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

Date: **9 March 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

Decision on Defence requests for lifting of redactions and disclosure

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**The Office of Public Counsel for the
Defence**

States' Representatives

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REGISTRY

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Mr Herman von Hebel

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**Victims Participation and Reparations
Section Others**

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 67, and 68 of the Rome Statute, Rule 77 of the Rules of Procedure and Evidence and Regulation 23*bis* of the Regulations of the Court, issues this 'Decision on Defence requests for lifting of redactions and disclosure'.

I. Procedural history

1. This decision addresses two requests from the defence team for Mr Ntaganda ('Defence') for the lifting of redactions and disclosure in relation to a series of filings pertaining to an individual the Office of the Prosecutor ('Prosecution') had previously considered calling as a witness in rebuttal ('Individual'). While the *ex parte* classification of the relevant submissions was initially accepted in order to protect ongoing investigations, the Chamber, upon being informed of the Prosecution's intention not to call the Individual due to security concerns expressed by the latter, and further to Defence requests to that effect, ordered the Prosecution to file redacted or lesser redacted versions of its various filings, with redactions being limited to any information that would reveal the identity of the Individual. The Defence challenges the scope of redactions applied by the Prosecution as going beyond the directions provided by the Chamber.¹
2. On 15 February 2018, further to a request by the Defence,² the Chamber ordered the Prosecution to file a confidential redacted version of a filing relating to an investigative step concerning the Individual ('Filing 2148'),³ as well as a lesser

¹ For further details on the procedural history related to this issue, *see, inter alia*, the Decision on Prosecution request for presentation of evidence in rebuttal (ICC-01/04-02/06-2197-Conf) and related filings, 26 February 2018, ICC-01/04-02/06-2246 ('Rebuttal Decision').

² 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), ICC-01/04-02/06-2215-Conf, paras 3, 4, and 24. The request was filed on 7 February 2018 and notified on 8 February 2018. A public redacted version was filed on 8 February 2018 as ICC-01/04-02/06-2215-Red.

³ Prosecution urgent request for authorisation to refer to a portion of the confidential testimony of the Accused during the course of a witness interview, 12 December 2017, ICC-01/04-02/06-2148-Conf-Exp.

redacted confidential version of its response to the aforementioned request ('Filing 2220'),⁴ with redactions being limited to any information that would reveal the identity of the Individual ('Reclassification Decision').⁵

3. On 16 February 2018, the Prosecution filed a confidential redacted version of Filing 2148,⁶ as well as a lesser redacted version of Filing 2220.⁷
4. On 19 February 2018, the Defence requested the Chamber to: (i) issue an order 'compelling the Prosecution to comply' with the Reclassification Decision ('Request for Lifting of Redactions'), or, in the alternative, issue lesser redacted versions of Filing 2148 and Filing 2220 'prepared by the Chamber itself' ('First Alternative Request'); and (ii) order the Prosecution to disclose 'any and all notes of case-related information provided by the [Individual]' ('Request for Disclosure' and collectively, 'First Request').⁸
5. On 26 February 2018, in line with the time limit set by the Chamber,⁹ the Prosecution filed its response ('First Response'), opposing the First Request in its entirety.¹⁰
6. Also on 26 February 2018, the Chamber ordered the Prosecution to file a lesser redacted version of the 'Prosecution preliminary submissions concerning the

⁴ Prosecution's response to the "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)", ICC-01/04-02/06-2215-Conf, 12 February 2018, ICC-01/04-02/06-2220-Conf-Exp. A confidential redacted version was filed on the same day as ICC-01/04-02/06-2220-Conf-Red.

⁵ Decision on expedited Defence request for reclassification of *ex parte* documents, ICC-01/04-02/06-2230, paras 10-12.

⁶ ICC-01/04-02/06-2148-Conf-Red.

⁷ ICC-01/04-02/06-2220-Conf-Red2.

⁸ Request on behalf of Mr Ntaganda for a further order compelling the Prosecution to comply with the Trial Chamber's directions, ICC-01/04-02/06-2234-Conf, paras 2, 3 and 14.

⁹ Email from the Chamber to the parties and participants on 19 February 2018, at 16:49.

¹⁰ Prosecution's response to the "Request on behalf of Mr Ntaganda for a further order compelling the Prosecution to comply with the Trial Chamber's directions", ICC-01/04-02/06-2234-Conf, ICC-01/04-02/06-2247-Conf.

presentation of evidence in rebuttal’ (‘Filing 2179’),¹¹ with redactions being limited to information that would reveal the identity of the Individual (‘Rebuttal Decision’).¹²

7. On 28 February 2018, the Prosecution filed a confidential lesser redacted version of Filing 2179.¹³
8. On 1 March 2018, the Defence requested the Chamber to: (i) direct the Prosecution to ‘disclose the substantive description of the [Individual]’s anticipated evidence in a way that does not reveal the [Individual]’s identity’, including the portion of the Individual’s testimony that concerns Mr Ntaganda’s testimony (‘Second Request’); or, in the alternative, (ii) issue a fourth lesser redacted version of Filing 2179 ‘prepared by the Chamber itself’ (‘Second Alternative Request’).¹⁴
9. On 6 March 2018, in line with the time limit set by the Chamber,¹⁵ the Prosecution responded to the Second Request (‘Second Response’), opposing it.¹⁶

¹¹ Second confidential redacted version of “Prosecution preliminary submissions concerning the presentation of evidence in rebuttal”, 11 January 2018, ICC-01/04-02/06-2179-Conf-Exp, 25 January 2018, ICC-01/04-02/06-2179-Conf-Red2.

¹² Rebuttal Decision, ICC-01/04-02/06-2246, para. 23.

¹³ Third confidential redacted version of “Prosecution preliminary submissions concerning the presentation of evidence in rebuttal”, 11 January 2018, ICC-01/04-02/06-2179-Conf-Exp, ICC-01/04-02/06-2179-Conf-Red3.

¹⁴ Request for further directions to ensure compliance with the Trial Chamber’s decision directing the filing of a lesser redacted version of Filing 2179, ICC-01/04-02/06-2248-Conf, paras 7 and 9.

¹⁵ Email from the Chamber to the parties and participants on 2 March 2018, at 10:52.

¹⁶ Prosecution’s response to the “Request for further directions to ensure compliance with the Trial Chamber’s decision directing the filing of a lesser redacted version of Filing 2179”, ICC-01/04-02/06-2248-Conf, ICC-01/04-02/06-2250-Conf.

II. Submissions and analysis

i. Submissions

1. Request for Lifting of Redactions

10. The Defence argues that the Prosecution has ‘not complied fully’ with the Reclassification Decision, since ‘[s]ubstantial’ *ex parte* submissions unrelated to the identity of the Individual ‘continue to be withheld from the Defence’. According to the Defence, these submissions appear to concern: (i) the portion of Mr Ntaganda’s testimony that the Prosecution sought to impugn; (ii) the characterisation of that testimony; (iii) the subjects on which it proposed to question the Individual; and (iv) the nature of the security threats to the Individual that purportedly explain why he would not be called as a rebuttal witness.¹⁷ The Defence submits that maintaining the *ex parte* nature of such submissions has ‘[n]o lawful justification’ and would ‘profoundly undermine the fairness of the trial and the administration of justice’, in particular insofar as the proposed areas of questioning are concerned.¹⁸ The Defence further argues that full disclosure should also be required due to the fact that the Prosecution’s *ex parte* submissions were considered ‘unjustified from the start’, since Filing 2148 fell afoul of the guidance given by Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* that *ex parte* filings should not be used ‘merely as a means of keeping the Bench informed of unfolding events’.¹⁹

11. The Prosecution opposes the Request for Lifting of Redactions, on the basis that the redactions: (i) are not ‘substantial’ and, in line with the directions in the

¹⁷ First Request, ICC-01/04-02/06-2234-Conf, paras 1 and 7.

¹⁸ First Request, ICC-01/04-02/06-2234-Conf, paras 8 and 9.

¹⁹ First Request, ICC-01/04-02/06-2234-Conf, para. 10, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007 (*‘Lubanga Decision on Ex parte Filings’*), ICC-01/04-01/06-1058, para. 13.

Reclassification Decision, are necessary to protect the identity of the Individual;²⁰ (ii) do not concern the Prosecution's 'characterisation' of the accused's evidence;²¹ and (iii) are not unfair or inappropriate, but in line with the Chamber's and the Court's previous decisions on these matters.²²

2. Request for Disclosure

12. The Defence argues that any notes of case-related information provided by the Individual are subject to disclosure pursuant to Rule 77 and/or Article 67(2), 'regardless of whether or not they are contained in a formal witness statement'.²³
13. The Prosecution asserts that it is not withholding disclosable information since the information provided by the Individual is limited to a discrete issue, and does not contain any information that is otherwise disclosable under its statutory obligations.²⁴ It further argues that the Defence's submission that the Prosecution submitted Filing 2148 in order to keep the Chamber informed of unfolding events is inaccurate.²⁵ Rather, the Prosecution submits that it acted 'with the utmost good faith' to seek the Chamber's authorisation for an investigative step, and the Chamber's clarification on this issue did not mean that the Prosecution's request was 'unjustified from the start', nor rendered disclosable any content that would identify the Individual.²⁶

3. Second Request

14. The Defence argues that the redactions in Filing 2179 include the substance of the Individual's potential testimony, including the portions of Mr Ntaganda's

²⁰ First Response, ICC-01/04-02/06-2247-Conf, paras 8, 10 and 14.

²¹ First Response, ICC-01/04-02/06-2247-Conf, para. 9.

²² First Response, ICC-01/04-02/06-2247-Conf, paras 11-13.

²³ First Request, ICC-01/04-02/06-2234-Conf, para. 11.

²⁴ First Response, ICC-01/04-02/06-2247-Conf, paras 15-18.

²⁵ First Response, ICC-01/04 02/06 2247-Conf, para. 19.

²⁶ First Response, ICC-01/04 02/06 2247-Conf, para. 19, referring to First Request, ICC-01/04-02/06-2234-Conf, para. 10.

testimony he commented upon, and are thus not justified under the statutory framework or the Chamber's previous orders.²⁷ The Defence further submits that the *ex parte* information provided by the Prosecution in Filing 2179 goes beyond the Chamber's direction to 'file a preliminary request for the presentation of rebuttal evidence', and was therefore used 'merely as a means of keeping the Bench informed of unfolding events', potentially in respect of a matter of substantive importance.²⁸

15. The Prosecution asserts that it has complied with the directions in the Rebuttal Decision, since the remaining redactions are necessary to protect the Individual's identity, and that disclosure of the precise information he provided, including the passage of the accused's testimony to which this information relates, would render the protection offered to the Individual by the Chamber moot.²⁹ It further incorporates by reference the submissions made in the First Response and requests the reclassification of its Second Response as public.³⁰

ii. Analysis

1. Preliminary issues

16. As a preliminary matter, concerning the First Alternative Request and Second Alternative Request, the Chamber considers that it is not appropriate for the Chamber to itself apply redactions to a filing submitted by a party in this case, and therefore rejects these requests *in limine*.
17. As a further preliminary matter, the Chamber does not consider that Filing 2148 was made 'merely as a means of keeping the Bench informed of unfolding events'. Indeed, Filing 2148 included 'a request to the Chamber to make a

²⁷ Second Request, ICC-01/04-02/06-2248-Conf, paras 2-3 and 5-6.

²⁸ Second Request, ICC-01/04-02/06-2248-Conf, para. 4, referring to Order providing directions related to the closure of the presentation of evidence, 22 December 2017, ICC-01/04-02/06-2166, para. 16.

²⁹ Second Response, ICC-01/04-02/06-2250-Conf, paras 2-3.

³⁰ Second Response, ICC-01/04-02/06-2250-Conf, paras 4-5.

decision on a relevant issue’,³¹ but the Chamber found that the matter at stake was already addressed in one of the protocols adopted in the case,³² and did not require any authorisation from the Chamber.³³

18. With respect to the information provided in Filing 2179, the Chamber notes that it was submitted further to the Chamber’s direction to file a preliminary request for the presentation of evidence in rebuttal, which did not include any restrictions on the scope of information to be provided. The Chamber also notes, however, that Filing 2179 includes information on the substance of the Individual’s anticipated evidence. Pending the Prosecution’s determination as to whether ‘it can request the Chamber to authorise his testimony in rebuttal’,³⁴ the Chamber considers that it would have been more appropriate if the Prosecution had refrained from providing the Chamber with any such information at that stage. That notwithstanding, and without prejudice to its assessment as to whether this information is to be provided to the Defence, the Chamber notes that, being composed of professional judges, it will disregard the information in its assessment of the evidence, and therefore considers that the inclusion of this information in Filing 2179 does not cause any undue prejudice to the accused.

2. Request for Lifting of Redactions

19. The Chamber recalls its direction that redactions in Filing 2148 and Filing 2220 shall be ‘limited to information that would reveal the identity of the Individual’. In this respect, the Chamber agrees with the Prosecution that, depending on the

³¹ See *Lubanga* Decision on *Ex parte* Filings, ICC-01/04-01/06-1058, para. 13.

³² See Decision on adoption of a ‘Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or a Participant, 12 December 2014, ICC-01/04-02/06-412, and Annex A.

³³ Decision on Prosecution request for authorisation to refer to confidential testimony during a witness interview, 14 December 2017, ICC-01/04-02/06-2157-Conf-Exp, para. 5. A confidential redacted version was filed on 15 February 2018 as ICC-01/04-02/06-2157-Red.

³⁴ See Filing 2179, ICC-01/04-02/06-2179-Conf-Red, para. 3.

circumstances, identifying information may include expressed security concerns and other details going beyond biographical information.

20. In the present case, the Chamber notes that the redactions applied in the lesser redacted version of Filing 2220 are limited to the Individual's pseudonym, issues related to security concerns expressed by him, and the dates of contact with the Prosecution. The Chamber therefore finds that the redactions are justified, and that no lesser redacted version of Filing 2220 is warranted.
21. The redactions in Filing 2148 relate to identifying information of the Individual, dates of contact with the Prosecution, as well as references to portions of the accused's testimony, which, according to the Prosecution, could lead to the Individual's identification.³⁵
22. Concerning the redactions applied to references to the accused's testimony, the Chamber is satisfied that certain references are so specific that they could lead to the Individual's identification. Other redactions, however, appear to be excessive, as the redacted information is, in the view of the Chamber, sufficiently broad so as not to reveal the specific Individual's identity. Specifically, the Chamber finds that the redactions in paragraphs 5 to 7, with the exception of the first sentence in paragraph 5, can be lifted without concretely identifying the Individual. Likewise, the Chamber considers that the redactions to the planned lines of enquiry of the Individual in paragraphs 8 and 9, and to the fact that the accused's testimony on the relevant issues was elicited to a large extent in private session in paragraph 10 could be lifted without revealing the Individual's identity. Therefore, and unless the Prosecution provides further and supported justification, within five days of the filing of this decision, as to why the lifting of the relevant redactions would lead to the identification of the Individual, the

³⁵ See Filing 2148, ICC-01/04-02/06-2148-Conf-Exp, paras 6 and 7.

Chamber orders the Prosecution to prepare a lesser redacted version of Filing 2148 in line with the aforementioned directions.

3. Request for Disclosure

23. At the outset, the Chamber notes that disclosure is requested pursuant to Rule 77 and/or Article 67(2), which, respectively and *inter alia*, provide for disclosure of information that is considered ‘material to the preparation of the defence’ and information which the Prosecution ‘believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence’. As emphasised by the Appeals Chamber,³⁶ contrary to the automatic obligation under Rule 76(1) to disclose the names and statements of witnesses whom the Prosecution intends to call to testify, the Prosecution’s disclosure obligations under Rule 77 and Article 67(2) are subject to an assessment as to whether the criteria under the relevant provisions are met.

24. In the present case, the Chamber notes the Prosecution’s submissions that the Individual provided information ‘that [it] wanted to rely upon but in the end will not be able to because [he] refuses to cooperate further’, as well as that the information is limited to a ‘discrete issue’ and ‘does not contain any information that is otherwise disclosable under the Prosecution’s statutory obligations’. However, given the Prosecution’s indication that the information provided, or expected to be provided, relates to the testimony of the accused, and the fact that it was found to be of sufficient importance to be considered for a request to present evidence in rebuttal, the Chamber considers that the information could be *prima facie* material, and therefore, disclosable to the Defence. In these circumstances, the Chamber directs the Prosecution to review the information

³⁶ Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses”, 20 May 2016, ICC-01/04-02/06-1330, para. 23.

provided by the Individual with a view to identifying any information that is disclosable to the Defence, and, if applicable, disclose any such information without delay, in line with the regime established in the 'Decision on the Protocol establishing a redaction regime'.³⁷ In case of uncertainties concerning the extent of its disclosure obligations, or serious and justified concerns that certain information cannot be disclosed without revealing the Individual's identity, the Prosecution shall provide the Chamber with the relevant information in order for the Chamber to determine whether, and under which conditions, such information is disclosable to the Defence.

4. Second Request

25. The redactions in Filing 2179 relate to the identity and pseudonym of the Individual and the portion of the accused's testimony to which the information provided by the Individual relates, including information on the statements made by the Individual to the Prosecution in this respect. As these statements pertain to facts that are of relevance to the present case, the Chamber considers that they are *prima facie* material to the preparation of the defence. Further, the Chamber is not persuaded by the Prosecution's submission that disclosure of the precise information he provides, including the passage of the accused's testimony to which his information relates, would render the protection offered to the Individual by the Chamber moot. Indeed, the Chamber considers that the redactions to paragraph 3 of Filing 2179 can be limited to references to the Individual without revealing his identity. Accordingly, and unless the Prosecution provides further and supported justification, within five days of the filing of this decision, as to why the lifting of the relevant redactions would lead to the identification of the Individual, the Prosecution shall file a lesser redacted version of Filing 2179 in accordance with the aforementioned directions.

³⁷ 12 December 2014, ICC-01/04-02/06-411 and Annex A.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTLY GRANTS the First Request;

PARTLY GRANTS the Second Request;

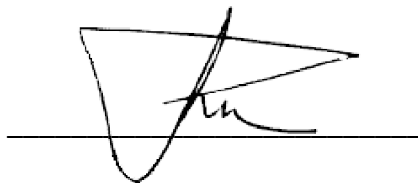
DIRECTS the Prosecution to file a lesser redacted version of Filing 2148 or provide further information in line with the directions in paragraph 22;

DIRECTS the Prosecution to comply with the disclosure related directions set out in paragraph 24;

DIRECTS the Prosecution to file a lesser redacted version of Filing 2179 or provide further information in line with the directions in paragraph 25; and

DIRECTS the Registry to reclassify filing ICC-01/04-02/06-2250-Conf as public.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 9 March 2018

At The Hague, The Netherlands