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No.: ICC-01/04-02/06

Date: 15 July 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

Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case

Source: Defence Team of Mr Bosco Ntaganda

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

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Pursuant to Regulation 42(3) of the Regulations of the Court (“RoC”) and Rule 77 of the Rules of Procedure and Evidence, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Request on behalf of Mr Ntaganda seeking access to all *inter partes* confidential material in the *Lubanga* case

“Defence Request”

OVERVIEW

1. As part of its preparations for trial, it is necessary for the Defence to gain access to certain confidential material placed on the trial record of the case of *The Prosecutor v. Thomas Lubanga* (Case No ICC-01/04-01/06) (“*Lubanga* case”), namely: (i) all exhibits classified as confidential; (ii) all *inter partes* confidential filings; (iii) all confidential decisions issued by Trial Chamber I; and (iv) all transcripts of private and closed sessions (“Requested Material”).
2. Such access involves that the various orders issued by Trial Chamber I in relation to the confidential classification of the Request Material be varied.
3. Considering that Trial Chamber I is no longer seized of the trial proceedings in the *Lubanga* case, the Defence Request is submitted before Trial Chamber VI (“Chamber”) pursuant to Regulation 42(3) of the Regulations of the Court (“RoC”).
4. As will be explained below: (i) the Defence Request properly identifies the Requested Material; (ii) the Requested Material is material for the preparation of the Defence to trial; and (iii) a legitimate forensic purpose exists for such access.

SUBMISSIONS

5. Pursuant to Regulation 42(3) RoC, if the chamber which issued the protective orders is no longer seized of the proceedings, applications for variation of

- protective measures shall be made to the Chamber before which a variation of the protective measures is being requested.
6. Further to the referral of the *Lubanga* case to Trial Chamber II,¹ the Defence Request is submitted before this Chamber.
 7. The Defence notes that Regulation 42 RoC – which uses a language similar to Rule 75(E) to (G) of the Rules of Procedure and Evidence of both *ad hoc* tribunals – does not set out the requirements which must be satisfied for a variation of protective measures to be granted when access to confidential material in another case is sought.
 8. In the absence of any specific criteria, the Defence submits that useful guidance can be drawn from the well-established jurisprudence of the *ad hoc* tribunals on similar matters.
 9. The Appeals Chamber of the ICTY has ruled that a party may gain access to confidential material in another case if: (i) it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail; and (ii) if it can show that such access is likely to materially assist its case² or if a legitimate forensic purpose exists for such access.³
 10. The Appeals Chamber of the ICTY has further indicated that requests for access to ‘all confidential material’ are sufficiently specific.⁴

¹ Decision referring the case of the The Prosecutor v Thomas Lubanga Dyilo to Trial Chamber II, 17 March 2015, ICC-01/04-01/06-3131.

² *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3 (“Hadžihasanović Decision”).

³ *Prosecutor v. Blaškić*, Case No IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s Request for assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v. Blaškić, 16 May 2002 (“Blaškić Decision”), para.14; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para.10.

⁴ *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Mičo Stanišić’s Motion for Access to All Confidential Materials in the Brđanin Case, 24 January 2007, para. 11

11. The Appeals Chamber has also found that a geographical, temporal and substantive overlap between two cases may be sufficient to conclude that access to confidential material will likely be of material assistance.⁵ With respect to confidential *inter partes* material, a 'legitimate forensic purpose' for disclosure will be shown if the applicant can demonstrate that the material is relevant and essential.⁶

A. The Defence has identified the material sought by its general nature

12. The material sought by the Defence is clearly identified. The Defence Request is limited to:

- i. All transcripts of closed and private sessions in the *Lubanga* case;
- ii. All exhibits admitted into evidence in the *Lubanga* case classified as confidential;
- iii. All witness statements on the record classified as confidential; and
- iv. All confidential submissions of the parties and participants as well as all confidential decisions issued by Trial Chamber I.

B. The Defence has shown a legitimate forensic purpose for access to confidential material in the *Lubanga* case

1. The material sought is relevant

13. Relevance of confidential material placed on the record of another case requires the showing of a nexus between the applicant's case and the original case from which the material is sought. To establish such a nexus, the applicant is required to demonstrate a "geographical, temporal or otherwise material overlap" between the two proceedings.

⁵ Hadžihasanović Decision, p.3.

⁶ Blaškić Decision, para.14.

14. It is undeniable that geographical, temporal and material overlaps exist between the case against Mr Ntaganda and the *Lubanga* case.
15. At the outset, the Defence notes that in the first “*Prosecutor’s Application for Warrants of Arrest, Article 58*” (“Prosecution’s Application for Warrants of Arrest”) submitted by the Prosecution on 12 January 2006,⁷ Thomas Lubanga and Bosco Ntaganda were *both* charged for the alleged commission of the crimes of enlisting, conscripting and using children to participate actively in hostilities.
16. The Defence further notes that the Prosecution’s Application for Warrants of Arrest rested on *co*-perpetration under Article 25(3)(a) of the Statute.
17. Further to the decision on the confirmation of the charges,⁸ Mr Lubanga was ultimately tried for the crimes of enlisting and conscripting children in the FPLC and using them to participate actively in hostilities.
18. Pursuant to the Updated DCC,⁹ Mr Ntaganda is charged under counts 14, 15 and 16 of the same charges, namely enlistment and conscription of children under 15 and their use to participate actively in hostilities.
19. Furthermore, insofar as child-soldier related charges are concerned, the case against Mr Ntaganda covers the temporal scope of the charges of the *Lubanga* case. Likewise, the case against Mr Ntaganda and the *Lubanga* case both cover Ituri district.
20. Lastly, it is noteworthy that the Prosecution alleges in the Updated DCC that Mr Ntaganda and Mr Lubanga were both co-perpetrators of the child soldier related crimes as they were both part of the same political organisation, the UPC, and leaders of its armed branch, the FPLC.

⁷ ICC-01/04-02/06-60-Conf-Red.

⁸ ICC-01/04-01/06-803.

⁹ ICC-01/04-02/06-458-AnxA.

2. The material sought is essential for the preparation of the defence

21. Material is deemed 'essential' when the party seeking access to it demonstrates "a good chance that access to this evidence will materially assist the applicant in preparing his case".¹⁰
22. The Requested Material will materially assist the Defence in understanding *inter alia*:
- a. how the Prosecution investigated the situation in the DRC, and more specifically in the Ituri district, and how it approached child soldier related crimes;
 - b. the proceedings related to the testimony of experts and witnesses who testified in the *Lubanga* case and whom the Prosecution intends to call in the case against Mr Ntaganda;
 - c. the involvement of intermediaries who introduced to the Prosecution some of the witnesses expected to testify in the case against Mr Ntaganda. The Defence specifically refers to Prosecution Witnesses P-0005, P-0020, P-0038, P-0031 and P-0010, who were introduced to the Prosecution by either intermediary P-0316 or intermediary P-0143. In its Judgement, Trial Chamber I has recognised the possibility that these two intermediaries – along with intermediary P-0321 – may have committed crimes under Article 70 of the Statute, mainly for persuading witnesses to give false evidence;¹¹ and
 - d. the account of non-trial witnesses whose statements were disclosed to the Defence as being material to its preparation or potentially exculpatory.
23. Furthermore, the Defence submits that access to the Requested Material is essential as the information contained therein is relevant to the factual

¹⁰ Blaškić Decision, para.14.

¹¹ ICC-01/04-01/06-2842 ("*Lubanga* Judgement"), para.483.

findings upon which the *Lubanga* Judgement is based, which are intrinsically related to charges brought by the Prosecution against Mr Ntaganda as confirmed in the Confirmation Decision.¹²

24. It follows from the above that the Request Material is essential for the Defence in its preparations for trial.

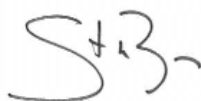
RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

ORDER the variation of protection measures ordered in relation to the Requested Material; and

GRANT the Defence access to the Requested Material

RESPECTFULLY SUBMITTED ON THIS 15TH DAY OF JULY 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

¹² ICC-01/04-02/06-309 ("Confirmation Decision").