

**Cour
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Internationale**

**International
Criminal
Court**



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Date: **3 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***

Confidential

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

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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Other

Prosecution's Submissions

1. The Defence Request for the reclassification of four *ex parte* filings¹ should be rejected since the classification of these filings is justified and the Defence provides no cogent reasons for the Chamber to determine otherwise.
2. Contrary to the Defence assertions, the Accused's rights and his Defence team's ability to represent him have not been prejudiced by the classification of these four filings. Indeed, it is the Prosecution's ongoing investigations that will be prejudiced if the Defence Request were to be granted at this stage.

Confidentiality

3. This filing is classified as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court² since it responds to a confidential submission. The Prosecution requests the Chamber's authorisation to reclassify this filing as "Public" since it contains no confidential information.

Procedural Background

4. During the 5 December 2017 Status Conference, the Prosecution noted that it required a decision by the Chamber on an *ex parte* request in order to determine whether the issue to which the request related would be relevant to the Prosecution's case in rebuttal.³ The Defence noted its concern with the *ex parte* nature of the request and asked to be informed of the issue to which it related.⁴
5. During the 7 December 2017 hearing, the Defence reiterated its concerns.⁵ In response, the Prosecution stated that *ex parte* filings are appropriate in certain

¹ ICC-01/04-02/06-2167-Conf ("Defence Request").

² "Regulations".

³ ICC-01/04-02/06-T-258-ENG ET, p. 8, lns. 2-4 (open session).

⁴ ICC-01/04-02/06-T-258-ENG ET, p. 8, ln. 19 – p. 9, ln. 1 (open session).

⁵ ICC-01/04-02/06-T-260-CONG-ENG ET, p. 100, ln. 22 – p.101, ln. 19 (private session).

circumstances and that once the Party provides its justification for such classification it is up to the Chamber to determine whether such classification is appropriate.⁶ The Prosecution also noted that the *ex parte* request to which it referred on 5 December 2017 was procedural and did not require the Chamber's adjudication of evidence.⁷ The Presiding Judge then stated that he could not provide further information, confirmed the information provided by the Prosecution about the *ex parte* request, and that if the Chamber determined that there was any reason to reconsider the classification of this filing, it would react accordingly.⁸

6. On 22 December 2017, the Chamber directed the Prosecution to file a preliminary request for the presentation of rebuttal evidence by 11 January 2018 and stated that, if necessary, the Prosecution may complement this preliminary request within one week of the close of the Defence's presentation of evidence.⁹
7. On 22 December 2017, the Defence filed the Defence Request.

Prosecution's Submissions

8. The *ex parte* filings referred to in the Defence Request¹⁰ comprise of two Prosecution requests and two corresponding decisions.¹¹ Pursuant to regulation 23bis(1) of the Regulations, in both its requests, the Prosecution provided the factual and legal basis for the classification adopted, namely that 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

⁶ ICC-01/04-02/06-T-260-CONG-ENG ET, p. 101, ln. 23 - p. 102, ln. 2 (private session).

⁷ ICC-01/04-02/06-T-260-CONG-ENG ET, p. 102, lns. 3-7 (private session).

⁸ ICC-01/04-02/06-T-260-CONG-ENG ET, p. 102, lns. 9-12 (private session).

⁹ ICC-01/04-02/06-2166, para. 16.

¹⁰ Defence Request, paras. 4, 27, fns. 4, 23.

¹¹ ICC-01/04-02/06-2121-Conf-Exp; ICC-01/04-02/06-2147-Conf-Exp; ICC-01/04-02/06-2148-Conf-Exp; ICC-01/04-02/06-2157-Conf-Exp.

notified.”¹² This is fully consistent with the explanation provided by the Prosecution during the 5 December 2017 Status Conference,¹³ and by the Prosecution and the Presiding Judge during the 7 December 2017 hearing.¹⁴

9. The Defence provides no justification for the reclassification of any of the four filings. Further, its arguments that the existence of these *ex parte* filings violates the Accused's right to a fair trial¹⁵ and renders the Defence “unable to perform its duty and efficiently protect the rights of Mr Ntaganda”¹⁶ are unfounded. Indeed, the jurisprudence cited by the Defence does not support its blanket statement that “[a]n essential requirement of a fair trial is that both parties are informed of *all* submissions and information relevant to the case before the Trial Chamber”¹⁷, since it also recognises that *ex parte* filings may at times be necessary and justified.¹⁸
10. Given that the Chamber has not required the reclassification of the two *ex parte* requests, nor of its corresponding decisions, it, like the Prosecution, observes no reason to modify the existing classifications. None of the Defence's arguments lead to a different conclusion. As noted, reclassifying the four *ex parte* filings would only prejudice the Prosecution's ongoing investigations concerning potential rebuttal evidence.

¹² ICC-01/04-02/06-2121-Conf-Exp, para. 6; ICC-01/04-02/06-2148-Conf-Exp, para. 2. The Defence misrepresents the Prosecution's submissions of 7 December 2017, since the Prosecution did not state that it filed any *ex parte* request concerning Detention Centre litigation (see Defence Request, paras. 3, 25(ii)). Rather, the Prosecution referred to such litigation as an example of instances in which it is appropriate for certain filings to be classified as *ex parte*, see ICC-01/04-02/06-T-260-CONG-ENG ET, p. 101, ln. 23 - p. 102, ln. 2 (private session) where the Prosecution stated: “as the Chamber is aware, as we've argued previously in relation to detention centre litigation, there are appropriate moments at which parties may bring filings on an *ex parte* basis. It's up to the party to justify that classification and it's ultimately up to the Chamber to agree and approve it”.

¹³ ICC-01/04-02/06-T-258-ENG ET, p. 8, lns. 2-4 (open session).

¹⁴ ICC-01/04-02/06-T-260-CONG-ENG ET, p. 101, ln. 23 - p. 102, ln. 12 (private session).

¹⁵ Defence Request, paras. 24, 29, 32.

¹⁶ Defence Request, para. 28.

¹⁷ Defence Request, para. 15 (emphasis added).

¹⁸ See Defence Request, paras. 16-19, fns. 10-13.

11. The Chamber's order regarding the Prosecution's filing of a preliminary request for the presentation of rebuttal evidence¹⁹ 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.

Conclusion

12. For the foregoing reasons, the Defence Request should be rejected.



Fatou Bensouda
Prosecutor

Dated this 3rd day of January 2018
At The Hague, the Netherlands

¹⁹ ICC-01/04-02/06-2166, para. 16.