



Original: English

No.: ICC-01/04-02/06
Date: 19 November 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

Public redacted version of “Prosecution response to “*Response on behalf of Mr Ntaganda to ‘Prosecution’s further 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’”*”, 29 October 2015, ICC-01/04-02/06-964-Conf”, 19 November 2015, ICC-01/04-02/06-1025-Conf

Source: The 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. The Prosecution opposes the Defence request for access to receipts for expenses related to witnesses in the *Lubanga* case who are not witnesses in the *Ntaganda* case (“Irrelevant Lubanga Receipts”) because, as submitted on 22 September 2015,¹ they are irrelevant to the *Ntaganda* case. The Prosecution included the receipts in a list of confidential materials from the *Lubanga* case to which the Defence should not be given access in compliance with Trial Chamber VI’s (“Chamber”) directions to include on such a list “anything which relates purely to procedural matters specific to the *Lubanga* case, or is otherwise irrelevant to the Defence”.²

2. The Prosecution also opposes the Defence request for access to expenses related to witnesses common to the *Lubanga* and *Ntaganda* cases (“Ntaganda Witnesses Receipts”) because, as submitted on 22 September 2015,³ these are being reviewed by the Prosecution pursuant to a separate Defence request for access to expense receipts for Prosecution witnesses and in accordance with the test articulated by the Chamber on this issue. The Chamber’s test requires an indication of irregularity or specific materiality, which the present Defence request fails to meet.

3. The Prosecution submits that the Defence request for access to the material related to Prosecution Witnesses [REDACTED] and [REDACTED] in the *Lubanga* case should be rejected.

4. The Prosecution submits that the Defence should not be able to see two lists of confidential materials from the *Lubanga* case to which the Prosecution has submitted the Defence should not have access. The lists were compiled in

¹ ICC-01/04-02/06-851, para.13.

² ICC-01/04-02/06-806, para.12.

³ ICC-01/04-02/06-851, para.13.

consultation with the *Lubanga* Legal Representatives and the Victims and Witnesses Unit (“VWU”). Providing access to the lists would undermine the measure of protection that the Chamber sought to give when it directed the *Lubanga* Legal Representatives to make submissions in the course of this litigation.

5. The Prosecution informs the Chamber that it is re-examining the position with respect to items 19-21 and 48-78 listed in Addendum Annex 1⁴ and will revert to the Chamber as soon as practicable , following consultations with the *Lubanga* Legal Representatives and the VWU.

Procedural Background

6. The Prosecution incorporates, by reference, the procedural background included in its filings of 22 September 2015⁵ and 13 October 2015.⁶
7. On 15 July 2015, the Defence requested access to confidential material from the *Lubanga* case.⁷
8. On 5 August 2015, the Prosecution submitted that it did not oppose this request, subject to the views of the *Lubanga* Defence and of the *Lubanga* Legal Representatives.⁸
9. On 1 September 2015, the Chamber ordered the Prosecution to identify, from within the materials to which the Defence sought access, those that were irrelevant to the Defence (“1 September 2015 Order”).⁹

⁴ ICC-01/04-02/06-910-Conf-Exp-Anx1.

⁵ ICC-01/04-02/06-851, paras. 8-12.

⁶ ICC-01/04-02/06-898, paras. 2-10.

⁷ ICC-01/04-02/06-721.

⁸ ICC-01/04-02/06-764, para. 1.

⁹ ICC-01/04-02/06-806, para. 12.

10. In compliance with the 1 September 2015 Order, the Prosecution reported on 22 September that it had identified certain confidential exhibits admitted into evidence in the *Lubanga* case which in its view need not be provided to the Defence, namely the Irrelevant Lubanga Receipts.¹⁰ The Prosecution also noted that the Ntaganda Witnesses Receipts were being reviewed pursuant to a separate Defence request and had therefore not been dealt with in the 22 September 2015 filing.¹¹
11. On 1 October 2015, the Chamber ordered the Prosecution to file a list which was to include, amongst others, any irrelevant items it had identified (“1 October 2015 Order”).¹² The Chamber directed the Registry to give the Defence access to the confidential materials in the *Lubanga* case,¹³ except for the items included on the Prosecution’s list.¹⁴
12. On 25 August 2015, the Defence requested that the Chamber order the Prosecution to disclose, *inter alia*, a record of all “payments and benefits conferred on any intended Prosecution witnesses” (“25 August 2015 Request”).¹⁵ The Prosecution responded on 14 September 2015.¹⁶
13. On 28 August 2015, the Defence requested that the Chamber order the Prosecution to disclose, *inter alia*, receipts and records of payments or expenditures made to or on behalf of Prosecution Witness P-0901 (“28 August 2015 Request”).¹⁷ The Prosecution responded on 7 September 2015.¹⁸
14. On 18 September 2015, the Chamber rejected the 25 August 2015 Request and the 28 August 2015 Request (“Witness Expenses Decision”), holding *inter alia* that

¹⁰ ICC-01/04-02/06-851, paras. 3 and 13.

¹¹ ICC-01/04-02/06-851, para. 13.

¹² ICC-01/04-02/06-879, para. 15.

¹³ As defined in the Chamber’s 1 September 2015 Order and 1 October 2015 Order. ICC-01/04-02/06-806, para. 9 and ICC-01/04-02/06-879, para. 15.

¹⁴ ICC-01/04-02/06-879, p. 10.

¹⁵ ICC-01/04-02/06-795-Red.

¹⁶ ICC-01/04-02/06-822-Red.

¹⁷ ICC-01/04-02/06-800-Red.

¹⁸ ICC-01/04-02/06-808-Red.

“material pertaining to reasonable expenses” paid by the calling party does “not automatically fall under Rule 77 of the Rules and/or *a fortiori* Article 67(2) of the Statute” and is “thus not *per se* disclosable”.¹⁹ The Chamber noted that the Defence had not sufficiently substantiated the materiality to its preparation of the record of expenses incurred by the Prosecution, as the Defence had “merely stated, without further detail, that such documents are disclosable because ‘they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of the Prosecution evidence’”. Absent “any indication of irregularity or specific materiality”, the Chamber did not find it appropriate to order disclosure.²⁰

15. On 12 October 2015, the Prosecution filed the “Prosecution’s further observations on the ‘Order on Defence access to confidential material in the Lubanga case’ issued by Trial Chamber VI” (“Prosecution Further Observations”).²¹ In Confidential, *Ex Parte*, Annex 2, the Prosecution filed a list comprised of the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts.²²

16. On 19 October 2015, the Prosecution filed an addendum to the “Prosecution’s further observations on the ‘Order on Defence access to confidential material in the Lubanga case’ issued by Trial Chamber VI” (“Addendum”).²³ The Addendum was filed with Confidential, *Ex parte* Annexes 1 and 2 (“Addendum Annexes 1 and 2”), in which the Prosecution provided an updated list of materials which should not be provided to the Defence, pursuant to consultations between the Prosecution, the *Lubanga* Legal Representatives and the VWU concerning the

¹⁹ ICC-01/04-02/06-840- Red, para. 57.

²⁰ ICC-01/04-02/06-840--Red, paras. 57, 60.

²¹ ICC-01/04-02/06-898.

²² ICC-01/04-02/06-898-Conf-Exp-Anx2. Described on para.14(g) of the cover filing as a list of confidential exhibits admitted into evidence in the *Lubanga* case “that need not be disclosed to the Defence because they are receipts for expenses related to individuals who were witnesses or intermediaries in the *Lubanga* but not the *Ntaganda* case and, as such, are irrelevant to the Defence, or which are receipts for expenses related to individuals who were witnesses in both the *Lubanga* and the *Ntaganda* cases but are being reviewed pursuant to a separate Defence request”.

²³ ICC-01/04-02/06-910.

security implications that disclosure to the Defence could have for the Legal Representatives' clients.

17. On 29 October 2015, the Defence filed the "Response on behalf of Mr Ntaganda to 'Prosecution's further 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" ("Defence Request").²⁴

Confidentiality

18. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court ("Regulations"), this document is filed confidentially because it refers to a document bearing that classification. The Prosecution will file a public redacted version simultaneously.

Prosecution Submissions

19. Pursuant to regulation 24(1) of the Regulations, the Prosecution responds to the Defence Request. Although the title of the Defence Request suggests it is a response, it in fact contains a new request for relief, to which the Prosecution is entitled to respond.

The Defence request for access to the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts should be rejected

20. On 13 October 2015, the Prosecution filed a list comprised of the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts as a confidential, *ex parte* annex to the Prosecution Further Observations ("Annex of Expense Receipts").²⁵

²⁴ ICC-01/04-02/06-964-Conf.

²⁵ ICC-01/04-02/06-898-Conf-Exp-Anx2. Described on para.14(g) of the cover filing as a list of confidential exhibits admitted into evidence in the *Lubanga* case "that need not be disclosed to the Defence because they are receipts for expenses related to individuals who were witnesses or intermediaries in the *Lubanga* but not the *Ntaganda* case and, as such, are irrelevant to the Defence, or which are receipts for expenses related to individuals who were witnesses in both the *Lubanga* and the *Ntaganda* cases but are being reviewed pursuant to a separate Defence request".

The Defence requests that the Chamber: (i) disregard the Annex of Expense Receipts;²⁶ and (ii) order the Registry to provide the Defence with access to the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts listed therein.²⁷ Both requests should be rejected.

(i) *The request to disregard the Annex of Expense Receipts*

21. The Defence has been aware of the Prosecution's position in relation to the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts since at least 22 September 2015.²⁸ It did not respond to the Prosecution's 22 September 2015 filing.

22. The Annex of Expense Receipts was filed in compliance with the Chamber's 1 October 2015 Order, which was rendered after the Prosecution had set out its position on the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts. In the 1 October 2015 Order, the Chamber recalled the instructions it had given to the Prosecution at para.12 of its 1 September 2015 Order.²⁹ These included an instruction for the Prosecution to identify "anything which relates purely to procedural matters specific to the *Lubanga* case, or is otherwise irrelevant to the Defence".³⁰ In the 1 October 2015 Order, the Chamber explicitly referred to the fact that the Prosecution had identified "certain exhibits pertaining to witness-related expenses in the *Lubanga* case which, in its view, need not be provided to the Defence".³¹ In the section of the 1 October 2015 Order titled "Irrelevant Items", the Chamber gave no further direction to the Prosecution concerning the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts. To the contrary, at para.12 of the 1 October 2015 Order, the Chamber

²⁶ ICC-01/04-02/06-964-Conf, para. 3.

²⁷ ICC-01/04-02/06-964-Conf, p. 9.

²⁸ ICC-01/04-02/06-851, para. 13.

²⁹ ICC-01/04-02/06-879, para. 10.

³⁰ ICC-01/04-02/06-806, para. 12.

³¹ ICC-01/04-02/06-879, para. 5.

permitted the Prosecution to identify “any further Irrelevant Items”³² (emphasis added).

23. Contrary to the Defence assertion, the Prosecution has not “venture[d] outside the review framework set out by the Chamber”.³³ The Chamber’s 1 September 2015 Order directed the Prosecution to identify irrelevant material³⁴ and to file any submissions it may have thereupon.³⁵ On 22 September 2015 the Prosecution was transparent about how it viewed the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts.³⁶ Subsequent to the Chamber’s 1 October 2015 Order, the Prosecution filed the list of materials along the lines of what it had already indicated to the Chamber in its 22 September 2015 filing.

24. The Prosecution submits that the Annex of Expense Receipts was filed in compliance with the Chamber’s 1 October 2015 order. The Defence request for the Chamber to disregard the Annex of Expense Receipts should therefore be rejected.

(ii) The request that the Chamber order the Registry to give the Defence access to the materials listed in the Annex of Expense Receipts

25. The Defence request that the Chamber order the Registry to provide the Defence with access to the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts listed in the Annex of Expense Receipts should also be rejected. If granted, the request would effectively bypass the 1 October 2015 Order, in which the Chamber directed the Registry to provide the Defence with access to the

³² ICC-01/04-02/06-879, para. 12.

³³ ICC-01/04-02/06-964-Conf, para. 15.

³⁴ ICC-01/04-02/06-806, para. 12.

³⁵ ICC-01/04-02/06-806, p. 10.

³⁶ ICC-01/04-02/06-851, para. 13.

confidential materials from the *Lubanga* case to which it had requested access, except for the items on the list filed by the Prosecution.³⁷

26. It is also an order which, if granted, would undercut the Chamber's finding that material pertaining to reasonable expenses is not *per se* disclosable, and its guidance as to the manner in which the Prosecution ought to review them. In this regard, the Prosecution recalls that it has already undertaken to review and where necessary disclose any receipts pertaining to expenses that go beyond routine expenses for its trial witnesses,³⁸ in the order in which they are scheduled to appear, and that the Chamber has taken note of this undertaking.³⁹ The Prosecution is mindful of the Chamber's direction that it must take a conservative approach in conducting such a review.⁴⁰

27. The Prosecution submits that if granted, the Defence request would also undercut the Chamber's findings in its Witness Expenses Decision, that "material pertaining to reasonable expenses" paid by the calling party does "not automatically fall under Rule 77 of the Rules and/or *a fortiori* Article 67(2) of the Statute" and is "thus not *per se* disclosable".⁴¹

28. Like the request adjudicated in the Witness Expenses Decision, the present Defence request also fails to meet the test for disclosure of expense receipts. The Defence request posits that access to the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts will "materially assist the Defence in understanding *inter alia* how the Prosecution investigated the situation in the [DRC] and the involvement of intermediaries who introduced to the Prosecution some of the witnesses expected to testify in the case against Mr Ntaganda".⁴² This is a restatement of the Defence's position, advanced in its initial request for access to

³⁷ ICC-01/04-02/06-879, p. 10.

³⁸ ICC-01/04-02/06-808-Red, para. 47; ICC-01/04-02/06-822-Red, para. 35.

³⁹ ICC-01/04-02/06-840-Conf-Exp, para. 58; ICC-01/04-02/06-904, para. 27.

⁴⁰ ICC-01/04-02/06-904, para. 32.

⁴¹ ICC-01/04-02/06-840-Conf-Exp (with public redacted version ICC-01/04-02/06-840-Red), para. 57. See also ICC-01/04-02/06-904, para. 32.

⁴² ICC-01/04-02/06-964-Conf, para. 17, citing ICC-01/04-02/06-721, para. 22(a) and (c).

the confidential materials in the *Lubanga* case, on 15 July 2015.⁴³ This statement does not, in the Prosecution's submission, meet the test articulated by the Chamber in the Witness Expenses Decision.

29. The Prosecution therefore submits that the Defence has not justified its request for full access to the Irrelevant Lubanga Receipts and the Ntaganda Witnesses Receipts – be it through the Registry or the Prosecution. Allowing the Defence to obtain access *via* the Registry to the receipts would effectively allow the Defence to circumvent the requirements of the test articulated by the Chamber for the purposes of disclosure of this type of materials.

30. The request for an order for the Registrar to grant the Defence access to the items listed in the Annex of Expense Receipts⁴⁴ should be rejected.

The Defence request for access to the material related to Prosecution Witnesses [REDACTED] and [REDACTED] should be rejected

31. The Defence requests that, if the Prosecution's list includes confidential items related to Witnesses [REDACTED] or [REDACTED], the Chamber should exclude these from the material to which the Defence should not be granted access.⁴⁵

32. The Prosecution submits that the Chamber has already ruled on this aspect of the Defence request when it ordered: (i) the Prosecution to consult the *Lubanga* Legal Representatives of [REDACTED] and [REDACTED] and others as to their concerns about the security of their clients, and to file a list of materials to which the Defence should not be granted access which took such concerns into

⁴³ ICC-01/04-02/06-721, para. 22(a) and (c).

⁴⁴ ICC-01/04-02/06-964-Conf, p. 9.

⁴⁵ ICC-01/04-02/06-964-Conf, para. 24.

account;⁴⁶ and (ii) the Registry to provide the Defence with access to the materials requested save for those included on the Prosecution's list.⁴⁷

33. The Defence suggests that it already knows the identity of Witnesses [REDACTED] and [REDACTED], as the Prosecution has disclosed confidential material related to them in unredacted form which includes the identity of the witnesses.⁴⁸ The Prosecution does not dispute that this is so.

34. The Defence now has access to voluminous materials from the *Lubanga* case: (i) the Prosecution provided the Defence access to a significant volume of such materials pursuant to its disclosure obligations;⁴⁹ (ii) the Chamber directed the Registry to provide the Defence with access to all the confidential materials it had requested, save for those included in the Prosecution's lists;⁵⁰ and (iii) it has access to the public redacted versions of all confidential materials filed in the record of the case, including the transcripts of the testimony of [REDACTED], [REDACTED], and all of other individuals who testified during the *Lubanga* trial.

35. The Defence is free to draw conclusions from all of these materials and to establish links between individuals referred to therein. It does not follow that the Prosecution must be required to provide the Defence with additional information which the Chamber has already ruled it is not to be provided with, given the security implications of such disclosure for the individuals concerned, as highlighted by the Legal Representatives pursuant to the Chamber's request for the latter's observations.

⁴⁶ ICC-01/04-02/06-879, paras. 13-15 and p. 10.

⁴⁷ ICC-01/04-02/06-879, p. 10.

⁴⁸ ICC-01/04-02/06-964-Conf, para. 22.

⁴⁹ Beginning on 27 May 2013, when the Prosecution disclosed approximately 2,200 items of evidence including witness statements from the *Lubanga* case.

⁵⁰ ICC-01/04-02/06-879, p. 10. The Prosecution has not been notified of the execution of the Chamber's order for the Defence to be given access to these materials.

The request for access to Addendum Annexes 1 and 2 should be rejected

36. The Prosecution submits that the Defence should not be able to see Addendum Annexes 1 and 2.⁵¹
37. The two lists filed in Addendum Annexes 1 and 2 are comprised of registration numbers of filings, transcripts, decisions and evidence in the record of the *Lubanga* case. They are thus not, *per se*, informative. Some of the same reference numbers appear on materials to which the Defence has access, whether public redacted versions of transcripts and other materials on the record of the *Lubanga* case or evidence disclosed by the Prosecution in the *Ntaganda* case. Allowing the Defence to see the lists filed by the Prosecution could thus reveal the identity of the individuals concerned.
38. The materials were included in the lists because of the security implications that their disclosure to the Defence could give rise to, in consultation with the *Lubanga* Legal Representatives and the VWU. Providing access to the lists would undermine the measure of protection that the Chamber sought to give when it directed the *Lubanga* Legal Representatives to make submissions on the matter; the Prosecution to consult with the Legal Representatives; and the Registry to exclude the items identified during that consultation process from the materials to which the Defence would be given access.
39. The Prosecution thus requests that the Chamber reject the Defence request for an order for the Prosecution to provide the Defence with copies of Prosecution Addendum Annexes 1 and 2.⁵²

⁵¹ See ICC-01/04-02/06-964-Conf, paras. 25-26 and p. 9.

⁵² ICC-01/04-02/06-964-Conf, p. 9.

Documents being re-examined by the Prosecution

40. The Prosecution informs the Chamber that it is re-examining the position with respect to items 19-21 and 48-78 listed in Addendum Annex 1⁵³ and will revert to the Chamber as soon as practicable , following consultations with the *Lubanga* Legal Representatives and the VWU.

Relief

41. On the basis of the foregoing, the Prosecution requests that the Defence Request be rejected.



Fatou Bensouda, Prosecutor

Dated this 19th day of November 2015

At The Hague, The Netherlands

⁵³ ICC-01/04-02/06-910-Conf-Exp-Anx1.