

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15 February 2018**

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 expedited Defence request for reclassification of *ex parte* documents

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

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, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 67, and 68 of the Rome Statute ('Statute'), Rule 81 of the Rules of Procedure and Evidence ('Rules') and Regulations 23 *bis* and 34 of the Regulations of the Court ('Regulations'), issues this 'Decision on expedited Defence request for reclassification of *ex parte* documents'.

I. Procedural history and submissions

1. On 7 February 2018, the defence team for Mr Ntaganda ('Defence') requested, *inter alia*, the reclassification ('Request'), or, in the alternative, the provision of redacted versions ('Alternative Request'), of an *ex parte* filing by the Office of the Prosecutor ('Prosecution')¹ and an *ex parte* decision issued by the Chamber² (respectively, 'Filing 2148' and 'Decision 2157', and collectively, 'Documents').³
2. The Defence submits that the Request was preceded by an *inter partes* attempt to seek reclassification, to which the Prosecution responded that 'the *ex parte* classification remains necessary for security reasons', and that it considered the information 'not material to the preparation of the Defence'.⁴
3. In support of its Request, the Defence argues that: (i) subject to the statutory exceptions, all communications by one party must be notified to the opposing party, which is 'not subject to any additional requirement of materiality'; (ii) the statutory exception under Rule 81(2) of the Rules which permits *ex parte* classification in order not to 'prejudice further or ongoing investigations' is no

¹ Prosecution urgent request for authorisation to refer to a portion of the confidential testimony of the Accused during the course of a witness interview, 12 December 2017, ICC-01/04-02/06-2148-Conf-Exp.

² Decision on Prosecution request for authorisation to refer to confidential testimony during a witness interview, 14 December 2017, ICC-01/04-02/06-2157-Conf-Exp.

³ Expedited request on behalf of Bosco Ntaganda seeking reclassification of *ex parte* Prosecution filing (ICC 01/04-02/06-2148) and *ex parte* Decision (ICC-01/04-02/06-2157), ICC-01/04-02/06-2215-Conf, paras 3, 4, and 24. The Request was notified on 8 February 2018, and a public redacted version was filed on 8 February 2018 as ICC-01/04-02/06-2215-Red.

⁴ Request, ICC-01/04-02/06-2215-Conf, para. 14.

longer applicable in the present case;⁵ (iii) security reasons do not constitute an authorised justification for *ex parte* submissions;⁶ and (iv) the scope and content of a previous *ex parte* request provides reason to believe that Filing 2148 is similarly substantive.⁷

4. On 9 February 2018, the Chamber rejected a Defence request for extension of time to respond to the ‘Prosecution request for presentation of evidence in rebuttal’⁸ ‘for a period of 24 hours following the Chamber’s decision [on the Request] and if applicable implementation thereof’,⁹ noting that the Documents ‘relate to an investigative step concerning potential rebuttal evidence that was ultimately not included in the Prosecution’s request for presentation of evidence in rebuttal’ and are not necessary for the Defence to respond to the Prosecution’s request for presentation of evidence in rebuttal.¹⁰
5. On 12 February 2018, in line with the time limit set by the Chamber,¹¹ the Prosecution responded, opposing the Request (‘Response’).¹² It argues, *inter alia*, that: (i) while initially necessary in order not to prejudice ongoing Prosecution investigations in relation to a possible request for rebuttal, the *ex parte* classification of the Documents remains necessary due to security concerns relating to the witness the Prosecution had considered in the context of its

⁵ Request, ICC-01/04-02/06-2215-Red, paras 15-16.

⁶ Request, ICC-01/04-02/06-2215-Conf, para. 18.

⁷ Request, ICC-01/04-02/06-2215-Conf, paras 19-22, referring to Prosecution notification of the consultation of 20 original items by an external expert, 21 November 2017, ICC-01/04-02/06-2121-Conf and confidential *ex parte*, Prosecution and Registry only, Annex A. The filing was reclassified as confidential on 9 February 2018 pursuant to the Chamber’s instruction dated 26 January 2018. A public redacted version was filed on 29 January 2018 as ICC-01/04-02/06-2121-Red.

⁸ Prosecution request for presentation of evidence in rebuttal, 30 January 2018, ICC-01/04-02/06-2197-Conf.

⁹ Request on behalf of Mr Ntaganda seeking a limited extension of time to respond to “Prosecution request for presentation of evidence in rebuttal”, 8 February 2018, ICC-01/04-02/06-2216-Conf, para. 8.

¹⁰ Email from the Chamber to the parties and participants on 9 February 2018, at 18:06.

¹¹ Email from the Chamber to the parties and participants on 8 February 2018, at 10:56.

¹² Prosecution’s response to the “Expedited request on behalf of Bosco Ntaganda seeking reclassification of *ex parte* Prosecution filing (ICC-01/04-02/06-2148) and *ex parte* Decision (ICC-01/04-02/06-2157)”, ICC-01/04-02/06-2215-Conf, ICC-01/04-02/06-2220-Conf-Exp. A confidential redacted version was filed on the same day as ICC-01/04-02/06-2220-Conf-Red.

investigations in relation to a possible request for rebuttal;¹³ and (ii) the Defence's contention that Filing 2148 likely contains substantive submissions that should not remain *ex parte* is 'entirely speculative and unfounded' and the Documents contain no potentially exculpatory information or information that is material to the preparation of the Defence.¹⁴

6. On 14 February 2018, the Defence sought leave to reply in relation to six issues arising from the Response ('Request for Leave to Reply').¹⁵

II. Analysis

7. At the outset, with regard to the Request for Leave to Reply, noting the matters upon which leave to reply is sought, the Chamber does not consider that it would be assisted by further submissions on any of the identified issues in ruling upon the Request. The Chamber therefore rejects the Request for Leave to Reply.
8. Turning to the Request, the Chamber recalls that it previously agreed with Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* that, in principle, recourse to *ex parte* submissions should be exceptional, only used when 'truly necessary and when no alternative procedures are available', and 'proportionate given the potential prejudice to the accused'. In this context, the Chamber further adopted a 'flexible approach' for the use of *ex parte* procedures, considering that the other party should be notified, and its legal basis should be explained, unless to do so is inappropriate, considering that complete secrecy would, for instance,

¹³ Response, ICC-01/04-02/06-2220-Conf-Red and ICC-01/04-02/06-2220-Conf-Exp, paras 14, 22-26.

¹⁴ Response, ICC-01/04-02/06-2220-Conf-Red, paras 15 and 27.

¹⁵ Request for leave to reply to "Confidential redacted version of 'Prosecution's response to the "Expedited request on behalf of Bosco Ntaganda seeking reclassification of *ex parte* Prosecution filing (ICC-01/04-02/06-2148) and *ex parte* Decision (ICC-01/04-02/06-2175)", ICC-01/04-02/06-2215-Conf", 12 February 2018, ICC-01/04-02/06-2220-Conf-Exp" (ICC-01/04-02/06-2220-Conf-Red), ICC-01/04-02/06-2225-Conf.

be justified if ‘providing information about the procedure would risk revealing the very thing that requires protection’.¹⁶

9. In respect of a previous request for reclassification of, *inter alia*, the Documents,¹⁷ the Chamber: (i) noted that the *ex parte* classification has been accepted as necessary in order not to prejudice ongoing investigations; (ii) determined that there was no reason to reconsider its assessment and to order their reclassification at that stage; and (iii) held that ‘in line with usual practice and in accordance with Regulation 23 *bis*(3) of the Regulations, the Prosecution shall request the reclassification of the relevant filings when the basis for their *ex parte* classification no longer exists’.¹⁸

10. The Chamber notes the Prosecution’s submission that it has decided not to call the individual referred to in the Documents as a rebuttal witness, and therefore finds that the initial justification for the *ex parte* classification, as previously approved by the Chamber,¹⁹ no longer exists. The Chamber further finds that, pursuant to its duty under Article 68(1) of the Statute it may order redactions to protect the safety of victims, witnesses or ‘other persons at risk on account of the activities of the Court’.²⁰

11. In the present case, having considered the Prosecution’s submissions as to the specific concerns expressed by the individual it had considered calling in rebuttal, the Chamber considers that non-disclosure of this person’s identity is

¹⁶ Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, ICC-01/04-02/06-1883, para. 49, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058, para. 12.

¹⁷ Request on behalf of Mr Ntaganda seeking reclassification of Prosecution *ex parte* application(s), 22 December 2017, ICC-01/04-02/06-2167-Conf.

¹⁸ Decision on Defence request for reclassification of *ex parte* filings, 8 January 2018, ICC-01/04-02/06-2177 (‘Decision 2177’), para. 9.

¹⁹ Decision 2177, ICC-01/04-02/06-2177, para. 9.

²⁰ *The Prosecutor v. Germain Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, paras 54- 56.

justified and necessary, and, noting that this information will not be adduced, not unduly prejudicial to the accused.

12. However, the Chamber is of the view that the *ex parte* classification of the entirety of Filing 2148 is neither 'truly necessary' nor 'proportionate'. The Chamber is further unpersuaded by the Prosecution's submission that the Alternative Request should be rejected 'since the extent of the redactions required would be so extensive as to make the filing unintelligible'.²¹ Rather, the Chamber is of the view that the fact that the Prosecution considered calling a witness in rebuttal in relation to the testimony of the accused, and that the relevant individual was ultimately not called due to security concerns expressed by the individual, can be shared with the Defence without compromising the security of the individual concerned. Accordingly, the Prosecution shall file a confidential redacted version of Filing 2148, with redactions being limited to any information that would reveal the identity of the individual concerned. Likewise, the Prosecution shall file a lesser redacted confidential version of its Response. The Chamber will issue a public redacted version of Decision 2157.

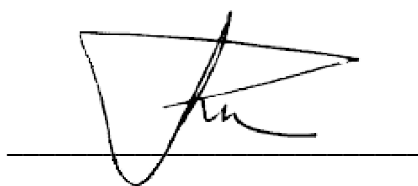
²¹ See Response, ICC-01/04-02/06-2220-Conf-Red, para. 4.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

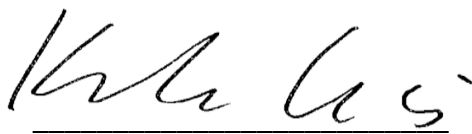
GRANTS the Alternative Request; and

DIRECTS the Prosecution to file a confidential redacted version of Filing 2148 and a lesser redacted confidential version of its Response.

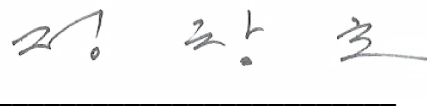
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated 15 February 2018

At The Hague, The Netherlands