



Original: **English**

No.: ICC-01/04-02/06
Date: **11 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***

Public

**Public redacted version of “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**

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin
Mlle Margaux Portier

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Counsel for the Defence of Thomas
Lubanga Dyilo
Legal Representative of Victims V01
Legal Representative of Victims V02

Further to the submission of 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”* by the Office of the Prosecutor (“Prosecution”) on 13 October 2015 (“Prosecution Further Observations”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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 Response”

INTRODUCTION

1. Further to the *“Order on Defence access to confidential material in the Lubanga case”* issued by Trial Chamber VI (“Chamber”) on 1 September 2015 (“Order”)² and the *“Further directions on Defence access to confidential material in the Lubanga case”* issued by the Chamber on 1 October 2015 (“Further Directions”),³ the Prosecution has identified a certain number of confidential exhibits admitted into evidence in the *Lubanga* case that, in its view, need not be transmitted to the Defence⁴ because they are either:
 - a. receipts for expenses related to individuals who were witnesses or intermediaries in the *Lubanga* case but not in the *Ntaganda* case (“Lubanga Witnesses Receipts”), on the basis that, according to the Prosecution, they “as such, are irrelevant to the Defence”; or
 - b. receipts for expenses related to individuals who were witnesses in the *Lubanga* case and who are expected to testify in the *Ntaganda* case (“Common Witnesses Receipts”), on the basis that, according to the

¹ ICC-01/04-02/06-898.

² ICC-01/04-02/06-806.

³ ICC-01/04-02/06-879.

⁴ These exhibits are listed in a confidential *ex parte* annex to which the Defence does not have access: ICC-01/04-02/06-Conf-Exp-Anx2 (“Prosecution Annex 2”).

Prosecution they "are being reviewed pursuant to a separate Defence request".⁵

2. The approach followed by the Prosecution in reviewing the confidential exhibits of the *Lubanga* case ("Lubanga Confidential Exhibits") for which access must be provided to the Defence pursuant to the Order, runs counter to the letter and spirit of both the Order and the Further Directions.
3. For the reasons stated herein, the Defence respectfully requests the Chamber to disregard Prosecution Annex 2 and order the Registry to provide the Defence with access to the the Lubanga Witnesses Receipts and the Common Witnesses Receipts.
4. On 19 October 2015, the Prosecution submitted its "*Addendum to 'Prosecution 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'*" ("Addendum")⁶ along with two confidential *ex parte* annexes 1 and 2 not available to the Defence. Annex 1 attached to the Addendum⁷ replaces Annex 1 attached to the Prosecution Further Observations⁸ and Annex 2 attached to the Addendum⁹ replaces Annex 3 attached to the Prosecution Further Observations.¹⁰
5. For the reasons expressed below, to the extent that Prosecution Addendum Annexes 1 and 2 replace Annexes 1 and 3 to the Prosecution Further Observations, the Defence respectfully requests the Chamber to: (i) order the Prosecution to provide the Defence with a copy which identifies, at a minimum, the nature of the material listed therein; and (ii) defer its decision thereof after having provided the Defence with an opportunity to submit

⁵ Prosecution Further Observations, para.14b.

⁶ ICC-01/04-02/06-910.

⁷ ICC-01/04-02/06-910-Conf-Exp-Anx1 ("Prosecution Addendum Annex 1").

⁸ ICC-01/04-02/06-898-Conf-Exp-Anx1.

⁹ ICC-01/04-02/06-910-Conf-Exp, Anx2 ("Prosecution Addendum Annex 2").

¹⁰ ICC-01/04-02/06-898-Conf-Exp-Anx3.

observations on the scope of the Requested Material for which access should not be granted to the Defence.

BACKGROUND

6. On 1 September 2015, the Chamber issued its Order whereby it instructed the Prosecution to *inter alia* review the *Lubanga* case-related material requested by the Defence (“Requested Material”)¹¹ in order to identify: (i) “anything which relates purely to procedural matters specific to the *Lubanga* case, or is otherwise irrelevant to the Defence; and (ii) “any specific material for which it considers that additional protective measures, including redactions, is required prior to disclosure of the Requested Material to the Defence”.¹²
7. On 22 September 2015, the Prosecution submitted its “*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*” (“Prosecution Initial Observations”).¹³
8. On 1 October 2015, the Chamber issued its Further Directions, whereby it authorised an extension of time limit until 12 October 2015 for the Prosecution to identify any further ‘irrelevant items’ within the Requested Material that shall not be transmitted to the Defence.¹⁴
9. On 13 October 2015, the Prosecution provided the Chamber with its Further Observations.
10. On 19 October 2015, the Prosecution submitted its Addendum.

¹¹ The Request Material includes: (i) the *Lubanga* Confidential Exhibits; (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: Order, para.9.

¹² Order, para.12.

¹³ ICC-01/04-02/06-851.

¹⁴ Further Directions, para.12 and p.10.

SUBMISSIONS

I. The Common Witnesses Receipts and the Lubanga Witnesses Receipts

11. The Prosecution erroneously construes its review obligations pursuant to the Order and the Further Directions as allowing it to engage in a substantive assessment of the relevance of the Lubanga Confidential Exhibits to the Defence.
12. In instructing the Prosecution to identify any material which relates purely to procedural matters specific to the *Lubanga* case or “is otherwise irrelevant to the Defence” for the purpose of identifying which of the Requested Material should not be transmitted to the Defence,¹⁵ the Chamber did not authorise the Prosecution to conduct a substantive review of the Lubanga Confidential Exhibits.
13. The Chamber provided clear guidelines for the determination of which of the Requested Material is ‘irrelevant to the Defence’, which were premised on the sole need to avoid overwhelming the Defence.
14. In its Order, the Chamber illustrated the irrelevance of some of the Requested Material to the Defence in referring only to material that relates to “procedural issues specific to the *Lubanga* case”.¹⁶ In its Further Directions, the Chamber further noted that identifying and removing irrelevant items from the Requested Material serves a dual purpose of “not *unnecessarily* extending access to material that is otherwise classified as confidential and not *overburdening* the Defence with material that is not of relevance to them”.¹⁷
15. In requesting the Chamber to deny the Defence access to the Lubanga Witnesses Receipts and the Common Witnesses Receipts, the Prosecution ventures outside the review framework set out by the Chamber.

¹⁵ Order, para.12.

¹⁶ Order, para.11.

¹⁷ Further Directions, para.12 (emphasis added).

16. Indeed, the Prosecution Initial and Further Observations fail to show how access to the Lubanga Witnesses Receipts and the Common Witnesses Receipts is unnecessary or would overburden the Defence.
17. Quite to the contrary, full access to the Lubanga Witnesses Receipts and the Common Witnesses Receipts will materially assist the Defence in understanding *inter alia* how the Prosecution investigated the situation in the Democratic Republic of the Congo and the involvement of intermediaries who introduced to the Prosecution some of the witnesses expected to testify in the case against Mr Ntaganda.¹⁸
18. Moreover, the Prosecution's review obligations pursuant to the Order are unrelated to its disclosure obligations. Indeed, the Chamber adjudicated the Defence Request for Access as a discretionary matter.¹⁹ The Prosecution cannot invoke a "separate Defence request" to exclude certain Lubanga Confidential Exhibits from the scope of the Requested Material for which access must be granted to the Defence.
19. In any event, the Prosecution's stance is somehow surprising given its initial position that it did not oppose the Defence's request for access to *all* of the Requested Material.²⁰

II. Confidential material related to Prosecution Witnesses [REDACTED] and [REDACTED]

20. On 22 September 2015, Legal Representatives V01 filed their "*Observation des Représentants légaux de groupe des victimes V01 sur la requête de la défense de Mr Ntaganda* 'ICC-01/04-02/06-721 request on behalf of Mr Ntaganda [sic]

¹⁸ Cf. ICC-01/04-02/06-721 ("Defence Request for Access"), para.22(a) and (c).

¹⁹ Order, para.8.

²⁰ Subject only to the views of the Lubanga Defence team for Mr Lubanga and of the Legal Representatives of Victims on the 'security implications' of a variation of protective measures for the witnesses *they* called or materials *they* presented: ICC-01/04-02/06-764, paras.5-7.

access to all inter partes confidential material in the Lubanga case''' ("LRV01 Observations").²¹

21. In their Observations, Legal Representatives V01 requested the Chamber to deny the Defence access to all confidential information concerning Witnesses [REDACTED] and [REDACTED].
22. The Defence notes that the Prosecution has already disclosed confidential material related to Witnesses [REDACTED] and [REDACTED] without any redactions, including the identity of these witnesses.
23. In such circumstances, there is no need to prevent the Defence from having access to any confidential material related to Witnesses [REDACTED] and [REDACTED].
24. Accordingly, in the event confidential material related to Witnesses [REDACTED] and [REDACTED] is included in any of the Prosecution Annexes, such material must be excluded from the scope of the Requested Material for which access should not be granted to the Defence.

III. The confidential exhibits listed in Prosecution Addendum Annex 1 and the other confidential materials listed in Prosecution Addendum Annex 2

25. Further to consultations with the Legal Representatives of Victims in the *Lubanga* case and the Victims and Witnesses Unit ("VWU"), the Prosecution has listed in Prosecution Addendum Annex 1 a list of Lubanga Confidential Exhibits that should not be transmitted to the Defence "because of the security implications of such disclosure for the individuals concerned".²² The Prosecution did the same in respect of other confidential materials, which have been listed in Prosecution Addendum Annex 2.²³

²¹ ICC-01/04-02/06-849-Conf.

²² Prosecution Further Observations, para.14(a).

²³ Prosecution Further Observations, para.16; Addendum to Prosecution Further Observations, para 2.

26. Considering that there may be misunderstandings²⁴ and/oversights²⁵ in the Prosecution's determination of the Requested Material for which access should not be granted to the Defence, the Defence respectfully submits that it should, at a minimum, be informed of the nature of the material listed in Prosecution Addendum Annexes 1 and 2, and be afforded with an opportunity to submit observations thereon, which would assist the Chamber in its determination of the scope of the Requested Material for which access should not be granted to the Defence.

CONFIDENTIALITY

18. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is submitted on a confidential basis as it refers to a filing bearing the same classification. A public redacted version will be filed separately.

RELIEF SOUGHT

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

ORDER the Registry to provide the Defence with access to the Common Witnesses Receipts and the Lubanga Witnesses Receipts as listed in Annex 2;

ORDER the Prosecution to provide the Defence with copies of Prosecution Addendum Annexes 1 and 2; and

GRANT the Defence leave to provide observations on the contents of Prosecution Addendum Annexes 1 and 2.

²⁴ See *supra*, paras.20-24.

²⁵ See Addendum, para.1(a).

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF JANUARY 2016

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands