

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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***

Confidential

**Prosecution response to Defence's application for leave to appeal the
"Decision regarding confidential material in the *Lubanga* case"**

Source: Office of the Prosecutor

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

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I. Introduction

1. The Defence's Application¹ seeking leave to appeal the Decision regarding confidential material in the *Lubanga* case² should be dismissed because it does not meet the threshold requirement for leave to appeal under article 82(1)(d) of the Rome Statute.
2. The proposed issue is not appealable because it expresses no more than disagreements with the Chamber. In any event, the Defence has failed to demonstrate either that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, or that the immediate intervention of the Appeals Chamber may materially advance the proceedings.

II. Submissions

A. The proposed issue is not appealable

3. The Application fails to identify an *appealable* issue arising from the Decision. An "issue" is an identifiable and discrete subject or topic requiring a decision for its resolution and *not merely a matter over which there is disagreement* or conflicting opinion.³ In this case, the Defence merely disagrees with the Chamber's disposition and challenges it as such.
4. In its original Request⁴ the Defence asked the Chamber to have access to the information contained in the Addendum Annexes⁵ and be given an opportunity to

¹ ICC-01/04-02/06-1072 ("Application").

² ICC-01/04-02/06-1063 ("Decision").

³ ICC-01/04-168 OA3, para. 9; ICC-02/11-01/15-117 paras. 19-22; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27.

⁴ ICC-01/04-02/06-964, Response of 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 IV, ICC-01/04-002/06-806" ("Request").

⁵ ICC-01/04-02/06-910-Conf-Exp-Anx1, ICC-01/04-02/06-910-Conf-Exp-Anx2 ("Addendum Annexes").

submit observations thereon.⁶ The Chamber rejected the Defence's Request and found there is no need to transmit the Addendum Annexes to Ntaganda Defence or to receive further submissions thereon.⁷

5. The proposed issue—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 thereon⁸—is a mere reiteration of the Defence prior argument⁹ and expresses no more than a disagreement with the Chamber's decision. Rather than identifying a discrete topic requiring a decision for its resolution, the Defence took the Chamber's Decision in its entirety¹⁰ and turned it into an "issue". In essence, the proposed issue is whether the Chamber should have rejected the Request. By merely restating its position and expressing its disagreement with the Chamber's Decision, the Defence has failed to properly identify a discrete appealable issue.

6. The Defence submits that the Addendum Annexes should be disclosed because they pertain to materials that the Defence *assumes* to be "highly relevant" to the preparation of its case.¹¹ This is not only speculative—the Defence is not in a position to assess the relevance of the listed material—but also irrelevant. The Decision is about the Defence's access to the Addendum Annexes and its opportunity to make submissions thereon and not about the relevance of the listed materials. Any arguments related to the relevance of the listed materials exceed the scope of the Decision and are inapposite to establish the existence of an appealable issue arising from it.

7. In addition, the Defence disagrees¹² with the Chamber's conclusion that the Addendum Annexes "are not in and of themselves relevant or informative"¹³ even

⁶ Request, para. 26.

⁷ Decision, para. 18.

⁸ Application, para. 2.

⁹ See Request, para. 26.

¹⁰ Decision, para. 18.

¹¹ Application, paras. 9-12.

¹² Application, paras. 12, 20.

though they have never seen them. The Defence simply asserts that they are informative and submits that if granted access to the Addendum Annexes it would provide properly informed views on which protective measure should be applied – if any.¹⁴ Accordingly, the Defence arguments reflect a mere disagreement with the Chamber's decision and do not constitute a matter that needs to be *resolved* by the Appeals Chamber.

8. Further, the Defence's submissions and disagreements with the Chamber's conclusion are premised on pure speculation. The Defence acknowledges that its submissions are based only on what it understands the Addendum Annexes may consist of (based on the reading of the redacted version of Lubanga's Observations).¹⁵ Thus the Defence is not in a position to argue that the information contained in the Addendum Annexes is informative *per se* and that the materials listed are "highly relevant" – or that the issue strikes "the core of the preparation for the defence".¹⁶

9. Finally, the fact that the Appeals Chamber has not yet pronounced on the matter of access to confidential material in another case is circular and does not make the issue appealable.¹⁷ The Appeals Chamber is not an advisory body and it is beyond the scope of its authority providing guidance on the interpretation of the law.¹⁸

10. The Defence, far from identifying a discrete topic requiring the Appeals Chamber's resolution, merely expresses its dissatisfaction and disagreement with the Decision's conclusion and reasoning. For this reason alone, the Application should be dismissed.

¹³ Decision, para. 18.

¹⁴ Application, paras. 17-18, 20.

¹⁵ See Application, paras. 12, 20 referring to Lubanga Defence Observations, ICC-01/04-02/06-950-Red ("Lubanga's Observations").

¹⁶ *Contra* Application, para. 12.

¹⁷ Application, para. 13.

¹⁸ ICC-01/04-01/06-772, para. 4.

B. The other requirements of article 82(1)(d) are not met

i. The issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

11. Even assuming, *arguendo*, that the proposed issue falls within the scope of an issue under article 82(1)(d), the Defence has failed to demonstrate that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

12. The Defence submits that the Decision significantly affects the fairness of the proceedings because it deprives the Defence of the opportunity to submit *informed* views on “crucial issues”¹⁹— including whether the security implications are well-founded, whether the relevance to the Defence of the material outweighs the need for protective measures and whether the protective measures could achieve the aim of protecting the individuals.²⁰

13. However, and as determined by the Chamber, the Addendum Annexes are not informative as to the nature and level of the current security concerns for victims and witnesses. Thus, even if the Defence were granted access to the Addendum Annexes, it would not be in a position to provide any *informed* views on which measures are required to protect the individuals concerned.

14. The arguments advanced on expeditiousness are equally unpersuasive: the Defence merely submits that the issue impacts the expeditious conduct of the proceeding, but it does not provide any argument in support. The Defence’s claim should therefore be rejected as unsubstantiated.²¹

¹⁹ Application, paras. 15-18, 20.

²⁰ Application, para. 17.

²¹ Application, paras. 3, 14, 16.

15. The issue also does not affect the outcome of the trial. The Defence submission is based on an incorrect premise: the Decision does not preclude the Defence “from gaining access to a number of items which are *relevant* to its case”.²² The Decision merely precludes the Defence from gaining access to the Addendum Annexes and to make further submissions.

16. Further, as discussed above, mere access to the Addendum Annexes would not place the Defence in a position to provide meaningful observations on the matter of protective measures.²³

ii. The immediate resolution by the Appeals Chamber will not materially advance the proceedings

17. The Defence has failed to show that the immediate resolution by the Appeals Chamber of the proposed issue may materially advance the proceedings.

18. The Defence submission is, once again, based on the incorrect premise that obtaining access to the Addendum Annexes would allow it to submit informed observations on the appropriateness of the protective measures.²⁴ As discussed above, the Chamber has concluded that the Addendum Annexes are not in and of themselves relevant or informative²⁵—and certainly not on protective measures related matters.

19. The Appeals Chamber’s pronouncement on whether the Defence is entitled to obtain a *non-informative* and *irrelevant* list that would *not* allow the Defence to submitting informed observations on protective measures will not materially advance the proceeding.

²² *Contra* Application, para. 21.

²³ *Contra* Application, para. 21.

²⁴ Application, para. 23.

²⁵ Decision, para. 18.

C. Relief requested

20. For all the reasons above, the Application should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 11th day of January 2016

At The Hague, The Netherlands