

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **16 March 2017**

**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**

**Decision on Defence request for access to *ex parte* material**

Decision 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 Christopher Gosnell

**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**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section Others**

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 67, and 68 of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), issues this 'Decision on Defence request for access to *ex parte* material'.

### **I. Procedural history and submissions**

1. On 17 February 2017, the defence team for Mr Ntaganda ('Defence') requested 'disclosure of any and all *ex parte* materials before the Chamber that concern, directly or indirectly, allegations of witness coaching against Mr Ntaganda or his associates and family'.<sup>1</sup> It requests the Chamber to 'order that the Defence be provided with the following material as soon as practicable: a) [a]ll *ex parte* filings and judicial orders/decisions, or parts thereof, as well as any *ex parte* underlying or supporting material referred to therein; b) [a]ll transcript[s] of *ex parte* hearings held before this Chamber; and c) [a]ll *ex parte* electronic correspondence between the Prosecution and the Chamber'.<sup>2</sup>
  
2. The Defence submits Mr Ntaganda must be informed of the case against him and that therefore 'full disclosure of information as to the content of any allegation of witness interference or coaching in which Mr Ntaganda is claimed to be involved in is required'.<sup>3</sup> It further submits that Mr Ntaganda must be given adequate time and facilities for the preparation of his defence and that, while its review of the recordings made in the context of the Article 70 investigations is ongoing, '[f]urther delays in disclosure of *ex parte* material will impair the Defence's adequate case preparation as well as its fulfilment of the time-lines prescribed by

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<sup>1</sup> Motion on behalf of Mr Ntaganda requesting access to *ex parte* material before the Chamber in Case ICC-01/04-02/06, ICC-01/04-02/06-1790-Conf.

<sup>2</sup> Request, ICC-01/04-02/06-1790-Conf, p. 12.

<sup>3</sup> Request, ICC-01/04-02/06-1790-Conf, paras 17-19.

the Chamber'.<sup>4</sup> According to the Defence, now that it is aware of the existence of the Article 70 investigations any legitimate purpose which may have justified the initial *ex parte* status of the material has ceased to exist.<sup>5</sup> It further argues that 'the fairness of trial proceedings depends on both parties having sight of all submissions that touch in any way upon the merits of the case, including the character or conduct of Mr Ntaganda'.<sup>6</sup>

3. On 27 February 2017, the Office of the Prosecutor ('Prosecution') opposed the Request ('Response'),<sup>7</sup> submitting that it is 'overly broad' and 'speculative as to the volume and nature of materials that remain *ex parte* in the case record'.<sup>8</sup> The Prosecution submits that 'the Defence is informed of the full scope of the interference allegations and the evidence that supports them', but that it nonetheless has reviewed the redacted versions of its filings concerned and will file lesser redacted versions to reflect the present state of disclosure.<sup>9</sup> In addition, the Prosecution undertakes to provide redacted versions of two filings that 'are relevant to the Prosecution's allegations of witness interference', which so far only existed in *ex parte* form.<sup>10</sup>

## II. Analysis

4. At the outset, the Chamber observes that while the Request initially refers to *ex parte* materials 'that concern, directly or indirectly, allegations of witness coaching against Mr Ntaganda or his associates and family',<sup>11</sup> the relief sought

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<sup>4</sup> Request, ICC-01/04-02/06-1790-Conf, paras 20-21.

<sup>5</sup> Request, ICC-01/04-02/06-1790-Conf, paras 22-23.

<sup>6</sup> Request, ICC-01/04-02/06-1790-Conf, para. 24.

<sup>7</sup> Prosecution's response to the "Motion on behalf of Mr Ntaganda requesting access to *ex parte* material before the Chamber in Case ICC-01/04-02/06", 17 February 2017, ICC-01/04-02/06-1790-Conf, ICC-01/04-02/06-1807-Conf.

<sup>8</sup> Response, ICC-01/04-02/06-1807-Conf, paras 11-12.

<sup>9</sup> Response, ICC-01/04-02/06-1807-Conf, para. 2.

<sup>10</sup> Response, ICC-01/04-02/06-1807-Conf, paras 18-20. The Prosecution refers to the following filings: ICC-01/04-02/06-603-Conf-Exp and ICC-01/04-02/06-1506-Conf-Exp.

<sup>11</sup> Request, ICC-01/04-02/06-1790-Conf, para. 1.

refers to '[a]ll' *ex parte* materials in the case record.<sup>12</sup> Whereas the present case record contains materials that are marked *ex parte* because they relate to the Prosecution's allegations of interference with and coaching of witnesses, and the related litigation concerning the restrictions placed on Mr Ntaganda's contacts, other materials have been marked *ex parte* for different reasons, such as that they were obtained, or contain information that was obtained, pursuant to Article 54(3)(e) of the Statute, or relate to the security of witnesses and/or victim applicants.

5. With respect to the Defence's request to be provided with '[a]ll *ex parte* filings and judicial orders/decisions, or parts thereof',<sup>13</sup> the Chamber notes the Prosecution's undertaking to file lesser redacted versions of eight of its filings related to its allegations of witness interference.<sup>14</sup> The Chamber notes that the Prosecution has already filed lesser redacted versions of some of these filings.<sup>15</sup> The Chamber further notes that the Prosecution requested the Chamber for authorisation to reclassify three filings and one annex.<sup>16</sup> Having reviewed these filings, the Chamber hereby authorises the requested reclassifications. For the remaining filing, the Chamber expects the Prosecution to file the lesser redacted version by 24 March 2017. In addition to the filings referred to by the Prosecution, the Chamber considers it appropriate for the *ex parte* version of a filing that contained information related to a witness, which was subsequently

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<sup>12</sup> Request, ICC-01/04-02/06-1790-Conf, p. 12.

<sup>13</sup> Request, ICC-01/04-02/06-1790-Conf, p. 12.

<sup>14</sup> ICC-01/04-02/06-349-Conf-Exp, ICC-01/04-02/06-371-Conf-Exp, ICC-01/04-02/06-422-Conf-Exp; ICC-01/04-02/06-431-Conf-Exp, ICC-01/04-02/06-603-Conf-Exp, ICC-01/04-02/06-635-Conf-Exp, ICC-01/04-02/06-1313, and ICC-01/04-02/06-1506-Conf-Exp.

<sup>15</sup> See ICC-01/04-02/06-349-Conf-Red4, with 4 lesser redacted confidential annexes; ICC-01/04-02/06-371-Conf-Red3, with one lesser redacted annex; ICC-01/04-02/06-603-Conf-Red2, with four lesser redacted annexes; and ICC-01/04-02/06-635-Conf-Red5.

<sup>16</sup> Email from the Prosecution to the Chamber on 13 March 2017 at 16:38, in which the Prosecution requests authorisation to reclassify filings ICC-01/04-02/06-422-Conf-Exp; ICC-01/04-02/06-431-Conf-Exp, ICC-01/04-02/06-1506-Conf-Exp, and annex ICC-01/04-02/06-371-Conf-Exp-AnxB.

made available to the Defence and the legal representatives for victims in later filings that form part of the same litigation, to be reclassified as confidential.<sup>17</sup>

6. In relation to the same matter, the Chamber has reviewed filings by the Registry and the Victims and Witnesses Unit ('VWU') and finds that the redactions, some of which were also applied to the version available to the Prosecution,<sup>18</sup> remain necessary.
7. Notwithstanding the ambiguity of the Request regarding the scope, the Chamber has reviewed all its decisions that were not, or only in redacted form, notified to the Defence. Besides decisions that concerned Article 54(3)(e) of the Statute and therefore are to remain *ex parte*, a number of the decisions that are *ex parte*, not available to the Defence, relate to requests for in-court protective measures for, or certain private matters of, Prosecution witnesses or other individuals at risk on account of the activities of the Court.<sup>19</sup> Even though the persons that these decisions relate to have by now appeared before the Chamber, or their testimony has been otherwise considered for admission, the Chamber finds that the redactions made to the version accessible to the Defence continue to be necessary to protect the safety and security of the witnesses or other persons. For the same reasons, the Chamber finds that one decision that only exists in *ex parte* form, not available to the Defence,<sup>20</sup> concerning the security situation of a witness, is to remain *ex parte*.
8. With respect to decisions that are related to the litigation on the restrictions to Mr Ntaganda's contacts, the Chamber considers it appropriate to give the Defence access to the entirety of, or more information currently redacted in, ten

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<sup>17</sup> This concerns filing number ICC-01/04-02/06-365-Conf-Exp.

<sup>18</sup> See, for example, ICC-01/04-02/06-355-Conf-Exp-Red, *ex parte* only available to Prosecution, Defence and Registry, footnote 9.

<sup>19</sup> See, for example, ICC-01/04-02/06-897-Conf-Exp, ICC-01/04-02/06-1004-Conf-Exp, ICC-01/04-02/06-1133-Conf-Exp, ICC-01/04-02/06-1160-Conf-Exp, ICC-01/04-02/06-1236-Conf-Exp, ICC-01/04-02/06-1293-Conf-Exp, ICC-01/04-02/06-1418-Conf-Exp, and ICC-01/04-02/06-1717-Conf-Exp.

<sup>20</sup> ICC-01/04-02/06-1520-Conf-Exp.

decisions.<sup>21</sup> In due course, the Chamber will therefore issue lesser redacted versions of these decisions, or reclassify them as confidential. It is noted, however, that the information that would become available as a result is mostly already known to the Defence due to public versions or lesser redacted version having been issued or the information having been referred to in a later decision.<sup>22</sup> The Chamber further notes that certain decisions that form part of the aforementioned litigation concern private matters of other detainees. Having reviewed this material, the Chamber considers it appropriate to maintain the *ex parte* classification of this information at this stage,<sup>23</sup> or indefinitely.<sup>24</sup>

9. The Defence also requests that it be provided with 'any *ex parte* underlying or supporting material referred to' in *ex parte* filings,<sup>25</sup> identifying any specific materials. The Chamber notes that any material underlying the Prosecution's filings is covered by the regular disclosure regime, subject to any reasons that would prevent the disclosure of these materials. With respect to its own decisions, the Chamber considers that the Defence could have identified information referred to in decisions that currently is not available to the Defence, rather than making a general request for 'any' material. The Chamber will nonetheless review its decisions related to the restrictions litigation to assess whether any information should be made available to the Defence.
10. As to the second part of the Request, namely for the Defence to be provided with '[a]ll transcript[s] of *ex parte* hearings held before this Chamber', the Chamber recalls its usual practice to consider *proprio motu* whether redactions or *ex parte* or

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<sup>21</sup> These ten decisions have the following filings numbers: ICC-01/04-02/06-373-Conf-Exp, ICC-01/04-02/06-410-Conf-Exp-Corr, ICC-01/04-02/06-616-Conf-Exp, ICC-01/04-02/06-684-Conf-Exp, ICC-01/04-02/06-686-Conf-Exp, ICC-01/04-02/06-687-Conf-Exp, ICC-01/04-02/06-786-Conf-Exp, ICC-01/04-02/06-788-Conf-Exp, ICC-01/04-02/06-1364-Conf-Exp, and ICC-01/04-02/06-1494-Conf-Exp.

<sup>22</sup> For example, ICC-01/04-02/06-1494-Pub-Red2.

<sup>23</sup> ICC-01/04-02/06-676-Conf-Exp and ICC-01/04-02/06-1061-Conf-Exp-Corr.

<sup>24</sup> This applies to the decisions with filing numbers ICC-01/04-02/06-771-Conf-Exp and ICC-01/04-02/06-1058-Conf-Exp.

<sup>25</sup> Request, ICC-01/04-02/06-1790-Conf, p. 12.

confidential classifications of any transcript remain necessary. The Chamber nevertheless clarifies that only one hearing took place in the absence of the Defence.<sup>26</sup> The Chamber has provided the parties with a summary of that hearing<sup>27</sup> and has previously ruled that the transcript of this hearing, during which only a witness, the legal adviser assigned to him pursuant to Rule 74 of the Rules of Procedure and Evidence ('Rules') and representatives of the VWU were present, is to remain *ex parte*, VWU only.<sup>28</sup> To the extent this part of the Request is intended to be a request for reconsideration of that decision, the Chamber observes that no arguments are advanced to support such a request and considers that there is no reason to reconsider its previous decision.

11. As concerns the third part of the Request, namely the provision of '[a]ll *ex parte* electronic correspondence between the Prosecution and the Chamber', the Chamber clarifies that any *ex parte* e-mail communication between the Chamber and the Prosecution related to the alleged witness coaching by the accused solely concerned the provision of courtesy copies or other procedural matters. In addition, any other *ex parte* e-mail communication between the Chamber and the Prosecution or a participant was either subject to a valid reason for such information to be, and remain, of an *ex parte* nature (e.g., because they contained the views of the Prosecution pursuant to Rule 74(4) of the Rules, information obtained pursuant to Article 54(3)(e) of the Statute, or information related to the security of witnesses), and the Chamber considers that providing any redacted versions of these emails would not be of assistance to the defence. No *ex parte* e-mail communication addressing any substantive matters has taken place

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<sup>26</sup> It is further noted that the Prosecution was not present at this hearing either.

<sup>27</sup> Provision of summary of *ex parte* hearing to parties and participants, ICC-01/04-02/06-995-Conf, with one confidential annex, ICC-01/04-02/06-995-Conf-Anx. The Chamber explained at the time that 'redactions have been made both to information that should not be disclosed in the interests of the security of the witness, and to information which the Chamber does not consider to be relevant to the preparations of the parties and participants' (para. 3).

<sup>28</sup> Decision on Defence request seeking provision of transcript of the *ex parte* hearing held on 30 October 2015, 24 February 2016, ICC-01/04-02/06-1189-Conf.



between the Chamber and the Prosecution that, in view of the Chamber, should be provided to the Defence. The Defence's allegation that communications exist that would be material to its preparations and its reference to appearance of bias in this regard is inapposite.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

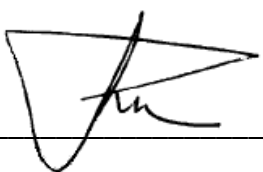
**PARTIALLY GRANTS** the Request;

**INSTRUCTS** the Registry to reclassify filings ICC-01/04-02/06-365-Conf-Exp, ICC-01/04-02/06-422-Conf-Exp, ICC-01/04-02/06-431-Conf-Exp, ICC-01/04-02/06-1506-Conf-Exp, and annex ICC-01/04-02/06-371-Conf-Exp-AnxB, as confidential;

**INSTRUCTS** the parties and participants to continue reviewing their filings and file lesser redacted versions, or request reclassification, if redactions are no longer necessary; and

**REJECTS** all other requests.

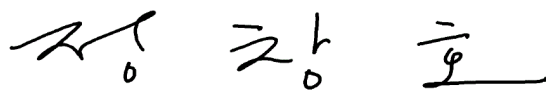
Done in both English and French, the English version being authoritative.



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Chang-ho Chung**

Dated 16 March 2017

At The Hague, The Netherlands