

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **8 January 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 Defence request for reclassification of *ex parte* filings**

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, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67 of the Rome Statute and Regulation 23 *bis* of the Regulations of the Court ('Regulations'), issues this 'Decision on Defence request for reclassification of *ex parte* filings'.

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

1. On 22 December 2017, the defence team for Mr Ntaganda ('Defence') requested the 'immediate reclassification', or provision of a redacted version, of an *ex parte* application referred to by the Office of the Prosecutor ('Prosecution') during the status conference ('Status Conference')<sup>1</sup> held on 5 December 2017 ('Request').<sup>2</sup> Specifically, the Defence refers to the Prosecution's mention of a pending application that it 'has filed with the Chamber *ex parte*' and for which the Prosecution 'require[s] a response' before being able to determine whether the issue to which the Request relates may be relevant to a potential rebuttal point.<sup>3</sup>
2. In support of its Request, the Defence puts forward: (i) the limited information available to it with respect to the Prosecution's *ex parte* application; (ii) its understanding that the application relates to a procedural matter concerning the rebuttal case the Prosecution has yet to seek leave to present, as well as Detention Centre litigation;<sup>4</sup> (iii) the existence of 'no less than four *ex parte* filings not accessible to the Defence in the past month'; and (iv) the present stage of the

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<sup>1</sup> See Order scheduling a status conference, 28 November 2017, ICC-01/04-02/06-2131; transcript of hearing of 5 December 2017, ICC-01/04-02/06-T-258-ENG-ET WT.

<sup>2</sup> Request on behalf of Mr Ntaganda seeking reclassification of Prosecution *ex parte* application(s), ICC-01/04-02/06-2167-Conf.

<sup>3</sup> Request, ICC-01/04-02/06-2167-Conf, para. 1, referring to transcript of hearing of 5 December 2017, ICC-01/04-02/06-T-258-ENG-ET WT, page 8, lines 2-4.

<sup>4</sup> The Defence refers to the Prosecution's submissions during the hearing on 7 December 2017, transcript of hearing on 7 December 2017, ICC-01/04-02/06-T-260-CONF-ENG ET, page 101, lines 23-25.

proceedings, which renders the *ex parte* classification ‘inconsistent with the rights of the [a]ccused to a fair trial and as such, certainly not in the interests of justice’.<sup>5</sup>

3. The Defence further submits that it is crucial for it to be informed without delay of the object and legal basis of the Prosecution’s application, including any material and/or information submitted in support thereof, and to have the possibility to make submissions before the Chamber’s adjudication of the matter and, ‘in any event, before the end of the presentation of the case for the Defence’.<sup>6</sup>
4. On 3 January 2018, the Prosecution responded, opposing the Request (‘Response’).<sup>7</sup> It argues that the *ex parte* classification of the filings concerned by the Request is justified, has been accepted by the Chamber and does not prejudice the accused’s rights or the ability of the Defence to represent him, that the Prosecution’s ongoing investigations concerning potential rebuttal evidence would be prejudiced if the Request were to be granted, and that the Defence provides no justification for the reclassification of any of the four filings.<sup>8</sup>
5. The Prosecution further indicates that: (i) the *ex parte* filings referred to in the Request comprise two Prosecution requests<sup>9</sup> and two corresponding decisions,<sup>10</sup> with the two requests having been submitted on an *ex parte* basis as they ‘concern [...] a prospective investigative step envisaged by the Prosecution, namely the collection of potential rebuttal evidence, of which the Defence is not entitled to be notified’;<sup>11</sup> (ii) the Defence misrepresents the Prosecution’s reference to Detention Centre litigation, since the Prosecution did not state that it had filed an *ex parte* request concerning Detention Centre litigation, but rather referred to such

<sup>5</sup> Request, ICC-01/04-02/06-2167-Conf, paras 2-5, 25-29.

<sup>6</sup> Request, ICC-01/04-02/06-2167-Conf, paras 24, 30-31.

<sup>7</sup> Prosecution’s response to the “Request on behalf of Mr Ntaganda seeking reclassification of Prosecution *ex parte* application(s)”, ICC-01/04-02/06-2167-Conf”, ICC-01/04-02/06-2174-Conf.

<sup>8</sup> Response, ICC-01/04-02/06-2174-Conf, paras 1-2, 9-10.

<sup>9</sup> ICC-01/04-02/06-2121-Conf-Exp; ICC-01/04-02/06-2148-Conf-Exp.

<sup>10</sup> ICC-01/04-02/06-2147-Conf-Exp; ICC-01/04-02/06-2157-Conf-Exp.

<sup>11</sup> Response, ICC-01/04-02/06-2174-Conf, para. 8, referring to ICC-01/04-02/06-2121-Conf-Exp, para. 6 and ICC-01/04-02/06-2148-Conf-Exp, para. 2.

litigation as an example of instances justifying *ex parte* classification of filings;<sup>12</sup> and (iii) '[t]he Chamber's order regarding the Prosecution's filing of a preliminary request for the presentation of rebuttal evidence means that, by 11 January 2018 or, at the latest, one week after the close of the Defence's presentation of evidence, the Defence will be fully informed of the rebuttal evidence the Prosecution seeks to admit and able to respond accordingly'.<sup>13</sup>

6. Lastly, the Prosecution submits that the Response is classified as 'confidential' pursuant to Regulation 23 *bis*(3) of the Regulations since it responds to a confidential submission. However, the Prosecution requests the Chamber's authorisation to reclassify the Response as 'public' since it contains no confidential information.<sup>14</sup>

## II. Analysis

7. At the outset, the Chamber is of the view that the issue underlying the Request could have been adequately addressed on an *inter partes* basis. Indeed, the Defence could have sought – and the Prosecution could have provided – information about the context of the *ex parte* filings before seeking the Chamber's involvement.
8. Turning to the merits of the Request, the Chamber notes the information provided by the Prosecution in its Response regarding the context of and the legal basis for the *ex parte* classification of the relevant filings, and considers that no further clarification by the Chamber is required.
9. Further, the Chamber notes that the *ex parte* classification of the two Prosecution requests has been accepted by the Chamber as necessary in order not to prejudice

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<sup>12</sup> Response, ICC-01/04-02/06-2174-Conf, footnote 12.

<sup>13</sup> Response, ICC-01/04-02/06-2174-Conf, para. 11 (footnote omitted). The Prosecution refers to the Chamber's Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 16.

<sup>14</sup> Response, ICC-01/04-02/06-2174-Conf, para. 3.

ongoing investigations, and the Chamber sees no reason to reconsider its assessment and to order their reclassification at this stage. Instead, 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.

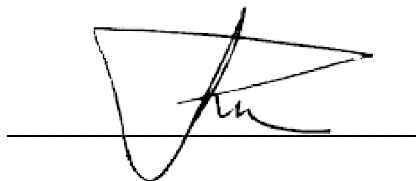
10. Lastly, considering the content of the filing, the Chamber considers it appropriate to reclassify the Response as 'public'.

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

**REJECTS** the Request; and

**INSTRUCTS** the Registry to reclassify filing ICC-01/04-02/06-2174-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 8 January 2018

At The Hague, The Netherlands