

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **15 January 2016**

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

**Public redacted version of “Prosecution’s request for public redacted versions of filings and decisions on allegations of witness interference”, 15 July 2015,
ICC-01/04-02/06-725-Conf-Exp**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution filed several requests related to alleged witness interference on a confidential, *ex parte* basis in order to protect its witnesses, and submitted confidential redacted versions of these filings. Further to regulation 23*bis* of the Regulations of the Court (“RoC”), the Defence responded using the same classification. The Chamber’s decisions on the requests have also been issued on a confidential basis, without public redacted versions.

2. In view of the principle of publicity of proceedings¹ and pursuant to articles 64(2) and 68(1) of the Rome Statute (“Statute”) and regulation 23*bis* of the RoC, the Prosecution requests the Chamber to issue public redacted versions of decisions ICC-01/04-02/06-410-Conf-Exp-Corr,² ICC-01/04-02/06-459-Conf-Exp,³ ICC-01/04-02/06-508-Conf-Exp,⁴ ICC-01/04-02/06-578-Conf-Exp,⁵ ICC-01/04-02/06-667-Conf-Exp⁶ and ICC-01/04-02/06-710-Conf-Exp-Red.⁷ The Prosecution also requests that the Parties be ordered to file public redacted versions of the filings underlying these decisions, without redaction to the allegations of witness interference or the measures in place to address these allegations. Any information which could identify victims and witnesses should be redacted in order to protect their safety, well-being, dignity and privacy (“Request”).

¹ ICC-01/09-02/11-988, para.13.

² Confidential, *ex parte* - only available to the Prosecution and Registry Corrected version of “Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs” issued on 8 December 2014 (ICC-01/04-02/06-410-Conf-Exp).

³ Confidential, *ex parte*, Prosecution, Defence and Registry only, with two confidential and *ex parte* annexes Decision on procedure for review of telephone communications and Defence requests ICC-01/04-02/06-421-Conf-Exp and ICC-01/04-02/06-446-Conf-Exp.

⁴ Confidential, *ex parte*, Prosecution, Registry and Defence only Order instructing the Registry to put in place additional temporary restrictions on contact.

⁵ Confidential, *ex parte*, Prosecution, Defence and Prosecution only Decision on reclassification of the Registry's report on *post factum* review.

⁶ Confidential, *ex parte*, Registry, Prosecution and Defence only Order taking interim measures in relation to a Defence investigator and related matters.

⁷ Confidential, *ex parte*, Registry, Prosecution and Defence only Confidential redacted version of “Decision on reclassification of the second Registry’s report on *post-factum* review”.

3. Granting the Request would be consistent with the practice of this Court, including in the *Ongwen* case in which allegations of witness interference and Pre-Trial Chamber II's decisions on appropriate measures have been made public. It would also allow witnesses to know if their concerns have been addressed.
4. Having public redacted versions of these filings and decisions will provide the benefits of informing the public of the underlying reasons for the postponement of the start of trial and allowing the witnesses involved to understand what measures have been taken. Making this issue public may also have a deterrent effect against any future attempts to interfere with witnesses.
5. Finally, information regarding potential witness interference is already in the public domain: a number of filings and decisions refer to it and [REDACTED] appears to have revealed to third parties that the Accused's telephone calls from the Detention Centre had been restricted because he allegedly threatened certain witnesses.⁸

Confidentiality

6. This filing is classified as "Confidential, *EX PARTE* - only available to the Prosecution and Defence" pursuant to regulation 23*bis*(2) of the RoC in line with filings bearing the same designation. Should the Chamber grant the Request, this filing should be reclassified as public pursuant to regulation 23*bis*(3) of the RoC.

Background

7. On 8 August 2014, the Prosecution filed a request for measures under regulation 101(2) of the RoC.⁹

⁸ See [REDACTED].

⁹ ICC-01/04-02/06-349-Conf-Exp with confidential redacted version at ICC-01/04-02/06-349-Conf-Red and lesser redacted Confidential version at ICC-01/04-02/06-349-Conf-Red2 ("8 August 2014 Request").

8. On 19 August 2014, the Registry¹⁰ and Victims and Witnesses Unit¹¹ submitted their respective observations on the 8 August 2014 Request, after being instructed by the Chamber to do so.
9. On 1 September 2014, the Defence filed its response.¹²
10. On 12 September 2014, the Prosecution filed its reply to the Defence response,¹³ with the leave of the Chamber.¹⁴
11. On 18 September 2014, the Prosecution submitted additional evidence in support of the Request,¹⁵ which it requested the Chamber to consider.
12. On 24 September 2014, following an application from the Defence,¹⁶ the Chamber issued a decision granting it leave to make further submissions.¹⁷ The Defence filed these submissions on 26 September 2014.¹⁸
13. On 8 December 2014, the Chamber issued its “Decision on the Prosecution request for restrictions on contact and the Defence request for access to logs”.¹⁹
14. On 15 December 2014, the Defence filed an urgent request²⁰ seeking leave to appeal and partial suspensive effect of the Decision until the leave to appeal application was ruled upon.²¹ The Chamber granted the Defence’s request for partial suspensive effect on 18 December 2014.²²

¹⁰ ICC-01/04-02/06-355-Conf-Exp.

¹¹ ICC-01/04-02/06-356-Conf-Exp.

¹² ICC-01/04-02/06-360-Conf-Exp.

¹³ ICC-01/04-02/06-368-Conf-Exp.

¹⁴ ICC-01/04-02/06-367-Conf.

¹⁵ ICC-01/04-02/06-371-Conf-Exp with confidential redacted version at ICC-01/04-02/06-371-Conf-Red.

¹⁶ ICC-01/04-02/06-370-Conf-Exp.

¹⁷ ICC-01/04-02/06-378-Conf.

¹⁸ ICC-01/04-02/06-378-Conf.

¹⁹ ICC-01/04-02/06-410-Conf-Exp.

²⁰ ICC-01/04-02/06-413-Conf-Exp-Red and Corrigendum ICC-01/04-02/06-413-Conf-Exp-Red-Corr.

²¹ ICC-01/04-02/06-413-Conf-Exp-Red, para.13.

²² ICC-01/04-02/06-415-Conf-Exp.

15. On 19 December 2014, the Registry filed its “Preliminary report on the *post factum* review of the non-privileged conversations made by Mr Ntaganda since December 2013”, together with *ex parte* annexes available only to the Registry and the Defence.²³
16. On 6 January 2015, the Prosecution filed the “Prosecution’s provision of parameters for the post-factum review of Bosco Ntaganda’s visitation and call records” providing the Registry with information to assist in the Registry’s review of information in its possession.²⁴
17. On 16 January 2015, the Chamber denied the Defence request seeking leave to appeal the Chamber’s order to the Registry to provide the Prosecution with the *ex parte* annexes containing call logs and visitation records.²⁵ The Chamber further ordered the Prosecution to notify the Registry of modifications to its parameters within five days after having received the call logs and visitation records.
18. On 19 January 2015, the Registry provided the Prosecution with the call logs and visitation records.²⁶
19. On 26 January 2015, the Prosecution filed the “Prosecution’s provision of updated parameters for the post-factum review of Bosco Ntaganda’s visitation and call records”.²⁷
20. On 16 February 2015, the Chamber issued its “Decision on procedure for review of telephone communications and Defence requests ICC-01/04-02/06-421-Conf-Exp and ICC-01/04-02/06-446-Conf-Exp”.²⁸

²³ ICC-01/04-02/06-417-Conf-Exp.

²⁴ ICC-01/04-02/06-422-Conf-Exp.

²⁵ ICC-01/04-02/06-425-Conf-Exp.

²⁶ ICC-01/04-02/06-417-Conf-Exp.

²⁷ ICC-01/04-02/06-431-Conf-Exp.

²⁸ ICC-01/04-02/06-459-Conf-Exp.

21. On 10 March 2015, the Registry filed, *ex parte*, Defence and Chamber only, its first report on the *post-factum* review of the phone conversations made by the Accused.²⁹
22. On 13 March 2015, on the basis of the information contained in the Registry's first report and its annexes, the Chamber ordered the Registry to put in place further restrictions to the Accused's contact regime.³⁰
23. On 20 April 2015, the Registry filed an addendum to the First Report.³¹
24. On 29 April 2015, the Chamber directed the Registry to make available to the Prosecution the First Report, together with annexes 1, 2, 4, 5 and 6, without redactions, as well as annexes 3, 8 and 9, with redactions. The Chamber also directed the Registry to make available to the Prosecution the Addendum, without redactions, together with redacted versions of its annexes.³²
25. On 5 June 2015, the Prosecution requested authorisation to change the order of appearance of its first witnesses.³³
26. On 15 June 2015, the Legal Representatives³⁴ and the Defence³⁵ filed their responses to the Prosecution's 5 June 2015 request.
27. On 19 June 2015, the Prosecution urgently requested [REDACTED].³⁶
28. On 22 June 2015, the Chamber issued its "Decision on Prosecution request to change the order of appearance of the first witnesses".³⁷

²⁹ ICC-01/04-02/06-504-Conf-Exp.

³⁰ ICC-01/04-02/06-508-Conf-Exp.

³¹ ICC-01/04-02/06-504-Conf-Exp.

³² ICC-01/04-02/06-578-Conf-Exp.

³³ ICC-01/04-02/06-630-Conf-Exp with confidential redacted version at ICC-01/04-02/06-630-Conf-Red and public redacted version at ICC-01/04-02/06-630-Red2.

³⁴ ICC-01/04-02/06-643-Conf with public redacted version at ICC-01/04-02/06-643-Red.

³⁵ ICC-01/04-02/06-644-Conf-Exp with *ex parte* redacted version at ICC-01/04-02/06-644-Conf-Exp-Red and public redacted version at ICC-01/04-02/06-644-Red2.

³⁶ [REDACTED].

29. On 23 June 2015, the Chamber issued an order taking interim measures in relation to the Prosecution's 19 June 2015 request.³⁸
30. On 25 June 2015, the Defence informed the Chamber of steps taken following the Chamber's 23 June 2015 order.³⁹
31. On 3 July 2015, the Chamber issued an order requesting final submissions on restrictions on the Accused's contacts and related matters.⁴⁰
32. On 10 July 2015, the Chamber issued its "Confidential redacted version of 'Decision on reclassification of the second Registry's report on *post-factum* review'" in which it, *inter alia*, ordered the Registry to redact the Second Report and accompanying annexes as directed and make them available to the Prosecution.⁴¹

Prosecution's Submissions

The principle of public proceedings

33. The jurisprudence of this Court highlights the importance of the principle of publicity of proceedings.⁴² In *Kenyatta*, Trial Chamber V(B) noted that this principle "underpins the Court's statutory framework" and considered that it is "bound to 'safeguard[...] the fundamental principle of public hearings and ensur[e] that the record of the case is as complete as possible'".⁴³
34. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia likewise supports the importance of this principle; "there is a public

³⁷ ICC-01/04-02/06-661-Conf-Exp with confidential redacted version at ICC-01/04-02/06-661-Conf-Red and public redacted version at ICC-01/04-02/06-661-Red2 ("Decision on order of witnesses").

³⁸ ICC-01/04-02/06-667-Conf-Exp.

³⁹ ICC-01/04-02/06-673-Conf-Exp.

⁴⁰ ICC-01/04-02/06-697-Conf-Exp-Red.

⁴¹ ICC-01/04-02/06-710-Conf-Exp-Red.

⁴² ICC-02/05-03/09-501, paras.43-44; ICC-01/05-01/08-3063-Red, para.20; ICC-01/04-01/07-T-189-ENG, p.10, lns.12-20.

⁴³ ICC-01/09-02/11-988, para.13.

interest in the workings of courts generally (including this Tribunal) – not just in the hearings, but in everything to do with their working – which should only be excluded if good cause is shown to the contrary.”⁴⁴

35. This Court’s jurisprudence also acknowledges that the principle of publicity of proceedings is not absolute since a balancing exercise must be carried out in order to consider the Chamber’s duties under article 68(1) of the Statute.⁴⁵ Therefore any information tending to identify victims and witnesses in the decisions and related filings should be redacted.⁴⁶ These redactions should extend to information identifying those alleged to be interfering with witnesses since revealing such information may in turn reveal the witnesses’ identities.

36. Such an approach would be consistent with the principle of publicity of proceedings and would fulfil the Chamber’s duty to protect victims and witnesses. It would also be in line with the justification provided in relation to the confidentiality level of the Prosecution’s first request regarding allegations of witness interference.⁴⁷

37. Further, this approach would be consistent with that adopted by the Defence in its 10 July 2015 request for leave to appeal in which it notes that it filed a public redacted version “[i]n the interests of justice and for the sake of the publicity of the proceedings”.⁴⁸ The Defence also stated that the redactions applied to that public redacted version “are limited to what is strictly

⁴⁴ *Prosecutor v Brđanin et al*, IT-99-36, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para.55.

⁴⁵ ICC-01/05-01/08-3063-Red, para.20; ICC-01/04-01/07-T-189-ENG, p.10, ln.21 – p.11, ln.5.

⁴⁶ Indeed, when considering whether making public certain documents, regarding, *inter alia*, allegations as to money being promised to witnesses, “would have a negative impact on the physical or psychological well-being of witnesses and victims” Trial Chamber III noted the possibility of publication “with the necessary redactions in order to protect the Relevant Witnesses’ identities”, see ICC-01/05-01/08-3063-Red, para.25.

⁴⁷ 8 August 2014 Request, para.6 (“This Request is classified as “Confidential, *EX PARTE* – only available to the Prosecution and VWU,” as it contains highly sensitive information which could impact the security of Prosecution witnesses and their family members (such as, their identities)”; See also 8 August 2014 Request, para.7 (“The redacted version of the Request is classified as Confidential as it addresses issues of witness safety and discusses personal details of individuals whose cooperation with the Prosecution is confidential”).

⁴⁸ ICC-01/04-02/06-709-Red, para.9.

necessary to achieve the aim sought by the confidential classification of the various filings referred to” noting the “imperative necessity to protect the safety of witnesses, while at the same time favouring the publicity of the Court’s proceedings”.⁴⁹

38. The Prosecution initially filed its requests on an *ex parte* basis with confidential redacted versions in order to protect witnesses and ongoing investigations. At this stage, the protections can remain in place while informing the public of the general allegations.

Information regarding allegations of witness interference is already in the public domain

39. The need for public redacted versions of the decisions also arises from the fact that some information regarding allegations of witness interference has already been made public in this case.

40. In *Bemba*, Trial Chamber III considered the fact that issues addressed in documents which the Defence sought to render public, in particular allegations as to money being promised to witnesses, were already in the public domain and that in the absence of a detailed explanation of the relevant context this may cause undue speculation in relation to the issues addressed in the documents.⁵⁰ Trial Chamber III therefore considered that the publication of the documents to the public “may provide the relevant context and prevent any possible misunderstanding”.⁵¹

⁴⁹ ICC-01/04-02/06-709-Red, para.10.

⁵⁰ ICC-01/05-01/08-3063-Red, para.24.

⁵¹ ICC-01/05-01/08-3063-Red, para.24.

41. There are references to alleged witness interference in this case in the public record. The public redacted version of the Chamber's "Decision on Prosecution request to change the order of appearance of the first witnesses"⁵² provides:

Turning now to the merits of the Request, the Chamber has taken into consideration the parties' submissions, VWU Observations, as well as other information placed before the Chamber related to witness' security. The Chamber is satisfied that potential security concerns exist in relation to the Witnesses and therefore considers that it is warranted to modify the order of witnesses, as well as the schedule for the presentation of evidence⁵³

See e.g. Victims and Witnesses Unit's report on potential interferences with some Prosecution witnesses and other individuals, 9 June 2015, ICC-01/04-02/06-634-Conf-Exp with *ex parte* annexes [...] ⁵⁴

42. The public redacted version of the Defence's 10 July 2015 request for leave to appeal also refers to the challenge to the integrity of Defence investigations:

[...] the Chamber arbitrarily setting a new date for the commencement of the trial [...] fails to take into account the impact of the [REDACTED] challenging the integrity of the Defence investigations, which could have been avoided, had the Prosecution addressed this confidential issue with the Defence [...] ⁵⁵

43. The public redacted version of the Prosecution's request for delayed disclosure contains the title "*Instances of alleged interference*".⁵⁶

44. Further, more specific information may already be in the public domain, at least in part. As noted in the Prosecution's request for [REDACTED], [REDACTED] appears to have revealed this information to members of the public by stating

⁵² Decision on order of witnesses.

⁵³ Decision on order of witnesses, para.8 (footnotes omitted).

⁵⁴ Decision on order of witnesses, fn.11.

⁵⁵ ICC-01/04-02/06-709-Red, para.5(iii), *see also* paras.31, 38, 39, 41.

⁵⁶ ICC-01/04-02/06-461-Red2, p.8.

that the Accused's telephone calls from the Detention Centre had been restricted as a result of his allegedly having threatened certain witnesses.⁵⁷

The reasons for postponing the commencement of trial are not clear to the public

45. The fact that the reasons for the Chamber's decision to postpone the commencement of the trial are not clear to the public is another factor in support of making the filings and decisions public.

46. The public redacted version of the Defence request for adjournment of the proceedings does not clearly set out the basis for its request.⁵⁸ The unredacted excerpts merely refer to the impossibility of proceedings being conducted fairly, a lack of necessary resources, and possible bias on the part of the Chamber.⁵⁹

47. Neither does the Chamber's 3 July 2015 oral ruling postponing the commencement of the trial clearly state the basis.⁶⁰ The Presiding Judge simply noted that this was being done "to ensure the fairness of the trial and the rights of the accused."⁶¹

48. Rendering the filings and decisions public would therefore serve to avoid undue, and incorrect, speculation on the trial's postponement.

Information on witness interference is publicly available in other cases

49. In *Ongwen*, the Single Judge of Pre-Trial Chamber II issued public decisions with regard to allegations made, and measures taken, against Dominic Ongwen pursuant to regulation 101(2) of the RoC.⁶² The Single Judge specifically granted the Prosecution request that once the requested interim measures are put in place,

⁵⁷ See [REDACTED].

⁵⁸ ICC-01/04-02/06-677-Corr-Red.

⁵⁹ ICC-01/04-02/06-677-Corr-Red, see e.g. paras.1, 3, 4, 5, 36, 72.

⁶⁰ ICC-01/04-02/06-T-22-CONF-ENG, pp.4-5 (open session).

⁶¹ ICC-01/04-02/06-T-22-CONF-ENG, p.5 lns.3-4 (open session).

⁶² See ICC-02/04-01/15-242; ICC-02/04-01/15-254.

the Prosecution request be reclassified as “public”, and ordered the Prosecution to file the necessary redactions to the annex of its request.⁶³ The Defence also filed a public redacted version of its response to the Prosecution request.⁶⁴

50. In *Ruto*, allegations of a scheme, by persons acting for the benefit of the Accused, to persuade Prosecution witnesses to withdraw or recant their evidence are also in the public record.⁶⁵

Public redacted versions could deter witness interference

51. It is in the interests of justice to seek to deter attempts to interfere with witnesses. Providing public redacted versions of the decisions could contribute to the deterrence of any attempts at witness interference in the present case and possibly other cases.

52. There is precedent for this position. The Single Judge in *Ongwen* held that his decision setting out the allegations of interference and granting the Prosecution access to information on Dominic Ongwen’s communication was public and, therefore, “serves the purpose of making clear that such activities will not be tolerated.”⁶⁶

53. Moreover, it is important that witnesses know whether and to what extent their concerns have been addressed by the Chamber. Witness interference has been a challenge for the judicial activities of the Court in several cases and it is paramount that witnesses, victims and the public are correctly informed that the Parties and Chambers will address such behaviour.

⁶³ ICC-02/04-01/15-242, para.4.

⁶⁴ ICC-02/04-01/15-248-Red.

⁶⁵ See ICC-01/09-01/11-1866-Red.

⁶⁶ ICC-02/04-01/15-254, para.10.

No prejudice to the Accused

54. Issuing public redacted versions of the decisions and related filings does not prejudice the Accused.

55. In *Kenyatta*, Trial Chamber V(B) rejected the Defence argument that a public redacted version of the Pre-Trial Brief should not be issued since it would damage Mr Kenyatta's reputation given that the evidence in that case was not sufficient to go to trial.⁶⁷ Trial Chamber V(B) noted that "[m]oreover, the principle of publicity, which encompasses the charges and factual allegations against an accused, is not dependant on the ultimate determination, if any, made in relation to those allegations."⁶⁸

Conclusion

56. Based on the foregoing, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 15th day of January 2016
At The Hague, the Netherlands

⁶⁷ ICC-01/09-02/11-988, para.15.

⁶⁸ ICC-01/09-02/11-988, para.15.