013. In particular, the Defence recalled in this matter all its requests for disclosure submitted to the Office of the Prosecutor throughout the proceedings (Annex 2).
8. On 15 November 2013, the Office of the Prosecutor responded to the Defence for Mr Lubanga, saying that it was keenly aware of its disclosure obligations, but in its view, "[...] the two documents do not fall under the provisions of either article 67(2) or Rule 77. They are documents that were collected under article 54(3)(e) and were assessed to have incriminating value. Lifting of those conditions was refused in the Lubanga case. Following a renewed request for lifting of restrictions, restrictions were lifted on 30 August 2013" (Annex 3).
9. On 22 November 2013, the Defence for Mr Lubanga again requested that the two documents be transmitted as a matter of urgency (Annex 4).
10. On 2 December 2013, the Prosecution officially transmitted the two documents and their metadata to the Defence. The two documents concerned are appended to this application (Annexes 5 and 6).

PURPOSE AND BASIS OF THE APPLICATION

11. The Defence hereby requests the Appeals Chamber:
 - To admit to the record, as additional evidence, documents DRC-OTP-0003-0032 and DRC-OTP-0014-0280 as they support three grounds of appeal: breaches by the Office of the Prosecutor of its investigation obligations, breaches by the Prosecution of its disclosure obligations, and

factual errors with regard to the age of the soldiers composing the Appellant's presidential guard during the material period;

- To authorise the Defence to add a new ground to those specified in its Appellate Briefs, consisting essentially of the assertion that the failure to disclose documents DRC-OTP-0003-0032 and DRC-OTP-0014-0280 in good time deprived the Defence of essential facts that would have allowed it to conduct a specific, in-depth investigation into the age of the soldiers composing the Appellant's presidential guard and, if necessary, to demonstrate that, contrary to the Trial Chamber's findings, none of them were under the age of 15 years; in these circumstances, it is manifestly unfair to draw conclusions based on evidence submitted by the Prosecution allegedly establishing the presence of children under the age of 15 among the Appellant's bodyguards.

12. This application relies on the provisions of article 54(1)(a) defining the scope of the Prosecution's duties with respect to investigations, on the provisions of article 67(2) and rule 77 on the Office of the Prosecutor's obligations to disclose evidence to the Defence, and on those of regulation 62 of the Regulations of the Court governing additional evidence presented to the Appeals Chamber.

I - THE ADMISSION OF ADDITIONAL EVIDENCE

1 – Description of the documents whose admission is sought

13. The documents numbered DRC-OTP-0003-0032 and DRC-OTP-0014-0280 concern expressly members of the UPC/RP presidential guard ("PG"), a term that refers to the bodyguards of the UPC/RP President, Mr Thomas Lubanga.

- Document DRC-OTP-0003-0032

14. Document DRC-OTP-0003-0032 consists of 11 files containing the names and photographs of Mr Lubanga's guards and the registration number of their firearms. Each features a star emblazoned with the letters "UPC GP".

- Document DRC-OTP-0014-0280

15. This document consists of a list of 33 names of the members of the presidential guard. Its header reads "[TRANSLATION] UPC/RP FPLC Presidential Guard" and it is entitled "[TRANSLATION] List of PG Members".
16. The documents' metadata indicate that they were transmitted to the Office of the Prosecutor by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in 2004.
17. It is highly probable that the documents were produced in June 2003 on the arrival of the multinational force in Bunia as part of the Artemis operation. The documents were therefore produced during the material period, i.e. between 1 September 2002 and 13 August 2003.
18. The two documents were not transmitted officially by the Prosecution to the Defence until 2 December 2013. As the Defence was unaware of their existence until their communication by the Prosecution on 2 December, it could not request their submission before that date.

2 - Grounds of appeal concerned

- Prosecution's breaches of its disclosure obligations

19. This ground of appeal is expounded in section 1.2 of the Defence Appellate Brief against the Judgment and in the Defence Appellate Brief against the Decision on sentence.⁵
20. The Appeals Chamber recalled that the Prosecution's disclosure obligations should be interpreted broadly.⁶ In consequence, the Prosecution is obligated to transmit any document or evidence containing exculpatory information or information necessary to the defence of the accused, even if this document is not exculpatory in its entirety.⁷ In this respect, the Appeals Chamber of the ICTR confirms that "[...] the Trial Chamber, by reasoning that exculpatory material in a document could be rendered nugatory by the existence of inculpatory material, applied an incorrect legal standard resulting in an abuse of its discretion."⁸
21. The Prosecution's disclosure obligations under rule 77 and article 67(2) continue after the first instance judgment, as the Appeals Chamber has confirmed in the present case.⁹

⁵ ICC-01/04-01/06-2948-Conf-tENG, paras. 40-75; see also: ICC-01/04-01/06-2949-Conf-tENG, paras. 58 *et seq.*

⁶ ICC-01/04-01/06-1433, paras. 77-82; ICC-01/04-01/06-3017, para. 10. See also for example: ICTR: *The Prosecutor v. Kalimanzira*, Case No. ICTR-05-88, Judgment on appeal, para. 18; *The Prosecutor v. Bagosora and others*, *Décision relative à l'appel interlocutoire concernant la communication de pièces en application de l'Article 66 B) du Règlement de procédure et de preuve*, 25 September 2006, para. 9.

⁷ ICTR: *The Prosecutor v. Édouard Karemera and others*, Case No. ICTR-98-44-AR73.13, *Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion"* (AC), 14 May 2008, paras. 12-14.

⁸ ICTR: *The Prosecutor v. Édouard Karemera and others*, Case No. ICTR-98-44-AR73.13, *Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion"* (AC), 14 May 2008, para. 12.

⁹ ICC-01/04-01/06-3017, para. 9. ICTY: *Prosecutor v. Brđanin*, Case No. IT-99-36-A, *Decision on appellant's motion for disclosure pursuant to Rule 68 and motion for an order to the Registrar to disclose certain materials*, 7 December 2004, p.3; *Prosecutor v. Kordić & Čerkez*, Case No. IT-65-14/2-A, *Decision on Appellant's notice and supplemental notice of Prosecution's non-compliance with its disclosure obligation under Rule 68 of the Rules*, 11 February 2004, para. 17; *Prosecutor v. Bralo*, Case No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material*, 30 August 2006, para. 29; *Prosecutor v. Karadžić*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision*, 10 December 2010, para. 11. ICTR: *The Prosecutor v. Niyitegeka*,

22. In the case at hand, the Prosecution has doubly failed in its disclosure obligations by omitting to disclose the two documents in question to the Defence.
23. First, the Prosecution has failed in its obligation to disclose **voluntarily** and immediately documents DRC-OTP-0003-0032 and DRC-OTP-0014-0280, although it was obligated to do so because of their direct connection with the charges brought against the Appellant; these documents are directly relevant to discussion of the accusation that children under the age of 15 were members of Mr Lubanga's guard, a fact of which he must have been aware.¹⁰
24. The Prosecution submitted to the Chamber video images of persons it presented as UPC/FPLC soldiers under the age of 15.¹¹ These images were admitted by the Chamber as proof of the presence of children under the age of 15 in the UPC armed forces and the Appellant's guard.¹² The Prosecution presented these individuals anonymously, without indicating that it had information or documents that would have allowed them to be identified. However, several of the individuals presented by the Prosecution as guards of the Appellant could have been identified precisely with these two documents.
25. Second, these two documents clearly fell within the scope of **requests for disclosure expressly made** by the Defence during the trial:
26. On 26 April 2010, the Defence expressly requested "[TRANSLATION] the transmission of all the documents originating from the UPC or Thomas

Case No. ICTR-96-14-R, *Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121*, 28 September 2005, p.8; *The Prosecutor v. Bizimungu and others*, Case No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI*, 14 September 2004, para. 8; *Prosecutor v. Karemera and others*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th notices of Rule 68 violation and motions for remedial and punitive measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho*, 18 February 2009, para. 31; *The Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, *Judgement*, 22 June 2009, para. 57.

¹⁰See for example ICC-01/04-01/06-2748-Conf, paras. 298-302.

¹¹ For example, ICC-01/04-01/06-2748-Conf, paras. 164-165 and T-356-FRA-ET, p. 33, line 25 to p. 37, line 17.

¹² For example, EVD-OTP-00574, 01:49:02: *Judgement*, paras. 713, 858-89, 915 and 1254. EVD-OTP-00571, 02:47:16: *Judgement*, paras. 713, 860, 915 and 1251.

Lubanga as well as all the documents mentioning the UPC”;¹³ such is the case of the two documents at issue.

27. On 8 September 2009, the Defence expressly requested the Prosecution to transmit to it “[TRANSLATION] as soon as possible, [...] all depositions and all documents relating to the witnesses who appear, or will subsequently appear, on the list of Defence witnesses”.¹⁴ The Prosecution was informed of the identity of Witness D-0040, Augustin Mbogo, in June 2012 and he appeared before Trial Chamber I during the sentencing hearing on 13 June 2012.¹⁵
28. Furthermore, this individual was presented by the Prosecution as a child under the age of 15, an assertion relied on by the Chamber in its Judgment in support of its conviction of the Appellant¹⁶ (he is shown in video excerpt EVD-OTP-00574 at 01:49:02).
29. At no time during the proceedings did the Prosecution inform the Defence that it had information on this individual’s identity; no disclosure about him was made.
30. However, the name of Witness D-0040, Augustin Mbogo, appears on the two documents at issue,¹⁷ and his photograph is included in document DRC-OTP-0003-0032.
31. Similarly, no disclosure was made to the Defence with regard to Witness D-0030; this witness appeared on the list of Defence witnesses from 20 November 2009 until his removal from the list in March 2011.¹⁸ The Defence informed the Office of the Prosecutor of the identity of this witness on

¹³ Email from the Defence dated 26 April 2010 to the Office of the Prosecutor entitled “[TRANSLATION] Request for the transmission of certain documents”.

¹⁴ Email dated 8 September 2009 to the Office of the Prosecutor entitled “[TRANSLATION] Request for the transmission of documents relating to Defence witnesses” (emphasis added).

¹⁵ ICC-01/04-01/06-T-360-Conf-FRA, pp. 21-33.

¹⁶ See for example Judgment, footnotes 1986, 2426, 2594 and 3357.

¹⁷ Notably DRC-OTP-0014-0280, No 14.

¹⁸ Email from the Defence to the Trial Chamber dated 18/03/2011 entitled “[TRANSLATION] List of Defence witnesses and suggested order of appearance”.

20 November 2009; however, the name of Witness D-0030 [REDACTED] appears on the list of names of the members of the UPC/RP presidential guard contained in document DRC-OTP-0014-0280, [REDACTED].

32. Finally, on two occasions the Defence submitted requests for disclosure relating to the individual with the first name of “[REDACTED]” or “[REDACTED]”,¹⁹ presented as one of the Appellant’s bodyguards in document DRC-OTP-0014-0280; the Defence questioned Witness P-0582, Mr Bernard Lavigne, who led the Office of the Prosecutor’s investigations in the *Lubanga* case, about this individual,²⁰ as it did Witness [REDACTED] in its cross-examination;²¹ the Prosecution did not provide any information to the Defence following these disclosure requests²² and these hearings; however, the name of [REDACTED] appears as [REDACTED] on the list of UPC/RP presidential guards contained in document DRC-OTP-0014-0280, and his name and photograph also appear in document DRC-OTP-0003-0032.
33. The two documents whose admission is sought therefore support the ground of appeal that the Prosecution failed in its disclosure obligations.²³
 - *Prosecution’s breaches of its obligations with respect to investigations*
34. In support of its appeals, the Defence argues that the Prosecution gravely failed in its duty to investigate “incriminating and exonerating circumstances equally” as laid down by article 54(1)(a).²⁴

¹⁹ Emails dated 8 October and 15 November 2010 to the Office of the Prosecutor entitled “[TRANSLATION] Request for transmission” and “[TRANSLATION] Urgent request for transmission of documents”.

²⁰ [REDACTED].

²¹ [REDACTED].

²² With the exception of a photograph of an individual mistakenly presented by the Office of the Prosecutor as [REDACTED].

²³ It should be noted that the Defence would have never received these documents if the Defence for Mr Ntaganda had not drawn its attention to the fact that two documents “seemingly of great importance to Mr Lubanga’s case” had not been transmitted to it.

²⁴ ICC-01/04-01/06-2948-tENG, paras. 23-39; ICC-01/04-01/06-2949-tENG, paras. 41 *et seq.*

35. The two documents whose admission is sought show that since 2004 the Prosecution has had in its possession the names and photographs of the members of the Appellant's presidential guard; however, although it had this identifying information, the Prosecution did not carry out any investigation seeking to establish the exact age of these soldiers, even though the assertion that a large proportion of them were under the age of 15 was one of the essential points in the charges brought against the Appellant with regard both to the existence of the crimes being prosecuted and the Appellant's individual responsibility for these crimes.
36. Investigations to establish the age of these soldiers could have easily been conducted, as the Defence did with respect to several Prosecution witnesses, by contacting the Congolese administration, and in particular the *Commission Electorale Nationale Indépendante* [National Independent Electoral Committee] (CENI).
37. It hence appears that the Prosecution gravely failed in its obligation to investigate "incriminating and exonerating circumstances", in this instance, its obligation to verify whether the charges brought against the Accused with regard to the age of his bodyguards were founded.
38. The two documents whose admission is sought therefore support the ground of appeal that the Prosecution failed in its investigatory obligations.
 - *Factual errors with regard to the presence of children under the age of 15 among the Accused's bodyguards and to the knowledge the Appellant should have had about this*
39. On several occasions, the Chamber found in support of its decisions on the Appellant's guilt and the sentence that children under the age of 15 were among the Appellant's bodyguards, that this circumstance formed part of the demonstration that the crimes being prosecuted were in fact committed and of the Appellant's essential contribution to the common plan, and that it

constituted proof of the mental element required under article 30 with respect to the Accused.²⁵

40. The Defence has asserted in its appeal briefs that the Chamber committed errors of fact on this point.²⁶
41. In particular, the Defence has argued that the Chamber was mistaken regarding the real age of Witness D-0040, Augustin Mbogo, one of the Appellant's bodyguards.²⁷
42. As previously discussed,²⁸ the two documents whose admission is requested confirm that this witness, aged 18 years at the material time, was one of the Appellant's bodyguards; the two documents therefore support the Defence's arguments both with respect to the witness himself and with respect to the age of the Appellant's bodyguards generally.

II - ADDITION OF A NEW GROUND OF APPEAL

43. The failure to disclose in good time documents DRC-OTP-0003-0032 and DRC-OTP-0014-0280, discovered fortuitously by the Defence during the appeal stage despite the Prosecution's misplaced opposition, has gravely infringed the rights of the Defence and must invalidate several of the Trial Chamber's findings.

1- Prejudice to the rights of the Defence

44. By refusing to transmit essential information identifying the 33 members of the presidential guard, the Prosecution deliberately obstructed the investigations the Defence would certainly have carried out to prove that,

²⁵ ICC-01/04-01/06-2842, paras. 858-869; 915; 1247-1262; 1277; 712-718.

²⁶ ICC-01/04-01/06-2948-tENG, paras. 158-167, 304-310 and 377-378; ICC-01/04-01/06-2949-tENG, paras. 17-18.

²⁷ ICC-01/04-01/06-2948-tENG, paras.158-167, 304-310 and 377-378; ICC-01/04-01/06-2949, paras.17-18.

²⁸ *Supra*, paras. 27-31.

contrary to the charges brought against the Appellant, none of them were under the age of 15 at the material time.

45. Using the list of presidential guards and their photographs, the Defence could have identified, found and called as witnesses several of these guards; equally, the Defence could have carried out checks with the competent Congolese authorities (namely, CENI) to verify the exact age of these individuals, as it did to good effect with regard to other witnesses whose identity was disclosed to it.
46. Without access to these military records, the Appellant was unable to remember the identity of each of his bodyguards and, in consequence, to work with his Counsel to conduct effective investigations into their vital details.
47. Because of the Prosecution, it was impossible for the Defence to adduce the exculpatory evidence it might have expected to receive, whereas at the same time the Prosecution, having essential information which it kept secret, deliberately omitted to ensure that some of the charges brought against the Appellant were well-founded by not verifying, as it could have easily done, the age of the Appellant's bodyguards.

2- Invalidation of findings by the Trial Chamber

48. According to the case law of the international criminal tribunals, if the Prosecution breaches its disclosure obligations and significant prejudice is caused to the accused, various remedies may be envisaged, including recalling witnesses, allowing the Defence to bring additional witnesses, making a reasonable finding in the accused's favour, excluding the relevant parts of the Prosecution's evidence, ordering a stay of the proceedings or withdrawing charges against the accused.²⁹

²⁹ See in particular: *The Prosecutor v. Bizimungu and others*, Case No. ICTR-99-50-T, Judgement, para. 143.

49. In this case, the Defence was denied access to documents produced at the material time containing essential information that would have allowed it to direct its investigations and provide evidence contradicting the Office of the Prosecutor's vague allegations that unidentified children under the age of 15 were members of the Appellant's personal guard.
50. However, at the current stage of proceedings, it is no longer possible for the Defence to use the essential information contained in these two documents in its investigations.
51. Given these conditions, it would be manifestly unfair to accept particularly vague evidence prejudicial to the Appellant (video images or witness statements) about facts (children under the age of 15 among the Appellant's bodyguards) which the Defence could not thoroughly investigate because of the Prosecution's breach of its disclosure and investigation obligations.
52. Evidence against the Appellant which he was unable to challenge fairly in compliance with the disclosure requirements set out in the Statute and the Rules of Procedure and Evidence cannot be accepted.
53. Accordingly, the only remedy that would ensure fairness is a ruling by the Appeals Chamber that no finding may be based on the evidence presented by the Prosecution establishing the presence of children under the age of 15 among the Appellant's bodyguards, and that in consequence all of the Trial Chamber findings that "between September 2002 and 13 August 2003, Thomas Lubanga, as President and Commander-in-Chief of the UPC/FPLC, used a significant number of children under the age of 15 within his personal escort and as his bodyguards"³⁰ must be set aside.

Confidentiality of this application

³⁰ In particular: ICC-01/04-01/06-2842, paras. 869, 1262, 1277 and 1348.

54. The Defence is filing this application confidentially in order not to disclose information protected by the Court. The Defence will submit a public redacted version as soon as possible.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

ACCEPT this application;

AUTHORISE the Defence to bring the following additional evidence in the context of its appeals against the *Judgment pursuant to Article 74 of the Statute* and 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 emails presented in Annexes 1 to 4;

And

ADJUDGE AND DECLARE that no finding may be based on the evidence submitted by the Prosecution establishing the presence of children under the age of 15 among the Appellant's bodyguards.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 23rd day of December 2013 in The Hague, the Netherlands