



Original: English

No.: ICC-01/04-02/06
Date: 12 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 Document
with**

**Confidential, *EX PARTE* Annexes 1-3 – only available to the Prosecution, *Lubanga*
Defence, OPCV, VWU, Legal Representatives of Victims V01 and V02 in the
Lubanga case**

**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**

Source: The Office of the Prosecutor

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

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Introduction

1. Pursuant to Trial Chamber VI (“Chamber”)’s order of 1 October 2015, and following consultations with the Legal Representatives of Victims in the *Lubanga* case and the Registry’s Victims and Witnesses Unit (“VWU”), the Prosecution provides, as Confidential *Ex Parte* Annexes 1-3, the lists of confidential materials from the *Lubanga* case which should not be transmitted to the Defence.

Procedural Background

2. On 15 July 2015, the Defence requested access (“Request”) to the following material from the *Lubanga* case (“Requested Material”):¹
 - (i) confidential exhibits admitted into evidence;
 - (ii) transcripts of all private and closed sessions;
 - (iii) confidential decisions by Trial Chamber I;
 - (iv) confidential submissions filed by the parties and participants;
and
 - (v) confidential witness statements placed in the trial record.²
3. On 4 and 5 August 2015, the Prosecution,³ the Legal Representatives of the V01 group of Victims in the *Lubanga* case (“Lubanga V01 LRVs”) ⁴ and the Legal Representative of Victims representing the former child soldiers in the *Ntaganda* case (“Ntaganda LRV”)⁵ responded to the Request. The Prosecution did not oppose the Request, given the overlap between the *Lubanga* and *Ntaganda* cases. It

¹ ICC-01/04-02/06-721.

² The Request excluded *ex parte* items. See ICC-01/04-02/06-806, para. 9; Order, para. 1.

³ ICC-01/04-02/06-764, para. 1.

⁴ ICC-01/04-02/06-763, para. 9.

⁵ ICC-01/04-02/06-766, para. 4.

submitted that it deferred to the views of Mr Lubanga and the Legal Representatives of Victims as to security implications, for the witnesses they called or the materials they presented, in granting the Request.⁶

4. On 1 September 2015, the Chamber issued an order on the Request ("1 September 2015 Order").⁷ It directed the Prosecution to identify, within the Requested Material, (i) anything which relates purely to procedural matters specific to the *Lubanga* case, or is otherwise irrelevant to the Defence ("Irrelevant Material"); 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 Defence⁸ ("Materials Requiring Further Protective Measures"). The Chamber directed the *Lubanga* Defence, Lubanga V01 LRVs and V02 group of Victims in the *Lubanga* case ("Lubanga V02 LRVs"), to submit any specific proposals for additional protective measures required with respect to the Requested Material, to enable the Chamber to rule on the matter.
5. On 22 September 2015, the Prosecution made observations in relation to the confidential exhibits admitted into evidence on the one hand, and the transcripts of private and closed sessions, confidential decisions and submissions, on the other⁹ ("Prosecution's Observations").
6. In relation to the exhibits, the Prosecution submitted (i) that receipts for expenses related to individuals who were witnesses in the *Lubanga* but not the *Ntaganda* case are irrelevant to the Defence and need not be provided,¹⁰ while (ii) receipts for expenses related to individuals who were witnesses in both the *Lubanga* and *Ntaganda* cases need not be provided pursuant to the 1 September 2015 Order,

⁶ ICC-01/04-02/06-764, paras. 5-6.

⁷ ICC-01/04-02/06-806.

⁸ 1 September 2015 Order, para. 12 and p. 10.

⁹ ICC-01/04-02/06-851.

¹⁰ Prosecution's Observations, para. 13.

because they are being reviewed pursuant to a separate Defence request.¹¹ The Prosecution (iii) requested an extension of time in order to complete its review for relevance of other confidential exhibits admitted into evidence in the *Lubanga* case.¹²

7. In relation to the other confidential material from the *Lubanga* case, namely the transcripts of private and closed sessions, confidential decisions and submissions by the Parties and participants, the Prosecution (iv) informed the Chamber about technical limitations preventing the identification of irrelevant parts thereof in a resource-efficient and expeditious manner.¹³ It noted that the items within the Requested Material most likely to require protective measures, in its view, are all related to the victims participating in the *Lubanga* case, specifically their victim participation application forms and, where applicable, statements and transcripts of their testimony, as well as some submissions and decisions concerning individuals whose identity has not been disclosed to the Defence in the *Ntangada* proceedings.¹⁴ The Prosecution noted (v) 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 It (vi) proposed that the Registry be ordered to provide the Defence with access to any transcripts of private and closed sessions, confidential decisions and submissions by the Parties and participants that are not identified by the *Lubanga* Defence or Legal Representatives of Victims as Materials Requiring Further Protective Measures.¹⁶

¹¹ Prosecution’s Observations, para. 13 and fn. 15.

¹² Prosecution’s Observations, paras. 14 and 31.

¹³ Prosecution’s Observations, paras. 4, 16-21.

¹⁴ Prosecution’s Observations, para. 24.

¹⁵ Prosecution’s Observations, paras. 26-28.

¹⁶ Prosecution’s Observations, paras. 22 and 32.

8. On the same day, the *Lubanga* Defence submitted that it does not consider it necessary to seek any additional protective measures.¹⁷
9. The Legal Representatives for the victims in the *Lubanga* case also filed their observations on 22 September 2015. The Lubanga V01 LRVs requested that the Chamber deny the Defence access to the confidential information concerning the witnesses in the *Lubanga* case they represent.¹⁸ The Lubanga V02 LRVs 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 OPCV requested that certain materials related to the victims it represents not be transmitted to the Defence.²⁰
10. On 1 October 2015 the Chamber issued further directions on the Request (“Order”). It authorised the transmission to the Defence “of the Requested Material without further exhaustive refining”, “subject to any further protective measures and redactions that may be required”,²¹ which are to be identified through a consultation process between the Prosecution, the Legal Representatives, and the VWU.²² The Chamber ordered the Prosecution to file by 12 October 2015 a list including: (a) “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”; and (b) “any Irrelevant Items²³ it has identified” (“List”). 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

¹⁷ ICC-01/04-02/06-847.

¹⁸ ICC-01/04-02/06-849, 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 Order, para. 15.

²³ The Order defined these as comprising “anything which relates purely to procedural matters specific to the *Lubanga* case, or is otherwise irrelevant to the Defence”.

evidence in that case; and that filings containing such forms may be included in the List.²⁴

Confidentiality

11. Pursuant to regulation 23bis(1) of the Regulations of the Court, Annexes 1-3 to this filing are filed *Ex Parte*, available only to the Prosecution, *Lubanga* Defence, OPCV, VWU, Legal Representatives of Victims V01 and V02 in the *Lubanga* case because they identify materials for which the Prosecution seeks non-disclosure to the Defence.

Prosecution Submissions

Confidential exhibits admitted into evidence in the Lubanga case

12. Since it filed the Prosecution's Observations on 22 September 2015, the Prosecution has reviewed the metadata associated with the approximately 1,600 exhibits admitted into evidence in the *Lubanga* case in eCourt closely and can provide the following clarifications. Contrary to its initial assessment,²⁵ the approximately 1,600 exhibits found in eCourt are all those admitted into evidence in the *Lubanga* case and not just the confidential ones.²⁶ Of this total of approximately 1,600 exhibits, approximately 1,360 are confidential.²⁷

13. From the approximately 1,360 confidential exhibits admitted into evidence, 510 have already been disclosed to the Defence, 447 of them in fully unredacted form.

²⁴ Order, para. 15.

²⁵ Prosecution's Observations, para. 13.

²⁶ A total of 1,683 exhibits respond to the search query --Advanced Search: -- EVD - Evidence Number - SELECT ALL". A slightly different query, "--Advanced Search:-- EVD - Status - EQUALS 'EVD'", yields 1,678 exhibits.

²⁷ 1,364 exhibits respond to the query --Advanced Search:-- EVD - Evidence Number - SELECT ALL " AND EVD - Confidential - EQUALS 'Confidential'.

14. From the approximately 850 confidential exhibits admitted into evidence that have not been disclosed to the Defence, the Prosecution lists:

- a. in Confidential, *Ex Parte* Annex 1 the ones that, pursuant to the Prosecution's consultations with the Legal Representatives and the VWU, should not be disclosed to the Defence because of the security implications of such disclosure for the individuals concerned;²⁸ and
- b. in Confidential, *Ex Parte* Annex 2 the ones that need not be disclosed to the Defence because they are receipts for expenses related to individuals who were witnesses or intermediaries in the *Lubanga* but not the *Ntaganda* case and, as such, are irrelevant to the Defence, or which are receipts for expenses related to individuals who were witnesses in both the *Lubanga* and *Ntaganda* cases but are being reviewed pursuant to a separate Defence request.

15. In the Prosecution's assessment, the Defence can be given access to the remaining confidential exhibits admitted into evidence in the *Lubanga* case, where applicable with the same redactions applied in the *Lubanga* case. The Prosecution submits that as the organ responsible for the maintenance of the full and accurate record of the case, and as the body that maintains and controls access to eCourt, where the exhibits admitted into evidence are found, the Registry is best placed to grant the necessary access to the Defence.

Other confidential materials from the Lubanga case

16. In relation to the other confidential material from the *Lubanga* case, namely the transcripts of private and closed sessions, confidential decisions and submissions

²⁸ See ICC-01/04-02/06-849-Conf, with public redacted version at ICC-01/04-02/06-849-Red, p. 5; ICC-01/04-02/06-848; and ICC-01/04-02/06-846-Conf-Exp, with public redacted version at ICC-01/04-02/06-846-Red, para. 14.

by the Parties and participants, the Prosecution lists in Confidential, *Ex Parte* Annex 3 the ones that, pursuant to the Prosecution's consultations with the Legal Representatives and the VWU, should not be disclosed to the Defence because of the security implications of such disclosure for the individuals concerned.²⁹

Request

17. The Prosecution respectfully requests that the Chamber order the Registry to provide the Defence with access to:

- a. the confidential exhibits admitted into evidence in the *Lubanga* case, with the exception of the exhibits listed in Confidential, *Ex Parte*, Annexes 1 and 2; and
- b. all transcripts of private and closed sessions, confidential decisions and submissions by the Parties and participants the Registry, with the exception of those listed in Confidential, *Ex Parte*, Annex 3.



Fatou Bensouda, Prosecutor

Dated this 12th day of October 2015
At The Hague, The Netherlands

²⁹ See ICC-01/04-02/06-849-Conf, with public redacted version at ICC-01/04-02/06-849-Red, p.5; ICC-01/04-02/06-848; and ICC-01/04-02/06-846-Conf-Exp, with public redacted version at ICC-01/04-02/06-846-Red, para. 14.