

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 18 February 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

Decision on Defence request seeking leave to appeal the ‘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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States' Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues this 'Decision on Defence request seeking leave to appeal the "Decision regarding confidential material in the *Lubanga* case"'.

I. Background

1. On 18 December 2015, the Chamber issued the 'Decision regarding confidential material in the *Lubanga* case' ('Impugned Decision'),¹ in which it ordered, *inter alia*, the Office of the Prosecutor ('Prosecution') to conduct a further review of certain *inter partes* confidential material from the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('*Lubanga* case'), in order to determine which, if any, remained to be provided to the defence team for Mr Ntaganda ('Defence').
2. The Prosecution had previously filed,² and subsequently amended,³ a number of confidential *ex parte* annexes containing the document numbers of confidential material from the *Lubanga* case which it submitted ought not to be transmitted to the Defence, including: (i) exhibits which, in the Prosecution's submission, should not be disclosed because of the security implications of such disclosure for the individuals concerned;⁴ (ii) receipts of witness-related expenses, which the Prosecution submitted were irrelevant to the Defence;⁵ and (iii) transcripts of private and closed sessions, confidential decisions and submissions by parties and participants, which the Prosecution submitted

¹ Decision regarding confidential material in the *Lubanga* case, 18 December 2015, ICC-01/04-02/06-1063-Conf. The Impugned Decision was reclassified as public on 12 February 2016.

² 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 ('Prosecution Further Observations').

³ 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 ('Addendum Observations').

⁴ See Prosecution Further Observations, ICC-01/04-02/06-898-Conf-Exp-Anx1, subsequently replaced by Annex 1 to the Addendum Observations, ICC-01/04-02/06-910-Conf-Exp-Anx1, ('Addendum Annex 1').

⁵ See Prosecution Further Observations, ICC-01/04-02/06-898-Conf-Exp-Anx2.

ought not to be transmitted to the Defence because of security implications of such disclosure for the individuals concerned.⁶

3. In the Impugned Decision, the Chamber denied the Defence request that the Chamber: (i) order the Prosecution to provide the Defence with copies of Addendum Annexes 1 and 2 (together, 'Addendum Annexes'); (ii) grant leave to the Defence to provide observations on the content of the Addendum Annexes; and (iii) 'defer its decision thereof' until the Defence had made observations thereon.⁷ In so doing, the Chamber held that the Addendum Annexes were 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'.⁸ The Chamber also found that, given the volume of material in the *Lubanga* case provided to the Defence at that stage, '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', that there was no need to transmit the Addendum Annexes to the Defence, nor to receive further submissions thereon.⁹
4. On 5 January 2016, the Defence filed a request for leave to appeal the Impugned Decision on this aspect ('Request').¹⁰
5. On 11 January 2016, the Prosecution responded, opposing the Request ('Prosecution Response').¹¹

⁶ See Prosecution Further Observations, ICC-01/04-02/06-898-Conf-Exp-Anx3, subsequently replaced by Annex 2 to the Addendum Observations, ICC-01/04-02/06-910-Conf-Exp-Anx2 ('Addendum Annex 2').

⁷ 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, paras 25-26 and page 9. A public redacted version was filed on 11 January 2016 as ICC-01/04-02/06-964-Red ('Defence Response of 29 October 2016').

⁸ Impugned Decision, ICC-01/04-02/06-1063, para. 18.

⁹ Impugned Decision, ICC-01/04-02/06-1063, para. 18.

¹⁰ Request on behalf of Mr Ntaganda seeking leave to appeal the "Decision regarding confidential material in the *Lubanga* case", 5 January 2016, ICC-01/04-02/06-1072-Conf.

¹¹ Prosecution's response to Defence's application for leave to appeal the "Decision regarding confidential material in the *Lubanga* case", 11 January 2016, ICC-01/04-02/06-1079-Conf.

II. Submissions

6. The Defence seeks leave to appeal on the following issue ('Issue'):

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;

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.¹²

7. The Defence submits that the Issue is appealable and arises 'for the first time in the Impugned Decision'.¹³ It argues that, while the Chamber had already established the procedure by which proposals for protective measures would attach to confidential material in the *Lubanga* case, '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 [...] before its application in the Impugned Decision'.¹⁴ The Defence argues further that the resolution of the Issue is essential for the determination of matters arising in the *Ntaganda* case, as it directly relates to 'the modalities for access to material relevant to the defence case', insofar as its access to certain *Lubanga* materials was frustrated by purported security implications upon which it had no opportunity to make observations.¹⁵
8. Further, the Defence submits that the Issue impacts the fairness and expeditiousness of the proceedings¹⁶ and outcome of trial¹⁷ insofar as the non-communication to the Defence of the material in the Addendum Annexes, upon which the Defence did not have the opportunity to present its views, is,

¹² Request, ICC-01/04-02/06-1072-Conf, para. 2.

¹³ Request, ICC-01/04-02/06-1072-Conf, para. 6.

¹⁴ Request, ICC-01/04-02/06-1072-Conf, para. 8.

¹⁵ Request, ICC-01/04-02/06-1072-Conf, paras 9-10 and 13.

¹⁶ Request, ICC-01/04-02/06-1072-Conf, paras 15-20.

¹⁷ Request, ICC-01/04-02/06-1072-Conf, para. 21.

in the view of the Defence, by far ‘the most draconic and far-reaching’ method to ensure continuation of the protective measures applicable to this material. The Defence argues that resolution of the Issue would also materially advance the proceedings, insofar as the Issue exemplifies the Prosecution’s ‘systematic reliance on security concerns’ to justify withholding material from the Defence, and that pronouncement by the Appeals Chamber on whether the Defence is entitled to the Addendum Annexes ‘may definitely advance proceedings’. The Defence also argues that adjudication of the Issue by the Appeals Chamber would ensure that the proceedings progress on a proper footing with respect of the issue of access to relevant material for the preparation of the defence.¹⁸

9. The Prosecution submits that the Issue ‘is not an appealable one because it expresses no more than disagreements with the Chamber’, is speculative, and fails to identify a discrete topic requiring a decision for its resolution.¹⁹ The Prosecution argues that the Defence is not in a position to argue that the material referred to in the Addendum Annexes is informative, that the materials listed therein are relevant, or that the Issue therefore strikes at ‘the core of the preparation for the defence’.²⁰ The Prosecution argues further that, even if the Issue were to fall within the scope of an issue under Article 82(1)(d) of the Statute, the Defence has failed to demonstrate that the Issue significantly affects the fair and expeditious conducts of the proceedings or the outcome of the trial.²¹ Further, the Prosecution avers that the immediate resolution by the Appeals Chamber will not materially advance the proceedings, given the non-informative nature of the Addendum Annexes.²²

¹⁸ Request, ICC-01/04-02/06-1072-Conf, paras 22-23.

¹⁹ Prosecution Response, ICC-01/04-02/06-1079-Conf, paras 2-10.

²⁰ Prosecution Response, ICC-01/04-02/06-1079-Conf, para. 8.

²¹ Prosecution Response, ICC-01/04-02/06-1079-Conf, paras 11-16.

²² Prosecution Response, ICC-01/04-02/06-1079-Conf, paras 17-19.

III. Analysis

10. The Chamber incorporates by reference the applicable law as set out in previous decisions.²³
11. At the outset, the Chamber observes that, as noted by the Defence, the Chamber previously established the relevant procedure by which items from the *Lubanga* case ought not be transmitted to the Defence on the basis of any requirement for protective measures, not in the Impugned Decision, but in a previous decision on the matter, namely the 'Further directions on Defence access to confidential material in the *Lubanga* case' ('Further Directions').²⁴ The Chamber considers that it was open to the Defence to seek leave to appeal or reconsideration of this procedure at the time of the issuance of the Further Directions, rather upon waiting until its application in the Impugned Decision. Notwithstanding, the Chamber has adjudicated the Request to the extent that it stems from a specific Defence application for access to the Addendum Annexes²⁵ which was rejected in the Impugned Decision.
12. However, having analysed the Request, the Chamber does not consider that the Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial. Indeed, the Chamber finds the Defence argument that it 'understands' that the items referred to in the Addendum Annexes contain 'highly relevant' information for its preparation,²⁶ while stemming from certain observations made by the defence team for Mr Lubanga,²⁷ to be unsubstantiated.

²³ See for example Decision on Defence request for leave to appeal the Chamber's decision on postponement of the trial commencement date, 4 August 2015, ICC-01/04-02/06-760-Red, paras 20-21.

²⁴ 1 October 2015, ICC-01/04-02/06-879, para. 15.

²⁵ Defence Response of 29 October 2016, ICC-01/04-02/06-964-Red, paras 25-26 and page 9.

²⁶ Request, ICC-01/04-02/06-1072-Conf, para. 12.

²⁷ *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. A public redacted version was filed on 30 October 2015.*

13. Moreover, the Chamber considers the notion that the Defence could be in a position to provide the Chamber with informed submissions on the Addendum Annexes, had they been transmitted to the Defence, to be wholly speculative, given that, as noted in the Impugned Decision, the Addendum Annexes are not ‘in and of themselves relevant or informative’.²⁸ The Chamber notes in this regard that, in terms of ensuring that the confidential materials in the *Lubanga* case were subject to any appropriate protective measures required, the Prosecution itself was dependent on seeking the views of the legal representatives of victims and defence team in the *Lubanga* case.²⁹ The ability of the Defence to therefore make meaningful submissions on protective measures based on provision of access to the non-descriptive Addendum Annexes alone, even if the document numbers of the items referred to therein were in any way illuminating as to the relevance of the listed material,³⁰ would be, in the view of the Chamber, extremely limited.
14. Emphasising the Chamber’s finding in the Impugned Decision that there is no general right of access to confidential materials or their descriptions in another case,³¹ the Chamber finds that the transmission of the Addendum Annexes to the Defence, in light of their non-descriptive nature, could not have meaningfully informed the Chamber’s subsequent directions with respect to confidential material from the *Lubanga* case, and thus would not in any event have significantly affected the fair and expeditious conduct of the proceedings or the outcome of trial.

²⁸ Impugned Decision, ICC-01/04-02/06-1063-Conf, para. 18.

²⁹ 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. 5.

³⁰ Cf. Request, ICC-01/04-02/06-1072-Conf, para. 20.

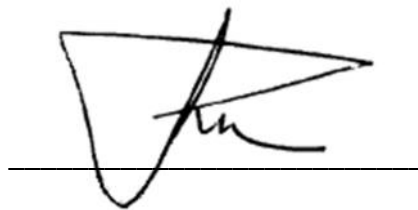
³¹ Impugned Decision, ICC-01/04-02/06-1063-Conf, para. 18.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

ORDERS the Defence to file a public redacted version of the Request (ICC-01/04-02/06-1072-Conf) and the Prosecution to file a public redacted version of the Prosecution Response (ICC-01/04-02/06-1079-Conf), within two weeks of the present decision being issued.

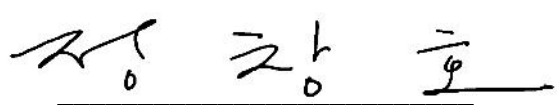
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 18 February 2016

At The Hague, The Netherlands