

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 15 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

Further decision regarding confidential material in the *Lubanga* case

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 Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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**

Others

Counsel for the defence team of
Mr Thomas Lubanga Dyilo
Legal Representatives of Victims V01
Legal Representatives of Victims V02

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), and 68 of the Rome Statute ('Statute') and Regulation 42 of the Regulations of the Court ('Regulations'), issues the following 'Further decision regarding confidential material in the *Lubanga* case'.

I. Background

1. On 1 September 2015, the Chamber granted access to the defence team for Mr Ntaganda ('Ntaganda Defence') to certain *inter partes* confidential material in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case'), subject to the continuation of existing protective measures and redactions imposed by Trial Chamber I in the *Lubanga* case, and excluding any irrelevant items ('Order of 1 September 2015').¹
2. On 1 October 2015, the Chamber issued further directions regarding the Order of 1 September 2015 ('Further Directions'), instructing the Prosecution to promptly liaise with the participants in the *Lubanga* case, as well as consulting with the Victims and Witnesses Unit ('VWU'), to identify the document numbers of the particular items for which further protective measures are required.²
3. On 18 December 2015, following receipt of further submissions,³ the Chamber issued the 'Decision regarding confidential material in the *Lubanga* case'

¹ Order on Defence access to confidential material in the *Lubanga* case, ICC-01/04-02/06-806.

² Further directions on Defence access to confidential material in the *Lubanga* case, ICC-01/04-02/06-879, para. 15.

³ 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; 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 ('Prosecution Addendum'); *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 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 »*, 27 October 2015, ICC-01/04-02/06-950-Conf-Exp. A public redacted version was filed on 30 October 2015 as ICC-01/04-02/06-950-Red ('Lubanga Defence Observations'); 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. A

(‘Decision’),⁴ in which the Chamber ordered, *inter alia*, the Prosecution to conduct a further review of certain *inter partes* confidential material from the *Lubanga* case in order to determine which, if any, remained to be provided to the Ntaganda Defence.

4. In its Decision, the Chamber specified that this review was to entail the Prosecution re-examining its position with respect to items 19-21 and 48-78 listed in Addendum Annex 1 to the Prosecution Addendum,⁵ in consultation with the legal representatives of victims in the *Lubanga* case (‘*Lubanga* Legal Representatives’) and the VWU, as the Prosecution had undertaken to do.⁶ The Chamber ordered that, in conducting such review, the Prosecution was also to take into account any outstanding matters raised in the *Lubanga* Defence Observations as appropriate, and to inform the Chamber of any changes to the lists of material to be excluded from transmission to the Ntaganda Defence no later than 18 January 2016.⁷
5. Accordingly, on 18 January 2016, the Prosecution filed the ‘Prosecution request for an order granting Defence access to confidential material from the *Lubanga* case’ (‘Request’).⁸ Therein, the Prosecution seeks an order from the Chamber for the Registry to grant the Ntaganda 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; and (ii) 1, 2, 8, 12, 13, 15, 17, 27, 50, 61 (cover filing only), 62, 88 (annex 1 only)

public redacted version was filed on 11 January 2016 as ICC-01/04-02/06-964-Red; Prosecution response to ‘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-01/04-02/06-964-Conf, 19 November 2015, ICC-01/04-02/06-1025-Conf. A public redacted version was filed on 20 November 2015 as ICC-01/04-02/06-1025-Red (‘Prosecution Submissions’); Request on behalf of Mr Ntaganda to strike the Prosecution response from the record, 20 November 2015, ICC-01/04-02/06-1030.

⁴ ICC-01/04-02/06-1063-Conf. The decision was reclassified as public on 12 February 2016.

⁵ ICC-01/04-02/06-910-Conf-Exp-Anx1.

⁶ See Decision, ICC-01/04-02/06-1063, para. 19, referring to Prosecution Submissions, ICC-01/04-02/06-1025-Red, para. 40.

⁷ See Decision, ICC-01/04-02/06-1063, para. 20.

⁸ ICC-01/04-02/06-1088-Conf, plus annexes 1-5 (confidential, *ex parte*, only available to the Prosecution, *Lubanga* Defence, *Lubanga* Legal Representatives and VWU).

and 97, listed in Addendum Annex 2 to the Prosecution Addendum⁹ ('Identified Items').¹⁰

6. On 29 January 2016, the Chamber instructed the Registry to release, ahead of the Chamber's eventual decision on the Request, two specific items to the Ntaganda Defence,¹¹ based on their stated relevance to a witness who was scheduled to testify in the third evidentiary block.¹²
7. No responses were filed in relation to the Request.

II. Submissions and analysis

8. The Chamber notes that, in its Request, the Prosecution indicates that it has re-examined the Identified Items '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'.¹³ The Prosecution states that, having consulted the *Lubanga* Legal Representatives and the VWU, it is of the view that the Chamber can authorise access to the Identified Items to the Ntaganda Defence. The Prosecution submits that, in conducting its further review, it also gave consideration to the Lubanga Defence Observations, but that, with the exception of Witness P-0010, in relation to whom all relevant documents have already been disclosed, the individuals referred to therein are neither witnesses nor intermediaries associated with the *Ntaganda* case and that any related material is therefore irrelevant to the Ntaganda Defence.¹⁴

⁹ ICC-01/04-02/06-910-Conf-Exp-Anx2.

¹⁰ See Request, ICC-01/04-02/06-1088-Conf, paras 2 and 25.

¹¹ The items are those numbered 58 and 59 in Addendum Annex 1, ICC-01/04-02/06-910-Conf-Exp-Anx1.

¹² See email communication from Legal Officer of the Chamber to parties and participants on 29 January 2016 at 08:59. Following a requested clarification of the Chamber, the Registry indicated that these items had also been transmitted to both the Prosecution and Legal Representatives of Victims in the *Ntaganda* case (see email communications from the Registry to the Chamber, parties and participants on 1 February 2016 at 17:04, 17:31 and 17:36).

¹³ Request, ICC-01/04-02/06-1088-Conf, para. 19.

¹⁴ Request, ICC-01/04-02/06-1088-Conf, para. 20.

9. The Prosecution concludes that the relevance of the remaining material from the *Lubanga* case to which the Ntaganda Defence does not have access is, 'if any, of marginal value in the *Ntaganda* case'.¹⁵
10. The Chamber recalls the applicable law it set out in its Order of 1 September 2015 and referred to in its Further Directions and Decision.¹⁶
11. The Chamber has considered the Identified Items in light of the submissions contained in the Request. On the whole, the Chamber finds that providing the Ntaganda Defence with access to the Identified Items, which may be of relevance to the Ntaganda Defence, is appropriate in light of the procedure outlined in the Decision.¹⁷ With respect of the confidential versions of the transcripts and filings contained in Addendum Annex 2, the Chamber considers that access should be granted to both the English and French versions of all final confidential transcripts and all translated filings, where applicable. With respect of Item 12 contained in Addendum Annex 2 to the Prosecution Addendum, the Chamber notes that the filing itself is public and the annex referred to therein is *ex parte* confidential and therefore falls outside the scope of the material requested by the Ntaganda Defence, which pertains to *inter partes* items only.¹⁸
12. The Chamber now turns to the proposed redactions to material in Annexes 1-5 to the Request, which is referable to items 13-17 listed at Addendum Annex 1 ('Five Items').¹⁹ With respect of the document contained in Annex 3 to the Request, the Chamber notes that its year of issue is not clearly visible in the typeface of either the redacted or unredacted version, and therefore considers the proposed redaction to that document to be proportionate in the circumstances. In

¹⁵ Request, ICC-01/04-02/06-1088-Conf, para. 21.

¹⁶ Order of 1 September 2015, ICC-01/04-02/06-806, paras 5-8; Further Directions, ICC-01/04-02/06-879, para. 10; Decision, ICC-01/04-02/06-1063, para. 12.

¹⁷ Decision, ICC-01/04-02/06-1063, paras 19-20.

¹⁸ Order of 1 September 2015, ICC-01/04-02/06-806, footnote 2; Further Directions, ICC-01/04-02/06-879, para. 1.

¹⁹ For clarity, the Chamber notes that these items are listed at Addendum Annex 1 with partially incorrect ERNs – the symbol between the letters and/or numbers should consist of a full-stop (‘.’) rather than a hyphen (‘-’).

relation to the remaining material, noting that the redactions proposed to the Five Items stem from Prosecution consultations with the VWU, the Chamber considers these redactions to also be necessary and proportionate. The Five Items should therefore be transmitted in their presently redacted form as reflected in Annexes 1-5 to the Request.

13. In light of the above, the Chamber directs the Registry to, forthwith, provide eCourt access to the Identified Items to the Ntaganda Defence, as well as to the Prosecution and Legal Representatives of Victims in the *Ntaganda* case ('LRVs'), with the exception of Item 12 in Addendum Annex 2 to the Prosecution Addendum,²⁰ and to the extent such access has not already been provided.²¹ The Chamber considers that, absent any further discrete, specific and motivated requests for access to any remaining confidential materials in the *Lubanga* case,²² the litigation on this matter has now been brought to a close.

²⁰ ICC-01/04-02/06-910-Conf-Exp-Anx2.

²¹ See footnotes 11 and 12 of the present decision.

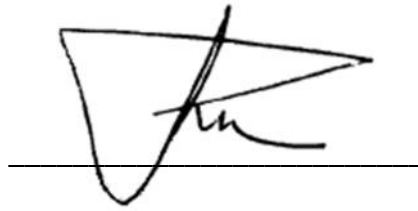
²² See *in this regard*, Decision, ICC-01/04-02/06-1063, para.18; Request, ICC-01/04-02/06-1088-Conf, para. 21.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Registry to provide access in eCourt to the Identified Items listed in paragraph 5 above, with the exception of Item 12 in Addendum Annex 2 to the Prosecution Addendum, in accordance with the guidance above and as framed in the Request, to the Ntaganda Defence, Prosecution, and LRVs; and

ORDERS the Prosecution to file a public redacted version of the Request (ICC-01/04-02/06-1088-Conf) within two weeks of the issuance of the present decision.

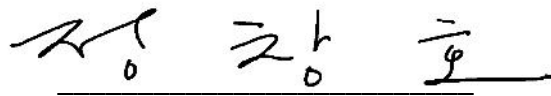
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 15 February 2016

At The Hague, The Netherlands