

**Cour
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**International
Criminal
Court**

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Date: 22 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

**Prosecution's Observations on the "Order on Defence access to confidential material in the *Lubanga* case" issued by Trial Chamber VI,
ICC-01/04-02/06-806**

Source: Office of the Prosecutor

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

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Introduction

1. On 1 September 2015 Trial Chamber VI (“Chamber”) directed the Parties and participants in the *Lubanga* case to file any submissions they may have on the Chamber’s direction for the identification of confidential, *inter partes* material from the *Lubanga* case to which the *Ntaganda* Defence has requested access by 22 September 2015 (“Requested Material”).¹
2. The Chamber instructed the Prosecution to identify, from within the Requested Material²: (i) any materials relating purely to procedural matters specific to the *Lubanga* case or which are otherwise irrelevant to the Defence (“Irrelevant Materials”); and (ii) any materials for which the Prosecution considers that additional protective measures, including redactions, are required prior to disclosure to the Defence (“Materials Requiring Further Protective Measures”).
3. The Prosecution has identified certain confidential exhibits which in its view need not be provided to the Defence, namely receipts for expenses related to witnesses in the *Lubanga* case. It continues to review the other confidential exhibits admitted into evidence in the *Lubanga* case (including “witness statements [...] placed in the trial record”³), and requests the Chamber grant it additional time to complete this review until 9 October 2015, prior to the commencement of the second evidentiary block.
4. The Prosecution informs the Chamber that due to technical limitations, it is not able to identify the Irrelevant Materials in a resource-efficient and expeditious

¹ The Chamber delineated the scope of the material requested by the Defence as excluding any *ex parte* material, but including: “(i) all exhibits classified as confidential that were admitted into evidence in the *Lubanga* case; (ii) transcripts of all private and closed sessions in 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...”. ICC-01/04-02/06-806, para.9.

² The Prosecution notes that, in compliance with its disclosure obligations, it has already identified and disclosed the *Lubanga* materials it considered relevant to the preparation of the Defence.

³ See fn.1, above.

manner. The Prosecution proposes, instead, that the Registry give the Defence access to “all” confidential, *inter partes* transcripts, decisions and filings in the *Lubanga* case, in line with the Defence Request,⁴ save for those to be identified by the Parties and participants in the *Lubanga* case as requiring further protective measures.

5. Finally, the Prosecution informs the Chamber that it is not in a position to identify “any specific material” from the *Lubanga* proceedings that may need “additional protective measures” until it has input from the *Lubanga* Defence and Legal Representatives.
6. As the Defence asserts that access to the Requested Material is “essential [...] in its preparations for trial,”⁵ the Prosecution respectfully submits that, in the interest of ensuring that the Defence has access to the Requested Material as quickly as possible, instead of requiring the Prosecution to review the Requested Material for the purpose of identifying the Irrelevant Materials, the Chamber order the Registry to give the Defence access to all confidential, *inter partes* materials in the *Lubanga* case,⁶ with the exception of any materials specifically identified by the *Lubanga* Defence or the *Lubanga* Legal Representatives of Victims.
7. The Prosecution maintains that it does not oppose the disclosure of the Requested Material. It submits, however, that it is dependent on the *Lubanga* Defence and *Lubanga* Legal Representatives of Victims’ assistance in identifying individual items within the Requested Material that should not be disclosed to the Defence without further protective measures.

⁴ See fn.1, above.

⁵ ICC-01/04-02/06-721, para.24. The Prosecution notes that, this assertion notwithstanding, the Request was filed two weeks prior to the commencement of the trial.

⁶ ICC-01/04-02/06-806, para.9.

Procedural History

8. On 15 July 2015, the Defence requested access to confidential material from the *Lubanga* case (“Request”).⁷
9. On 4 August 2015, the Legal Representatives of Victims V01 requested that the Chamber deny the Defence access to confidential information concerning the victims they represent in the *Lubanga* case who do not participate in the *Ntaganda* case.⁸
10. On 5 August 2015, the Prosecution submitted that it “does not oppose the Request, subject to the views of the Defence of Mr Lubanga and of the Legal Representatives of Victims on the security implications of a variation of protective measures for witnesses they called or material they presented.”⁹
11. On 5 August 2015, the Common Legal Representative of the former child soldiers requested that the Chamber dismiss the Request entirely.¹⁰
12. On 1 September 2015, the Chamber issued its order on Defence access to confidential material in the *Lubanga* case.¹¹

Observations

Some of the Irrelevant Materials cannot be identified in a resource-efficient or expeditious manner

13. The Prosecution informs the Chamber that it has identified approximately 1,600 confidential exhibits admitted into evidence in the *Lubanga* case¹² that have not

⁷ ICC-01/04-02/06-721.

⁸ ICC-01/04-02/06-763, para.9.

⁹ ICC-01/04-02/06-764, para.1.

¹⁰ ICC-01/04-02/06-766, para.4.

¹¹ ICC-01/04-02/06-806 (“1 September 2015 Order”).

been disclosed to the Defence. Of these, over 1,350 are materials associated with witness-related expenses. Over a third of these items are witness-related expenses for individuals who were witnesses in the *Lubanga* case as well as the *Ntaganda* case.¹³ Given that materials associated with witness-related expenses for Prosecution witnesses in the *Ntaganda* case are being reviewed to determine whether they go beyond routine expenses and must be disclosed,¹⁴ pursuant to a separate Defence request,¹⁵ these particular items have not been considered in this filing. The Prosecution considers that the witness-related expenses for *Lubanga* witnesses who are not also *Ntaganda* witnesses are, in principle, irrelevant to the Defence.

14. The Prosecution is continuing its review of the remaining approximately 260 confidential exhibits admitted into evidence in the *Lubanga* case (including witness statements placed on the trial record), and expects to be able to set aside any further irrelevant items¹⁶ within this group of materials. To this end, the Prosecution requests until 9 October 2015 to report back to the Chamber, prior to the beginning of the next evidentiary block.

15. The rest of the Requested Material is comprised of the transcripts of all private and closed sessions in the *Lubanga* case, the confidential decisions issued by Trial Chamber I in the *Lubanga* case, and all submissions classified as confidential that were filed by the Parties and participants in the *Lubanga* case (“Remaining Irrelevant Material”).

16. The Prosecution informs the Chamber that there is no effective tool available to accurately filter the Remaining Irrelevant Material for the elements referred to by

¹² ICC-01/04-02/06-806, paras.9, 12.

¹³ 415 items associated with witness-related expenses for Prosecution Witnesses P-2, P-5, P-10, P-12, P-14, P-16, P-17, P-24, P-30, P-31, P-38, P-43, P-46 and P-55.

¹⁴ ICC-01/04-02/06-822-Conf-Exp, paras.38-44; ICC-01/04-02/06-808-Conf-Exp, paras.49-50.

¹⁵ ICC-01/04-02/06-795-Red. There is also a related decision of the Chamber on this issue: ICC-01/04-02/06-840-Conf-Exp, para.57.

¹⁶ Consistent with the Chamber’s 1 September 2015 Order, para.12.

the Chamber in its 1 September 2015 Order, specifically, for “purely procedural matters specific to the *Lubanga* case” or “irrelevant matters”.¹⁷ Rather, it would require the Prosecution to review the totality of the *Lubanga* transcripts and a large proportion of the filings and decisions individually.

17. It is impossible to distinguish, in an automated way, transcripts, decisions or submissions that deal with procedural matters from ones that do not – let alone transcripts, decisions or submissions dealing with *irrelevant* procedural or other irrelevant matters. While some transcripts indicate at the top of the page whether the Chamber was entertaining submissions or ruling on procedural matters rather than listening to witness testimony,¹⁸ others do not,¹⁹ making this indication an unreliable tool. The same is true for private and closed sessions; while the nature of the session is normally indicated at the top of the page,²⁰ it may not always be the case. Finally, while the title of some filings or decisions indicates their irrelevance to the *Ntaganda* case, it may not always be so.

18. Similarly, there are no tools or resources to enable the Prosecution to effectively search through and filter the Remaining Irrelevant Material, as the issues are largely conceptual and do not lend themselves to keyword searching. As such, each *Lubanga* trial transcript, decision and filing would need to be scrutinised individually, and in the case of transcripts, generally read page-by-page.

19. Once identified, the irrelevant portions within otherwise relevant transcripts, decisions and filings would also, presumably, need to be excluded from the

¹⁷ ICC-01/04-02/06-806, para.12.

¹⁸ For example, see: *Lubanga* Transcript of P-0002 (T-160, ENG), DRC-OTP-2054-2447 at 2447-2448, that reads “Procedural Matters (Closed Session)” at the top of the page; and *Lubanga* Transcript of P-0024 (T-171, ENG), DRC-OTP-2054-2801 at 2834-2848 that reads “Ruling (Open Session)” at the top of the page.

¹⁹ For example, see: *Lubanga* Transcript of P-0038 (T-113, ENG), DRC-OTP-2054-4702 at 4702-4711, where the words “Hearing (Open Session)” at the top of the page do not indicate a procedural discussion about self-incrimination.

²⁰ For example, see: *Lubanga* Transcript of P-0017 (T-154, ENG), DRC-OTP-2054-1921 at 1921-1922, where “(Closed Session)” appears at the top of the first page and then “(Open Session)” on the second; and *Lubanga* Transcript of P-0016 (T-188, ENG), DRC-OTP-2054-1255 at 1339, top of page indicating “Witness DRC-OTP-WWW-0016 (Closed Session)”.

materials to be disclosed to the Defence in some way, most likely through redactions, making this an even more resource-intensive exercise.

20. The Prosecution submits that such an endeavour is disproportionate to the aim of proving the Defence with only relevant materials, particularly given the broad terms of the Defence Request.
21. That these efforts would constitute a considerable burden is borne out by the volume of the transcripts, filings and decisions in the *Lubanga* case that would need to be reviewed: 275 transcripts spanning almost 15,000 pages, and 954 filings and decisions spanning close to 8,000 pages, as of the date of the trial judgment. The Requested Material spans the duration of the *Lubanga* trial proceedings—opening statements began on 26 January 2009 and closing statements concluded on 26 August 2011.
22. The Prosecution thus respectfully submits that – with the exception of confidential exhibits admitted into evidence in the *Lubanga* case²¹ – the Registry should be ordered to give the Defence access to “all” confidential, *inter partes* transcripts, decisions and filings in the *Lubanga* case, in line with the Defence Request,²² save for those to be identified by the Parties and participants in that case as requiring further protective measures.

The Lubanga Legal Representatives are best placed to identify individually the Materials Requiring Further Protective Measures

23. In compliance with its disclosure obligations, the Prosecution has already identified and disclosed the *Lubanga* materials it considered relevant to the preparation of the Defence: 1,614 items as incriminatory, 2,798 items under rule 77 of the Rules of Procedure and Evidence, and 624 items under article 67(2) of

²¹ As advanced in paragraphs 13 and 14 above, the Prosecution is able to review these materials for relevance.

²² See fn.1, above.

the Statute. Wherever these materials required protective measures, the Prosecution requested them in a timely manner, in accordance with deadlines imposed at the pre-confirmation and pre-trial stages.

24. In the Prosecution's view, the items within the Requested Material most likely to require protective measures are all related to the victims participating in the *Lubanga* case, specifically their victim participation application forms, and, in the case of victims with dual-status or who were called as witnesses by the Court, their statements and transcripts of their testimony. There will also be some submissions and decisions that concern individuals whose identity has not been disclosed to the Defence in these proceedings.
25. As a general matter, the Prosecution submits that the Defence should have no more access to these materials than the *Lubanga* Defence. For example, where the *Lubanga* Defence only had access to redacted victim participation application forms, the Defence should only have access to those versions of the applications.
26. The Prosecution is unable to identify "any specific material" from the *Lubanga* proceedings that may need "additional protective measures", as it does not have access to the particulars of the security situation of any of the victims participating in the *Lubanga* case, or of victim-witnesses who testified in that case. The Prosecution only has access to information about the security situation of individuals who participated in the *Lubanga* case as victims or witnesses where they are also now witnesses in the *Ntaganda* case. Simply put, the Prosecution is not in a position to make meaningful proposals of further protective measures.
27. In certain cases, some of these individuals are in the Court's protection programme and therefore the input of the Registry's Victims and Witnesses' Section, in addition to that of the Office of Public Counsel for Victims ("OPCV") is required.

28. The Prosecution submits that, while it is willing to consult with the Legal Representatives and the OPCV for the purpose of expediting the Defence's access to the Requested Material, the Legal Representatives should make their own representations to the Chamber concerning the security situation of their clients. Any redactions proposed by the Legal Representatives should be applied by the Registry where the materials concerned are victim participation application forms initially placed on the record of the case by the Registry, or by the Prosecution in consultation with the Legal Representatives, in the case of statements from dual-status victim/witnesses.

Conclusion

29. On the basis of the foregoing, the Prosecution advises the Chamber that for technical reasons, it is not able to identify the Remaining Irrelevant Material in a resource-effective and expeditious manner. The Prosecution also advises the Chamber that it is not in a position to identify "any specific material" from the *Lubanga* proceedings that may need "additional protective measures" until it has input from the *Lubanga* Defence and Legal Representatives.

30. The Prosecution notes that the Chamber has already directed the *Lubanga* Defence and Legal Representatives of Victims to propose protective measures they deem necessary by the same deadline given to the Prosecution to submit these observations. The Prosecution will endeavour to consult with the *Lubanga* Defence and Legal Representatives of Victims in follow-up to the filing of those observations.

Relief

31. The Prosecution requests that it be granted until 9 October 2015 to complete its review of the confidential exhibits admitted into evidence in the *Lubanga* case.
32. The Prosecution also respectfully requests that the Chamber order the Registry to provide the Defence with access to any parts of the Requested Material that are not identified by the *Lubanga* Defence or Legal Representatives of Victims as Materials Requiring Further Protective Measures.



Fatou Bensouda, Prosecutor

Dated this 22nd day of September 2015
At The Hague, the Netherlands