

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06

Date: **21 July 2015**

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Confidential, *ex parte* – only available to the Prosecution, Registry and Defence

Urgent request for confidential documents in the *Katanga* case

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

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Counsel for the Defence

Me Stéphane Bourgon

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Me Véronique Talbot

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Pursuant to Regulation 42(3) of the Regulations of the Court, and further to *Prosecution's urgent request for immediate suspension of Defence investigators and other measures* communicated on 26 June 2015 ("Prosecution Request")¹, Counsel for Mr Ntaganda ("Defence") hereby submits this:

Urgent request for confidential documents in the *Katanga* case

INTRODUCTION

1. Bosco Ntaganda requests disclosure of confidential filings, transcripts and documents from proceedings in the *Katanga* case relevant to allegations of misconduct against Mr Jean Logo Dhengachu in that case. The Prosecution Request selectively relies on that confidential material² without mentioning that those allegations³, as far as the Defence can ascertain, were rejected.
2. The confidential documents that are believed or known to exist in relation to those allegations include: (i) the Prosecution's request for "temporary exclusion" of Mr Logo;⁴ (ii) Mr Logo's closed session testimony in which he responds to the Prosecution's allegations;⁵ and (iii) the probability of a Trial Chamber decision on the Prosecution motion and other filings related thereto.
3. The information requested, given the Prosecution's reliance thereon, is highly material and relevant to the pending Prosecution Request. The ability to respond comprehensively, as well as fairness and equality of arms, requires that the Defence be granted the same access as the Prosecution to this highly material and relevant information.

¹ ICC-01/04-02/06-658-Conf-Exp.

² Prosecution Request, paras. 42-44, fn. 59.

³ See *Prosecutor v. Katanga*, ICC-01/04-02/12-3-tENG, para. 280, fn. 610.

⁴ *Id.*

⁵ See e.g. Prosecution Request, para. 42, fn. 59.

APPLICABLE LAW

4. Rule 42(3) of the Regulations of Court ("RoC") provides that:

Any application to vary a protective measure shall first be made to the Chamber which issued the order. If that Chamber is no longer seized of the proceedings in which the protective measure was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested. That Chamber shall obtain all relevant information from the proceedings in which the protective measure was first ordered.

5. This provision is broadly similar to Rule 75(G) common to the Rules of Procedure of both the ICTY and ICTR and, in the absence of established ICC practice on the issue, the jurisprudence thereunder provides persuasive guidance as to its potential interpretation. A party may be granted access to confidential material in another case, according to this jurisprudence, if: (i) it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail; and (ii) it can show that such access is likely to materially assist its case or if a legitimate forensic purpose exists for such access.⁶ Such orders are now extremely common in respect of overlapping "crime-base" components,⁷ in respect of specific witnesses,⁸ or in respect of specific issues.⁹ Recourse to such requests does not, of course, diminish the Prosecution's obligation to disclose Rule 77 or Article 67(2) material directly to the Defence.

⁶ *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3 ("Hadžihasanović Decision"). *Prosecutor v. Blaškić*, Case No IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002 ("Blaškić Decision"), para.14; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para.10.

⁷ *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Decision on Motion by Ratko Mladić for Access to Confidential Material, 20 February 2013.

⁸ *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-A, Decision on Goran Hadžić's Urgent Motion for Access to Audio Recordings in the Stanišić & Simatović Case, 28 August 2014.

⁹ *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-A, Decision on Ratko Mladić's Motion for Access to the Psychological Examination of Milan Babić on 5th March 2004, 3 February 2014.

SUBMISSIONS

6. Trial Chamber II is no longer seized of the *Katanga* case. This Trial Chamber is therefore appropriately seized of this Request under Regulation 42(3).
7. The information whose disclosure is sought has been described with as much detail and specificity as possible. As indicated above, the documents that are known to exist, based on references thereto in public documents, include: (i) an identified confidential request by the Prosecution requesting measures against Mr Logo;¹⁰ and (ii) identified closed session testimony of Mr Logo in which he seems to have responded to these allegations, to which the Prosecution appears to make reference in its Request under the label of "[REDACTED]".¹¹ The existence of these documents suggests that there must also be: (iii) submissions made in relation to the Prosecution motion seeking measures against Mr Logo, whether by the parties, the VWU or any other intervener; and (iv) some decision or decisions by the Trial Chamber on that request. Categories of information (i) – (iv) are definite and specific. Access thereto can be provided without significant administrative difficulty or burden.
8. Access to the material serves a legitimate and necessary forensic purpose. First, the Prosecution has itself relied on this information in its submissions. The Defence must, as a matter of basic fairness and equality of arms, be in a position to respond. Second, previous allegations of misconduct are potentially (but not necessarily) relevant to these allegations. The Prosecution evidently thinks so, having relied on these previous events in support of its Request for Mr Logo's removal in this case. The Defence must be in a position

¹⁰ See *Prosecutor v. Katanga*, ICC-01/04-02/12-3-tENG, para. 280, fn. 610, referring to "Prosecution's Request seeking temporary prohibition of contacts between Germain Katanga and the outside; post-factum analysis of telephone conversations and immediate temporary exclusion of an investigator", 23 December 2009, ICC-01/04-01/07-1739 with ex parte confidential annexes (DRC-OTP-1052-0141).

¹¹ Prosecution Request, para. 42, fn. 59.

to assess the potential relevance of those events to the present allegations, which are likely to be of material assistance.¹²

9. Expedited disposition of the present request is appropriate, in light of the deadline for the Defence to file submissions on Mr Logo's suspension by 31 July 2015, and the need to consult with him on the basis of these materials.
10. Accordingly, this request is filed as urgent pursuant to Regulation 24(3) of the Regulations of the Registry.

CONFIDENTIALITY

11. Pursuant to Regulations 23bis (1) and (2) of the Regulations of the Court, this Defence Request is submitted on a confidential *ex parte* basis – only available to the Prosecution, Registry and Defence – as it refers to filings bearing the same classification.

RELIEF SOUGHT

12. In light of the above submissions, the Defence respectfully requests the Chamber to:

ORDER that the Defence be granted access to the materials identified in paragraph 7 above, as well as any other materials that may be deemed relevant to the adjudication of allegations against Mr Logo in the *Katanga* case;

GRANT this access on condition that it shall be treated as confidential and not subject to disclosure, except *vis a vis* Mr Logo himself, who is already privy thereto; and

DECIDE the present motion on an expedited basis.

¹² Hadžihasanović Decision, p.3.

RESPECTFULLY SUBMITTED ON THIS 21ST DAY OF JULY 2015

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands