

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **16 April 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 the reclassification of further items admitted into evidence

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* ('Ntaganda case') having regard to Articles 64 and 67 to 69 of the Rome Statute ('Statute'), Rules 15 and 137 of the Rules of Procedure and Evidence, and Regulation 20 of the Regulations of the Court, issues the following 'Decision on the reclassification of further items admitted into evidence'.

I. Background

1. On 31 January 2018 and 21 and 22 February 2018, the Chamber directed the parties and participants to coordinate with each other and the Registry to file submissions on the appropriate level of confidentiality for each of the items admitted into evidence pursuant to the respective decisions.¹
2. On 28 March 2018, the Office of the Prosecutor ('Prosecution'), in consultation with the Legal representative of the victims of the attacks ('LRV') in relation to items pertaining to dual status individuals, filed its submissions, including a table containing 134 items (respectively, and, where relevant, referred to as 'Item 1' to 'Item 134') with recommendations on the appropriate level of confidentiality ('Prosecution Recommendations').² The Prosecution recommends that: (i) a total of 45 items be reclassified as public without redactions; (ii) 15 items be reclassified as public with redactions; and (iii) 74 items remain confidential.
3. On 29 March 2018, the defence team for Mr Ntaganda ('Defence') filed its observations on the Prosecution Recommendations, indicating that it: (i) agrees with the Prosecution's recommendations in relation to 124 items ('Non-contested

¹ Decision on Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2201-Conf, para. 66, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, para. 12 and Decision on Defence request seeking partial reconsideration of the 'Decision on Defence request for admission of evidence from the bar table', ICC-01/04-02/06-2241, para. 10.

² Prosecution's recommendations on the reclassification of items admitted into evidence through the Defence bar table motion, ICC-01/04-02/06-2265 and Confidential Annex A, ICC-01/04-02/06-2265-Conf-AnxA.

Items’); and (ii) disagrees with the Prosecution’s recommendations in relation to 10 items (‘Contested Items’).³

4. On 13 April 2018, via email,⁴ the Defence informed the Chamber that, at this stage, it does not intend to file any additional submissions on the appropriate level of confidentiality of items admitted into evidence.

II. Submissions and analysis

Non-contested Items

5. In the interest of the publicity of the proceedings, and further to the parties’ submissions, the Chamber finds it appropriate to reclassify from confidential to public those items identified by the Prosecution as suitable for such reclassification and which are not contested by the Defence.
6. In relation to those items for which the Prosecution recommends that they remain confidential, and which are not contested by the Defence, the Chamber has considered the reasons put forward for the recommended classification, including that the relevant items: (i) were subject to confidentiality agreements pursuant to Article 54(3)(e) of the Statute; (ii) ought to remain confidential in order to avoid identification of protected witnesses, including dual status individuals; or (iii) were received in response to requests for assistance, requiring the protection of the sources’ identities in accordance with the agreements with the source providers.⁵ In light of these reasons, and without prejudice to any subsequent determination in relation to any of the items subject to confidentiality agreements referred to in paragraph 13 below, the Chamber decides that the confidentiality of these items shall be maintained at this stage.

³ Defence observations on Prosecution recommendations regarding the reclassification of items admitted into evidence, ICC-01/04-02/06-2266 (‘Defence Observations’), para. 4.

⁴ Email to the Chamber, Prosecution and participants at 14:29.

⁵ Confidential Annex A, ICC-01/04-02/06-2265-Conf-AnxA.

7. With regard to the Prosecution's recommendation for certain items to be reclassified as public with redactions, and which are not contested by the Defence, the Chamber, taking into account the need to balance the publicity of proceedings and its responsibility to safeguard the identity of protected witnesses, while noting that these items will remain confidential, directs the Prosecution, in concertation with the LRV, where applicable, to prepare public redacted versions of these items and make them available in eCourt as soon as practicable.

Contested Items

(i) Challenges to the reclassification of certain items with redactions

8. The Defence challenges the Prosecution's recommendation to apply redactions in relation to Items 34, 35, 47, 48, 100, and 101.
9. With regard to Items 34 and 35, the Defence submits that while Item 34 might contain information related to a witness, and Item 35 refers to the name of a Prosecution witness, the reclassification of these items as public would not identify the relevant individuals.⁶ The Chamber is satisfied that, although referring to the names of certain individuals, reclassification of these items as public without redactions would not identify any individual as witnesses in the *Ntaganda* case. It therefore finds that these items shall be reclassified as public.
10. The Defence further challenges the Prosecution's recommendation to apply redactions to the identities of 'innocent third parties' in Items 47, 48, 100, and 101, arguing that this would 'defeat the purpose' of reclassification, and that adopting such an approach would require the redaction of many more documents admitted from the bar table.⁷ The Chamber considers that the Prosecution has

⁶ Defence Observations, ICC-01/04-02/06-2266, paras 5-6.

⁷ Defence Observations, ICC-01/04-02/06-2266, para. 7.

not provided sufficient justification as to why redactions to the identities of the individuals referred to in these items are necessary, and therefore finds that these items shall be reclassified as public.

(ii) Challenges to the Prosecution's recommendations for items to remain confidential

11. The Defence further contests the Prosecution's recommendation that Items 70, 126, 127, and 128 remain confidential, and argues that these items should be reclassified as public without redactions.

12. In regard to Item 70, the Defence challenges the Prosecution's submission that confidentiality is required because the item was previously provided under Article 54(3)(e) of the Statute, and that reclassification as public could reveal the source's identity. According to the Defence: (i) the item is similar to many documents that were not provided under that provision; (ii) the fact that it was obtained pursuant to Article 54(3) does not appear on the document; and (iii) public access will not reveal the source's identity or that of any particular witness.⁸ The Chamber is satisfied that, although the item includes the signatures of several individuals, reclassification of the item as public would not identify any individual or entity as a source provider. The Chamber therefore finds that, absent any further substantiated justification, to be provided within five days of notification of the present decision, as to why the relevant item is to remain confidential, the item is to be reclassified as public.

13. Relatedly, the Chamber notes that other items in relation to which maintaining confidentiality is recommended on the basis that they were obtained pursuant to Article 54(3), are similar to Item 70, but are not contested by the Defence.⁹ The Chamber therefore encourages the Prosecution to review the relevant items with

⁸ Defence Observations, ICC-01/04-02/06-2266, para. 8.

⁹ See, for example, Items 6, 7, 8 and 9.

a view to determining whether any of them can be reclassified in accordance with the Chamber's aforementioned assessment.

14. Concerning Items 126, 127, and 128, the Prosecution argues that these items should remain confidential on the basis that they constitute, or are related to, mission reports written by a Prosecution intermediary, 'thus fall[ing] with[in] Prosecution internal works', and contain information that may identify protected witnesses and the intermediary himself.¹⁰ The Defence opposes the Prosecution's recommendation on the basis that public access to the items would not allow for the identification of protected witnesses or the intermediary involved, and that, considering that certain redactions have already been applied to protect the identities of persons referred to therein, 'the justification provided that they "fall with Prosecution internal works" is not valid'.¹¹ The Chamber is of the view that reclassification of these items, due to the specificity of the information contained therein, even with the limited redactions already applied, may lead to identification of the intermediary, whose first name is further included in the items. In these circumstances, the Chamber considers that the items shall remain confidential, and that no reclassification is warranted.

¹⁰ Prosecution Recommendations, ICC-01/04-02/06-2265-Conf-AnxA, pages 9-10.

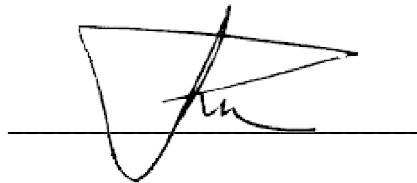
¹¹ Defence Observations, ICC-01/04-02/06-2266, para. 9.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

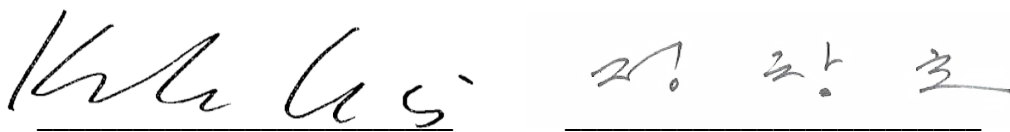
DIRECTS the Prosecution to communicate to the Registry, for the purpose of reclassification, a list of the items to be reclassified as 'public' in accordance with paragraphs 5, 9, 10, 12 and 13 of the present decision; and

DIRECTS the Prosecution, in concertation with the LRV, as applicable, to prepare, as soon as practicable, public redacted versions of the items subject to the directions in paragraph 7 of the present decision, and to make these items available in eCourt.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, one on the left and one on the right, each written over a horizontal line.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated this 16 April 2018
At The Hague, The Netherlands