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Internationale**



**International
Criminal
Court**

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Date: 18 December 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

Decision regarding confidential material in the *Lubanga* case

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

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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), and 68 of the Rome Statute ('Statute') and Regulations 24 and 42 of the Regulations of the Court ('Regulations'), issues the following 'Decision regarding confidential material in the *Lubanga* case'.

I. Procedural history and submissions

1. On 1 September 2015, the Chamber granted access to the defence team for Mr Ntaganda ('Ntaganda Defence') to certain *inter partes* confidential material in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case'), subject to the continuation of existing protective measures and redactions imposed by Trial Chamber I in the *Lubanga* case, and excluding any irrelevant items ('Order of 1 September 2015').¹ The Order of 1 September 2015 directed the Office of the Prosecutor ('Prosecution') to review the confidential material to identify: (i) anything which relates solely to procedural matters within the *Lubanga* case, or is otherwise irrelevant to the Ntaganda Defence ('Irrelevant Items'); and (ii) any specific materials for which it considers that additional protective measures, including redactions, is required prior to disclosure of the confidential material to the Ntaganda Defence.²
2. On 1 October 2015, the Chamber issued further directions regarding the Order of 1 September 2015 ('Further Directions'), granting a time extension to the Prosecution to identify further Irrelevant Items that should not be transmitted to the Ntaganda Defence³ and instructing the Prosecution to promptly liaise with the participants in the *Lubanga* case, as well as consulting with VWU, to identify

¹ Order on Defence access to confidential material in the *Lubanga* case, 1 September 2015, ICC-01/04-02/06-806.

² Order of 1 September 2014, ICC-01/04-02/06-806, para. 12.

³ Further directions on Defence access to confidential material in the *Lubanga* case, 1 October 2015, ICC-01/04-02/06-879, para. 12.

the document numbers of the particular items for which further protective measures are required.⁴

3. On 12 October 2015, the Prosecution submitted further observations ('Prosecution Further Observations') requesting that the Chamber order the Registry to provide the Ntaganda Defence with access to certain confidential materials in the *Lubanga* case, with the exception of the material listed in three confidential, *ex parte* annexes ('List').⁵ The List includes: (i) exhibits which the Prosecution submitted should not be disclosed to the Ntaganda Defence because of the security implications of such disclosure for the individuals concerned ('Annex 1');⁶ (ii) receipts of witness-related expenses, which constitute Irrelevant Items ('Annex 2');⁷ and (iii) transcripts of private and closed sessions, confidential decisions and submissions by parties and participants which the Prosecution submitted should not be disclosed to the Ntaganda Defence because of security implications of such disclosure for the individuals concerned ('Annex 3').⁸
4. On 19 October 2015, the Prosecution submitted an addendum to the Prosecution Further Observations ('Prosecution Addendum'),⁹ submitting two annexes ('Addendum Annexes') containing amended lists of: (i) certain confidential exhibits admitted into evidence in the *Lubanga* case ('Addendum Annex 1');¹⁰ and (ii) certain other confidential materials from the *Lubanga* case ('Addendum Annex 2'),¹¹ to replace Annex 1 and Annex 3 respectively.¹²

⁴ Further Directions, ICC-01/04-02/06-879, para. 15.

⁵ 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, 12 October 2015, ICC-01/04-02/06-898 with Confidential, *ex parte* Annexes 1-3.

⁶ See Prosecution Further Observations, ICC-01/04-02/06-898-Conf-Exp-Anx1.

⁷ See Prosecution Further Observations, ICC-01/04-02/06-898-Conf-Exp-Anx2.

⁸ See Prosecution Further Observations, ICC-01/04-02/06-898-Conf-Exp-Anx3.

⁹ Addendum to 'Prosecution's further observations on the 'Order on Defence access to confidential materials in the *Lubanga* case' issued by Trial Chamber VI, ICC-01/04-02/06-806', 12 October 2015, ICC-01/04-02-06-898, 19 October 2015, ICC-01/04-02/06-910 with Confidential, *ex parte* Annexes 1-2.

¹⁰ See Prosecution Addendum, ICC-01/04-02/06-910-Conf-Exp-Anx1.

¹¹ See Prosecution Addendum, ICC-01/04-02/06-910-Conf-Exp-Anx2.

5. On 27 October 2015, the defence team for Mr Lubanga ('Lubanga Defence') filed observations on the Prosecution Further Observations and Prosecution Addendum ('Lubanga Defence Observations') in order, in its view, to preserve the rights of the defence, given that the List is not available to the Ntaganda Defence.¹³ The Lubanga Defence observes, *inter alia*, that: (i) it has identified certain items in the List as *prima facie* necessary for the preparation of the Ntaganda Defence;¹⁴ (ii) in relation to dual status witnesses who had their victim status withdrawn by Trial Chamber I, only the Prosecution should be permitted to submit observations in relation to whether their materials can be disclosed to the Ntaganda Defence, and not also the legal representatives in the *Lubanga* case;¹⁵ (iii) proposed redactions must take into account the public nature of certain documents and be consistent with previous disclosure already effected by the Prosecution;¹⁶ (iv) at a minimum, ERN and other document reference numbers in the List, as contained in the Prosecution's annexes, should be disclosed to the Ntaganda Defence so it may determine whether any documents on the List are relevant to the preparation of its defence and make relevant submissions;¹⁷ and (v) any document relating to the credibility of Witness P-0010 should be disclosed to the Ntaganda Defence.¹⁸
6. On 29 October 2015, the Ntaganda Defence submitted a response to the Prosecution Further Observations and Prosecution Addendum ('Ntaganda

¹² Prosecution Addendum, ICC-01/04-02/06-910, para. 2.

¹³ *Observations de la Défense de M. Lubanga en réponse à l' « Addendum to 'Prosecution's further observations on the 'Order on Defence access to confidential materials in the Lubanga case' issued by Trial Chamber VI, ICC-01/04-02/06-806', 12 October 2015, ICC-01/04-02/06-898 », 30 October 2015, ICC-01/04-02/06-950-Conf-Exp, paras 2-3. A public redacted version was filed on 30 October 2015 as ICC-01/04-02/06-950-Red.*

¹⁴ Lubanga Defence Observations, ICC-01/04-02/06-950-Red, paras 5-6.

¹⁵ Lubanga Defence Observations, ICC-01/04-02/06-950-Red, para. 8.

¹⁶ Lubanga Defence Observations, ICC-01/04-02/06-950-Red, para. 9.

¹⁷ Lubanga Defence Observations, ICC-01/04-02/06-950-Red, para. 10.

¹⁸ Lubanga Defence Observations, ICC-01/04-02/06-950-Red, para. 11.

Defence Response').¹⁹ The Ntaganda Defence submits that: (i) the Prosecution erroneously conducted a substantive assessment of the documents pertaining to witness-related expenses beyond the review framework set out by the Chamber,²⁰ and, accordingly, it seeks access to the relevant witness-related expenses in the *Lubanga* case ('*Lubanga* Witness Receipts') as well as those witness-related expenses for witnesses appearing in both the *Ntaganda* case and the *Lubanga* case ('Common Witness Receipts', and together with *Lubanga* Witness Receipts, 'Witness Expense Receipts');²¹ (ii) in the event that confidential material related to Witnesses P-0298 and P-0299 is included on the List, access to such material to the Ntaganda Defence should be granted;²² (iii) at a minimum, the Ntaganda Defence should be informed of the materials listed in the Addendum Annexes, as well as information regarding 'the nature of the material listed therein', and that the Chamber ought to 'defer its decision thereof' until the Ntaganda Defence has made observations thereon.²³

7. On 19 November 2015, the Prosecution filed a response to the Ntaganda Defence Response ('Prosecution Submissions'),²⁴ averring that it is entitled to do so as the Ntaganda Defence Response 'in fact contains a new request for relief, to which the Prosecution is entitled to respond'.²⁵ The Prosecution opposes the Ntaganda Defence request to access the Witness Expense Receipts, submitting that they are either irrelevant, in the case of the *Lubanga* Witness Receipts, or are being reviewed by the Prosecution pursuant to a separate Ntaganda Defence request, in accordance with the test previously articulated by the Chamber, in the case of the

¹⁹ Response on behalf of Mr Ntaganda to 'Prosecution's further observations on the 'Order on Defences 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.

²⁰ Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 11-17.

²¹ Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 3 and 17.

²² Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 20-24.

²³ Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 5 and 25-26.

²⁴ 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-01/04-02/06-964-Conf, 19 November 2015, ICC-01/04-02/06-1025-Conf. A public redacted version was filed on 20 November 2015 as ICC-01/04-02/06-1025-Red.

²⁵ Prosecution Submissions, ICC-01/04-02/06-1025-Red, para. 19.

Common Witness Receipts.²⁶ With respect to the Ntaganda Defence request for confidential material related to Witnesses P-0298 and P-0299, the Prosecution does not dispute that it already disclosed some confidential material relating to these witnesses to the Ntaganda Defence, including the witnesses' identity.²⁷ The Prosecution submits that, despite this, it is not required to provide the Ntaganda Defence with additional material with respect to the witnesses, as the Chamber has already ruled that security concerns may provide a basis for limiting disclosure with respect to certain individuals.²⁸

8. The Prosecution submits that the Ntaganda Defence should not be granted access to the Addendum Annexes as, *inter alia*, it would reveal the identity of the individuals concerned.²⁹ It indicates further that it is re-examining its position with respect to items 19-21 and 48-78 listed in Addendum Annex 1 and will revert to the Chamber as soon as practicable.³⁰
9. On 20 November 2015, the Ntaganda Defence filed a request to strike the Prosecution Submissions from the record ('Request to Strike').³¹ The Ntaganda Defence views the Prosecution Submissions as an attempt to reply to the Ntaganda Defence Response without the Chamber's authorisation, and as such, submits that the Prosecution Submissions contravene Regulation 24(1) of the Regulations of the Court and should be struck from the record.³²

II. Preliminary issue

10. At the outset, the Chamber will adjudicate the Request to Strike. As the Chamber has previously noted, in certain cases, when a responding party raises 'new and

²⁶ Prosecution Submissions, ICC-01/04-02/06-1025-Red, paras 2 and 20-30.

²⁷ Prosecution Submissions, ICC-01/04-02/06-1025-Conf, para. 33.

²⁸ Prosecution Submissions, ICC-01/04-02/06-1025-Red, paras 31-35.

²⁹ Prosecution Submissions, ICC-01/04-02/06-1025-Red, paras 36-39.

³⁰ Prosecution Submissions, ICC-01/04-02/06-1025-Red, para. 40.

³¹ Request on behalf of Mr Ntaganda to strike the Prosecution response from the record, 20 November 2015, ICC-01/04-02/06-1030.

³² Request to Strike, ICC-01/04-02/06-1030, para. 3.

distinct issues of law', or the relief requested is outside the normal scope of a response, the response may be treated as a request, thus entitling the other party to respond pursuant to Regulation 24(1) of the Regulations.³³

11. In the present circumstances, the Chamber notes that the Ntaganda Defence Response contains three specific requests for: (i) access to the Witness Expense Receipts; (ii) any disclosable information pertaining to Witnesses P-0298 and P-0299; and (iii) access to the list of materials in the Addendum Annexes, as well as details of 'the nature of the material listed therein'.³⁴ The Chamber considers that only one of these issues, namely request number (ii), triggers a right of response, given it contains relief of a particularised nature which may not have been foreseeable at the time of the Prosecution filings. By contrast, the Chamber considers that the remainder of the Ntaganda Defence Response flows from the Prosecution Further Observations and Prosecution Addendum, and therefore finds the Prosecution Submissions on (i) and (iii) to exceed the scope of a response under Regulation 24 of the Regulations. Accordingly, the Chamber will limit its consideration of the Prosecution Submissions to request (ii),³⁵ and accordingly, does not consider it necessary to strike the filing from the record.

III. Analysis

12. The Chamber recalls the applicable law it set out in its Order of 1 September 2015 and referred to in its Further Directions.³⁶ The Chamber notes further that, as of 3 November 2015, the Registry indicated that the Ntaganda Defence was being granted access to confidential documents in the *Lubanga* case in accordance with

³³ Decision on Prosecution request to change the order of appearance of the first witnesses, 22 June 2015, ICC-01/04-02/06-661-Red2, para. 7; Decision on Prosecution request for authorisation of non-disclosure of five documents, 11 June 2015, ICC-01/04-02/06-637, para. 5.

³⁴ Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 11-26.

³⁵ To facilitate the expeditiousness of the present litigation, the Chamber will also take into account the Prosecution undertaking at paragraph 40 of the Prosecution Submissions to conduct a further review of certain items.

³⁶ Order of 1 September 2015, ICC-01/04-02/06-806, paras 5-8; Further Directions, ICC-01/04-02/06-879, para. 10.

the Further Directions.³⁷ Therefore, the Chamber's present decision is confined to adjudicating the Ntaganda Defence Response to the extent that it alleges that the Prosecution failed to comply with the Further Directions in identifying items not to be transmitted to the Ntaganda Defence on the basis of the materials': (i) irrelevance; and/or (ii) security implications for witnesses and/or victims, as alleged in the Ntaganda Defence Response and Lubanga Further Observations.

i. Witness Expense Receipts

13. Firstly, the Ntaganda Defence argues that it ought to have access to the Witness Expense Receipts contained in Annex 2,³⁸ as such access will materially assist the Ntaganda Defence in understanding how the Prosecution conducted its investigations and the involvement of intermediaries.³⁹ The Chamber notes that the Prosecution has previously submitted that the *Lubanga* Witness Receipts are irrelevant and that the Common Witness Receipts are the subject of a separate request.⁴⁰
14. The Chamber observes that the Ntaganda Defence seeks access to a large volume of Witness Expense Receipts in their entirety, including in respect of individuals who are not witnesses in the *Ntaganda* case and in the absence of any showing of specific relevance.⁴¹ The Chamber considers that, *prima facie*, payments made to witnesses in the *Lubanga* case, who are not appearing in the *Ntaganda* case and in the absence of any other circumstances which may make the information material to the Ntaganda Defence, are correctly categorised as not needing to be transmitted to the Ntaganda Defence for the purpose of fulfilling the Further Directions. Moreover, the Chamber notes that Common Witness Receipts are the

³⁷ Emails from Court Management Services on 3 November 2015 at 17:46 and 17 December 2015 at 11:44.

³⁸ Prosecution Further Observations, ICC-01/04-02/06-898-Conf-Exp-Anx2.

³⁹ Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 3 and 17.

⁴⁰ Prosecution Further Observations, ICC-01/04-02/06-898, para. 6.

⁴¹ Order of 1 September 2015, ICC-01/04-02/06-806, para. 8 (where the Chamber indicates that the basis for granting access to material in another case is a finding of 'relevance to the defence case'). *See also, in respect of witness expenses*, Decision on Defence requests seeking disclosure orders in relation to witness P-0901 and seeking the postponement of the witness's cross-examination, 5 October 2015, ICC-01/04-02/06-840-Red ('Decision of 5 October 2015'), para. 60.

subject of a separate review being conducted by the Prosecution in accordance with guidance previously provided by the Chamber,⁴² and ought to be addressed within that framework.

ii. Material relating to Witnesses P-0298 and P-0299

15. The Ntaganda Defence also argues that access to all confidential material relating to Witnesses P-0298 and P-0299 should be granted, as it is aware of the identity of these witnesses and the Prosecution has already disclosed unredacted confidential information regarding these witnesses.⁴³ The Prosecution opposes this request on the basis that it followed the Further Directions in consulting with the *Lubanga* Legal Representatives to determine whether any security concerns may justify the material relating to Witnesses P-0298 and P-0299 not being transmitted to the Ntaganda Defence, and is therefore not required to provide for transmission of further material on this basis.⁴⁴
16. The Chamber notes that the Prosecution has already submitted that it has disclosed 'confidential material related to [Witnesses P-0298 and P-0299] in unredacted form which includes the identity of the witnesses'.⁴⁵ The Chamber recalls that, in the Order of 1 September 2015, the finding that information from the *Lubanga* case record which is of relevance to the defence case should be transmitted to the Ntaganda Defence was subject to a review as to the necessity of additional protective measures 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.⁴⁶ Contrary to the Ntaganda Defence submission, it does not follow that, because certain material in relation to a witness has been provided, *all* material relating to them should be provided. It may be appropriate

⁴² Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses, 16 October 2015, ICC-01/04-02/06-904 ('Decision of 16 October 2015'), para. 32.

⁴³ Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 20-24.

⁴⁴ Prosecution Submissions, ICC-01/04-02/06-1025-Conf, paras 31-35.

⁴⁵ Prosecution Submissions, ICC-01/04-02/06-1025-Conf, para. 33.

⁴⁶ Order of 1 September 2015, ICC-01/04-02/06-806, paras 8 and 12.

for certain information to be withheld, including for reasons of security, as identified in good faith consultations with the *Lubanga* Legal Representatives. The Chamber therefore finds the Prosecution's approach to comply with the Further Directions.

iii. Ntaganda Defence access to Addendum Annexes 1 and 2

17. The Ntaganda Defence argues that it should be informed of the materials listed in the Addendum Annexes, as well as information regarding 'the nature of the material listed therein', and that the Chamber ought to 'defer its decision thereof' until the Ntaganda Defence has made observations thereon.⁴⁷
18. The Chamber considers that the Addendum Annexes are not in and of themselves relevant or informative, and that there is no general right of access to confidential materials, or descriptions thereof, forming part of another case. Moreover, the Chamber notes the Prosecution's submission that their transmission may have security implications for certain victims and witnesses in the *Lubanga* case. Given the volume of material in the *Lubanga* case provided to the Ntaganda Defence thus far,⁴⁸ and in the absence of a properly motivated request for other specific categories of items from the *Lubanga* case that may be material to the preparation of the defence, the Chamber does not consider there to be a need to transmit the Addendum Annexes to the Ntaganda Defence or to receive further submissions thereon.

iv. Prosecution re-examination of scope of materials in Addendum Annexes

19. Finally, the Chamber notes the Prosecution indication of 19 November 2015 that it will re-examine its position with respect to items 19-21 and 48-78 listed in Addendum Annex 1 and will revert to the Chamber as soon as practicable,

⁴⁷ Ntaganda Defence Response, ICC-01/04-02/06-964-Conf, paras 5 and 25-26.

⁴⁸ See for example 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, 22 September 2015, ICC-01/04-02/06-851, para. 23.

following consultations with the *Lubanga* Legal Representatives and the VWU.⁴⁹ In accordance with this undertaking, the Chamber instructs the Prosecution to undertake any further consultations forthwith and to clarify its position with respect of these items.

20. Finally, in addition to re-examining its position in relation to the items specifically identified by it in the Prosecution Submissions, the Chamber directs the Prosecution to take into account any outstanding matters raised in the Lubanga Defence Observations as appropriate, including at paragraphs 12-24 thereto. Having completed this review, the Prosecution is instructed to inform the Chamber of any changes to the lists of material to be excluded from transmission to the Ntaganda Defence, no later than 18 January 2016, by way of filing.

⁴⁹ Prosecution Submissions, ICC-01/04-02/06-1025-Red, para. 40.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief sought in the Ntaganda Defence Response;

REJECTS the Request to Strike;

ORDERS the Ntaganda Defence to file a public redacted version of the Ntaganda Defence Response (ICC-01/04-02/06-964-Conf) by 11 January 2016; and

ORDERS the Prosecution to undertake its review in accordance with paragraphs 19-20 above and make any necessary filing before the Chamber no later than 18 January 2016.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 18 December 2015

At The Hague, The Netherlands