

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 1 October 2015

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

Further directions on Defence access to 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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Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64(2) and (6)(f) of the Rome Statute and Regulation 42 of the Regulations of the Court ('Regulations'), issues the 'Further directions on Defence access to confidential material in the *Lubanga* case'.

I. Procedural history and submissions

1. On 15 July 2015, the defence team for Mr Ntaganda ('Defence') filed a request ('Defence Request')¹ seeking access to certain *inter partes* confidential material in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case'). The requested material excludes *ex parte* items, and comprises: (i) all exhibits classified as confidential that were admitted into evidence in the *Lubanga* case; (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 ('Requested Material').
2. The Office of the Prosecutor ('Prosecution'),² the Legal Representatives of the V01 group of Victims in the *Lubanga* case ('Lubanga V01 LRVs'),³ and the Legal Representative of Victims representing the former child soldiers in the *Ntaganda* case ('Ntaganda LRV')⁴ each responded to the Defence Request.

¹ Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case, ICC-01/04-02/06-721.

² Response to "Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case", 5 August 2015, ICC-01/04-02/06-764.

³ *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 access to all *inter partes* confidential material in the *Lubanga* case », 4 August 2015, ICC-01/04-02/06-763.

⁴ Former child soldiers' response to the "Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case", 5 August 2015, ICC-01/04-02/06-766.

3. On 1 September 2015, 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, the Chamber ordered that the Defence shall be granted access to the Requested Material (‘Order of 1 September 2015’),⁵ subject to the continuation of existing protective measures and redactions imposed by Trial Chamber I in the *Lubanga* case, and excluding any irrelevant items.⁶
4. Accordingly, the Chamber instructed the Prosecution to review the Requested Material to identify, by 22 September 2015: (i) anything which relates purely to procedural matters specific to the *Lubanga* case, or is otherwise irrelevant to the Defence (‘Irrelevant Items’); 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 (together with (i), ‘Instructions’). The other party and participants to the *Lubanga* case were similarly directed to submit any specific proposals for additional protective measures that are required with respect of the Requested Material, including redactions, and to provide all relevant information to enable the Chamber to subsequently rule on the matter.⁷
5. On 22 September 2015, the Prosecution filed its observations (‘Prosecution Observations’),⁸ submitting that it has identified certain exhibits pertaining to witness-related expenses in the *Lubanga* case which, in its view, need not be provided to the Defence. The Prosecution states that it shall continue to review the remaining confidential exhibits (numbering approximately 260 items), but that it shall require an extension of time until 9 October 2015 to do so.⁹ It avers that it cannot, however, easily or efficiently filter the remainder of the

⁵ Order on Defence access to confidential material in the *Lubanga* case, ICC-01/04-02/06-806.

⁶ Order of 1 September 2015, ICC-01/04-02/06-806, para. 11.

⁷ Order of 1 September 2015, ICC-01/04-02/06-806, para. 12.

⁸ 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, ICC-01/04-02/06-851.

⁹ Prosecution Observations, ICC-01/04-02/06-851, paras 3 and 13-14.

Requested Material (namely, transcripts, submissions and decisions) to determine which items are irrelevant, and proposes that the Chamber grant access to the Defence to all Requested Material, save for those requiring further protective measures.¹⁰ The Prosecution submits further that it is not in a position to identify any specific material requiring additional protective measures until it is apprised of the observations of the defence team for Mr Lubanga ('Lubanga Defence') and other participants in the *Lubanga* case, although notes that items most likely requiring protective measures will include, *inter alia*, victim participation application forms.¹¹

6. Also on 22 September 2015, the Lubanga Defence filed its observations ('Lubanga Defence Observations').¹² Therein, the Lubanga Defence notes that the Order of 1 September 2015 stipulates that protective measures shall continue to apply with respect of the Requested Material, and that the Requested Material does not include *ex parte* items. On these bases, the Lubanga Defence does not consider it necessary to seek additional protective measures.¹³
7. Also on 22 September 2015, the Lubanga V01 LRVs filed their observations ('Lubanga V01 Observations').¹⁴ The Lubanga V01 LRVs express their understanding that the Requested Material does not include victim participation application forms, given they do not constitute submissions of the parties and participants but rather documents sent to the Court by individuals who were not participants before the start of the case.¹⁵ With respect to two particular victims who testified in the *Lubanga* case, the Lubanga V01 LRVs

¹⁰ Prosecution Observations, ICC-01/04-02/06-851, paras 4 and 15-22.

¹¹ Prosecution Observations, ICC-01/04-02/06-851, paras 5 and 23-28.

¹² *Observations de la Défense de M. Thomas Lubanga transmises conformément à l'ordonnance de la Chambre de première instance VI du 1er septembre 2015*, ICC-01/04-02/06-847.

¹³ Lubanga Defence Observations, ICC-01/04-02/06-847, paras 2-3.

¹⁴ *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 access to all inter partes confidential material in the Lubanga case »*, ICC-01/04-02/06-849-Conf.

¹⁵ Lubanga V01 Observations, ICC-01/04-02/06-849-Conf, para. 4.

submit that their identities should not be disclosed to the Defence, as this may interfere with, *inter alia*, their right to private and family life and security. Therefore, any transcripts or identifying material with respect to these witnesses should either not be transmitted or be redacted to protect their identities.¹⁶

8. Also on 22 September 2015, the Legal Representatives of the V02 group of Victims in the *Lubanga* case ('Lubanga V02 LRVs') filed their observations ('Lubanga V02 Observations').¹⁷ The Lubanga V02 LRVs recall the provisions regulating requests with respect to protective measures,¹⁸ stating that while the Ntaganda Defence should be granted access to the Requested Material, the Chamber should ensure that witnesses and victims are protected, and 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.¹⁹
9. Also on 22 September 2015, the Office of Public Counsel for Victims ('OPCV') filed its observations ('OPCV Observations').²⁰ Therein, the OPCV, acting as legal representative of certain victims in the *Lubanga* case, submits that some material pertaining to its clients should not be transmitted to the Ntaganda Defence. It submits that one such victim is participating in the *Ntaganda* case and is currently represented; therefore it has no further observations with respect to this victim.²¹ However, with respect to certain other victims, it submits that the transcripts of their testimony should not be transmitted to the Defence in order, *inter alia*, 'to protect the safety of [OPCV's] clients'.²² The OPCV also submits that victim participation and reparations application forms

¹⁶ Lubanga V01 Observations, ICC-01/04-02/06-849-Conf, paras 7-10.

¹⁷ *Observations de l'équipe V02 de représentants légaux de victimes dans l'affaire ICC-01/04/01/06, suite à l'ordonnance ICC-01/04/02/06-806 du 1er septembre 2015*, ICC-01/04-02/06-848.

¹⁸ Lubanga V02 Observations, ICC-01/04-02/06-848, paras 7-13.

¹⁹ Lubanga V02 Observations, ICC-01/04-02/06-848, paras 14-16.

²⁰ Observations in accordance with the "Order on Defence access to confidential material in the *Lubanga* case", ICC-01/04-02/06-846-Conf-Exp.

²¹ OPCV Observations, ICC-01/04-02/06-846-Conf-Exp, para. 8.

²² OPCV Observations, ICC-01/04-02/06-846-Conf-Exp, para. 12.

should not be transmitted as they are of no interest to the Defence in the *Ntaganda* case, although if the Chamber decides they should be transmitted, they should be provided in redacted form.²³

II. Analysis

10. The Chamber recalls the applicable law and procedure it set out in its Order of 1 September 2015.²⁴ The Chamber further recalls its Instructions to the Prosecution.²⁵

Irrelevant Items

11. The Chamber notes that the Prosecution has encountered difficulties in identifying the Irrelevant Items within certain categories of the Requested Material. In particular, the Chamber notes the Prosecution's submission that the review of the Requested Material to identify the Irrelevant Items has proven to be disproportionately time-consuming and onerous.
12. The Chamber notes that identifying and removing Irrelevant Items 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. Nonetheless, the Chamber considers that providing the Defence with access to the remainder of the materials, which may be of relevance to it, as soon as possible, should, in the circumstances, take priority. Accordingly, given that the Prosecution does not oppose the Defence Request, and subject to any further protective measures and redactions that may be required, the Chamber considers it to be practicable to authorise the transmission to the Defence of the remainder of the Requested Material without further exhaustive refining. Accordingly, the Prosecution is permitted until 12 October 2015 to identify any further Irrelevant Items within the

²³ OPCV Observations, ICC-01/04-02/06-846-Conf-Exp, para. 13.

²⁴ Order of 1 September 2015, ICC-01/04-02/06-806, paras 5-8.

²⁵ Order of 1 September 2015, ICC-01/04-02/06-806, para. 12.

Requested Material that shall not be transmitted to the Defence, in accordance with paragraph 14 of the Prosecution Observations. The Chamber instructs the Prosecution to do its utmost to identify further Irrelevant Items in the intervening period.

Requirement for further protective measures

13. The Chamber notes further that the Prosecution states that it 'is unable to identify "any specific material" from the *Lubanga* proceedings that may need "additional protective measures", on the basis that it does not have access to the particulars of the security situation of any of the victims participating in the *Lubanga* case, or of victim-witnesses who testified in that case'.²⁶ The Prosecution indicated that it is, however, willing to consult with the Lubanga Defence and participants in the *Lubanga* case after being notified of their submissions on any further protective measures that may be required, for the purpose of expediting the Defence's access to the Requested Material.²⁷
14. The Chamber appreciates that the Prosecution's identification of further protective measures that may be required is contingent on specific input from the Lubanga Defence and participants, which is now available to the Prosecution. The Chamber notes that, in terms of the observations received to date:
 - i. The Lubanga Defence submit that it does not consider there to be a need for further protective measures. Therefore, the Chamber considers there is no need to consult further with the Lubanga Defence;
 - ii. The Lubanga V02 LRVs submitted that the VWU should be consulted each time it is necessary to defend the interests of the victims in the V02 Group.²⁸ Recalling that its Order of 1 September 2015 was based on the

²⁶ Prosecution Observations, ICC-01/04-02/06-851, para. 26.

²⁷ Prosecution Observations, ICC-01/04-02/06-851, paras 28 and 30.

²⁸ Lubanga V02 Observations, ICC-01/04-02/06-848, para. 16.

continuation of existing protective measures rather than their variation under Regulation 42(3) of the Regulations, and required 'all relevant information to enable the Chamber to subsequently rule on the matter',²⁹ the Chamber considers that the Lubanga V02 LRVs must identify specific victims that may require further protective measures as a result of the transmission of the Requested Material, should they find this to be necessary;

- iii. The Lubanga V01 LRVs and OPCV identified specific victims in relation to which particular items falling within the Requested Material ought not to be transmitted. The Chamber considers that the particular document numbers of these items must now be identified in order for a final determination to be made on the scope of the Requested Material to be transmitted.
15. The Chamber instructs the Prosecution to promptly liaise with the participants in the *Lubanga* case, to the extent still necessary, as well as consulting with the VWU, to determine whether further protective measures are required, and/or to identify the document numbers of 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. The Prosecution is to file a list of any such items by **12 October 2015**, including any Irrelevant Items it has identified ('List'). In so doing, the Chamber notes that, having reviewed the Defence Request, and in view of its obligations under Article 68(1) of the Statute, the Chamber does not consider that the victim participation or reparations application forms in the *Lubanga* case fall within the Requested Material, unless they were admitted into evidence by Trial Chamber I in the *Lubanga* case. Relevant filings containing such applications may therefore be included in the List.

²⁹ Order of 1 September 2015, ICC-01/04-02/06-806, para. 12.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES an extension of time until 12 October 2015 for the Prosecution to identify any further Irrelevant Items, in accordance with paragraph 12 above;

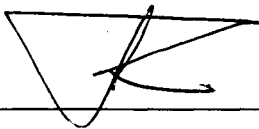
ORDERS the Prosecution to consult with the participants in the *Lubanga* case, as well as the VWU, and to file the List by 12 October 2015, in accordance with paragraphs 14-15 above;

DIRECTS the Registry to provide the Defence with access to all Requested Material except for the items on the List, as promptly as possible after the List is filed;

DIRECTS the Lubanga V01 LRVs to file a public redacted version of the Lubanga V01 Observations within three days of the date of the present decision; and

DIRECTS the OPCV to file both a public redacted version and, to the extent it would contain fewer redactions, a confidential redacted version of the OPCV Observations, notifying the Defence, within three days of the date of the present decision.


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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 1 October 2015

At The Hague, The Netherlands