

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 4 July 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR V. BOSCO NTAGANDA***

Public

Decision on Reclassification of Certain Documents

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence
Marc Desalliers
Caroline Buteau

Legal Representatives of the Victims
Sarah Pellet
Dmytro Suprun

Legal Representatives of the 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

Other
Jean-Pierre Kilenda Kakengi Basila

REGISTRY

Registrar
Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Fiona McKay

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court,¹ hereby renders the decision on reclassification of certain documents in the record of the case of the *Prosecutor v. Bosco Ntaganda* (“Mr. Ntaganda”).

1. On 16 January 2014, the Single Judge issued the “Decision on the Reclassification of Documents” (the “16 January 2014 Decision”).²
2. On 9 June 2014, the Chamber issued the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda” in which it decided to commit Mr. Ntaganda to trial on the charges as confirmed.³
3. The Single Judge notes articles 21, 57(3)(c), 67 and 68(1) of the Rome Statute (the “Statute”), rules 15, 81, 121(10) and 129 of the Rules of Procedure and Evidence (the “Rules”), regulations 8(c), and 23bis of the Regulations of the Court (the “Regulations”) and regulations 14 and 22 of the Regulations of the Registry.
4. At the outset, the Single Judge notes in particular the principle of publicity of the proceedings as enshrined in article 67(1) of the Statute. The Single Judge also recalls the duty of the Chamber to ensure that the overall procedure is fair, conducted with full respect for the rights of Mr. Ntaganda. As a matter of principle, the suspect is entitled to have access to all documents which are necessary for the preparation of his defence as set forth in article 67(1)(a) of the Statute.
5. At the same time, however, the effective exercise of these rights must be weighed against competing interests dictated by law. Accordingly, the Single Judge is entrusted with the responsibility to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of witnesses, victims and

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, 21 March 2013, ICC-01/04-02/06-40.

² Pre-Trial Chamber II, ICC-01/04-02/06-212-Conf-Exp. A confidential redacted version is also available, see ICC-01/04-02/06-212-Conf-Red.

³ Pre-Trial Chamber II, ICC-01/04-02/06-309.

third persons in accordance with articles 57(3)(c) and 68(1) of the Statute. Among the measures of protection are those which involve the redactions of parts of documents.

6. In view of the forthcoming end of the pre-trial proceedings in this case, it is the Chamber's duty to transmit a properly maintained case record of the pre-trial proceedings to the Presidency, and further to a constituted Trial Chamber. To this end, the Single Judge carried out a thorough review of the entire case record with a view to identifying which decisions and filings can be made public, albeit with redactions, as the case may be, and which decisions and/or filings can be made available to the Defence with fewer redactions.

7. The assessment of the reclassification of decisions and filings as well as the application or retention of redactions therein is made in light of the need to balance the above interests on a case-by-case basis in order to ascertain the (continued) necessity and proportionality of any classification and/or redaction. Throughout this process, the Single Judge has been guided by the following considerations: (i) the Defence has been informed in the meantime of the identity of witnesses during the disclosure process which no longer warrants the retention of certain redactions in earlier decisions of the Chamber and filings; (ii) considering the present stage of the proceedings, the reasons for the initial classification of a decision or document no longer exist (iii) decisions of the Chamber have been or, pursuant to this decision, will be reclassified, which entails the possible reclassification of related filings.

8. In light of the above, the Single Judge has, as the case may be, reclassified or re-issued decisions with fewer redactions for the benefit of Mr. Ntaganda. With regard to filings emanating from the Prosecutor, the Defence, the Registry or others, the Single Judge conducted a thorough review and identified those filings which could be reclassified as "confidential" or "public", with redactions, as necessary. The redactions will have to be applied by the respective author of the documents in light of the principles governing the non-disclosure of information which have been

established by this Chamber.⁴ No further authorization is required by this Chamber where the original classification remains the same. The Single Judge highlights that redactions should only be applied in case there is an “objectively identifiable risk” to the safety of the protected person and when such redaction is “necessary” and “proportionate”.⁵ The Single Judge clarifies that her rulings in the present decision concern both the English and French versions of documents, where applicable.

9. Lastly, this case record exists since 2006 and has been maintained by Pre-Trial Chamber I in different compositions as well as this Chamber. It has been noticed that one and the same document relevant to this case is registered in the situation and case record or the record of another case at different classification levels. Finding a specific document or decision in this case record may therefore at times be challenging. Most importantly, with the closure of the pre-trial proceedings, the parties, participants and the Trial Chamber will only have access to the present case record. As a result, the Single Judge deems it essential that all filings relevant to the case must be encompassed in the record of this case so as to facilitate the finding of documents for the Trial Chamber and the parties and participants in the future.

1. Ex Parte or Confidential Documents

10. As clarified in the 16 January 2014 Decision, the Single Judge exempts from this reclassification exercise, in principle, any filings that should remain *ex parte* and/or confidential by reasons of their nature or content.⁶ This concerns, for example, filings which relate to the proceedings of non-disclosure of information and documents or issues related to State cooperation.

⁴ See, for example, Pre-Trial Chamber II, “Redacted Decision on the Prosecutor’s Request and Amended Request for Redactions to Applications for Warrants of Arrest”, 3 July 2014, ICC-01/04-02/06-58-Red3, para. 14; Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and other Related Requests”, 3 July 2014, ICC-01/04-02/06-117-Red3.

⁵ Pre-Trial Chamber II, “Redacted First Decision on the Prosecutor’s Requests for Redactions and other Related Requests”, 3 July 2014, ICC-01/04-02/06-117-Red3, para. 21.

⁶ Pre-Trial Chamber II, “Decision on Reclassification of Documents”, 16 January 2014, ICC-01/04-02/06-212-Conf-Red, paras 18 and 19.

2. Filings Addressed in the 16 January 2014 Decision

11. The Single Judge observes that the Prosecutor has not complied fully with the 16 January 2014 Decision, in which she was ordered to make available to the Defence a series of documents in redacted form. The Single Judge recalls her previous findings and orders the Prosecutor to resubmit the following documents, both in English and French, where applicable, and in accordance with the authorization for redactions granted in the 16 January 2014 Decision:

- **ICC-01/04-02/06-4-Conf-Exp** (to be filed as confidential redacted);⁷
- **ICC-01/04-02/06-15-Conf-Exp** (to be filed as public redacted)⁸

12. The Single Judge also notes that the Prosecutor has not yet complied with the order set out in the 16 January 2014 Decision to refile **ICC-01/04-02/06-74-Conf-AnxA-Red** (as confidential redacted) and **ICC-01/04-02/06-74-Conf-AnxB** (as confidential redacted) with fewer redactions for the benefit of Mr. Ntaganda.⁹ The Prosecutor is reminded to prepare the redacted versions for the Defence as instructed in the 16 January 2014 Decision.

13. As to the **registration** of the new confidential redacted versions of documents contained in ICC-01/04-02/06-74-Conf-AnxA and ICC-01/04-02/06-74-Conf-AnxB, the Single Judge observes that these two documents correspond to submissions in the record of the situation filed as ICC-01/04-104-US-Exp and ICC-01/04-106-US-Exp respectively. In the record of this case, these documents have been annexed, together with other documents, to a request of the Prosecutor for redactions. Accordingly, it becomes quite difficult to find these two documents. For ease of future reference to said documents, the Single Judge orders the Registrar to transfer the original host documents ICC-01/04-104-US-Exp and ICC-01/04-106-US-Exp to the record of this

⁷ See Pre-Trial Chamber II, "Decision on Reclassification of Documents", 16 January 2014, ICC-01/04-02/06-212-Conf-Red, paras 24 and 25.

⁸ See Pre-Trial Chamber II, "Decision on Reclassification of Documents", 16 January 2014, ICC-01/04-02/06-212-Conf-Red, ICC-01/04-02/06-212-Conf-Red, para. 33.

⁹ See Pre-Trial Chamber II, "Decision on Reclassification of Documents", 16 January 2014, ICC-01/04-02/06-212-Conf-Red, ICC-01/04-02/06-212-Conf-Red, paras 34 to 38.

case and register them as “confidential *ex parte*”. The Prosecutor, in turn, is ordered to submit the new confidential redacted version (Red2). Additionally, the Prosecutor is ordered to provide public redacted versions of the two documents, which already exist in ICC-01/04-01/06-39-AnxC-Red and ICC-01/04-01/06-39-AnxD-Red in the record of the case of the *Prosecutor v. Thomas Lubanga Dyilo*.

14. Further, the Single Judge has not received any update on the Prosecutor’s efforts to contact one witness with a view to disclosing the witness’ identity and, consequently, making **ICC-01/04-02/06-61-Conf-Red** available to the Defence in unredacted form. As held previously, the Prosecutor is hereby ordered to continue her efforts to seek the consent of the witness concerned so that the document can be shared with the Defence in unredacted form.¹⁰

15. The Single Judge notes that the Registrar also has only partly complied with the Single Judge’s order in the 16 January 2014 Decision to transfer document ICC-01/04-114-Conf-Exp into the case record (it now carries the number **ICC-01/04-02/06-215-Conf-Exp**) and to reclassify it as confidential.¹¹ The Registrar is reminded to reclassify document ICC-01/04-02/06-215-Conf-Exp as confidential thus providing access to the Defence.

16. Further, the Registrar was ordered to seek the consent of States whether, and to what extent, documents ICC-01/04-02/06-11-US-Exp-Anx3, ICC-01/04-02/06-11-US-Exp-Anx5 and ICC-01/04-02/06-14-US-Exp-Anx1 can be made available to the Defence on a confidential basis.¹² To date, the Chamber has not received any response from the State concerned in relation to document **ICC-01/04-02/06-14-US-Exp-Anx1**. The Registrar is ordered to continue his efforts to receive the necessary information so as to make available this document to the Defence in the near future.

¹⁰ See Pre-Trial Chamber II, “Decision on Reclassification of Documents”, 16 January 2014, ICC-01/04-02/06-212-Conf-Red, ICC-01/04-02/06-212-Conf-Red, para. 50, and p. 25.

¹¹ See Pre-Trial Chamber II, “Decision on Reclassification of Documents”, 16 January 2014, ICC-01/04-02/06-212-Conf-Red, ICC-01/04-02/06-212-Conf-Red, para. 50, and p. 25.

¹² See Pre-Trial Chamber II, “Decision on Reclassification of Documents”, 16 January 2014, ICC-01/04-02/06-212-Conf-Red, ICC-01/04-02/06-212-Conf-Red, para. 20.

17. With regard to **ICC-01/04-02/06-11-US-Exp-Anx3** and **ICC-01/04-02/06-11-US-Exp-Anx5**, the Single Judge has taken note of the response of the State.¹³ Having due regard to the redaction proposals and justifications provided by the State, the Single Judge is of the view that the limited redactions in those documents are necessary and proportionate, i.e. not prejudicial to or inconsistent to the rights of Mr. Ntaganda. As a result, the Registrar is ordered to implement the redactions, as proposed by the State in ICC-01/04-02/06-299-US-Exp-AnxIII, in the documents contained in ICC-01/04-02/06-11-US-Exp-Anx3 and ICC-01/04-02/06-11-US-Exp-Anx5¹⁴.

18. As regards the **classification** of the documents concerned, the Single Judge orders the Registrar to reclassify ICC-01/04-02/06-11-US-Exp-Anx3 and ICC-01/04-02/06-US-Exp-Anx5 and, consequently, ICC-01/04-02/06-299-US-Exp-AnxIII as “confidential *ex parte*”, and to provide the Defence with the redacted confidential versions of ICC-01/04-02/06-11-US-Exp-Anx3 and ICC-01/04-02/06-11-US-Exp-Anx5, as herewith authorized.

3. *Other Documents Emanating from the Prosecutor*

19. The Single Judge observes that the list of evidence in the Kinyarwanda language is classified as confidential (**ICC-01/04-02/06-203-AnxD**), whereas its English version (**ICC-01/04-02/06-203-AnxB**) is classified as public. The Single Judge is of the view that both documents shall be classified at the same level, namely as public.

20. The Single Judge recalls that three documents have been attached as annexes to filing ICC-01/04-02/06-22 which contains the “Prosecution’s Application to Lift the Seal on Proceedings before the Pre-Trial Chamber”.¹⁵ Two of them, namely annexes 2 and 3, have been refiled separately in the case record and shared with the Defence: (i) the decision contained in ICC-01/04-02/06-22-Conf-Anx2 corresponds to the

¹³ See ICC-01/04-02/06-299-Conf-Exp.

¹⁴ The Single Judge understands that the redaction proposals mentioned in subparagraph (b), second bullet point, in ICC-01/04-02/06-299-US-Exp-AnxIII extends to the information to be redacted in ICC-01/04-02/06-11-US-Exp-11-Anx5, p. 2 and p. 4.

¹⁵ For clarification purposes, the Defence has been notified of the three annexes as a result of the 16 January 2014 Decision.

decision contained in ICC-01/04-02/06-214-Red; (ii) the transcript contained in ICC-01/04-02/06-22-Conf-Anx3 corresponds to the transcript ICC-01/04-02/06-T-4-Red. The document contained in **ICC-01/04-02/06-22-Conf-Anx1**, which is a previous decision of Pre-Trial Chamber I at the situation level, has not been refiled in the case record separately but remains as an annex to the Prosecutor's request in ICC-01/04-02/06-22.¹⁶ At the same time, the Single Judge notes that a public redacted version of ICC-01/04-02/06-22-Conf-Anx1 exists, which carries the document number ICC-01/04-102-Red. Consequently, the Single Judge orders the Registrar to transfer ICC-01/04-102-Conf-Exp and ICC-01/04-102-Red, in English and French, to the case record and to reclassify as "confidential" the document ICC-01/04-102-Conf-Exp.

21. Filing **ICC-01/04-02/06-305-Conf-Exp**, which involves the question of disclosure of exculpatory evidence, has not been shared with the Defence. Due to the relevance of this filing to the further preparation of the Defence, the Single Judge is of the view that the Defence should be provided with a confidential redacted version of said filing.

22. In the following, the Single Judge lists certain documents in the case record which she deems could be made publicly available with, as the case may be, redactions to the extent necessary:

- **ICC-01/04-02/06-108-Conf;**
- **ICC-01/04-02/06-119-Conf;**
- **ICC-01/04-02/06-121-Conf** (only the main filing);
- **ICC-01/04-02/06-128-Conf;**
- **ICC-01/04-02/06-135-Conf** (only the main filing);
- **ICC-01/04-02/06-146-Conf;**
- **ICC-01/04-02/06-157-Conf** (only the main filing);

¹⁶ See also Pre-Trial Chamber II, "Decision on Reclassification of Documents", 16 January 2014, ICC-01/04-02/06-212-Conf-Red, ICC-01/04-02/06-212-Conf-Red, p. 24. For clarification purposes, this annex has been shared with the Defence on a confidential basis.

- ICC-01/04-02/06-166-Conf;¹⁷
- ICC-01/04-02/06-168-Conf;
- ICC-01/04-02/06-190-Conf (only the main filing);
- ICC-01/04-02/06-195-Conf;
- ICC-01/04-02/06-220-Conf.

4. Other Documents Emanating from the Defence

23. The Single Judge, having reviewed the content of the filings of the Defence submitted in the record of the case, lists in the following certain documents which she deems could be made publicly available with, as the case may be, redactions to the extent necessary:

- ICC-01/04-02/06-83-Conf;
- ICC-01/04-02/06-89-Conf;
- ICC-01/04-02/06-99-Conf-Exp;
- ICC-01/04-02/06-111-Conf;
- ICC-01/04-02/06-118-Conf;
- ICC-01/04-02/06-127-Conf;
- ICC-01/04-02/06-143-Conf;
- ICC-01/04-02/06-169-Conf;
- ICC-01/04-02/06-172-Conf;
- ICC-01/04-02/06-196-Conf;
- ICC-01/04-02/06-219-Conf;
- ICC-01/04-02/06-236-Conf (only the main filing).

¹⁷ In fact, the Prosecutor announced that she would file a public redacted version of said filing, see ICC-01/04-02/06-166-Conf, para. 9.

5. Other Documents Emanating from the Registry and the Common Legal Representatives

24. The Single Judge having reviewed the content of the filings of the Registry and the common legal representatives of victims submitted in the record of the case, lists in the following certain documents which she deems could be made publicly available with, as the case may be, redactions to the extent necessary:

- **ICC-01/04-02/06-106-Conf-Exp** (only the main filing);
- **ICC-01/04-02/06-113-Conf** (only the main filing);
- **ICC-01/04-02/06-122-Conf** (only the main filing);
- **ICC-01/04-02/06-132-Conf** (only the main filing);
- **ICC-01/04-02/06-141-Conf-Exp**;
- **ICC-01/04-02/06-154-Conf** (only the main filing);
- **ICC-01/04-02/06-179-Conf** (only the main filing);
- **ICC-01/04-02/06-200-Conf** (only the main filing);
- **ICC-01/04-02/06-246-Conf**.

6. Documents Emanating from Counsel of Mathieu Ngudjolo Chui

25. With reference to the filings submitted by counsel of *Mathieu Ngudjolo Chui* ("Mr. Ngudjolo"), the Single Judge observes that the original document has been filed as public redacted (ICC-01/04-02/06-82-Red). However, all ensuing submissions are only available in confidential form. Counsel for Mr. Ngudjolo is hereby ordered to prepare public redacted versions of the following filings:

- **ICC-01/04-02/06-85-Conf**;
- **ICC-01/04-02/06-86-Conf**;
- **ICC-01/04-02/06-91-Conf**.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **Authorizes** the reclassification of documents within the meaning of regulation 23*bis* (3) of the Regulations in the event that documents can be reclassified as public and/or confidential without any redactions; and **orders** the Prosecutor, the Defence, the legal representatives of victims, the Registrar or the counsel of Mathieu Ngudjolo Chui to communicate this information to the Registry, which shall, in turn, reclassify the document concerned accordingly.
- b) **Orders** the Prosecutor, the Defence, the legal representatives of victims, the Registrar and counsel of Mathieu Ngudjolo Chui to prepare public and/or confidential redacted versions of the filings addressed in this decision, as the case may be, and to file them within the upcoming four weeks as of notification of this decision;
- c) **Orders** the Registrar (i) to transfer the documents from the situation record into the case record as set out above in paragraphs 13 and 20;
- d) **Orders** the Registrar to reclassify as **public** the following documents, both in English and French, as the case may be:
 - ICC-01/04-02/06-84-Conf;
 - ICC-01/04-02/06-90-Conf (only the main filing);
 - ICC-01/04-02/06-105-Conf;
 - ICC-01/04-02/06-109-Conf;
 - ICC-01/04-02/06-112-Conf;
 - ICC-01/04-02/06-152-Conf;
 - ICC-01/04-02/06-180-Conf-Corr-Red (only the main filing as public redacted);
 - ICC-01/04-02/06-203-AnxD;
 - ICC-01/04-02/06-289-Conf (only the main filing).

- e) **Orders** the Registrar to reclassify as **confidential *ex parte*** the following documents, both in English and French:
- ICC-01/04-02/06-1-US-Exp;
 - ICC-01/04-02/06-11-US-Exp-Anx3;
 - ICC-01/04-02/06-11-US-Exp-Anx5;
 - ICC-01/04-02/06-299-US-Exp-AnxIII.
- f) **Orders** the Registrar to reclassify as **confidential** the following documents, both in English and French, as the case may be:
- ICC-01/04-02/06-63-Conf-Exp;
 - ICC-01/04-102-Conf-Exp (after having been transferred to the case record);
 - ICC-01/04-02/06-133-Conf-Exp;
 - ICC-01/04-02/06-215-Conf-Exp.
- g) **Orders** the Prosecutor to continue her efforts to receive the consent of the witness as instructed above in paragraph 14;
- h) **Orders** the Registrar to continue his efforts to receive the necessary information from the State in relation to ICC-01/04-02/06-14-US-Exp-Anx1 as instructed above in paragraph 16.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 4 July 2014
At The Hague, The Netherlands