

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 1 September 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***

Public

Order on Defence access to confidential material in the *Lubanga* case

Order to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Mr James Stewart
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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**

Others

Counsel for Mr Thomas Lubanga Dyilo
Legal Representatives of Victims V01
Legal Representatives of Victims V02

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64(2) and (6)(f) of the Rome Statute and Regulation 42 of the Regulations of the Court ('Regulations'), issues the following 'Order on Defence access to confidential material in the *Lubanga* case'.

I. Procedural history and submissions

1. On 15 July 2015, the defence team for Mr Ntaganda ('Defence') filed a request ('Defence Request')¹ seeking access to all *inter partes* confidential material in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case'), namely: '(i) all exhibits classified as confidential; (ii) all *inter partes* confidential filings; (iii) all confidential decisions issued by Trial Chamber I; and (iv) all transcripts of private and closed sessions'.² The Defence states that, pursuant to Regulation 42(3) of the Regulations, considering that Trial Chamber I is no longer seised of the trial proceedings in the *Lubanga* case, 'the Defence Request is submitted before Trial Chamber VI'.³ The Defence notes that Regulation 42 of the Regulations does not set out the requirements which must be satisfied for a variation of protective measures to be granted when access to confidential material in another case is sought.⁴ It avers that 'well-established jurisprudence of the *ad hoc* tribunals on similar matters' should be drawn on as useful guidance.⁵
2. On 4 August 2015, the Legal Representatives of Victims in the *Lubanga* case ('Lubanga LRVs') filed observations on the Defence Request ('Lubanga LRVs

¹ Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case, ICC-01/04-02/06-721.

² Defence Request, ICC-01/04-02/06-721, para. 1. The Chamber considers the use of the term '*inter partes*' by the Defence to pertain to all confidential material that is not *ex parte*.

³ Defence Request, ICC-01/04-02/06-721, paras 3, 5 and 6.

⁴ Defence Request, ICC-01/04-02/06-721, para. 7.

⁵ Defence Request, ICC-01/04-02/06-721, para. 8. The Defence refers to certain jurisprudence of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY') in paras 9-11.

Observations'),⁶ in which they submit that not all participating victims in the *Lubanga* case will participate in the *Ntaganda* case, and that such victims should be consulted on any risk of disclosure on their confidential information to the Defence.⁷ The *Lubanga* LRVs observe that they were not able to consult those victims who participated in the *Lubanga* case on the consequences of giving consent to disclosure of their confidential information to the Defence.⁸ Hence, the *Lubanga* LRVs submit that the confidential information pertaining to the victims they represent in the *Lubanga* case who do not participate in the *Ntaganda* case should be withheld.⁹

3. On 5 August 2015, the Office of the Prosecutor ('Prosecution') filed a response to the Defence Request ('Prosecution Response').¹⁰ The Prosecution submits that it does not oppose the Defence being granted access to the Requested Material, 'given the overlap between the proceedings',¹¹ but defers to the views of the defence team for Mr Lubanga and the Legal Representatives of Victims in the *Lubanga* case as to whether there are security implications in varying the protective measures imposed by Trial Chamber I for the witnesses they called or materials they presented.¹²
4. On 5 August 2015, the Legal Representative of Victims representing the former child soldiers in the *Ntaganda* case ('*Ntaganda* LRV') filed a response to the Defence Request, in which she requests the Chamber to dismiss it ('*Ntaganda* LRV Observations').¹³ The *Ntaganda* LRV submits that the Defence Request does not comply with the requirements of 'due diligence' as the Defence 'does

⁶ *Observation des Représentants légaux de groupe des victimes V01 sur la requête de la défense de Mr Ntaganda* « ICC-01/04-02/06-721- request on behalf of Mr Ntaganda access to all *inter partes* confidential material in the *Lubanga* case », ICC-01/04-02/06-763.

⁷ *Lubanga* LRVs Observations, ICC-01/04-02/06-763, para. 8.

⁸ *Lubanga* LRVs Observations, ICC-01/04-02/06-763, para. 11.

⁹ *Lubanga* LRVs Observations, ICC-01/04-02/06-763, page 6.

¹⁰ Response to "Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case", ICC-01/04-02-06-764.

¹¹ Prosecution Response, ICC-01/04-02/06-764, paras 1 and 5.

¹² Prosecution Response, ICC-01/04-02/06-764, para. 6.

¹³ Former child soldiers' response to the "Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case", ICC-01/04-02/06-766.

not offer any valid reason as to why it submitted its Request at this specific juncture' and 'given the large amount of material sought, granting the [Defence] Request would result in an undue delay of the proceedings'.¹⁴ The *Ntaganda* LRV adds that the Defence Request lacks proper legal basis and misapprehends the scope of the Prosecution's disclosure obligations. She emphasises that the disclosure obligation at the Court, contrary to the system at the ICTY, 'does not extend to material emanating from the other organs of the Court such as Chambers' transcripts and decisions, or material filed by other participants in the proceedings [...]'.¹⁵ The *Ntaganda* LRV further submits that the Defence fails to identify with sufficient specificity the relevant documents sought and overlooks confidentiality requirements and the protective measures already in place.¹⁶

II. Analysis

i. Applicable law and procedure

5. The Chamber notes that the Defence Request is premised on the assumption that, pursuant to Regulation 42(3) of the Regulations, it was required to seek variation of existing protective measures imposed by Trial Chamber I in the *Lubanga* case in relation to the material requested, in order for the Defence to be authorised to access it. Noting that Trial Chamber I is no longer seised of the *Lubanga* case, the Defence avers that the present Chamber, being the chamber 'before which a variation of the protective measures is being requested', is the appropriate chamber to authorise any such variation.¹⁷ The Chamber notes that, on this basis, it could indeed make such order.

¹⁴ *Ntaganda* LRV Observations, ICC-01/04-02/06-766, paras 3 and 5-9.

¹⁵ *Ntaganda* LRV Observations, ICC-01/04-02/06-766, paras 3 and 11-18.

¹⁶ *Ntaganda* LRV Observations, ICC-01/04-02/06-766, paras 3 and 19-27.

¹⁷ Defence Request, ICC-01/04-02/06-721, paras 3, 5 and 6.

6. However, the Chamber is not persuaded that Regulation 42(3) of the Regulations constitutes the appropriate legal basis upon which to base the Defence Request in the present circumstances. The Chamber observes that requests at the Court for access to confidential information in another case have previously been authorised by several chambers on the condition of the *continuation* of existing protective measures in the second proceedings, rather than their *variation*, without recourse to Regulation 42(3). For example, Trial Chamber I in the *Lubanga* case authorised access to certain closed-session transcripts and exhibits in the *Lubanga* case to defence teams in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ('*Katanga and Ngudjolo* case')¹⁸ on the condition 'that there would need to be an order in terms as strong, at least as strong as the order that we've made in relation to protective measures emanating from Trial Chamber II directed at all those who would be recipients of the material before we will allow the release of the closed-session transcripts to the Defence teams in [the *Katanga and Ngudjolo* case]'.¹⁹
7. This approach of *continuing*, rather than *varying*, protective measures was also adopted by Trial Chamber II in the *Katanga and Ngudjolo* case²⁰ and by Trial Chamber III in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*,²¹ the latter of which found, *inter alia*, that 'disclosure of transcripts does not amount to a

¹⁸ See, for example, *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of hearing of 15 May 2009, ICC-01/04-01/06-T-175-Red3-ENG (page 1, line 16 to page 3, line 22 and page 83, line 18 to page 85, line 24); Transcript of hearing of 9 December 2009, ICC-01/04-01/06-T-222-ENG, page 9, line 20 to page 11, line 2; Decision on the request from the defence in the *Katanga and Ngudjolo* case for disclosure of transcripts in the *Lubanga* case, 11 June 2010, ICC-01/04-01/06-2471; Order entering into the record an order on disclosure of transcripts of Witness 28 dated 3 December 2010, 31 March 2011, ICC-01/04-01/06-2711-Conf-AnxA.

¹⁹ ICC-01/04-01/06-T-175-CONF-ENG, page 85, lines 14-19.

²⁰ See, for example, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order concerning protection measures applied to transcripts of testimonies of prosecution Witnesses 2, 12, 30 and 157 in the *Thomas Lubanga Dyilo* case, 7 October 2009, ICC-01/04-01/07-1516-tENG; Decision on protective measures for the exhibits associated with the testimony of P-2, P-30 and P-157, 24 December 2009, ICC-01/04-01/07-1741; Transcript of hearing of 30 November 2010, ICC-01/04-01/07-T-225-Red-ENG, page 2, lines 21-24.

²¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on 'Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding', 27 May 2014, ICC-01/05-01/08-3074; Redacted Version of "Decision on 'Prosecution's Second Further Request for Disclosure of Evidence in a Related Article 70 Proceeding'", 26 June 2014, ICC-01/05-01/08-3098-Red ('*Bemba* Decision of 26 June 2014'). But see *contra* Decision on 'Prosecution request for a variance of protective measures of trial witnesses to allow access to transcripts of evidence in a related article 70 proceeding', 12 March 2014, ICC-01/05-01/08-3014.

variance of protective measures under Regulation 42(3) of the Regulations. As such, the requirement under Regulation 42(4) that the Chamber seek to obtain the consent of the witnesses concerned is not applicable'.²²

8. The Chamber acknowledges that there is no uniform approach at the Court for dealing with requests of this type. However, it considers, in the current circumstances, in which the Defence has requested access to confidential materials in trial proceedings that have been completed and form part of the Court archive, that granting access to the materials requested is a discretionary matter for the Chamber, based on a finding that such materials are of relevance to the defence case, and conditional upon the continuation of existing protective measures and redactions imposed by the chamber in the first proceedings. Notwithstanding the non-applicability of Regulation 42(4) of the Regulations, the Chamber is still bound by its obligation to ensure the safety and well-being of witnesses, victims and other persons who may be at risk on account of the activities of the Court. Consequently, if it determines that the requested material is of relevance to the Defence, the Chamber considers it appropriate to seek the views of the parties and participants to the first proceedings to determine whether any additional protective measures or specific redactions may be required.

ii. Determination of the Chamber

9. As a preliminary matter, noting the inconsistency between the lists of materials requested by the Defence in paragraphs 1 and 12 of the Defence Request, the Chamber considers that the scope of the Defence Request to cover the materials outlined in the Prosecution Response, and to exclude any *ex parte* material, namely: (i) all exhibits classified as confidential that were admitted into evidence in the *Lubanga* case; (ii) transcripts of all private and closed sessions in

²² *Bemba* Decision of 26 June 2014, ICC-01/05-01/08-3098-Red, para. 14.

the *Lubanga* case; (iii) all decisions classified as confidential that were issued by Trial Chamber I in the *Lubanga* case; (iv) all submissions classified as confidential that were filed by the parties and participants in the *Lubanga* case; and (v) all witness statements classified as confidential placed in the trial record in the *Lubanga* case ('Requested Material').²³

10. The Chamber notes that the Defence argues that the Requested Material is relevant due to the geographical, temporal and material overlaps between the *Ntaganda* case and *Lubanga* case, including, *inter alia*, that: (i) Mr Lubanga and Mr Ntaganda were both charged with commission of the crimes of enlisting, conscripting and using children to participate actively in the hostilities, and that the applications for their arrest warrants were based on co-perpetration;²⁴ (ii) insofar as the 'child soldier-related charges' are concerned, the case against Mr Ntaganda covers the same temporal and geographical scope of the charges in the *Lubanga* case, the location being the Ituri district in both cases;²⁵ and (iii) the Updated DCC in the *Ntaganda* case refers to co-perpetration of 'child soldier-related crimes' on the basis that both men were part of the UPC and were leaders of the FPLC.²⁶ The Chamber notes that it is not apparent from the Prosecution Response whether it has already reviewed the Requested Material for potential relevance to the Defence; however, the Prosecution does not contest the Defence being granted access to the Requested Material, 'given the overlap between the proceedings'.²⁷
11. Accordingly, on the basis of the uncontested 'overlap' between the *Ntaganda* case and *Lubanga* case with respect to the geographical, temporal and material scope of the charges, the Chamber considers that certain of the Requested Material may have relevance to the Defence and may assist in its analysis of the

²³ Prosecution Response, ICC-01/04-02/06-764, para. 4.

²⁴ Defence Request, ICC-01/04-02/06-721, paras 15-16.

²⁵ Defence Request, ICC-01/04-02/06-721, para. 19.

²⁶ Defence Request, ICC-01/04-02/06-721, para. 20.

²⁷ Prosecution Response, ICC-01/04-02/06-764, paras 1 and 5.

material it has received from the Prosecution to date. However, in so finding, the Chamber considers that some of the Requested Material that relates to, for example, procedural issues specific to the *Lubanga* case, will not be relevant to the Defence.

12. Accordingly, the Chamber instructs the Prosecution to review the Requested Material to identify: (i) anything which relates purely to procedural matters specific to the *Lubanga* case, or is otherwise irrelevant to the Defence; and (ii) any specific material for which it considers that additional protective measures, including redactions, is required prior to disclosure of the Requested Material to the Defence. The other parties and participants to the *Lubanga* case are similarly directed to submit any specific proposals for additional protective measures that are required with respect of the Requested Material, including redactions, providing all relevant information to enable the Chamber to subsequently rule on the matter.

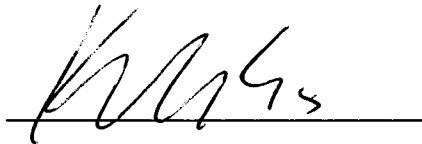
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Prosecution and the parties and participants to the *Lubanga* case to file any submissions they may have in accordance with paragraph 12 above, by the filing deadline on 22 September 2015.

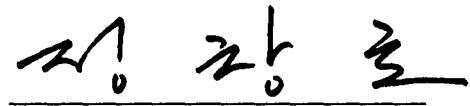
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 1 September 2015

At The Hague, The Netherlands