

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-02/06  
Date: 29 December 2014

**TRIAL CHAMBER VI**

**Before:** Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Geoffrey Henderson

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Confidential, *ex parte* – only available to the Chamber, Registry, Prosecution and  
Defence**

**Request on Behalf of Mr Ntaganda Seeking Reclassification of the  
Registry's Observations and VWU's Observations Dated 19 August 2014**

**Source: Defence Team of Mr Bosco Ntaganda**

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

**The Office of the Prosecutor**

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Mr James Stewart  
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**Counsel for the Defence**

Me Stéphane Bourgon  
Me Luc Boutin  
Me William St-Michel

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(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**

Further to the *“Decision on the Prosecution Request for Restrictions on Contact and the Defence Request for Access to Logs”* rendered by Trial Chamber VI (“Chamber”) on 8 December 2014 (“Decision”) and the confidential redacted version of the *“Prosecution’s Urgent Request for Measures Under Regulation 101(2) of the Regulations of the Court”* filed on 19 December 2014 (“Prosecution Request”),<sup>1</sup> Counsel representing Mr Ntaganda (“Mr Ntaganda” and “Defence”, respectively) hereby submit this:

**Request on Behalf of Mr Ntaganda Seeking Reclassification of the  
Registry’s Observations and VWU’s Observations Dated 19 August 2014**

(“Reclassification Request”)

**OVERVIEW**

1. Pursuant to the Decision, Mr Ntaganda understands that he will have the opportunity to provide observations on the merits of the allegations raised in the Prosecution Request once the Registry’s final report on Mr Ntaganda’s prior telephone conversations since December 2013 will have been disclosed to the Parties.
2. The Decision also establishes that for this purpose, Mr Ntaganda must be provided with a genuine opportunity to do so, which entails *inter alia*, having sufficient information to be able to make meaningful observations.
3. While the Defence is presently analyzing the confidential redacted version of Prosecution Request and disclosure of supplementary evidence<sup>2</sup> – both filed on 19 December 2014 pursuant to the Chamber’s Instruction – this

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<sup>1</sup> ICC-01/04-02/06-349-Conf-Red2.

<sup>2</sup> *“Prosecution’s Submission of Additional Evidence in Support of “Prosecution’s urgent request for measures under Regulation 101(2) of the Regulations of the Court”, ICC-01/04-02/06-371-Conf-Red+Conf-AnxA-Red.*

Reclassification Request focuses on the Registry and the VWU Observations referred to in the Decision.<sup>3</sup>

4. To this day, the contents of the Registry and VWU Observations provided to the Chamber – upon being invited to do so *via* electronic mail correspondence to which the Defence was not privy to – are unknown to the Defence.
5. Considering that when submitting its observations on the merits of the Prosecution allegations, the Defence will need to address *inter alia*, the necessity and proportionality of the measures requested by the Prosecution pursuant to Regulation 101 of the Regulations of the Court ("RoC"), a requirement exists for the correspondence / exchange of mails between the Chamber and the Registry / VWU to be transferred on the record as well as for the Chamber to order the reclassification of the Registry and VWU Observations with a view to allowing the Defence to gain access to the same.
6. The Defence requests that this Reclassification Request be received as "Confidential, *ex parte* – only available to the Chamber, Registry, Prosecution and Defence", pursuant to Regulation 23bis(1) RoC, as it contains references concerning the Prosecution Request, which was filed confidentially *ex parte*.

## SUBMISSIONS

- a. **The Defence must be in a position to provide meaningful observations on the merits of the Prosecution allegations and measures requested pursuant to Regulation 101 RoC.**
7. In the Decision, the Chamber noted that in addition to being informed of the existence of the Prosecution Request, Mr Ntaganda shall be given the

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<sup>3</sup> See Decision, para.2, referring to "Registry's Observations in Relation to the Restrictions Sought in the 'Prosecution's Urgent Request for Measures under Regulation 101(2) of the Regulations of the Court'" ("Registry Observations"); para.3, referring to VWU's "Observations on the 'Prosecution's Urgent Request for Measures under Regulation 101(2) of the Regulations of the Court'" ("VWU Observations") (collectively, "Registry and VWU Observations").

opportunity to be heard or to submit his views on the allegations contained in the same.<sup>4</sup>

8. In this regard, the Chamber recognized that Mr Ntaganda should be provided with “sufficient information” to submit an “informed view” on the allegations raised in the Prosecution Request.<sup>5</sup> Surely, such information is not limited to the scope of the allegations and necessarily includes all materials considered by the Chamber in its Decision.

**b. The Registry and VWU Observations and correspondence by electronic mail with the Chamber are relevant to the issues at hand**

9. It is evident from the Decision that both the Registry and VWU Observations contain information that is highly relevant for the adjudication on the merits of the Prosecution Request.
10. The Registry Observations provide information on the “feasibility and consequences of the measures requested by the Prosecution”.<sup>6</sup> In this regard, the Defence underscores that the Registry Observations formed the basis of the Chamber’s decision to prohibit non-privileged visits to Mr Ntaganda on an interim basis.<sup>7</sup>
11. As for the VWU Observations, the Defence acknowledges that they are not explicitly referred to in the Chamber’s analysis of the allegations raised in the Prosecution Request.<sup>8</sup> Nonetheless, on the basis of the summary included in the Decision, the Defence notes that VWU Observations appear to confirm, at

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<sup>4</sup> Decision, para.46.

<sup>5</sup> Decision, para.46.

<sup>6</sup> Decision, para.2.

<sup>7</sup> In imposing prohibition on visits, the Chamber noted the practical difficulties of lesser measures such as monitored visits. These difficulties were specifically addressed in the Registry Observations: Decision, paras.51-52.

<sup>8</sup> Rather, the Chamber appears to have based its findings on the “information provided by the Prosecution”: Restrictions on Contact Decision, para.49.

least in part, some of the allegations contained in the Prosecution Request.<sup>9</sup> As such, VWU Observations are highly relevant as they will necessarily be considered by the Chamber when issuing its decision on the merits.

12. The correspondence between the Chamber and the Registry and VWU is also relevant. For instance, on the basis of the limited information available, it appears evident that VWU – rather than to provide views on the requests included in paragraph 51 of the Prosecution Request – actually investigated the allegations raised therein. The Defence is deeply concerned with the approach that VWU appears to have taken with respect to the instructions it received from the Chamber. According to footnote 5 of the Decision, VWU was requested to file “observations” on the “specific requests included in paragraph 51” of the Prosecution Request. It thus appears that VWU has again exceeded its mandate.
13. Accordingly, with the aim of being in a position to properly address the content of VWU’s Observations, the Defence respectfully requests that the instructions sent to VWU by electronic mail on 12 August 2014, as well as any subsequent communications, be registered in the record. The same rationale applies also to the communications between the Chamber and the Registry.

**c. The Registry and VWU Observations and correspondence by electronic mail with the Chamber were not disclosed to the Defence**

14. It is only through the Decision that the Defence was made aware for the first time that the Chamber had requested the Registry and VWU to submit “observations on the specific requests included in paragraph 51” of the Prosecution Request.<sup>10</sup> The Registry and VWU submitted their observations

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<sup>9</sup> Compare Decision, paras.33-34 with Prosecution Request, paras.27-35.

<sup>10</sup> Decision, fns.4 and 5. In its “*Decision granting the Prosecution leave to reply*” (ICC-01/04-02/06-367-Conf), the Chamber only indicated that it had requested “observations” from VWU and the Registry: para.2. A mere reference to VWU Observations was made in the “*Prosecution’s Request to File a Reply*” (ICC-01/04-02/06-361-Conf), para.9.

on 19 August 2014. While the Registry Observations were submitted *ex parte*, available to the Registry only,<sup>11</sup> the VWU Observations were filed *ex parte*, available to the Prosecution and Registry only.<sup>12</sup>

15. The Defence underscores that other than for the limited information contained in footnotes 4 and 5 of the Decision, it is not cognizant of the exact instructions transmitted by the Chamber to the Registry and VWU. It is neither aware of the reasons justifying the *ex parte* status of the Registry and VWU Observations. Furthermore, except for the summary included in the Decision – which is heavily redacted concerning VWU Observations<sup>13</sup> – the Defence did not have access to the contents of the Registry and VWU Observations. Although the summary provides for a general understanding of the Registry and VWU Observations, it is evident that their respective submissions address issues that go beyond what is stated in the Decision.
16. In addition, while it is recognized that e-mail communications between the Chamber and the parties, participants, Registry and Registry units may serve the purposes of judicial economy and efficiency in certain circumstances, the Defence respectfully posits that when an issue has the potential to impact on the rights of parties – more particularly the rights of the Mr Ntaganda – instructions, orders and decisions issued by the Chamber should be placed on the record by way of an official filing.

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<sup>11</sup> Decision, para.2.

<sup>12</sup> Decision, para.3.

<sup>13</sup> Decision, paras.33-36.

- d. **Access to the Registry and VWU observations and correspondence by electronic mail with the Chamber is necessary to allow the Defence to submit meaningful observations on the Prosecution allegations and measures sought pursuant to Regulation 101 RoC**
17. As a preliminary matter, the Defence recalls its earlier submission that it is not in a position to make any meaningful observations on the merits of the Prosecution Request without being provided with sufficient details concerning the Prosecution allegations and being provided with the evidence underpinning these allegations.<sup>14</sup>
18. Considering that the content of VWU Observations appears to be closely related to the Prosecution allegations, the Defence respectfully submits that it is of the utmost importance for the contents of VWU Observations to be disclosed to the Defence without delay. That said, the Defence is not opposed to the redaction of certain information contained therein – if really necessary – provided that such redactions comply with the principles set out by the Chamber in paragraph 48 of the Decision.
19. When presenting its views on the merits of the Prosecution Request, the Defence will not only have to address the allegations themselves, but also the necessity and proportionality of the measures requested by the Prosecution pursuant to Regulation 101 RoC. In this regard, the Registry Observations will inevitably be relied upon by the Chamber when determining whether the imposition of *any* restrictive measures is necessary. With a view to preparing its observations on the merits of the Prosecution Request, which include the restrictive measures sought therein, it is of the utmost importance that the Defence be informed of the contents of the Registry Observations.

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<sup>14</sup> ICC-01/04-02/06-360-Conf-Exp, paras.7, 19.

20. The Defence should also be informed of any and all instructions given by the Chamber to the Registry and VWU. This is necessary to understand the mandate they were entrusted with as well as to enable the Defence to provide informed views on their respective Observations.

## RELIEF SOUGHT

21. For the foregoing reasons, pursuant to Article 64(6)(f) of the Statute and Regulation 23*bis*(3) RoC, the Defence respectfully requests the Chamber to:

**ORDER** that the instructions sent by the Chamber to the Registry and VWU by electronic mail on 12 August 2014, as well as any subsequent communications, be registered in the record;

**ORDER** the Registry Observations to be reclassified as *ex parte*, available to the Registry, the Defence and the Prosecution only, subject to the necessary redactions;

**ORDER** the VWU Observations to be reclassified as *ex parte*, available to the Prosecution, the Defence and the Registry only, subject to the necessary redactions.

**RESPECTFULLY SUBMITTED ON THIS 29<sup>th</sup> DAY OF DECEMBER 2014**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands