

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-02/06**
Date: **17 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

Response to Confidential redacted version of "Prosecution preliminary submissions concerning the presentation of evidence in rebuttal", 11 January 2018

Source: Defence Team of Mr Bosco Ntaganda

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

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Other

**Response to Confidential redacted version of “Prosecution preliminary
submissions concerning the presentation of evidence in rebuttal”, 11 January 2018¹**

INTRODUCTION

1. The Defence objects to the Prosecution Notice as not in compliance with the Trial Chamber’s Order of 22 December 2017.² In addition, the Defence objects to the provision of information to the Trial Chamber by the Prosecution on an *ex parte* basis. The appropriate remedy is to declare that the Notice does not comply with the Trial Chamber’s Order, to reject the filing, and/or to order that all redacted portions of the Notice be disclosed to the Defence immediately.

APPLICABLE LAW

2. The Statute and Rules expressly authorise *ex parte* submissions in five situations.³ Articles 63(1) and 67(2) of the Statute instruct that at all other stages of trial proceedings, the “accused shall be present.” One of the statutory exceptions enshrined in the Rules is Rule 81(2):

Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

¹ ICC-01/04-02/06-2179-Conf-Red (“Prosecution Notice” or “Notice”).

² Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 16 (“Order”).

³ See *Lubanga*, Decision on the procedures to be adopted for ex parte proceedings, 6 December 2007, ICC-01/04-01/06-1058, para. 4.

3. This Rule is not dissimilar from Rule 66(C) of the ICTY Rules of Procedure and Evidence which, as of the date of the adoption of the ICC Rules of Procedure and Evidence and today, provides:

Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

4. The ICTY Appeals Chamber, addressing the circumstances in which an *ex parte* filing within this expressly defined exception could be justified, instructs that the party making the application must exercise "some care" in explaining why the information should be received *ex parte*, and rejected the possibility of not informing the other party of the existence of the application:

The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in circumstances where, for example, the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact of the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application. The party seeking relief on an *ex parte* basis in such a case must identify with some care why the disclosure of the fact of the application, or of its detail, to the other party to the proceedings would cause such unfair prejudice. In the present case, the prosecution has not identified the basis upon which it claims to be entitled to file its application to the Appeals Chamber upon a wholly *ex parte* basis, although (as already stated) the prosecution has disclosed to Kordic the fact of the application itself. Applications made by the prosecution under Rule 66(C) – seeking to be relieved of its obligation to disclose material where the disclosure "may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State" – may not be filed on a wholly *ex parte* basis.⁴

⁴ *Kordic & Cerkez*, Order to Prosecution to Re-file its Ex Parte Filing in Response to Motion by Kordic for Disclosure in Relation to Witness "AT", 31 March 2003, paras. 4-5. See *Brdanin & Talic*, Decision on

5. The Pre-Trial Judge in *Lubanga*, recognising that *ex parte* submissions “constitute a restriction on the rights of the Defence,” declared that such submissions in the context of rule 81 of the ICC Rules:

shall only be permitted subject to the Prosecution showing in its application [to make such submissions] that:

- i. it serves a sufficiently important objective;
- ii. it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and
- iii. the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.⁵

6. Furthermore, the Pre-Trial Judge, as had the ICTY Appeals Chamber before her, required that the Defence must be informed of any request to make *ex parte* submissions, at least in respect of that particular rule.⁶

Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 11 (“The possible conflict between those two decisions (*Blaškić* appearing to state that protective measures can *never* be sought *ex parte*, and *Simić* permitting such applications when the person to be protected would otherwise be identified) is somewhat reduced by the subsequent decision in the *Blaškić* case permitting such applications on an *ex parte* basis in certain circumstances. The Trial Chamber accepts the statement in the *Simić* Decision as the correct one, but it emphasises that that statement does not authorise *ex parte* applications, as opposed to *confidential* applications, for protective measures in *every* case. The statement must be understood in the light of the general principle stated in that case: ‘The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact [of] the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.’ It was also made clear in the *Simić* Decision that the party seeking relief on an *ex parte* basis must identify with some care why the disclosure of the detail of the application to the other party to proceedings would cause such unfair prejudice.”)

⁵ *Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, ICC-01/04-01/06-108-Corr, para. 13.

⁶ *Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, ICC-01/04-01/06-108-Corr, para. 17 (“the Defence must: i. be informed of the existence and legal basis of any Prosecution *ex parte* application under rule 81 (2) or (4) of the Rules; ii. be allowed the opportunity to present submissions on (i) the general scope of the provisions that constitute the legal basis of the Prosecution’s *ex parte* application; and (ii) any other general matter which in the view of the Defence could have an impact on the disposition of the Prosecution application; iii. be provided, at the very least, with a redacted version of any decision taken by the Chamber in any *ex parte* proceedings under rule 81 (2) or (4) of the Rules held in the absence of the Defence.”)

7. The Appeals Chamber subsequently held that the Pre-Trial Chamber had erred in categorically excluding the possibility that such applications could be kept secret from the other parties.⁷ In so doing, the ICC Appeals Chamber departed from the guidance of the ICTY Appeals Chamber that the accused must be informed, at the least, of the existence of an application to make an *ex parte* filing.⁸ The ICC Appeals Chamber did not, however, disapprove the Pre-Trial Judge's two-step approach, nor did it suggest any error in the test to be met as a prerequisite to receiving any such submissions.⁹ Indeed, the Prosecution in other proceedings before this Court has previously acknowledged that this is the procedure that must be followed:

A party making an *ex parte* application shall notify the other party or participants of the fact of that application and of the legal basis, unless to do so would prejudice the interests being protected by the *ex parte* nature of the application. And second, if the party making an *ex parte* application proposes not to notify the other party or the participants of the fact and/or the legal basis of that application, then the party should set out its reason for doing so in the application itself.¹⁰

8. An application to make *ex parte* submissions should be granted only within one of the statutory exceptions prescribed by the Statute or Rules and, even within those exceptions, should be permitted only to the extent strictly

⁷ *Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, para. 67 ("The decision of the Pre-Trial Chamber that is the object of the third ground of appeal does not provide for any flexibility. The Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable. Nevertheless, there may be cases where this approach would be inappropriate. Should it be submitted that such a case arises, any such application would need to be determined on its own specific facts and consistently with internationally recognized human rights standards, as required by article 21 (3) of the Statute. By making a decision that does not allow for any degree of flexibility, the Pre-Trial Chamber precluded proper handling of such cases.")

⁸ It does not appear that the Appeals Chamber, in making this decision, was informed of the contrary jurisprudence at the ICTY.

⁹ See *Lubanga*, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058, para. 8 ("the Appeals Chamber [...] whilst not disagreeing with the judge's assessment of the limitations to be imposed on *ex parte* proceedings, reversed her decision that whenever an application is filed *ex parte* under Rule 81 the other participant must be made aware in an *inter partes* filing of the fact that such an application was filed as well as its legal basis [...].")

¹⁰ ICC-01/04-01/06 (Transcript, 2 October 2007), p. 7.

necessary and concretely justified. As recently stated by the Prosecution in another proceeding, such *ex parte* submissions "should only be allowed to the extent that they were absolutely necessary and limited."¹¹

9. The policy reason underpinning this stringency is the damage to the actual and perceived fairness of the trial if one party is permitted to offer submissions, without the opportunity for prompt and direct response by the accused, that may influence the trier-of-fact's eventual assessment of the evidence. As explained by one adversarial appellate court dealing with the less prejudicial situation of *ex parte* submissions to a presiding judge who was not the trier-of-fact:

Ex parte proceedings "can only be justified and allowed by compelling state interests." [...] "An *ex parte* communication between a trial court and government counsel '[i]n addition to raising questions of due process ... involve[s] a breach of legal and judicial ethics. Regardless of the propriety of the court's motives in such a case ... the practice should be discouraged since it undermines confidence in the impartiality of the court.' ("The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte* because the court does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties may participate."). Although there are circumstances where an *ex parte* communication might be "overlooked," "the burden of proving lack of prejudice is on the [government], and it is a heavy one." The *ex parte* conference in the instant case occurred at a time when the defense was arguing that the [statements] were subject to disclosure [...] The government has proffered no explanation why the defense was denied an opportunity to participate in a conference at such a critical stage of the proceedings. We refuse to condone conduct that "undermines confidence in the impartiality of the court."¹²

¹¹ See *Bemba*, ICC-01/05-01/08-T-372 (9 January 2018), p. 30. See also *id.* p. 31 ("It's important to note that the *ex parte* submissions of the Prosecution were limited to what was strictly necessary for the legitimate purpose being pursued.")

¹² United States, *US v. Minsky*, 963 F2d 870 (6th Cir 1992) p. 874 (citations omitted).

SUBMISSIONS

(i) The Prosecution Has Failed to Comply With the Trial Chamber's Deadline for Filing a Preliminary Request for Leave to Present Rebuttal Evidence

10. The Prosecution Notice has been filed in purported compliance with an "Order" of the Trial Chamber.¹³ This Order sets the deadline for filing "a preliminary request for the presentation of rebuttal evidence":

Noting that the Defence's presentation of evidence is drawing to a close, the Chamber considers that the Prosecution should, already at this point, be in a position to assess whether it wishes to present certain rebuttal evidence in relation to the evidence presented by the Defence so far. Under these circumstances, and mindful of its duty to ensure that the trial is expeditious, the Chamber directs the Prosecution to file a preliminary request for the presentation of rebuttal evidence by **11 January 2018**, to be complemented within one week after the close of the Defence's presentation of evidence, if necessary.

11. The allowance that the Notice may be "complemented" indicates that the Prosecution's primary deadline for bringing the application for rebuttal evidence was 11 January 2018, with an opportunity to supplement such a notice in respect of Defence evidence heard thereafter. The latter deadline, accordingly, avoids the prejudice that could otherwise arise from not giving the Prosecution an opportunity to apply to introduce rebuttal evidence in respect of evidence heard after the 11 January 2018 deadline. The Order was manifestly not intended to allow the Prosecution to delay bringing any motion to introduce rebuttal evidence until one week after the close of Defence evidence. Filing 2174 reflects the Prosecution's understanding that it was required to "file a preliminary request for the presentation of rebuttal evidence by 11 January 2018."¹⁴

¹³ Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 16.

¹⁴ 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, 3 January 2018, ICC-01/04-02/06-2174, para. 6 ("On 22 December 2017, the Chamber directed the Prosecution to file a preliminary request for

12. The Prosecution has not complied with the Trial Chamber's Order. The stated premise of the Order was that the Prosecution "should, already at this point, be in a position to assess whether it wishes to present certain rebuttal evidence in relation to the evidence presented by the Defence so far."¹⁵ The Prosecution Notice, however, disputes this premise. After a series of submissions that have been with-held from the Defence, the Prosecution concludes in respect of a first category of undisclosed evidence that it "will then determine whether to request its admission as rebuttal evidence,"¹⁶ and in respect of second category that it "will [REDACTED] determine whether it can request the Chamber to authorise his testimony in rebuttal."¹⁷ The Prosecution then goes on to state – contrary to deadline prescribed in the Order – that it is "not currently able to submit a request for the admission of evidence in rebuttal."¹⁸ Notwithstanding the heavy redactions that have been applied, it is apparent that the Prosecution Notice – contrary to the deadline set out in the Trial Chamber Order – contains no articulated request for the admission of evidence in rebuttal.
13. The appropriate course of action, if the Prosecution considered that it could not meet the deadline, was to request an extension. This was not done. Instead of allowing the Trial Chamber to adjudicate such a request, the Prosecution purports to unilaterally extend the deadline by simply declaring – on the date that the application was due – that it is not prepared to meet the deadline.
14. The Prosecution's failure to comply with the deadline imposed by the Trial Chamber prejudices the Accused for three reasons.

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.")

¹⁵ Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 16.

¹⁶ Prosecution Notice, para. 2 (underline added).

¹⁷ Prosecution Notice, para. 3 (underline added).

¹⁸ Prosecution Notice, para. 5.

15. First, the Prosecution's non-compliance with the deadline interferes with the Trial Chamber's objective of discharging "its duty to ensure that the trial is expeditious."¹⁹ The Notice provides none of the details that would be necessary to allow the Defence to initiate investigations, or to prepare a response to the Prosecution request to introduce rebuttal evidence. The Notice, accordingly, serves no useful purpose in terms of expediting proceedings, and ensuring compliance with the right of the Accused under Article 67(1)(c) to be tried without undue delay. This right should be a matter of particularly anxious concern to the Trial Chamber given that Mr Ntaganda is in detention.
16. Second, the Prosecution's non-compliance with the deadline imposed by the Trial Chamber prolongs the non-disclosure of *ex parte* submissions. This Trial Chamber has previously expressed its view that, in order to minimise the danger of prejudice, *ex parte* communications must be disclosed to the Defence as soon as possible.²⁰
17. Third, the Trial Chamber set the 11 January 2018 in full awareness of the very *ex parte* submissions that the Prosecution now relies upon to justify non-compliance with that deadline. The matters encompassed by the *ex parte* submissions, accordingly, do not justify the Prosecution's non-compliance with deadline set by the Trial Chamber.
18. The appropriate remedy is a declaration that the Prosecution has failed to comply with the deadline prescribed in the Trial Chamber's Order, and that

¹⁹ Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 16.

²⁰ Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, ICC-01/04-02/06-1883, paras. 50-51 ("In the present case, *ex parte* classification of the relevant proceedings was initially ordered by the Pre-Trial Chamber on the basis that disclosure of the information would have compromised ongoing investigations, as provided for under Rule 81(2) of the Rules. In that context, the Chamber reminded the Prosecution on two occasions that the Article 70 investigations should be concluded as expeditiously as possible, and that any related applicable disclosure of information to the Defence should be made as soon as possible. [...] the Chamber gave specific instructions to the Prosecution in this regard as to concluding the investigations swiftly and effecting relevant disclosure in the *Ntaganda* case, with the specific purpose of minimising any prejudice to the accused.")

any further application by the Prosecution for rebuttal evidence should be strictly limited to rebuttal of Defence evidence heard after 11 January 2018.

(ii) The Prosecution Has Failed to Justify Submitting Portions of Its Filing to the Trial Chamber Ex Parte

19. A substantial portion of the Prosecution's submissions to the Trial Chamber have been with-held from the Defence. Text that has been given to the Trial Chamber has been replaced in the version given to the Defence with the notation "[REDACTED]." The Defence is not informed of the content of the submissions that have been made to the Trial Chamber *ex parte*.
20. The justification offered for these redactions is that its Notice "refers to filings and decisions with the same classification and concerns ongoing Prosecution investigations related to the collection of potential rebuttal evidence. Notifying the Defence of these investigations at this stage may prejudice the investigations."²¹ The last sentence is substantiated with reference to a recent decision of the Trial Chamber that held as follows:

the Chamber notes the information provided by the Prosecution in its Response regarding the context of and the legal basis for the *ex parte* classification of the relevant filings, and considers that no further clarification by the Chamber is required. Further, the Chamber notes that the *ex parte* classification of the two Prosecution requests has been accepted by the Chamber as necessary in order not to prejudice ongoing investigations, and the Chamber sees no reason to reconsider its assessment and to order their reclassification at this stage. Instead, in line with usual practice and in accordance with Regulation 23 *bis*(3) of the Regulations, the Prosecution shall request the reclassification of the relevant filings when the basis for their *ex parte* classification no longer exists.²²

21. The Defence objects: (i) to the lack of substantiation of these *ex parte* submissions; and (ii) to any portion of these submissions being *ex parte*.

²¹ Prosecution Notice, para. 6.

²² Decision on Defence request for reclassification of *ex parte* filings, 8 January 2018, ICC-01/04-02/06-2177, paras. 7-8.

22. A party is required, separate and apart from the substance of the *ex parte* filing, to show that the *ex parte* filing is justified. The Prosecution Notice does not appear to do so. No section of the filing even attempts to address the three-part test set out in *Lubanga* of: (i) a sufficiently important objective; (ii) no lesser or alternative measures available; and (iii) proportionality.²³ Non-disclosure of the arguments in relation to any of these three criteria to the Defence can be justified only if “absolutely necessary” to preserve the interest that is the object of the *ex parte* submission.
23. The Prosecution Notice does not, even in the most general terms, respond to this three-part test. Not even the gist of the justification for the *ex parte* submissions has been set out. On this basis alone, the *ex parte* filing is not justified, and the redactions should be lifted.
24. The Trial Chamber’s previous ruling authorising *ex parte* submissions in respect of a previous and ostensibly related submission to the Trial Chamber does not justify the filing of any portion of its Notice *ex parte* for four reasons.
25. First, the context and circumstances of the present filing is different than the previous filings, requiring separate justification. Second, the Trial Chamber’s conclusion in respect of the previous submissions was reached without the benefit of any separate application disclosing the existence of, and justifying, the previous *ex parte* submissions. Third, time has now passed since the previous applications, which may be a relevant consideration to their continued justification. Fourth, the Prosecution appears now to offer a lower justification than was previously accepted by the Trial Chamber: “may

²³ *Lubanga*, Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, 19 May 2006, ICC-01/04-01/06-108-Corr, para. 13.

prejudice”,²⁴ instead of “necessary in order not to prejudice ongoing investigations.”²⁵

26. Finally, there is a reasonable basis to suspect that the *ex parte* submissions, if they were ever justified, should not be allowed to linger any longer without a response. Submissions can remain *ex parte* pursuant to Rule 81(2) only if the Prosecution can establish the prospect of “prejudice” to its further investigations. The monitoring of Mr Ntaganda’s non-privileged communications prevents him from influencing or interfering with Prosecution investigations. This raises important questions about the content of the Prosecution’s submissions explaining how disclosure to the Defence will cause prejudice to Prosecution investigations.

CONFIDENTIALITY

27. This Defence Response is filed confidential pursuant to Regulation 23*bis* (2) of the Regulations of the Court (“RoC”). However, the Defence requests that the Prosecution Notice and this filing be reclassified public.

CONCLUSION AND RELIEF REQUESTED

28. The Prosecution has failed to comply with the deadline prescribed by the Trial Chamber for filing its application seeking leave to adduce rebuttal evidence. No request for extension of the deadline has been sought, and the non-compliance causes prejudice to the Accused. A declaration is requested instructing the Prosecution that any further request to adduce rebuttal evidence be strictly limited to rebuttal of Defence evidence heard after the expiry of the deadline imposed by the Trial Chamber.

²⁴ Notice, para. 6.

²⁵ Decision on Defence request for reclassification of *ex parte* filings, 8 January 2018, ICC-01/04-02/06-2177, para. 8.

29. The Prosecution has failed to justify the filing of any portion of its Notice *ex parte*. The Trial Chamber is requested to order that the entirety of the Notice be communicated to the Defence without redactions or, in the alternative, that the filing be rejected in its entirety.

RESPECTFULLY SUBMITTED ON THIS 17th DAY OF JANUARY 2018

A handwritten signature in dark ink, appearing to read 'StB' with a stylized flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands