

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 August 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 application by Child Soldiers International for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence

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

Organisation requesting leave to participate pursuant to rule 103 of the Rules of Procedure and Evidence
Child Soldiers International

REGISTRY

Registrar
Mr Herman von Hebel

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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),

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 “Application by Child Soldiers International for leave to submit observations to Appeals Chamber of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence” of 8 March 2013 (ICC-01/04-01/06-2995),

Renders the following

DECISION

The above-mentioned application is rejected.

REASONS

I. BACKGROUND

1. On 14 March 2012, Trial Chamber I (hereinafter: “Trial Chamber”) rendered the “Judgment pursuant to Article 74 of the Statute”¹ (hereinafter: “Conviction Decision”), in which it, *inter alia*, found Mr Thomas Lubanga Dyilo (hereinafter: “Mr Lubanga”) guilty of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8 (2) (e) (vii) and 25 (3) (a) of the Rome Statute.

2. On 10 July 2012, the Trial Chamber rendered its “Decision on Sentence pursuant to article 76 of the Statute” (hereinafter: “Sentencing Decision”).

¹ ICC-01/04-01/06-2842.

3. On 3 October 2012, the Prosecutor filed a notice of appeal against the Sentencing Decision.² Also on 3 October 2012, Mr Lubanga filed notices of appeal against the Conviction Decision³ and the Sentencing Decision.⁴

4. On 8 March 2013, Child Soldiers International filed a request for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence (hereinafter: “Request”).⁵ Child Soldiers International indicates that it is an international human rights research and advocacy organisation that seeks to end military recruitment and the use of children as soldiers through the promotion of global adherence to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁶ The organisation submits that it has useful information and experience to assist the Appeals Chamber in determining the elements of the crime of conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.⁷ Specifically, Child Soldiers International wishes to make observations on the following issues: (1) the concept of ‘conscripting’ or ‘enlisting’ children into armed groups; (2) the continuous nature of these crimes; and (3) the interpretation of ‘active participation’.⁸ Child Soldiers International attached its proposed observations in respect of these three issues as an annex (hereinafter: “Annex to the Request”).⁹

² “Prosecution’s Notice of Appeal against Trial Chamber I’s ‘Decision on Sentence pursuant to Article 76 of the Statute’”, 3 October 2012, ICC-01/04-01/06-2933 (A 4).

³ “Notice of Appeal by the Defence for Mr Thomas Lubanga Against Trial Chamber I’s *Judgment pursuant to Article 74 of the Statute* of 14 March 2012”, 3 October 2012, ICC-01/04-01/06-2934-tENG (A 5).

⁴ “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”, 3 October 2012, ICC-01/04-01/06-2935-tENG (A 6).

⁵ “Application by Child Soldiers International for leave to submit observations to Appeals Chamber of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence”, 8 March 2013, ICC-01/04-01/06-2995 (A A 2 A 3) with “Annex I – Draft submissions of Child Soldiers International to the Appeals Chamber”, ICC-01/04-01/06-2995-Anx1 (A A 2 A 3). This document and the annex were re-stamped in order to reflect the correct appeals phase, i.e. the appeals A 4 A 5 A 6, in accordance with the Appeals Chamber’s order of 26 March 2013. See “Order inviting responses to the ‘Application by Child Soldiers International for leave to submit observations to Appeals Chamber of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 26 March 2013, ICC-01/04-01/06-3001, p. 3 (A 4 A 5 A 6).

⁶ Request, paras 6-7.

⁷ Request, para. 12.

⁸ Request, paras 13-17.

⁹ “Annex I – Draft submissions of Child Soldiers International to the Appeals Chamber” to “Application by Child Soldiers International for leave to submit observations to Appeals Chamber of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence”, 8 March 2013, ICC-01/04-01/06-2995-Anx1 (A 4 A 5 A 6).

5. On 26 March 2013, the Appeals Chamber invited responses to the Request, to be submitted by 9 April 2013.¹⁰

6. On 9 April 2013, Mr Lubanga filed his observations on the Child Soldiers Amicus Request, in which he opposes the Request.¹¹ He recalls that, in a decision issued on 14 December 2012¹² (hereinafter: “Admissibility Decision”), the Appeals Chamber notified five organisations, which had made observations before the Trial Chamber, that they may seek leave to make observations before the Appeals Chamber, but that Child Soldiers International was not among them.¹³ Second, Mr Lubanga contends that the participation of Child Soldiers International is likely to infringe upon his rights by rendering the trial unfair and by unduly extending the appeals proceedings as the Defence and the Prosecutor must have the opportunity to reply to the observations pursuant to rule 103 (2) of the Rules of Procedure and Evidence.¹⁴ Mr Lubanga then notes that the organisation has annexed its observations to its application, which he argues is contrary to the established practice of the Court.¹⁵ Further, Mr Lubanga argues that the observations of Child Soldiers International will not assist the Appeals Chamber in its proper determination of the case, as they partly relate to issues which have not been brought before the Appeals Chamber,¹⁶ and because the organisation failed to demonstrate legal expertise.¹⁷ Finally, Mr Lubanga is of the view that Child Soldiers International lacks the objectivity, impartiality and independence required from *amicus curiae*.¹⁸

¹⁰ “Order inviting responses to the ‘Application by Child Soldiers International for leave to submit observations to Appeals Chamber of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 26 March 2013, ICC-01/04-01/06-3001 (A 4 A 5 A 6).

¹¹ “Observations de la Défense de M. Thomas Lubanga concernant la demande présentée par l’organisation Child Soldiers International le 8 mars 2013”, 9 April 2013, ICC-01/04-01/06-3013 (A 4 A 5 A 6), para. 5 (hereinafter: “Defence Observations”).

¹² “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 proceedings”, 14 December 2012, ICC-01/04-01/06-2953 (A A 2 A 3).

¹³ Defence Observations, paras 17-18, referring to Admissibility Decision, para. 77..

¹⁴ Defence Observations, paras 21, 30.

¹⁵ Defence Observations, para. 25.

¹⁶ Defence Observations, paras 33-36.

¹⁷ Defence Observations, para. 39.

¹⁸ Defence Observations, para. 38.

7. Also on 9 April 2013, the Prosecutor submitted her observations on the Child Soldiers Amicus Request, stating that she would not object to the granting of the Request, reserving, however, her right to respond.¹⁹

II. MERITS

A. Preliminary matters

8. In respect of Mr Lubanga's argument that Child Soldier's International was not among the five organisations that were notified in the Admissibility Decision that they could request leave to submit observations before the Appeals Chamber, the Appeals Chamber recalls that the Admissibility Decision was rendered in the parallel appeals proceedings A, A 2 and A 3 against the Trial Chamber's "Decision establishing the principles and procedures to be applied to reparations".²⁰ In contrast, the Request relates to the appeals against the Conviction and Sentencing Decisions, notwithstanding the fact that it was initially (and incorrectly) filed in the A, A 2 and A 3 appeals proceedings.²¹ For that reason, the Appeals Chamber sees no need to address this argument any further.

9. The Appeals Chamber notes that Child Soldiers International filed its substantive observations on the appeals under rule 103 of the Rules of Procedure and Evidence without having obtained leave to do so. While the Appeals Chamber does not consider it necessary in the present case to reject the Request on this basis, the Appeals Chamber reiterates that requests for leave pursuant to rule 103 of the Rules of Procedure and Evidence should not include the substance of the proposed observations and that the submission of observations is only permissible after a Chamber has either invited or granted leave to an individual, organisation, or state to make such a submission.²² Accordingly, the Annex to the Request has been disregarded in respect of the Appeals Chamber's determination of whether to grant the Request.

¹⁹ "Prosecution's Observations on the Application by Child Soldiers International for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence", 9 April 2013, ICC-01/04-01/06-3014, para. 5.

²⁰ ICC-01/04-01/06-2904.

²¹ See *supra* para. 4 and the corresponding footnotes.

²² See, for example, *Prosecutor v. Jean-Pierre Bemba*, "Decision on the application of 14 September 2009 for participation as an *amicus curiae*", 9 November 2009, ICC-01/05-01/08-602 (OA 2), para. 9 (hereinafter: "9 November 2009 *Amicus Curiae* Decision"), para. 10; Admissibility Decision, para. 77.

B. Discussion

10. Rule 103 of the Rules of Procedure and Evidence provides that:

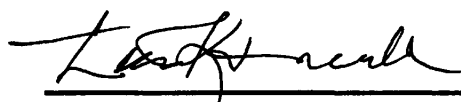
(1) At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observations on any issue that the Chamber deems appropriate.

(2) The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

(3) A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

11. The decision to grant leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence falls within the Appeals Chamber's discretion.²³ In the present case, the Appeals Chamber does not consider that receiving observations from Child Soldiers International is "desirable for the proper determination of the case", given that the three issues upon which Child Soldiers International wishes to make observations are of an essentially legal nature, whereas Child Soldiers International is a "research and advocacy organisation". Accordingly, the Request is rejected.

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



 Judge/Erkki Kourula
 Presiding Judge

Dated this 16th day of August 2013

At The Hague, The Netherlands

²³ See 9 November 2009 *Amicus Curiae* Decision: "Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence'", 22 April 2008, ICC-01/04-01/06-1289 (OA 11), para. 8.