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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 "Prosecution request for an order granting Defence access to confidential material from the *Lubanga* case", 18 January 2016,
ICC-01/04-02/06-1088-Conf**

Source: The Office of the Prosecutor

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

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

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

Introduction

1. Pursuant to Trial Chamber VI's ("Chamber") "Decision regarding confidential material in the *Lubanga* case",¹ and as announced on 19 November 2015,² the Prosecution has re-examined its position with respect to certain items formerly listed as confidential material from the *Lubanga* case to which the Defence should not be given access.³
2. Having consulted the *Lubanga* Legal Representatives and the Victims and Witnesses Unit ("VWU"), the Prosecution requests that the Chamber order the Registry to grant the Defence access to (i) items 6-8, 13-17 (with redactions), 19-21, 22-26, 37, 38, 42, 43, and 48-78 listed in Addendum Annex 1;⁴ and (ii) 1, 2, 8, 12, 13, 15, 17, 27, 50, 61 (cover filing only), 62, 88 (annex 1 only) and 97, listed in Addendum Annex 2.⁵

Procedural Background

3. On 15 July 2015, the Defence requested access to confidential material from the *Lubanga* case.⁶
4. On 5 August 2015, the Prosecution submitted that, given the overlap between the *Lubanga* and *Ntaganda* cases, it did not oppose this request.⁷ It submitted that it deferred to the views of Mr Lubanga and the Legal Representatives of Victims as to the security implications, if any, for the witnesses they called or the materials they presented in the *Lubanga* case.⁸

¹ ICC-01/04-02/06-1063-Conf.

² ICC-01/04-02/06-1025-Red, para. 40.

³ ICC-01/04-02/06-910-Conf-Exp-Anx1 and 2.

⁴ ICC-01/04-02/06-910-Conf-Exp-Anx1.

⁵ ICC-01/04-02/06-910-Conf-Exp-Anx2.

⁶ ICC-01/04-02/06-721. See ICC-01/04-02/06-806, para. 9; ICC-01/04-02/06-879, para. 1.

⁷ ICC-01/04-02/06-764, para. 1.

⁸ ICC-01/04-02/06-764, paras. 5-6.

5. On 1 September 2015, in exercise of its discretion⁹ to give access to the requested material, and having found that certain material “may” be relevant to the Defence and “may” assist in its analysis of the material disclosed by the Prosecution,¹⁰ the Chamber ordered: (i) the Prosecution to identify, within the requested material, any specific material requiring protective measures prior to disclosure to the Defence; and (ii) the other parties and participants to the *Lubanga* case to submit any specific proposals for additional protective measures, providing all relevant information to enable the Chamber to rule on the matter.¹¹ The filing deadline for these proposals was 22 September 2015.¹²

6. On 22 September 2015, the Prosecution requested an extension of time in order to complete its review for relevance of certain confidential exhibits admitted into evidence in the *Lubanga* case.¹³ In relation to the material other than exhibits, the Prosecution informed the Chamber of the technical limitations that would prevent it from identifying irrelevant parts thereof in a resource-efficient and expeditious manner.¹⁴ The Prosecution noted further that it would be unable to identify specific material from the *Lubanga* proceedings requiring additional protective measures until it received input from the *Lubanga* Defence and Legal Representatives.¹⁵ Moreover, it proposed that the Registry be ordered to provide the Defence with access to any parts of the requested material (other than exhibits) not identified by the *Lubanga* Parties and participants as requiring protective measures.¹⁶

7. On the same day, the *Lubanga* Defence submitted that it did not consider it necessary to seek any additional protective measures.¹⁷

⁹ ICC-01/04-02/06-806, para. 8.

¹⁰ ICC-01/04-02/06-806, para. 11.

¹¹ ICC-01/04-02/06-806, para.12

¹² ICC-01/04-02/06-806, p. 10.

¹³ ICC-01/04-02/06-851, paras. 14 and 31.

¹⁴ ICC-01/04-02/06-851, paras. 4, 16-21.

¹⁵ ICC-01/04-02/06-851, paras. 26-29.

¹⁶ ICC-01/04-02/06-851, para. 32.

¹⁷ ICC-01/04-02/06-847, para. 3.

8. The Legal Representatives for the victims in the *Lubanga* case also filed their observations on 22 September 2015. The Legal Representatives of the V01 group of Victims in the *Lubanga* case requested that the Chamber deny the Defence access to the confidential information concerning the witnesses in the *Lubanga* case they represent.¹⁸ The Legal Representatives of the V02 group of Victims in the *Lubanga* case submitted that the VWU should consult the Legal Representatives each time, if necessary, in order to defend the interests of the clients they represent.¹⁹ The Office of Public Counsel for Victims requested that certain materials related to the victims it represents not be transmitted to the Defence.²⁰
9. On 1 October 2015, the Chamber issued further directions on the Defence request. It authorised the transmission to the Defence of the requested material without further exhaustive filtering for relevance, “subject to any further protective measures and redactions that may be required”,²¹ which were to be identified through a consultation process between the Prosecution, the *Lubanga* Legal Representatives, and the VWU.²² The Chamber ordered the Prosecution to file by 12 October 2015 a list including “the particular items within the Requested Material that: (i) will require further redactions, including the precise redactions proposed; or (ii) ought not be transmitted to the Defence”.²³ The Chamber determined that the victim participation or reparations application forms in the *Lubanga* case do not fall within the scope of the requested material, unless they were admitted into evidence in that case; and that filings containing such applications may be included in the list.²⁴

¹⁸ ICC-01/04-02/06-849-Red, p. 5.

¹⁹ ICC-01/04-02/06-848, para. 16. Cf ICC-01/04-02/06-879, para. 8: “...that the Victims and Witnesses Unit (‘VWU’) should be consulted each time it is necessary to defend the interests of the victims in the V02 group”.

²⁰ ICC-01/04-02/06-846-Conf-Exp, paras. 9, 12-14.

²¹ ICC-01/04-02/06-879, para. 12.

²² ICC-01/04-02/06-879, para. 15.

²³ ICC-01/04-02/06-879, para. 15.

²⁴ ICC-01/04-02/06-879, para. 15.

10. On 12 October 2015, the Prosecution filed the “Prosecution’s further observations on the ‘Order on Defence access to confidential material in the *Lubanga* case’ issued by Trial Chamber VI” (“Further Observations”).²⁵ In Confidential, *ex parte*, Annexes 1 and 3, the Prosecution filed lists of materials which should not be provided to the Defence, pursuant to consultations between the Prosecution, the *Lubanga* Legal Representatives and the VWU.²⁶
11. On 19 October 2015, the Prosecution filed an addendum to its Further Observations (“Addendum”).²⁷ The Addendum was filed with Confidential, *Ex parte* Annexes 1 (“Addendum Annex 1”) and 2 (“Addendum Annex 2”), which were updated versions of Annexes 1 and 3 to the 12 October 2015 Further Observations.
12. On 27 October 2015, the Defence for Mr Lubanga filed observations on the Prosecution’s Further Observations and Addendum (“Lubanga Defence Observations”), identifying items that, in its view, ought to be communicated to the Defence for Mr Ntaganda.²⁸
13. On 29 October 2015, the Defence filed the “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 29 October 2015 Request”).²⁹ It requested that, if the Prosecution’s list included confidential material related to [REDACTED], the Chamber should exclude these from the material to which the Defence should not be granted access.³⁰

²⁵ ICC-01/04-02/06-898.

²⁶ ICC-01/04-02/06-898-Conf-Exp-Anx1 and ICC-01/04-02/06-898-Conf-Exp-Anx3.

²⁷ ICC-01/04-02/06-910.

²⁸ ICC-01/04-02/06-950-Conf-Exp, with public redacted version ICC-01/04-02/06-950-Red filed on 30 October 2015.

²⁹ ICC-01/04-02/06-964-Conf.

³⁰ ICC-01/04-02/06-964-Conf, para. 24.

14. On 19 November 2015, the Prosecution responded to the Defence 29 October 2015 Request. It argued that the Chamber had already ruled on the matter when it ordered the Registry to provide the Defence access to the confidential material from the *Lubanga* case with the exception of the items included on the Prosecution's list;³¹ and that the Prosecution was entitled to respond to the Defence 29 October 2015 Request as it contained a new request for relief.³² The Prosecution submitted that the Defence request for access to the material related to [REDACTED] in the *Lubanga* case should be rejected.³³ In addition, the Prosecution informed the Chamber that it was re-examining the position with respect to items 19-21 and 48-78 listed in Addendum Annex 1³⁴ and would revert to the Chamber as soon as practicable, following consultations with the *Lubanga* Legal Representatives and the VWU.³⁵
15. On 20 November 2015, the Defence filed a request to strike the Prosecution's response from the record ("Defence Request to Strike").³⁶
16. On 18 December 2015, the Chamber (i) rejected the Defence Request to Strike; (ii) rejected the Defence 29 October 2015 Request; and (iii) ordered the Prosecution to finalise by 18 January 2016 the consultations with the Legal Representatives and the VWU announced in its 19 November 2015 submissions, and to take into account any outstanding matters raised in the Lubanga Defence Observations by the same date.³⁷
17. On 5 January 2016 the Defence sought leave to appeal the Chamber's 18 December 2015 decision.³⁸ The Prosecution filed its response on 12 January 2016.³⁹

³¹ ICC-01/04-02/06-1025-Conf, para. 32, citing ICC-01/04-02/06-879, p. 10.

³² ICC-01/04-02/06-1025-Red, para. 19.

³³ ICC-01/04-02/06-1025-Conf, paras. 3 and 31-35.

³⁴ ICC-01/04-02/06-910-Conf-Exp-Anx1.

³⁵ ICC-01/04-02/06-1025-Red, para. 40.

³⁶ ICC-01/04-02/06-1030.

³⁷ ICC-01/04-02/06-1063-Conf.

³⁸ ICC-01/04-02/06-1072-Conf.

³⁹ ICC-01/04-02/06-1079-Conf.

Confidentiality

18. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court (“Regulations”), this document is filed confidentially because it refers to documents bearing that classification. The Prosecution files annexes 1-5 as confidential, *ex parte*, only available to the Prosecution, *Lubanga* Legal Representatives, *Lubanga* Defence and VWU, because the materials contain redactions proposed for the Chamber’s approval.

Prosecution Submissions

19. The Prosecution has re-examined items (i) 6-8, 13-17, 19-21, 22-26, 37, 38, 42, 43, and 48-78 listed in Addendum Annex 1;⁴⁰ and (ii) 1, 2, 8, 12, 13, 15, 17, 27, 50, 61, 62, 88, 97, listed in Addendum Annex 2, with a view to re-assessing their relevance, if any, to the Defence’s preparation; and in the light of other disclosed materials, as well as confidential materials from the *Lubanga* case to which the Chamber has ordered the Defence be given access. Having consulted the *Lubanga* Legal Representatives and the VWU, the Prosecution is of the view that the Defence can be given access to these items. For items 13-17, the Prosecution attaches, as Confidential *ex parte* annexes 1-5, copies with redactions proposed pursuant to its consultations with the VWU.

20. The Prosecution has conducted its review in particular in light of the *Lubanga* Defence Observations,⁴¹ as directed by the Chamber.⁴² With the exception of witness P-0010, for whom all relevant documents have been disclosed to the Defence, none of the individuals referred to in the *Lubanga* Defence Observations⁴³ are witnesses in the *Ntaganda* case. Similarly, P-0321 has not been used as an intermediary for contacts with any of the witnesses called in the *Ntaganda* case. While P-0143 was used as intermediary with witness P-0010

⁴⁰ ICC-01/04-02/06-910-Conf-Exp-Anx1.

⁴¹ ICC-01/04-02/06-950-Conf-Exp.

⁴² ICC-01/04-02/06-1063-Conf, para. 20.

⁴³ ICC-01/04-02/06-950-Conf-Exp, para.10.

during the *Lubanga* case, all relevant material related to the intermediary was disclosed to the Ntaganda Defence prior to Witness P-0010's testimony in the *Ntaganda* case. The Prosecution submits that documents that may affect the credibility of witnesses and victims called in the *Lubanga* case but who are not witnesses in the present case against are irrelevant for the Defence.

21. The Prosecution notes that the relevance of the materials that remain on the Prosecution's lists is, if any, of marginal value in the *Ntaganda* case. The materials from the *Lubanga* case already available to the Defence enable it to bring discrete applications justifying further access, should it be warranted.⁴⁴

Items introduced through witness DRC-D01-0029

22. Items 19-21, 38, 42, 43 and 48-78 listed in Addendum Annex 1 are rosters from schools in Ituri which are potentially relevant to the preparation of the Defence. They were introduced through witness DRC-D01-0029 in the *Lubanga* case. The Defence should already have, or should soon have, access to the confidential versions of the transcripts of this witness's testimony, as these were not listed by the Prosecution as items to which the Defence should not have access.

Other items assessed as potentially relevant and not raising security concerns.

23. After further review and in consultation with the VWU and the Legal Representatives, the Prosecution recommends to transmit to the Defence the items listed in Addendum Annex 1 at numbers 6-8, 13-17 (with redactions), and

⁴⁴ The Prosecution notes, for example, that where the Defence does not have access to confidential materials, it often has access to public redacted versions of the filings, and/or to public or public redacted versions of the decisions. See, for example, ICC-01/04-01/06-2026-Conf, listed at number 84 in Addendum Annex 2, with public redacted version ICC-01/04-01/06-2092 and decision ICC-01/04-01/06-2109; ICC-01/04-01/06-2586-Conf-Red, listed at number 87 in Addendum Annex 2, with public redacted version ICC-01/04-01/06-2586-Red; and ICC-01/04-01/06-2657-Conf, listed at number 88 in Addendum Annex 2, with public redacted version ICC-01/04-01/06-2657-Red. The Defence also has or should have access to the public redacted versions of all transcripts of testimony listed in Addendum Annex 2.

22-26,⁴⁵ and in Addendum Annex 2 at numbers 1, 2, 8, 12, 13, 15, 17, 27, 50, 61 (cover filing only), 62, 88 (annex 1 only), 97.⁴⁶

24. As for the item listed at number 37 of Addendum Annex 1, the Prosecution submits that it is irrelevant to the Defence. However, as the item was included by mistake in Addendum Annex 1,⁴⁷ the Defence should not be prevented from gaining access to it.⁴⁸

Relief

25. On the basis of the foregoing, the Prosecution requests that the Chamber order the Registry to grant the Defence access to items 6-8, 13-17 (with redactions), 19-21, 22-26, 37, 38, 42, 43, and 48-78 listed in Addendum Annex 1⁴⁹ and 1, 2, 8, 12, 13, 15, 17, 27, 50, 61 (cover filing only), 62, 88 (annex 1 only), 97, listed in Addendum Annex 2.⁵⁰



Fatou Bensouda
Prosecutor

Dated this 25th day of February 2016

At The Hague, The Netherlands

⁴⁵ ICC-01/04-02/06-910-Conf-Exp-Anx1.

⁴⁶ ICC-01/04-02/06-910-Conf-Exp-Anx2.

⁴⁷ The item had been mistakenly assessed to be linked to a participating victim in the *Lubanga* case, [REDACTED], whose witness code and identity are similar to the code and identity of another witness, [REDACTED].

⁴⁸ The Prosecution refers to para. 9 of the “Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant”, ICC-01/04-02/06-412-AnxA, concerning the use of photographs depicting witnesses or victims involved with the Court.

⁴⁹ ICC-01/04-02/06-910-Conf-Exp-Anx1.

⁵⁰ ICC-01/04-02/06-910-Conf-Exp-Anx2.