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Date: **5 January 2016**

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

**Request on behalf of Mr Ntaganda seeking leave to appeal the
“Decision regarding confidential material in the *Lubanga* case”**

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the "*Decision regarding confidential material in the Lubanga case*" issued by Trial Chamber VI ("Chamber") on 18 December 2015 ("Impugned Decision"),¹ and the Chamber's order of 3 January 2016 granting an extension of deadline to submit an application for leave to appeal the Impugned Decision until 5 January 2016,² Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Request on behalf of Mr Ntaganda seeking leave to appeal the "*Decision regarding confidential material in the Lubanga case*"

"Defence Request"

INTRODUCTION

1. In the Impugned Decision, the Chamber rejected *inter alia* the Defence's request to: (i) be informed of the nature of the exhibits listed in the Annex 1 to the Prosecution's "*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" ("Prosecution Addendum" and "Addendum Annex 1", respectively) as well as of the nature of the other confidential materials listed in Annex 2 to the Prosecution Addendum ("Addendum Annex 2"); and (ii) be provided with an opportunity to submit observations thereon ("Defence Request for Observations").³
2. The Defence hereby seeks leave to appeal the Impugned Decision on the following discrete issue:

¹ ICC-01/04-02/06-1063-Conf.

² Email of a Legal Officer of the Chamber, 3 January 2016, 11:47.

³ Impugned Decision, paras.17-18. See "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, paras.5, 26 and p. 9.

Taking into consideration the law applicable to requests for access to confidential material in another case, as set out by the Chamber in its Order of 1 September 2015;⁴

Whether the Defence must be granted access to the list of material for which additional protective measures are requested by the Prosecution and be provided with an opportunity to submit observations thereon

("Issue")

3. The Issue is appealable. First, the Issue significantly affects the fair and expeditious conduct of proceedings or their outcome. Second, immediate appellate resolution of the Issue may, at the very least, materially advance the proceedings. In fact, in the absence of immediate appellate resolution, the Issue is bound to hamper and delay the proceedings.

PROCEDURAL BACKGROUND

4. The Defence refers to the procedural background as summarized by the Chamber in the Impugned Decision.⁵

SUBMISSIONS

I. The Issue constitutes an 'appealable' issue

5. The Issue arises from the Impugned Decision. Indeed, the Issue follows from the Chamber's rejection of the Defence Request for Observations, for which the Chamber considered there to be no "need to transmit the Addendum Annexes to the Ntaganda Defence or to receive further submissions thereon"⁶ in light of: (i) the fact "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"; (ii) the Prosecution's submission that "their transmission may have security

⁴ Impugned Decision, para.12, referring to "Order on Defence access to confidential material in the *Lubanga* case", 1 September 2015, ICC-01/04-02/06-806 ("Initial Order"), para.12.

⁵ Impugned Decision, paras.1-9.

⁶ Impugned Decision, para.18.

- implication for certain victims and witnesses in the *Lubanga* case"; (iii) the volume of material in the *Lubanga* case provided to the Defence thus far; and (iv) 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.⁷
6. While the procedure for the submission of proposals for additional protective measures has been set out in the Chamber's Initial Order⁸ and further specified in the Chamber's "*Further directions on Defence access to confidential material in the Lubanga case*",⁹ the Issue arises for the first time in the Impugned Decision.
 7. Indeed, the factors relied upon by the Chamber when ruling on the Defence Request for Observations directly flow from the "*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*" ("*Prosecution Further Observations*").¹⁰
 8. In addition, it would have been premature for the Defence to seek leave to appeal the law applicable to requests for access to confidential material in another case – as set out by the Chamber in its Initial Order of 1 September 2015 – before its application in the Impugned Decision.
 9. What is more, the Issue is a subject, the resolution of which is *essential* for the determination of matters arising in the present case. Indeed, the Issue directly relates to the modalities for access to material *relevant* to the defence case. In this regard, the Defence recalls that in its Initial Order, the Chamber

⁷ Impugned Decision, para.18.

⁸ Initial Order, para.12.

⁹ "*Further directions on Defence access to confidential material in the Lubanga case*", 1 October 2015, ICC-01/04-02/06-879, para.15.

¹⁰ The Defence Request for Observations – from which derives the Issue – was considered by the Chamber to fall within the normal scope of a response to the Prosecution Further Observations. *Cf.* Impugned Decision, paras.10-11.

considered – 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 – that (at least) certain of the requested material may have relevance to the Defence and may assist in its analysis of the material it has received from the Prosecution to date.¹¹ The Defence underscores that the sole *Lubanga*-related material deemed by the Prosecution to be ‘irrelevant’ to the *Ntaganda* defence case are the receipts of the expenses borne by the Prosecution for individuals who were witnesses or intermediaries in the *Lubanga* case but not in the *Ntaganda* case.¹²

10. It follows that the Prosecution’s request to preclude the Defence from gaining access to: (i) the exhibits listed in Addendum Annex 1; and (ii) the other confidential material listed in Addendum Annex 2, is not based on a purported absence of relevance of such material to the *Ntaganda* defence case; rather, the Prosecution bases its request to preclude the Defence from gaining access to these exhibits and material listed in Addendum Annexes 1 and 2 on “the security implications of such disclosure for the individuals concerned”.¹³
11. The relevance of the material listed in Addendum Annexes 1 and 2 is further evidenced by the “*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 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’*”, 27 October 2015, ICC-01/04-02/06-950-Conf-Exp (“*Lubanga Defence Observations*”).¹⁴
12. Although substantial parts of the *Lubanga* Defence Observations were submitted on *ex parte*, the Defence understands from these observations that a significant number of the items listed in Addendum Annexes 1 and 2 are

¹¹ Initial Order, para.11.

¹² Prosecution Further Submissions, paras.6, 14.b. See also “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.13.

¹³ See Prosecution Further Submissions, paras.14.b, 16.

¹⁴ *Lubanga* Defence Observations, paras.12-24.

highly relevant to the preparation of its case. Consequently, the Issue strikes at the core of the preparation for the defence, which is a fundamental right of an accused person enshrined in Article 67 of the Statute.

13. Finally, to the extent that the Appeals Chamber has not yet pronounced on the approach to follow with respect to requests for access to confidential material in another case,¹⁵ the Issue is certainly not a matter over which there is mere disagreement. Rather, the Issue is decisive regarding the scope of the material to which the Defence might be granted access when the Prosecution seeks to preclude the Defence from gaining access to this material on the basis of alleged security concerns, the particulars of which are unknown to the Defence.

II. The Issue satisfies the standard for immediate appellate review

14. In addition to significantly affecting both the fair and expeditious conduct of the proceedings and the outcome of the trial, the Issue also constitutes a matter for which immediate appellate resolution, at the very least, may advance materially the proceedings.

A. The Issue would significantly affect the fair and expeditious conduct of the proceedings

15. Subject to a re-examination of its position with respect to items 19-21 and 48-78 listed in Addendum Annex 1¹⁶ and a review of the other items listed in both Addendum Annexes 1 and 2 taking into account any outstanding matters raised in the Lubanga Defence Observations,¹⁷ the Prosecution has requested that the items listed in Addendum Annexes 1 and 2 *not* be communicated to the Defence.¹⁸ In this regard, the Defence underscores that

¹⁵ Initial Order, para.8.

¹⁶ "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, para.40.

¹⁷ Impugned Decision, para.20 *referring to* Lubanga Defence Observations, paras.12-24.

¹⁸ Prosecution Addendum, para.2.

amongst the spectrum of 'additional' protective measures that could be applied to the *Lubanga*-related material, precluding the Defence from gaining access to relevant items is undoubtedly the most draconic and far-reaching measure. This is particularly the case if these protective measures are applied without the Defence being granted with an opportunity to provide observations, as set out below.

16. Consequently, the Issue undeniably impacts the fair and expeditious conduct of the proceedings.
17. The Impugned Decision deprives the Defence of the opportunity to provide the Chamber with its views on the appropriateness of the drastic additional protective measures requested by the Prosecution, in particular on:
 - (i) whether the 'security implications' for the individuals concerned by the items listed in Addendum Annexes 1 and 2 are well-founded, bearing in mind that as a result of the measures put in place by the Chamber in its "*Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts*",¹⁹ there is virtually no possibility of interference on the part of Mr Ntaganda;
 - (ii) whether the relevance of the material to the Defence outweighs the purported need for the Defence to be precluded from gaining access to such material; and
 - (iii) whether other 'additional' protective measures could achieve the aim of protecting the individuals concerned by the items listed in Addendum Annexes 1 and 2.
18. The Defence posits that on such a crucial issue – whether the Defence should be granted access or not to relevant material in another case – fairness of the proceedings requires the Chamber to be provided with the views of all parties concerned. In the present context, while other parties may offer relevant observations,²⁰ the Impugned Decision ignores that the Defence is best placed

¹⁹ ICC-01/04-02/06-785-Red.

²⁰ See e.g. *Lubanga Defence Observations*, paras.12-24.

to submit informed views on the above-listed considerations, which would favour a more efficient adjudication of the matter.

19. In this regard, the Defence notes that in the analogical context of a Prosecution request under Regulation 101 of the Regulations of the Court ("Regulations"),²¹ the Chamber held that in addition to being informed, Mr Ntaganda shall be given the opportunity to be heard or to submit his views. The Chamber further observed that this should be a 'genuine' opportunity, "which entails the Defence being provided with sufficient information to submit an informed view".²²
20. In holding that "the Addendum Annexes are not in and of themselves relevant or informative",²³ the Chamber failed to take into consideration the Lubanga Defence's observation that – to the extent most of them are referred to in public proceedings – the ERN numbers of the exhibits (listed in Addendum Annex 1) and the reference numbers of the other confidential material (listed in Addendum Annex 2) may assist the Defence in identifying the relevance of the material listed therein.²⁴

B. The Issue would significantly affect the outcome of the trial

21. The Issue would also significantly impact the outcome of the trial. The Impugned Decision results in the Defence being precluded from gaining access to a number of items which are relevant to its case – as implicitly acknowledged by the Prosecution²⁵ and specifically argued by the Lubanga

²¹ To the extent that measures taken under Regulation 101 of the Regulations are deemed to be 'protective measures' aimed at ensuring the safety of witnesses. Cf. "Order instructing the Registry to put in place additional temporary restrictions on contact", 13 March 2015, ICC-01/04-02/06-508-Conf-Exp, para.5.

²² "Corrected version of "Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs' issued on 8 December 2014 (ICC-01/04-02/06-410-Conf-Exp-Red", 16 February 2015, ICC-01/04-02/06-410-Conf-Exp-Red-Corr, para.46.

²³ Impugned Decision, para.18.

²⁴ Lubanga Defence Observations, para.10.

²⁵ Prosecution Further Submissions, paras.14.b, 16.

Defence²⁶ – without the Defence being heard thereon. In such circumstances, where the Defence is expected to conduct its case without the benefit of relevant material, the impact of the Issue on the outcome of the trial is certainly not mere speculation. The Defence notes that non-disclosure or late disclosure in other complex trials – an issue tantamount to precluding the Defence from gaining access to confidential material in another case – has obliged trial chambers to draw an adverse inference about the reliability of Prosecution evidence.²⁷ Any similar finding on appeal would, similarly, compel reversal of factual findings arising from a context of non-disclosure.

C. The immediate resolution of the Issue, at the very least, may materially advance proceedings

22. The Prosecution's request to preclude the Defence from gaining access to the items listed in Addendum Annexes 1 and 2 is premised on 'security implications' for the individuals concerned.²⁸ The Issue is but another illustration of the Prosecution's systematic reliance on security concerns to justify precluding the Defence from gaining to relevant material, without the Defence being in a position to provide meaningful observations thereon.²⁹ In fact, the matter highlighted by the Issue permeates the present proceedings. Immediate appellate pronouncement on whether the Defence is entitled to obtain the list of material – for which the Prosecution is seeking to preclude the Defence from gaining access to this material on the basis of security considerations – with a view to submitting informed observations on the appropriateness of such measures, may definitely advance the proceedings.

²⁶ Lubanga Defence Observations, paras.12-24.

²⁷ See for example: *Bizimungu et al*, ICTR-99-50-T, Judgement and Sentence, 30 September 2011, para. 176 ("[g]iven [that the Prosecution only informed the Defence of the exculpatory material once the Chamber was at an advanced stage in the process of drafting its judgment], the Chamber considers that the most appropriate remedy is to draw a reasonable inference in favour of the Accused from the exculpatory material"), paras. 1063-1065 ("[d]rawing the reasonable inferences due to the late disclosure of this highly relevant, probative and exculpatory material, the Chamber entertains reasonable doubt"), paras. 1189-1192 (Drawing the reasonable inferences due to the late disclosure of this exculpatory material, the Chamber entertains reasonable doubt").

²⁸ Prosecution Further Submissions, paras.14.b, 16.

²⁹ See, for instance, ICC-01/04-02/06-502-Conf-Corr, para.4.

23. Indeed, immediate appellate resolution of the Issue, especially where there has been no previous appellate treatment of the issue,³⁰ would ensure that the trial proceeds on a proper footing in respect of a vital issue of access to relevant material for the preparation of the defence case. It would set the authoritative framework under which the Defence may, or may not, offer observations on the appropriateness of protective measures when such measures impact its ability to prepare for trial, like in the present instance. Moreover, for the reasons expressed above regarding the impact of the Issue on the outcome of the trial, immediate appellate resolution is also necessary to ensure that the judgement to be pronounced will not be reversed on the basis that the Defence was precluded from gaining access to relevant material it is entitled to.

CONFIDENTIALITY

24. Pursuant to Regulations 23*bis* (1) and (2), this Defence Request is classified as confidential as it seeks leave to appeal a decision bearing the same classification. Should the Chamber issue a public version of the Impugned Decision, the Defence undertakes to submit a public version of its Request.

RELIEF SOUGHT

25. In light of the above submissions, the Defence respectfully requests the Chamber to:

GRANT leave to appeal the Impugned Decision on the Issue.

RESPECTFULLY SUBMITTED ON THIS 5TH DAY OF JANUARY 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

³⁰ Cf. Initial Order, para.8.