



Original: English

No.: ICC-01/04-02/06
Date: 26 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 Prosecution request for presentation of evidence in rebuttal
(ICC-01/04-02/06-2197-Conf) and related filings**

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 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

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 and 68 of the Rome Statute ('Statute') and Regulations 23bis, 24, 34, and 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution request for presentation of evidence in rebuttal (ICC-01/04-02/06-2197-Conf) and related filings'.

I. Procedural history and submissions

1. On 22 December 2017, the Chamber directed the Office of the Prosecutor ('Prosecution') 'to file a preliminary request for the presentation of rebuttal evidence by **11 January 2018**, to be complemented within one week after the close of the [...] presentation of evidence' by the defence team for Mr Ntaganda ('Defence'), 'if necessary' ('22 December Order').¹

Preliminary submissions

2. On 11 January 2018, the Prosecution filed preliminary submissions concerning rebuttal evidence ('Prosecution Submissions'), including an *ex parte* version available to the Prosecution and the Registry, and a confidential redacted version.² The Prosecution then indicated that its rebuttal request may, provisionally, consist of the testimony of one witness and the tendering of one item into evidence.³ The item was expected to be in the Prosecution's possession on 19 January 2018 and discussions with the potential witness were due to take place during the week of 8 January 2018.⁴ Accordingly, the Prosecution submitted that it was not able to submit its rebuttal request by 11 January 2018, but indicated that it would do so 'at the earliest possible

¹ Order providing directions related to the closure of the presentation of evidence, ICC-01/04-02/06-2166, para. 16 (emphasis in original).

² Prosecution preliminary submissions concerning the presentation of evidence in rebuttal, ICC-01/04-02/06-2179-Conf-Exp and Confidential redacted version of "Prosecution preliminary submissions concerning the presentation of evidence in rebuttal", ICC-01/04-02/06-2179-Conf-Red, respectively.

³ Prosecution Submissions, ICC-01/04-02/06-2179-Conf-Red, paras 2-3.

⁴ Prosecution Submissions, ICC-01/04-02/06-2179-Conf-Exp, paras 2-3.

opportunity' and, at the latest, within one week of the close of the Defence's presentation of evidence.⁵ Lastly, the Prosecution submitted that the original filing is classified *ex parte* because it refers to filings and decisions with the same classification, and concerns ongoing investigations related to the collection of potential rebuttal evidence.⁶

3. On 17 January 2018, the Defence responded to the Prosecution Submissions ('Defence First Response').⁷ According to the Defence, the Prosecution failed to comply with the Chamber's 11 January 2018 deadline, as the Prosecution Submissions did not contain a concrete request for the admission of rebuttal evidence.⁸ It also argues that the Chamber's direction that the request may be 'complemented within one week after the close of the Defence's presentation of evidence, if necessary' was not intended to allow the Prosecution to delay bringing a request for the introduction of rebuttal evidence until that time.⁹ The Defence submits that, instead, the direction was only meant to provide an opportunity to request the introduction of rebuttal evidence which would refute Defence evidence adduced after 11 January 2018.¹⁰ According to the Defence, if the Prosecution could not meet the 11 January 2018 deadline, it should have requested an extension thereof.¹¹
4. The Defence therefore requests that the Chamber: (i) declare that the Prosecution failed to comply with the 11 January 2018 deadline; and (ii) instruct the Prosecution that any further rebuttal request be limited to addressing Defence evidence adduced after 11 January 2018 ('Defence

⁵ Prosecution Submissions, ICC-01/04-02/06-2179-Conf-Red, para. 5.

⁶ Prosecution Submissions, ICC-01/04-02/06-2179-Conf-Red, para. 6.

⁷ Response to Confidential redacted version of "Prosecution preliminary submissions concerning the presentation of evidence in rebuttal", 11 January 2018, ICC-01/04-02/06-2185-Conf.

⁸ Defence First Response, ICC-01/04-02/06-2185-Conf, paras 10-12.

⁹ Defence First Response, ICC-01/04-02/06-2185-Conf, para. 11.

¹⁰ Defence First Response, ICC-01/04-02/06-2185-Conf, para. 11.

¹¹ Defence First Response, ICC-01/04-02/06-2185-Conf, para. 13.

Request').¹² The Defence further argues that the Prosecution failed to justify submitting portions of its filing to the Chamber on an *ex parte* basis and therefore seeks that the redacted portions be disclosed to the Defence ('Defence Request for Reclassification') or, in the alternative, that the filing be rejected.¹³

5. On 19 January 2018, the Prosecution responded to the Defence Request ('Prosecution Response').¹⁴ The Prosecution submits that, in accordance with the 22 December Order, it: (i) provided the Chamber with an indication of the evidence that it may tender in rebuttal; and (ii) for the reasons set out in the Prosecution Submissions, confirmed that it will finalise its rebuttal request no later than one week after the close of the Defence's presentation of evidence.¹⁵

The Prosecution argues that, because of the preliminary nature of the 11 January 2018 deadline, a request for an extension was not required.¹⁶ Lastly, the Prosecution requests that the Prosecution Response be reclassified as 'public'.¹⁷

6. On 25 January 2018, the Prosecution filed a confidential lesser redacted version of the Prosecution Submissions,¹⁸ thereby providing the Defence with details concerning one item that it intends to present as rebuttal evidence.¹⁹ That same day, it also requested the Chamber to reclassify as 'confidential' an initially *ex parte* filing, in which the Prosecution notified the Chamber of its intention to have an external expert consult 20 original items of evidence pursuant to

¹² Defence First Response, ICC-01/04-02/06-2185-Conf, paras 1, 18, 28.

¹³ Defence First Response, ICC-01/04-02/06-2185-Conf, paras 1, 19-26, 29.

¹⁴ Prosecution response to new request in Defence "Response to Confidential redacted version of 'Prosecution preliminary submissions concerning the presentation of evidence in rebuttal', 11 January 2018", ICC-01/04-02/06-2185-Conf, ICC-01/04-02/06-2188-Conf.

¹⁵ Prosecution Response, ICC-01/04-02/06-2188-Conf, para. 2.

¹⁶ Prosecution Response, ICC-01/04-02/06-2188-Conf, para. 4.

¹⁷ Prosecution Response, ICC-01/04-02/06-2188-Conf, para. 5.

¹⁸ Second confidential redacted version of "Prosecution preliminary submissions concerning the presentation of evidence in rebuttal", 11 January 2018, ICC-01/04-02/06-2179-Conf-Exp, ICC-01/04-02/06-2179-Conf-Red2.

¹⁹ Prosecution Submissions, ICC-01/04-02/06-2179-Conf-Red2, para. 2.

Regulation 16(3) of the Regulations of the Registry, for the purposes of preparing an expert report that may potentially be tendered as rebuttal evidence.²⁰ On 26 January 2018, the Chamber granted the requested reclassification and further directed the Registry to reclassify the Chamber's related decision as 'confidential'.²¹

Prosecution Request

7. On 30 January 2018, the Prosecution filed a request to present rebuttal evidence ('Prosecution Request').²² The Prosecution requests authorisation to call someone with expertise in handwriting as a witness and indicates that it will request the admission of the report co-authored by this person ('Report') pursuant to Rule 68(3) of the Rules.²³ The proposed expert is available to testify after 5 March 2018 and her examination-in-chief would last two hours.²⁴ The Prosecution confirms that it does not intend to request the admission of any other rebuttal evidence to refute Defence evidence presented up to 11 January 2018.²⁵

8. The Prosecution submits that the Report relates to the authenticity of Mr Ntaganda's signature on a hotel registration form ('Hotel Record'),²⁶ which indicates that Mr Ntaganda arrived in Kigali, Rwanda, on 15 February 2003. Mr Ntaganda confirmed signing the Hotel Record in February 2003, in support of his testimony that he was not aware of the second attack (referring to the alleged attack on a number of villages in Walendu-Djatsi *collectivité* ('Second

²⁰ Email from the Prosecution to the Chamber, at 16:52, 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-Exp, with confidential *ex parte* Annex A.

²¹ Email from the Chamber to the Prosecution and the Registry, at 13:44. Public versions of the Prosecution's notification and the related Chamber's decision were made available on 30 January 2018 as ICC-01/04-02/06-2121-Red and ICC-01/04-02/06-2147, respectively.

²² Prosecution request for presentation of evidence in rebuttal, ICC-01/04-02/06-2197-Conf.

²³ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 1.

²⁴ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 1.

²⁵ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 48.

²⁶ DRC-D18-0001-5147.

Attack')).²⁷ The Prosecution argues that the Report indicates that Mr Ntaganda's signature as it appears on the Hotel Record is more consistent with his signature on documents from the period 2013-2017 rather than the period 2002-2003.²⁸ It therefore argues that the proposed expert's evaluation rebuts Mr Ntaganda's testimony of a trip to Rwanda in February 2003 because it discredits his new alibi defence that he signed the Hotel Record form in 2003 and, therefore, rebuts his evidence of lack of knowledge of the Second Attack.²⁹

9. The Prosecution submits that Mr Ntaganda's alleged alibi and alleged lack of knowledge regarding the Second Attack, due to his visit to Rwanda between 14 and 17 February 2003, is an issue that has arisen *ex improviso* during his testimony and was not foreseeable through the exercise of reasonable diligence.³⁰ It argues that it was only on 26 April 2017, when the Defence disclosed the Hotel Record and other hotel documents, that the Defence indicated it would be raising any issue of alibi, or that Mr Ntaganda was in Rwanda between 14 and 17 February 2003.³¹
10. It further avers that the proposed rebuttal evidence is relevant and of significant probative value to the resolution of an issue central to the determination of the guilt or innocence of the accused in the present case, as it was co-authored by two highly qualified experts, one of whom is the proposed expert witness, and since it relates to Mr Ntaganda's whereabouts and his intent and knowledge regarding one of the two charged attacks.³² In the view of the Prosecution, the fact that the Hotel Record has not been admitted into evidence is not a relevant consideration to the Chamber's determination of the Request since Mr Ntaganda explicitly confirmed its

²⁷ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 2.

²⁸ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 3.

²⁹ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 3.

³⁰ Prosecution Request, ICC-01/04-02/06-2197-Conf, paras 31-32.

³¹ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 32.

³² Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 35-40.

contents during his testimony.³³ Lastly, the Prosecution submits that granting the Request would not cause any undue delay to the proceedings and would not be unduly prejudicial to, nor undermine, Mr Ntaganda's rights.³⁴

Regulation 35 Request

11. On 8 February 2018, the Defence requested an extension of time pursuant to Regulation 35 of the Regulations to respond to the Prosecution Request ('Regulation 35 Request').³⁵ The Defence referred to a then pending request for reclassification³⁶ of what was then an *ex parte* Prosecution filing³⁷ and the related decision,³⁸ arguing that both *ex parte* documents 'relate specifically' to the Prosecution Request.³⁹ It further averred that the information unavailable to the Defence as a result of the *ex parte* classification of certain documents constitutes good cause, warranting an extension of time of 24 hours following the Chamber's decision on the reclassification request, and, if applicable, its implementation.⁴⁰
12. On 9 February 2018, in line with the deadline set by the Chamber,⁴¹ the Prosecution opposed the Regulation 35 Request ('Regulation 35 Response').⁴²
13. On 9 February 2018, the Chamber rejected the Regulation 35 Request ('Decision on Regulation 35 Request').⁴³ The Chamber noted that the two

³³ Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 40.

³⁴ Prosecution Request, ICC-01/04-02/06-2197-Conf, paras 44-47.

³⁵ Request on behalf of Mr Ntaganda seeking a limited extension of time to respond to "Prosecution request for presentation of evidence in rebuttal", ICC-01/04-02/06-2216-Conf.

³⁶ 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), 8 February 2018, ICC-01/04-02/06-2215-Conf.

³⁷ ICC-01/04-02/06-2148-Conf-Exp.

³⁸ ICC-01/04-02/06-2157-Conf-Exp.

³⁹ Regulation 35 Request, ICC-01/04-02/06-2216-Conf, paras 1, 3-6.

⁴⁰ Regulation 35 Request, ICC-01/04-02/06-2216-Conf, paras 7-8.

⁴¹ Email from the Chamber to the parties and the participants on 8 February 2018, at 19:05.

⁴² Prosecution response to the "Request on behalf of Mr Ntaganda seeking a limited extension of time to respond to 'Prosecution request for presentation of evidence in rebuttal'", ICC-01-04-02/06-2216-Conf, ICC-01/04-02/06-2219-Conf.

⁴³ Email from the Chamber to the parties and the participants on 9 February 2018, at 18:06.

documents subject to the Defence's then pending request for reclassification related to an investigative step concerning potential rebuttal evidence that was ultimately not included in the Prosecution Request. It further considered that the documents were not necessary for the Defence to respond to the Prosecution Request and that therefore, no good cause was shown for the requested extension.⁴⁴

Defence Response

14. On 12 February 2018, the Defence responded to the Prosecution Request, opposing it ('Defence Response').⁴⁵ The Defence argues that Mr Ntaganda did not raise an alibi in relation to the Second Attack and that, in any event, given the various modes of liability charged, Mr Ntaganda's absence from Bunia during periods relevant to the Second Attack does not, in and of itself, constitute a ground for excluding criminal responsibility.⁴⁶ The Defence also argues that the evidence the Prosecution seeks to rebut did not arise *ex improviso* during the Defence's presentation of evidence and was foreseeable to the Prosecution through the exercise of reasonable diligence, considering: (i) the stance taken by the Defence during opening statements and during the Prosecution's presentation of evidence; and (ii) the Prosecution's unrestricted access to Mr Ntaganda's non-privileged detention centre conversations from March 2013 onwards, which provided the Prosecution with details concerning his whereabouts during the time period relevant to the Second Attack.⁴⁷

15. The Defence further avers that the proposed evidence does not relate to a significant issue, the resolution of which is central to the determination of the

⁴⁴ Email from the Chamber to the parties and the participants on 9 February 2018, at 18:06.

⁴⁵ Response on behalf of Mr Ntaganda to "Prosecution request for presentation of evidence in rebuttal", ICC-01/04-02/06-2222-Conf.

⁴⁶ Defence Response, ICC-01/04-02/06-2222-Conf, paras 2, 28-31.

⁴⁷ Defence Response, ICC-01/04-02/06-2222-Conf, paras 2, 37-50, also referring to DRC-OTP-2101-1248 and DRC-OTP-2101-1436.

guilt or innocence of the accused, considering, *inter alia*, that: (i) Mr Ntaganda's location during the Second Attack is not determinative of his knowledge; and (ii) Mr Ntaganda neither used nor relied on the Hotel Record when testifying about his whereabouts at the relevant time.⁴⁸ The Defence also submits that the Report has very low probative value, if any, and therefore does not meet the threshold for admission as rebuttal evidence.⁴⁹ In particular, the Defence submits that the report is insufficient to negate the authenticity of the document challenged by the Prosecution, as it is inconclusive.⁵⁰ Lastly, the Defence argues that: (i) the low probative value of the proposed rebuttal evidence is substantially outweighed by the potential prejudice to the accused, arising from the Prosecution's attempt to undermine Mr Ntaganda's credibility on the basis of the Hotel Record; and (ii) granting the Request would impede on the right of the accused to a fair and expeditious trial.⁵¹

Request for Leave to Reply

16. On 14 February 2018, the Prosecution requested leave to reply to seven issues arising from the Defence Response ('Request for Leave to Reply').⁵²
17. On 15 February 2018, the Defence opposed the Request for Leave to Reply ('Response to Request for Leave to Reply'), arguing that further submissions on any of the identified issues would not assist the Chamber. Specifically, the Defence argued that the Prosecution inaccurately presented the Defence's submissions, altered its position as originally set out in the Prosecution

⁴⁸ Defence Response, ICC-01/04-02/06-2222-Conf, paras 3, 51-54.

⁴⁹ Defence Response, ICC-01/04-02/06-2222-Conf, paras 3, 55-65.

⁵⁰ Defence Response, ICC-01/04-02/06-2222-Conf, paras 56-61.

⁵¹ Defence Response ICC-01/04-02/06-2222-Conf, paras 4-5, 66-78.

⁵² Prosecution request for leave to reply to the "Response on behalf of Mr Ntaganda to 'Prosecution request for presentation of evidence in rebuttal'", ICC-01/04-02/06-2222-Conf", ICC-01/04-02/06-2227-Conf.

Request, and sought to address issues that have already been fully litigated or were entirely foreseeable.⁵³

18. On 16 February 2018, the Prosecution filed submissions to the Response to Request for Leave to Reply, arguing that the response contains substantive arguments on the merits which should be disregarded by the Chamber.⁵⁴

II. Applicable law

19. The Chamber's 'Decision on the conduct of proceedings'⁵⁵ provides that '[u]nless otherwise directed by the Chamber, evidence will be presented in the following sequence: [...] Prosecution evidence in rebuttal, if applicable'.⁵⁶

20. In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I reviewed the jurisprudence of Trial Chamber II and the *ad hoc* tribunals, and found that 'calling rebuttal evidence is likely to be an exceptional event, and certainly in the context of [the particular application before the chamber], it will be necessary for the prosecution to demonstrate, first, that an issue of significance has arisen *ex improviso*; second, that the evidence on rebuttal satisfies the admissibility criteria; and, third, this step will not undermine the accused's rights, in particular under Article 67 of the Statute'.⁵⁷ The Chamber considers

⁵³ Response on behalf of Mr Ntaganda to the "Prosecution request for leave to reply to the 'Response on behalf of Mr Ntaganda to 'Prosecution request for presentation of evidence in rebuttal'", ICC-01/04-02/06-2222-Conf, ICC-01/04-02/06-2229-Conf.

⁵⁴ Prosecution submissions on the "Response on behalf of Mr Ntaganda to the 'Prosecution request for leave to reply to the 'Response on behalf of Mr Ntaganda to 'Prosecution request for presentation of evidence in rebuttal'", ICC-01/04-02/06-2222-Conf, ICC-01/04-02/06-2229-Conf", ICC-01/04-02/06-2231-Conf.

⁵⁵ 2 June 2015, ICC-01/04-02/06-619.

⁵⁶ 2 June 2015, ICC-01/04-02/06-619, para. 12.

⁵⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution's Application to Admit Rebuttal Evidence from Witness DRC-OTP-WWWW-0005, 21 April 2011, ICC-01/04-01/06-2727-Conf, paras 42-43 and the case law referred to in relevant footnotes. See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of hearing on 24 November 2010, ICC-01/04-01/07-T-222-Red2-ENG WT, page 77, lines 11 to 25 and *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029, paras 24-25.

this to provide appropriate guidance on the adjudication of the request to adduce rebuttal evidence in the present case.

III. Analysis

Preliminary matters

21. In relation to the timing of the Prosecution Request, the Chamber recalls that, in its 22 December Order, it stated that '[n]oting that the Defence's presentation of evidence is drawing to a close, the Chamber considers that the Prosecution should, already at this point, be in a position to assess whether it wishes to present certain rebuttal evidence in relation to the evidence presented by the Defence so far', and directed the Prosecution to file a preliminary request for the presentation of rebuttal evidence by 11 January 2018.⁵⁸ The Chamber considers that this direction was clear in that the Prosecution was to file any preliminary request for the presentation of rebuttal evidence in relation to evidence presented by the Defence up to that point by 11 January 2018. Under these circumstances, the Chamber finds that the Prosecution should have requested an extension of the deadline pursuant to Regulation 35 of the Regulations if it considered that it was not in a position to request to tender the items in question by that date.

22. However, the Chamber notes that the Prosecution did make a preliminary indication by the 11 January 2018 deadline as to the specific items that it intended to tender in rebuttal to Defence evidence presented up to that date.⁵⁹ It further notes the reasons put forward by the Prosecution as to why it required further time to determine whether to request the admission of certain rebuttal evidence.⁶⁰ Under these circumstances, and considering that the

⁵⁸ 22 December Order, ICC-01/04-02/06-2166, para. 16.

⁵⁹ Prosecution Submissions, ICC-01/04-02/06-2179-Conf-Red, paras 2-3.

⁶⁰ Prosecution Submissions, ICC-01/04-02/06-2179-Conf-Exp, paras 2-3.

Prosecution did file its request, the Chamber considers it appropriate to entertain the Prosecution Request.

23. In relation to the Defence Request for Reclassification, the Chamber recalls that, in its 'Decision on expedited Defence request for reclassification of *ex parte* documents' ('Reclassification Decision'),⁶¹ it decided on a Defence request for reclassification of a previously *ex parte* Prosecution filing⁶² and related decision⁶³ concerning the same individual as the one referred to in the Prosecution Submissions. In that decision, the Chamber, noting the Prosecution's submission that it had decided not to call the relevant individual as a rebuttal witness, found that the initial justification for the *ex parte* classification of the relevant documents, as approved by the Chamber, no longer exists. Further, having considered the Prosecution's submissions as to the specific concerns expressed by the individual, the Chamber found that non-disclosure of that person's identity was 'justified and necessary', and, noting that this information will not be adduced, not unduly prejudicial to the accused. Accordingly, considering that *ex parte* classification of the entirety of the relevant documents was 'neither "truly necessary" nor "proportionate"', the Chamber, *inter alia*, ordered the Prosecution to file a confidential redacted version of the relevant filing, 'with redactions being limited to any information that would reveal the identity of the individual concerned'.⁶⁴

24. The Chamber notes that, since the request was made, the Prosecution has filed a lesser redacted version of the Prosecution Submissions,⁶⁵ providing

⁶¹ 15 February 2018, ICC-01/04-02/06-2230.

⁶² Prosecution urgent request for authorization 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. A confidential redacted version was filed on 16 February 2018 as ICC-01/04-02/06-2148-Conf-Red.

⁶³ Decision on Prosecution request for authorization to refer to confidential testimony during a witness interview, 14 December 2017, ICC-01/04-02/06-2157-Conf-Exp. A public redacted version was filed on 15 February 2018 as ICC-01/04-02/06-2157-Red.

⁶⁴ Reclassification Decision, ICC-01/04-02/06-2230, paras 10-12.

⁶⁵ ICC-01/04-02/06-2179-Conf-Red2.

details concerning the item of evidence which it ultimately tendered in rebuttal, while the submissions referring to the then potential rebuttal witness still remain redacted. Furthermore, the Prosecution filed a confidential redacted version of the filing referred to in one of the redacted paragraphs of the Prosecution Submissions.⁶⁶

25. In these circumstances, and in accordance with its findings in the Reclassification Decision, the Chamber directs the Prosecution to file a lesser redacted confidential version of the Prosecution Submissions, with redactions being limited to any information that would reveal the identity of the individual concerned. In relation to the Defence First Response and the Prosecution Response, the Chamber considers that the two filings do not contain any confidential information and shall therefore be reclassified as 'public'.
26. 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.

⁶⁶ See Reclassification Decision, ICC-01/04-02/06-2230, and "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, 16 February 2018, ICC-01/04-02/06-2148-Conf-Red. A Defence request seeking, *inter alia*, an order compelling the Prosecution to comply with the Reclassification Decision, arguing that the Prosecution did not fully comply with the Chamber's direction, is currently pending before the Chamber. See Request on behalf of Mr Ntaganda for a further order compelling the Prosecution to comply with the Trial Chamber's directions, 19 February 2018, ICC-01/04-02/06-2234-Conf.

Prosecution Request

27. Turning to the merits of the Prosecution Request, the first matter to be determined by the Chamber is whether the issue that the Prosecution seeks to rebut is a significant issue that has arisen *ex improviso* directly from the evidence introduced during the Defence's presentation of evidence.

28. In this respect, the Chamber firstly observes that the legal characterisation of Mr Ntaganda's alleged lack of knowledge of the Second Attack as an 'alibi' or as a 'defence' is irrelevant to the Chamber's determination of this matter. Secondly, the Chamber considers that neither the general stance taken by the Defence during opening statements and during the Prosecution's presentation of evidence, indicating that Mr Ntaganda's defence was 'contrary in every respect' to the Prosecution's case regarding his purported responsibility for the crimes allegedly committed during the Second Attack,⁶⁷ nor the Prosecution evidence referred to by the Defence in its response⁶⁸ contained any reference to Mr Ntaganda's precise whereabouts, his alleged presence in Kigali during the relevant timeframe, or to the Hotel Record.

29. Similarly, the Chamber considers that the Defence has not substantiated its submission that Mr Ntaganda's non-privileged Detention Centre conversations, to which the Prosecution had unrestricted access,⁶⁹ provided the Prosecution with an indication of what Mr Ntaganda was ultimately going to testify to before the Chamber. Although the Prosecution did have access to Mr Ntaganda's non-privileged phone calls, it is mere speculation that the Prosecution used this access for the purpose alleged by the Defence.

⁶⁷ See Response, ICC-01/04-02/06-2222-Conf, paras 32-37, 40-41 and the references contained therein.

⁶⁸ See Response, ICC-01/04-02/06-2222-Conf, para. 38 and the references contained therein.

⁶⁹ See Response, ICC-01/04-02/06-2222-Conf, paras 42-45.

30. Thirdly, the Chamber notes that the Hotel Record was disclosed to the Prosecution on 26 April 2017,⁷⁰ and the issue of Mr Ntaganda's precise whereabouts between 15 and 17 February 2003, and the fact that he allegedly signed certain documents upon his arrival at the hotel in Kigali on 15 February 2003, arose for the first time during his testimony.⁷¹ Specifically in relation to the latter assertion, when shown the Hotel Record during cross-examination, Mr Ntaganda testified that the signature on the document is his and that he recalled having signed a document upon his arrival at the hotel.⁷² Under these circumstances, the Chamber considers that the Prosecution would not have been in a position to anticipate this specific evidence during the course of its case-in-chief. The Chamber therefore finds that the evidence the Prosecution seeks to adduce falls, in principle, within the appropriate parameters of rebuttal evidence.

31. In relation to the admissibility of the proposed evidence, the Chamber notes that the Report contains the letter of instruction from the Prosecution,⁷³ an account on the methodology used,⁷⁴ and a detailed description of the individual steps and observations of the analysis carried out.⁷⁵ Furthermore, the report was co-authored by two persons, one of whom is the proposed expert witness, who would be willing to testify before the Chamber, be cross-examined by the Defence, and answer any questions from the Chamber.⁷⁶ The Chamber further notes the Prosecution's submissions that the Report suggests that Mr Ntaganda did not sign the Hotel Record in 2003, but rather that his

⁷⁰ That is, after the closure of the presentation of evidence by the Prosecution on 29 March 2017, *see* Request, ICC-01/04-02/06-2197-Conf, para. 8.

⁷¹ Transcript of hearing of 7 July 2017, ICC-01/04-02/06-T-220-Conf-Eng, pages 51-55, 58-59; transcript of hearing of 6 September 2017, ICC-01/04-02/06-T-238-Conf-Eng, pages 36-37.

⁷² Transcript of hearing of 6 September 2017, ICC-01/04-02/06-T-238-Conf-Eng, pages 36-37.

⁷³ DRC-OTP-2107-0017, Annex A, pages 0091-0094.

⁷⁴ DRC-OTP-2107-0017, pages 0035-0036.

⁷⁵ DRC-OTP-2107-0017, pages 0037- 0085.

⁷⁶ *See* Prosecution Request, ICC-01/04-02/06-2197-Conf, paras 1, 37 and DRC-OTP-2107-0017, pages 0037-0085 and Annex B, pages 0095-0097.

signature was affixed years later, which, according to the Prosecution, regardless of the fact that the Hotel Record has not been admitted into evidence, undermines his testimony regarding his whereabouts in February 2003 and his alleged lack of knowledge concerning the Second Attack.⁷⁷

32. However, the Chamber notes that the Report and the expected expert testimony deal only with the Hotel Record, a document which has not been tendered into evidence during Mr Ntaganda's testimony or from the bar table, and which the Defence therefore decided not to rely on in order to prove Mr Ntaganda's whereabouts in February 2003.⁷⁸ Furthermore, the Chamber considers that the expert's expected testimony and the conclusion of her report deal only with the Hotel Record, which, even if in evidence, would not necessarily rebut Mr Ntaganda's testimony regarding his whereabouts during the Second Attack, or be determinative of any criminal responsibility therefor.

33. The Chamber further notes that the Report was prepared on the basis of a low-quality scanned version of the Hotel Record, which did not allow for the determination as to whether the signature on the Hotel Record is fraudulent.⁷⁹ In addition, according to the Report, no signature dating between 2005 and 2012 was provided for the persons who drafted the Report, which could have assisted in the evaluation of the evolution of the signatures.⁸⁰

34. In light of the foregoing, considering, in particular: (i) the fact that the Defence neither used the Hotel Record nor sought its admission in support of Mr Ntaganda's testimony; (ii) the fact that the Hotel Record has not been admitted

⁷⁷ See Prosecution Request, ICC-01/04-02/06-2197-Conf, paras 3, 38-40.

⁷⁸ In this respect, the Chamber also notes that, according to the Request, on 5 October 2017, the Defence informed the Prosecution via email that it no longer intended to call Witness D-0076, the alleged source of the Hotel Record, to testify in this case. See Prosecution Request, ICC-01/04-02/06-2197-Conf, para. 19.

⁷⁹ See DRC-OTP-2107-0017, pages 0042 and 0086; see also DRC-OTP-2107-0017, page 0056, indicating that the absence of the original document constitutes an obstacle to the analysis and renders the analysis of certain parameters significantly limited or even impossible.

⁸⁰ See DRC-OTP-2107-0017, page 0085.

into evidence; and (iii) the material on which the Report was based, the Chamber finds that the Report concerning the authenticity of Mr Ntaganda's signature on the Hotel Record testimony is of very limited relevance and has a low probative value. Accordingly, the Chamber finds that the probative value of the Report, which the Prosecution intends to tender under Rule 68(3), would be outweighed by the potential prejudice admission would cause to the accused. In these circumstances, any connected testimony by the proposed expert would not be of sufficient relevance. The Chamber therefore rejects the Prosecution Request.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PLACES ON THE RECORD the Decision on Regulation 35 Request;

REJECTS the Request for Leave to Reply;

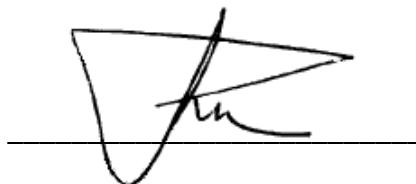
REJECTS the Prosecution Request;

REJECTS all other requests;

DIRECTS the Prosecution to file a confidential lesser redacted version of filing ICC-01/04-02/06-2179-Conf-Red2 within two days of notification of the present decision; and

DIRECTS the Registry to reclassify filings ICC-01/04-02/06-2185-Conf and ICC-01/04-02/06-2188-Conf as 'public'.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 26 February 2018
At The Hague, The Netherlands