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**International
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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 request for reclassification of *ex parte* Defence submissions

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 requests the reclassification of all *ex parte* submissions related to D-0308, the Registry's Director of Judicial Services.
2. Given the Chamber's provision of D-0308's identity, there no longer is any justification for withholding the Defence's *ex parte* submissions from the Prosecution. In accordance with the Chamber's usual practice, these submissions should therefore be reclassified.
3. The Prosecution is entitled to know the Defence's submissions related to information which the Defence considered "essential" to the Chamber's determination of Bosco Ntaganda's ("Convicted Person") sentence. As a matter of procedural fairness, the Prosecution is also entitled to know the content of the Defence's consultations with the Director of Judicial Services regarding the making of what are now to be the Registry's additional observations regarding the Convicted Person's conduct while in detention, in particular given that, according to the Defence, the Director of Judicial Services himself considers the information in his possession to be "exceptional". Full transparency is required in light of the Registry's duty to provide a complete, accurate and neutral report to the Chamber on these matters. In the absence of any security risk, the Chamber should order the reclassification of all Defence submission related to D-0308 to "Public", giving both the Prosecution and the public access to all relevant information.
4. Alternatively, to the extent that any submissions or materials relate to other detainees whose prior consent needs to be secured, the Defence should be ordered to limit its *ex parte* submissions to what is strictly necessary for that purpose and file public lesser redacted versions of its relevant filings.

Confidentiality

5. This filing is classified as “Confidential” pursuant to regulation 23bis(1) and(2) of the Regulations of the Court since it refers to information not yet available to the public and responds to filings bearing the same classification.

Procedural Background

6. On 8 July 2019, Trial Chamber VI (the “Chamber”) convicted Bosco Ntaganda of 18 counts of war crimes and crimes against humanity.¹
7. On the same day, the Chamber issued an order on the sentencing procedure (Sentencing Order).² The Parties and Legal Representatives of Victims (“LRVs”) were directed to file any requests to submit further evidence or to call witnesses by 29 July 2019. The requests are to provide the details of any documentary evidence intended to be submitted, the identities of any witnesses sought to be called, an estimated length of examination, a summary of anticipated testimony and any requests for protective measures, video-link testimony and/or admission of prior recorded testimony.
8. On 11 July 2019, the Chamber instructed the Registry to file a report on the Convicted Person’s conduct while in detention by 29 July 2019.³
9. On 26 July 2019, the Registry filed the “Registry’s Report on Mr Bosco Ntaganda’s Solvency and Conduct While in Detention” (“Registry Report”).⁴
10. On 29 July 2019, the Prosecution and Defence filed their respective requests to submit further evidence and call witnesses.⁵ The Defence withheld the identity of

¹ ICC-01/04-02/06-2359.

² ICC-01/04-02/06-2360.

³ E-mail from Trial Chamber VI to the Registry, dated 11 July 2019, at 16:29.

⁴ ICC-01/04-02/06-2367-Conf and ICC-01/04-02/06-2367-Conf-Anx.

⁵ ICC-01/04-02/06-2368-Conf and ICC-01/04-02/06-2369-Conf-Red.

one witness, namely D-0308, by redacting his identity, witness summary⁶ and significant portions of its submissions,⁷ as well as by withholding from the Prosecution a document related to the witness's evidence.⁸

11. On 30 July 2019, the Prosecution requested access to D-0308's identity and associated materials⁹ and, on 31 July 2019, the LRVs joined the Prosecution's request.¹⁰

12. On 5 August 2019, the Defence filed the "Confidential redacted version of "Notice concerning the status of proposed Witness D-0308"", seeking the Chamber's guidance regarding "the status of Witness D-0308 and the form in which his evidence is to be adduced", should the Chamber decide to admit this evidence.¹¹

13. On 14 August 2019, the Chamber issued its "Order in relation to D-0308" ("Order"), wherein it: (1) indicates that D-0308 is the Registry's Director of Judicial Services; (2) considers it appropriate for any information from the Director of Judicial Services to be filed on the record as an *addendum* to the Registry Report to be filed by the Director of Judicial Services by 30 August 2019 ("Addendum"); (3) considers it appropriate for the consent of any other detainees referred to in the Addendum to be sought prior to its filing in the *Ntaganda* case.¹² The Order does not address the Prosecution's request for access to the Defence's submissions and associated materials filed on the record in relation to D-0308.

⁶ ICC-01/04-02/06-2369-Conf-AnxA, p. 10.

⁷ ICC-01/04-02/06-2369-Conf-Red, paras. 5, 26-30, and 36.

⁸ ICC-01/04-02/06-2369-Conf-AnxC.

⁹ ICC-01/04-02/06-2370-Conf.

¹⁰ ICC-01/04-02/06-2371-Conf.

¹¹ ICC-01/04-02/06-2376-Conf-Red.

¹² ICC-01/04-02/06-2382-Conf, para. 4.

Prosecution's submissions

14. D-0308's identity has now been disclosed as the Director of Judicial Services and the *ex parte* classification of the Defence's submissions related to D-0308 is no longer justified. Accordingly, the Prosecution seeks access to all *ex parte* material placed before the Chamber in the context of this litigation.¹³
15. As previously held by the Chamber, "in principle, recourse to *ex parte* submissions should be exceptional, only used when 'truly necessary and when no alternative procedures are available'". The Chamber further held that "the other party should be notified, and [the *ex parte* procedure's] legal basis should be explained, unless to do so is inappropriate, considering that complete secrecy would, for instance, be justified if 'providing information about the procedure would risk revealing the very thing that requires protection'".¹⁴ Lastly, in accordance with the "usual practice" established by the Chamber, when the basis for the *ex parte* classification of information before the Chamber no longer exists, the filing party shall request its reclassification.¹⁵
16. As a result of the Chamber's decision to provide D-0308's identity to the Prosecution and participants and its ruling that he shall not provide evidence in the *Ntaganda* case, but instead file an Addendum to the Registry's Report, any legal basis for the Defence's *ex parte* submissions has, at least partially, ceased to exist. The Prosecution can now confirm that D-0308's was not withheld on the basis of any security concern. Furthermore, no argument of privilege appears to

¹³ These materials include: (1) the "Defence request for admission of sentencing evidence", 29 July 2019, ICC-01/04-02/06-2369-Conf-Red, paras. 5, 26-30, 36, fns. 3, 20, and title II at p.11 ("II. Mr. Ntaganda's personal and direct involvement in [REDACTED]"); (2) ICC-01/04-02/06-2369-Conf-AnxA-Red, p.1 (name of the witness) and p. 10 (D-0308's witness summary); (3) ICC-01/04-02/06-2369-Conf-AnxB-Red, no. 18; (4) ICC-01/04-02/06-2369-Conf-Exp-AnxC (described by the Defence as "one document which emphasizes Mr. Ntaganda's [REDACTED]" at ICC-01/04-02/06-2369-Conf-Red, para.5); (5) the Defence's "Notice concerning the status of proposed Witness D-0308", 5 August 2019, ICC-01/04-02/06-2376-Conf-Red, paras. 3, 5-10; and (6) any other *ex parte* submissions related to D-0308 of which the Prosecution is unaware.

¹⁴ ICC-01/04-02/06-2230, para. 8, referring to Trial Chamber I in *Lubanga*, ICC-01/04-01/06-1883, para. 49 and ICC-01/04-01/06-1058, para. 12.

¹⁵ See ICC-01/04-02/06-2177, para. 9 and ICC-01/04-02/06-2230, para. 11.

justify the continued *ex parte* classification of the Defence's submissions: either the information has already been revealed by the Convicted Person to the Chamber, or it has been revealed to him, the Director of Judicial Services and/or the Chamber by other detainees involved in the events at the Detention Centre. Accordingly, no exception justifies maintaining the Defence's submissions *ex parte*.

17. To the extent that any information in the Defence's submissions and associated material relates to detainees other than the Convicted Person, which the Chamber finds appropriate to withhold until their consent is obtained,¹⁶ this does not detract from the Defence's duty to immediately provide to the Prosecution all *ex parte* submissions that are presently not justified. Procedural fairness to the Prosecution requires that this information be provided forthwith.

18. The Prosecution notes that the Defence appears to have made significant submissions regarding D-0308 to which the Prosecution does not have access. These submissions characterise D-0308's proposed evidence as "essential"¹⁷ and appear to relate to the Convicted Person's alleged good conduct while in detention.¹⁸ The Defence also appears to already have placed a summary of such information – or of relevant connected information – before the Chamber,¹⁹ and made submissions about the contents of the Registry's Report, and the information to be contained in the Addendum, as well as both documents' author, namely the Director of Judicial Services.

19. As such, these submissions relate to information on the basis of which the Chamber will determine the appropriate sentence and to which, as a matter of procedural fairness, the Prosecution ought to have full access. The change in the

¹⁶ ICC-01/04-02/06-2382-Conf, para. 4.

¹⁷ ICC-01/04-02/06-2369-Conf-Red, para. 4.

¹⁸ ICC-01/04-02/06-2369-Conf-Red, para. 4-5, 26-30.

¹⁹ ICC-01/04-02/06-2369-Conf-AnxA-Red, p. 10.

form in which the information is to be presented - an Addendum to the Registry Report instead of a statement submitted under rule 68(2) - does not detract from the Prosecution's right to access to information on the record of the case.

20. As the Court's neutral organ, instructed by the Chamber to provide information relevant to sentencing in the ongoing *Ntaganda* trial proceedings, the Registry is duty-bound to provide the Chamber with complete and accurate information regarding the Convicted Person's conduct while in detention. The Chamber effectively rejected the Defence's proposal to have the Registry's Director of Judicial Services testify for the Defence and decided that it was more appropriate for him to supplement the Registry's Report with additional information that may be relevant to this matter. Prior to this decision, however, the Defence and the Director of Judicial Services apparently entered into consultations and, in this context, the latter allegedly held the view that "he did have knowledge of Mr Ntaganda's acts and conduct" and "agreed that the evidence sought from him was exceptional in nature and that it was not covered in the Registry's Report on Mr Bosco Ntaganda's Solvency and Conduct While in Detention".²⁰ The Prosecution notes that other Chambers have held that, in order for good behaviour while in detention to constitute mitigating circumstances, it must be "exceptional".²¹ In the interest of full transparency regarding the Registry's Report and the Addendum it is to submit, all *ex parte* submissions regarding these consultations should be made available to the Prosecution. Indeed, this background information is necessary for a proper and informed assessment by the Prosecution of the Director of Judicial Service's addendum to the Registry Report, once it is filed with the Chamber. Accordingly, there is a proper forensic justification for the request, in addition to the basic considerations of fairness and transparency outlined above.

²⁰ ICC-01/04-02/06-2376-Conf-Red, para. 4.

²¹ ICC-01/04-01/07-3484-tENG, paras. 127 and 128; ICC-01/05-01/08-3399, para. 81.

21. Consequently, the Prosecution requests access to all *ex parte* submissions and materials related to D-0308, the Director of Judicial Services, in order to be placed in a position to make meaningful submissions both at the time of the Addendum's filing and in its sentencing submissions.

Relief Requested

22. Based on the foregoing, the Prosecution requests the Chamber to order: (1) the reclassification as "Public" of all *ex parte* submissions related to D-0308, or, alternatively, (2) the filing of public lesser redacted versions of all Defence submissions, with all redactions that are no longer justified lifted.



Fatou Bensouda
Prosecutor

Dated this 16th day of August 2019
At The Hague, The Netherlands