

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 5 October 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 Redacted Version of filing ICC-01/04-02/06-846-Conf-Exp

**Observations in accordance with the
“Order on Defence access to confidential material in the *Lubanga* case”**

Source: Office of Public Counsel for Victims

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims, acting as legal representative of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06, at the time authorised to participate in the proceedings against Mr Lubanga, respectfully submits that some material pertaining to her clients should not be transmitted to the Defence of Mr Bosco Ntaganda.

2. This proposal is justified in light of the Court obligation under article 68(1) of the Rome Statute to ensure the protection of victims and witnesses and the requirement according to which the Court has to assess the impact that the transmission of material to the Defence would have on the security of third parties. In this regard, the Appeals Chamber held that rule 81(4) of the Rules of Procedure and Evidence should be read to include the protection of “*persons at risk on account of the activities of the Court*”.¹

II. PROCEDURAL HISTORY

3. On 15 December 2008, Trial Chamber I issued the “Decision on the applications by victims to participate in the proceedings”² granting applicants a/0047/06, a/0048/06, a/0050/06 and a/0052/06 the status of participating victims in the trial against Mr Lubanga.

4. In accordance with the oral decision issued by Trial Chamber I on 16 January 2009³, the Principal Counsel of the Office of Public Counsel for Victims was

¹ See the “Judgement on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (Appeals Chamber), No. ICC-01/04-01/07-475 OA, 13 May 2008, par. 56.

² See the “Decision on the applications by victims to participate in the proceedings” (Trial Chamber I), 15 December 2008, No. ICC-01/04-01/06-1556, par. 137.

³ See the Transcript of the hearing held on 16 January 2009, No. ICC-01/04-01/06-T-104-ENG RT, page 34 lines 21 à 23.

appointed as legal representative of victims a/0047/06, a/0048/06, a/0050/06 and a/0052/06 at trial in the proceedings against Mr Lubanga. [REDACTED].

5. On 1 September 2015, Trial Chamber VI (the “Chamber”), following the “Request by the Defence of Mr Bosco Ntaganda seeking access to all *inter partes* confidential material in the case of *The Prosecutor v. Thomas Lubanga Dyilo*” (the “Request”) ⁴, issued the “Order on the Defence access to confidential material in the *Lubanga* case” (the “Order”) ⁵, instructing the Prosecution to review the material for which the Defence seeks access and requesting the parties and participants to the *Lubanga* case to submit “any specific proposal for additional protective measures that are required with respect to the Requested Material, including redactions, providing all relevant information to enable the Chamber to subsequently rule in the matter” by 22 September 2015⁶.

6. In accordance with the Order, the Principal Counsel submits the following observations for the Chamber’s consideration. This submission is filed on a confidential *ex parte* basis, only available to the OPCV, OTP and VWS, because it contains confidential information not available to the Defence of Mr Bosco Ntaganda and considering the specific current delicate situation in relation to the persons concerned as explained below.

III. OBSERVATIONS

7. The Principal Counsel wishes to inform the Chamber of the specific current situation of the four individuals she represented in the *Lubanga* trial in order for the Judges to be fully informed when ruling on the Request.

⁴ See the “Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case”, No. ICC-01/04-01/06-721, 15 July 2015 (the “Request”).

⁵ See the “Order on the Defence access to confidential material in the *Lubanga* case” (Trial Chamber VI), No. ICC-01/04-01/06-806, 1 September 2015 (the “Order”).

⁶ *Idem*, para. 12 and page 10.

8. Concerning victim a/0050/06 (DRC-OTP-0010), she is also a Prosecution witness in the *Ntaganda* case and she is represented by Ms Pellet. Therefore, the Principal Counsel has no specific observations concerning the transmission to the Defence of material pertaining to her.

9. Concerning victims a/0047/06 [REDACTED], a/0048/06 [REDACTED] and a/0052/06 [REDACTED], the Prosecution has recently informed the Principal Counsel that it has already disclosed the witnesses' statements to the Defence of Mr Bosco Ntaganda in their unredacted form, without previously informing the legal representative. The Principal Counsel submits that, at this point in time, considering the specific situation of these three individuals as explained below, the only measure available to minimise the risks to their security and well-being is to not transmit [REDACTED]. Indeed, at this point in time, the Defence is [REDACTED].

10. In particular, concerning victims a/0047/06 [REDACTED] and a/0048/06 [REDACTED], following [REDACTED] full disclosure of information related to them may jeopardise their security, as well as the security of their families. Indeed, both victims [REDACTED]. Both individuals are not witnesses in the *Bosco Ntaganda* trial.

11. Concerning victim a/0052/06 [REDACTED], following [REDACTED]. Therefore, the full disclosure of information related to him may jeopardise his security and the one of his family members [REDACTED]. He is not a witness in the *Bosco Ntaganda* trial.

12. Moreover, the Principal Counsel informs the Chamber that when [REDACTED]. This person was also originally represented by the Principal Counsel and subsequently represented at trial by Mr Walley and Mr Mulenda (known as V01 team). [REDACTED]. This circumstance is relevant to the present submission because [REDACTED]. Therefore, the Principal Counsel argues that in order to

protect the safety of her clients, as well as the one of [REDACTED], the statements and related documents of the latter should not be provided to the Defence.

13. Furthermore, the Principal Counsel notes that the application forms for participation submitted by victims in the proceedings are also part of the *Lubanga* case record. In this regard, the Court has determined that the victims' application forms provide information to the Chamber only for the purposes of substantiating their status as victims of the case, and are not evidence on either points of facts or law.⁷ Therefore, the Principal Counsel submits that said documents and related material, if any, should not be provided as they are of no interest to the Defence in the *Ntaganda* case. If the Chamber were minded to transmit said applications to the Defence, only the redacted form thereof shall be transmitted, as it is the practice within the Court. Indeed, all victims requested to participate in the proceedings without their identity to be disclosed to the Defence. In relation to the applications for reparations – also part of the *Lubanga* case record – which were sent to the Defence of Mr Lubanga on 26 January 2010⁸ in unredacted form because [REDACTED], the Principal Counsel contends that said documents are of no interest for the Defence and therefore should not be provided to it. In the alternative, said documents should be provided to the Defence in the same redacted form as the application forms for participation, should the Chamber were minded to transmit said applications.

14. In conclusion, the Principal Counsel respectfully requests the Chamber to order the non-transmission to the Defence of Mr Bosco Ntaganda of [REDACTED]. The Principal Counsel also respectfully requests the Chamber to order the non-

⁷ See *inter alia* the “Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case” (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-169, 8 July 2011, paras. 9-10 and 18. See also the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-01/04-01/07-717, 1 October 2008, para. 232; and the transcript of the confirmation of charges hearing of 7 July 2008, No. ICC-01/04-01/07-T-44-ENG ET, p. 14, line 25 to p. 15, line 3.

⁸ See the “Second Notification to the Defence of applications for reparations in accordance with Rule 94(2) of the Rules of Procedure and Evidence”, No. ICC-01/04-01/06-2270, 26 January 2010 and related Annexes.

transmission to the Defence of Mr Bosco Ntaganda of the applications for participation and for reparations of the individuals concerned.

15. Finally, the Principal Counsel notes that she is unable to provide the Chamber with the exhaustive list of material related to the above mentioned individuals because she is not the party bearing the disclosure obligation. Therefore, she respectfully requests the Chamber to order the Prosecution, in consultation with the legal representative, to identify and indicate the relevant material for transmission to the Defence of Mr Bosco Ntaganda.

FOR THESE REASONS, the Principal Counsel respectfully requests the Chamber to take into consideration the above observations when ruling on the access to confidential material in the *Lubanga* case requested by the Defence of Mr Bosco Ntaganda.

Respectfully submitted.

A handwritten signature in black ink, reading 'Paolina Massidda', with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 5th day of October 2015

At The Hague, The Netherlands