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

Date: **8 February 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

Public redacted version of “Expedited request on behalf of Bosco Ntaganda seeking reclassification of *ex parte* Prosecution filing (ICC-01/04-02/06-2148) and *ex parte* Decision (ICC-01/04-02/06-2157)”, 7 February 2017, ICC-01/04-02/06-2215-Conf

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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Expedited request on behalf of Bosco Ntaganda seeking reclassification of *ex parte* Prosecution filing (ICC-01/04-02/06-2148) and *ex parte* Decision (ICC-01/04-02/06-2157)

INTRODUCTION

1. The Defence requests that the Trial Chamber immediately reclassify Prosecution filing ICC-01/04-02/06-2148¹ and Trial Chamber decision ICC-01/04-02/06-2157² from *ex parte* to confidential. The situation has materially changed since the Defence previously made this request:³ the Prosecution has now filed its request to present rebuttal evidence, and the deadline for doing so has now expired.⁴ This is a decisive change, since the Trial Chamber denied the Defence's previous request on the basis that it was "necessary in order not to prejudice ongoing investigations".⁵
2. Filing 2148 and Decision 2157 should now, accordingly, be communicated to the Defence. The statutory basis for non-disclosure, Rule 81(2), is no longer applicable. Even assuming, *arguendo*, that the content of Filing 2148 is not independently subject to disclosure, all substantive communications to the Trial Chamber must be notified to the other party unless a statutory exception applies. This practice is essential for preserving the fairness of adversarial proceedings, and the reasonable perception of fairness. The accused must be in a position to know about any submissions made by the opposing party to the Judges who will determine his fate. The Prosecution's other *ex parte* filing related to rebuttal investigations, which has now been disclosed to the Defence, contains extensive substantive submissions that remained

¹ ICC-01/04-02/06-2148-Conf-Exp ("Filing 2148").

² ICC-01/04-01/06-2157-Conf-Exp ("Decision 2157").

³ Request on behalf of Mr Ntaganda seeking reclassification of Prosecution *ex parte* application(s), 22 December 2017, ICC-01/04-02/06-2167-Conf; Decision on defence request for reclassification of *ex parte* filings, 8 January 2018, ICC-01/04-02/06-2177.

⁴ Prosecution request for presentation of evidence in rebuttal, 30 January 2018, ICC-01/04-02/06-2197-Conf ("Rebuttal Request"); Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 16.

⁵ Decision on Defence request for reclassification of *ex parte* filings, 8 January 2018, ICC-01/04-02/06-2177, para. 9.

undisclosed to the Defence for more than three months. Filing 2148 likely contains similar substantive submissions that should not remain *ex parte*.

3. The Trial Chamber is requested, accordingly, to immediately reclassify Filing 2148, as well as Decision 2157.
4. In the event that some limited information cannot be reclassified, then a redacted version is requested.

APPLICABLE LAW

5. The Statute and Rules expressly authorise *ex parte* submissions in five situations.⁶ 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.⁷

6. 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

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

⁷ Rule 81(2) [underline added].

the Trial Chamber) with the information that is sought to be kept confidential.

7. 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 Kordić 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.⁸

⁸ *Kordić & Čerkez*, Order to Prosecution to Re-file its Ex Parte Filing in Response to Motion by Kordić for Disclosure in Relation to Witness “AT”, 31 March 2003, paras. 4-5 [footnote omitted]. See *Brđanin & Talic*, Decision on 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

8. 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.⁹

9. Furthermore, the Pre-Trial Judge, as had the ICTY Appeals Chamber before her, required that the Defence be informed of any request to make *ex parte* submissions, at least in respect of that particular rule.¹⁰
10. 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.¹¹ In so doing, the ICC Appeals Chamber

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”) [footnotes omitted].

⁹ *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.

¹⁰ *Ibid*, 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”).

¹¹ *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

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.¹² 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.¹³ 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.¹⁴

11. 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 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."¹⁵
12. 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

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").

¹² It does not appear that the Appeals Chamber, in making this decision, was informed of the contrary jurisprudence at the ICTY.

¹³ 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").

¹⁴ ICC-01/04-01/06-T-54-ENG, 2 October 2007, p. 7, ln. 10-17.

¹⁵ See *Bemba*, ICC-01/05-01/08-T-372, 9 January 2018, p. 30, ln. 14-15; See also *id.* p. 31, ln. 3-4 ("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").

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."¹⁶

SUBMISSIONS

(i) The statutory justification for non-disclosure of Filings 2148 and Decision 2157 no longer exists

13. The Prosecution filed its Rebuttal Request on 30 January 2018. The Rebuttal Request [REDACTED].
14. The Defence, after receiving the Rebuttal Request, asked the Prosecution to voluntarily reclassify Filing 2148.¹⁷ The Prosecution responded that it would not do so because "[REDACTED]."¹⁸

¹⁶ United States, *US v. Minsky*, 963 F2d 870 (6th Cir 1992) p. 874 [footnote omitted].

¹⁷ Email from Defence Counsel to Prosecution on 2 February 2018 at 15:27 ("[REDACTED]").

¹⁸ Email from the Prosecution to Defence Counsel on 5 February 2018 at 17:55.

15. All communications by one party to the Trial Chamber must, subject to the statutory exceptions, be notified to the opposing party. Notification is not subject to any additional requirement of materiality. The fact that the communication contains information that may also otherwise be subject to disclosure under Rule 77 is irrelevant; what matters is that the other party must be informed of all communications by a party with the judges who are adjudicating the case, barring a statutory exception.
16. One such statutory exception is Rule 81(2), which permits *ex parte* submissions with the judges where *inter partes* communication “may prejudice further or ongoing investigations.” This is no longer the case in respect of Filing 2148, if it ever was. The Prosecution’s opportunity to seek out and present rebuttal evidence has now closed. Disclosure of Filing 2148, accordingly, can no longer prejudice the Prosecution’s ongoing or further investigations.
17. The Trial Chamber itself indicated that the reason for allowing Filing 2148’s *ex parte* status was that its disclosure could “prejudice ongoing investigations,” but that this justification could change:

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.¹⁹

18. The Prosecution tacitly acknowledges that prejudice is no longer the basis of non-disclosure by shifting its justification to “[REDACTED].” Even assuming that such “[REDACTED]” exist, this is not an authorised justification for *ex parte* submissions under the Statute or the Rules. The category is too broad, too undefined, and too difficult to keep within proper bounds. In fact, it would

¹⁹ Decision on Defence request for reclassification of *ex parte* filings, 8 January 2018, ICC-01/04-02/06-2177, paras. 7-8.

open the door to the Prosecution making substantive submissions that would frequently be expected to include allegations against an accused that he or she is a danger to witnesses. The corrosive effect on fairness of such submissions being made *ex parte* cannot be overstated. This Trial Chamber should not entertain such submissions, and should not permit them to be used as a justification for maintaining the *ex parte* status of Filing 2148.

(ii) The Prosecution's other *ex parte* filing gives cause for concern about the need to reclassify Filing 2148

19. On 29 January 2018, the Prosecution produced a public redacted version of its *ex parte* request for authorisation to send hand-writing samples to its potential expert.²⁰ This document had been filed *ex parte* on 21 November 2017. The request is ten pages long. Aside from generally questioning the Accused's credibility, the filing specifically alleges that certain documents are not authentic, gives an account of the Defence's efforts to obtain and disclose certain documents, and purports to explain the alleged connection between the Prosecution's investigative objectives and the charges against the Accused.²¹ The filing also generally provides a road-map of the purported signature evidence upon which the Prosecution intends to rely to attempt to undermine the credibility of Mr Ntaganda.
20. The First *Ex Parte* Request offers extensive submissions on the case *sub judice*. It describes the evidence purportedly heard by the Trial Chamber; offers a particular account of the conduct of the Defence; expressly casts doubt on the credibility or reliability of Mr Ntaganda's testimony; provides a guide to the Trial Chamber of the evidence on which it may seek to rely; offers an account of the supposed relevance of this information to the charges; and informs the

²⁰ Public redacted version of "Prosecution notification of the consultation of 20 original items by an external expert", 21 November 2017, ICC-01/04-02/06-2121-Conf, 29 January 2018, ICC-01/04-02/06-2121-Red ("First *Ex Parte* Request").

²¹ First *Ex Parte* Request, paras. 7-29.

Trial Chamber of the existence of information not in evidence.²² The Prosecution filing also fails to mention that: (i) the “Hotel Documents” are not in evidence; (ii) had not been tendered by the Defence; and (iii) had not been the object of Mr Ntaganda’s direct testimony. These omissions – which were, in part, noted by the Trial Chamber²³ – do not comply with the stringent obligation on the party advancing an *ex parte* application to draw attention to any material facts that may be adverse to the application.²⁴

21. The Trial Chamber Decision on the First *Ex Parte* Request, notably, did not make any finding that the *ex parte* filing was justified.²⁵ The Trial Chamber nevertheless granted the Prosecution *ex parte* request and appears to have accepted the appropriateness of the *ex parte* filing. On 26 January 2018, the Trial Chamber reclassified its decision to public and *inter partes*.

²² *Ibid.*

²³ Decision on ‘Prosecution notification of the consultation of 20 original items by an external expert’, 11 December 2017, ICC-01/04-02/06-2147, para. 6.

²⁴ *Australia, Thomas A. Edison Ltd v Bullock*, (1912) 15 CLR 679 at 681 (“*Dalglish v Jarvie*, a case of high authority, establishes that it is the duty of a party asking for an injunction *ex parte* to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse for him to say he was not aware of their importance. *Uberrima fides* is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall” [footnote omitted]); *Canadian Paraplegic Assn. (Newfoundland & Labrador) Inc. v. Sparcott Engineering Ltd.*, 1997 Carswell Nfld 275, para. 18 (“On any *ex parte* application, the utmost good faith must be observed. That requires full and frank disclosure of all material facts known to the applicant or counsel that could reasonably be expected to have a bearing on the outcome of the application. Because counsel for the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances”); South Africa, *National Director of Public Prosecutions v Basson*, [2001] ZASCA 111, para. 21 (“Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E – 349B)”); New York Rules of Professional Conduct (Effective April 1, 2009), Rule 3.3 (d) (“In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse”).

²⁵ Decision on ‘Prosecution notification of the consultation of 20 original items by an external expert’, 11 December 2017, ICC-01/04-02/06-2147, para. 3 (“The Request is classified as *ex parte* as it concerns a prospective investigative step envisaged by the Prosecution, the collection of potential rebuttal evidence, of which, the Prosecution submits, the Defence is not entitled to be notified”).

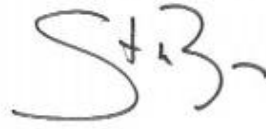
22. The scope of the Prosecution's First *Ex Parte* Request provides reason to believe that Prosecution Filing 2148 is similarly substantive. The potential for such a filing to cause prejudice cannot be over-stated. Even professional judges require the assistance of the opposing party's views in order to be confident that they have a full view of the relevant evidence, and that it has been correctly interpreted. *Ex parte* submissions undermine that central tenant of a fair adversarial proceeding.
23. Filing 2148 and Trial Chamber Decision 2157, accordingly, should be reclassified as confidential. This reclassification should occur urgently and immediately. Filing 2148 may be relevant to the pending Prosecution Rebuttal Request, to which the Defence must respond on 12 February 2018. The Defence should be fully apprised of all submissions relevant to that issue before being called upon to respond.

CONCLUSION AND RELIEF REQUESTED

24. The Defence requests reclassification of Prosecution Filing 2148 and Trial Chamber Decision 2157. There can no longer be a credible claim, if there ever was, that communication of these filings to the Defence is liable to undermine Prosecution investigations. The statutory instruments do not, and should not be interpreted as, permitting a party to make submissions *ex parte* on the basis of "security concerns." The Trial Chamber should be extremely cautious, and is implored to reject, any *ex parte* submissions from the Prosecution that purport to explain these security concerns by impugning Mr Ntaganda.
25. Fairness requires transparency, and transparency requires that there be no submissions before the Trial Judges outside of statutory exceptions of which the other party is not aware. Within the statutory exceptions, the measure must be compelling, necessary and proportional. This is particularly important in respect of wide-ranging evidential submissions such as those that were put before the Trial Chamber in the First *Ex Parte* Request.

26. The Trial Chamber is requested to advance the briefing schedule of the present request and to issue a decision as soon as possible.

RESPECTFULLY SUBMITTED ON THIS 8th DAY OF FEBRUARY 2018

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands