

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **29 August 2019**

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 requests in relation to D-0308

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

The Office of the Prosecutor

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Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

**Unrepresented Applicants for
Participation/Reparation**

Unrepresented Victims

The Office of Public Counsel for Victims

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI of the International Criminal Court ('Chamber'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), pursuant to Articles 64(2), 67 and 68 of the Rome Statute and Regulation 23 *bis* of the Regulations of the Court issues this 'Decision on requests in relation to D-0308'.

I. Procedural history and submissions

1. Having convicted Mr Ntaganda of several crimes against humanity and war crimes,¹ on 8 July 2019, the Chamber ordered the Office of the Prosecutor ('Prosecution'), the defence team for Mr Ntaganda ('Defence') and the legal representatives of the victims ('LRVs') to file any requests to submit further evidence or to call witnesses in relation to sentencing by 29 July 2019, with any responses to follow by 5 August 2019 ('Order on Sentencing Procedure').²
2. On 11 July 2019, the Chamber instructed the Registry filed a report on, *inter alia*, Mr Ntaganda's conduct while in detention.³ This report was filed on 26 July 2019 ('Registry Report').⁴
3. On 29 July 2019, in its request to call witnesses and adduce evidence in relation to sentencing ('Defence Request'),⁵ the Defence referred to the Registry Report, arguing that it does not accord due weight to certain aspects of Mr Ntaganda's conduct while in detention.⁶ The Defence further indicated that it intends to adduce the evidence of a member of the Registry, at the time only referred to as D-0308, who is well-aware of the acts and conduct of Mr Ntaganda in detention, but that it had not yet made the necessary arrangements to have his evidence admitted before the Chamber, although

¹ Judgment, ICC-01/04-02/06-2359 (with Annexes A, B, and C).

² Order on the sentencing procedure, ICC-01/04-02/06-2360. The Chamber indicated that any requests pursuant to Rule 68(2)(b) of the Rules did not need to include the actual statement, but rather an indication that the relevant witness, if permitted to be called, would provide a witness statement to be submitted for admission under the aforementioned rule. See Order on Sentencing Procedure, footnote 2.

³ Email from the Chamber to the Registry, 11 July 2019, at 16:29.

⁴ Registry's Report on Mr Bosco Ntaganda's Solvency and Conduct While in Detention, ICC-01/04-02/06-2367-Conf (with confidential annex).

⁵ Defence request for admission of sentencing evidence, ICC-01/04-02/06-2369-Conf-Exp (with confidential *ex parte* Annexes A, B and C only available to the Chamber and the Registry and confidential Annex D; confidential redacted versions were notified the same day, ICC-01/04-02/06-2369-Conf-Red, ICC-01/04-02/06-2369-Conf-AnxA-Red and ICC-01/04-02/06-2369-Conf-AnxB-Red, respectively).

⁶ Defence Request, para. 26.

it ‘expect[ed] to finalize the necessary arrangements shortly’.⁷ It also sought leave to tender a document related to an accused person in another case before the Court, intended to corroborate and contextualise the evidence sought to be presented by the Defence.⁸

4. On 30 July 2019, the Prosecution requested access to the identity of D-0308, as well as to unredacted versions of all submissions and materials related to the proposed witness’ evidence (‘Request for Access’).⁹ It submits that the Defence failed to comply with the Chamber’s order to provide details of any documentary evidence intended to be submitted and to disclose the identity of any witness sought to be called, without having advanced any valid reason for not doing so.¹⁰
5. The LRVs jointly responded in support of the Request for Access on 31 July 2019.¹¹ They argue that in the absence of the requested information, they are unable to meaningfully respond to the Defence’s request as far as D-0308 is concerned.¹² They further aver that the Order on Sentencing Procedure does not provide for the possibility for a requesting party or participant to provide information related to witnesses sought on an *ex parte* basis.¹³
6. On 5 August 2019, the Defence informed the Chamber that D-0308 is the Director of Judicial Services and indicated that he would be able to provide the Chamber with further information concerning Mr Ntaganda’s conduct while in detention and sought guidance from the Chamber as to the form in which such information should be presented (‘Notice’).¹⁴
7. On 14 August 2019, the Chamber issued a confidential order, in which it informed the Prosecution and the LRVs that D-0308 is the Director of Judicial Services (‘Order in

⁷ Defence Request, paras 27-28 and footnote 20.

⁸ Defence Request, paras 29-30; and Annex C, *annexed to* ICC-01/04-02/06-2369-Conf-Red.

⁹ Prosecution’s request for access to the identity of Defence witness D-0308 and associated submissions and materials, ICC-01/04-02/06-2370-Conf.

¹⁰ Request for Access, paras 2-3, 9-12.

¹¹ Joint Response of the Common Legal Representatives of Victims to the “Prosecution’s request for access to the identity of Defence witness D-0308 and associated submissions and materials” (ICC-01/04-02/06-2370-Conf), ICC-01/04-02/06-2371-Conf (‘LRVs Response’).

¹² LRVs Response, para. 2.

¹³ LRVs Response, paras 9-10.

¹⁴ Notice concerning the status of proposed Witness D-0308, ICC-01/04-02/06-2376-Conf-Exp (a confidential redacted version was notified the next day, ICC-01/04-02/06-2376-Conf-Red).

Relation to D-0308’).¹⁵ The Chamber further instructed that any information that the Defence requests the Director of Judicial Services to provide, and that he deems appropriate to inform the Chamber of, in relation to Mr Ntaganda’s conduct while in detention, be filed on the record as a confidential *addendum* to the Registry Report by 30 August 2019, and that the consent of any detainees referred to, other than Mr Ntaganda, be sought in order to make such an *addendum* available to the parties and participants in the *Ntaganda* case.¹⁶

8. On 16 August 2019, the Prosecution requested the reclassification of all *ex parte* submissions related to D-0308 (‘Reclassification Request’).¹⁷ It argues that, given the Chamber’s provision of D-0308’s identity, no justification exists for withholding the Defence’s *ex parte* submissions.¹⁸ It further avers that, as a matter of procedural fairness, the Prosecution is entitled to know the content of the Defence’s consultations with the Director of Judicial Services regarding the making of additional observations in relation to Mr Ntaganda’s conduct while in detention, so as to be able to make meaningful submissions at the time of filing of the *addendum*, as well as in its final submissions in relation to sentencing.¹⁹ To the extent that any submissions or materials relate to persons whose prior consent needs to be secured, the Prosecution requests, in the alternative, that the Defence be ordered to limit its *ex parte* submissions to what is strictly necessary for that purpose and to file public lesser redacted versions of its relevant filings.²⁰
9. On 23 August 2019, the Chamber, *inter alia*, set 30 August 2019 as a deadline for any requests for admission of documentary evidence other than through witnesses (‘Order Setting a Deadline’).²¹
10. On 28 August 2019, the Defence responded to the Reclassification Request, opposing it.²² The Defence does not object to providing a revised confidential version of the

¹⁵ Order in relation to D-0308, ICC-01/04-02/06-2382-Conf.

¹⁶ Order in Relation to D-0308, para. 4.

¹⁷ Prosecution’s request for reclassification of *ex parte* Defence submissions, ICC-01/04-02/06-2383-Conf.

¹⁸ Reclassification Request, paras 2, 14-16.

¹⁹ Reclassification Request, paras 3, 17-21.

²⁰ Reclassification Request, paras 4, 22.

²¹ Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing, ICC-01/04-02/06-2385-Conf (a public redacted version was notified the same day, ICC-01/04-02/06-2385-Red).

²² Defence response to “Prosecution’s request for reclassification of *ex parte* Defence submissions”, ICC-01/04-02/06-2383-Conf, 16 August 2019, ICC-01/04-02/06-2386-Conf (‘Defence Response’).

Defence Request and the Notice, containing less redactions, but submits that the Reclassification Request is unnecessary and premature, as it intended to file revised confidential versions of the Defence Request and the Notice after verifying the content and the classification of the *addendum* to be filed by 30 August 2019.²³ According to the Defence, being appraised of the content and classification of the *addendum* will assist it in knowing how the scope of the waiver referred to in the Order in Relation to D-0308 has been interpreted.²⁴

II. Analysis

11. As the Chamber already provided the identity of D-0308 to the Prosecution and the LRVs in the Order in Relation to D-0308, the Prosecution's request to have the identity of D-0308 disclosed to it is moot.
12. As to the remainder of the Request for Access and the Reclassification Request, the Chamber recalls that it previously found, albeit with regards to *ex parte* filings by the Prosecution, that recourse to *ex parte* submissions should, in principle, be exceptional, to be used only when 'truly necessary' and when no alternatives are available, and that resort to *ex parte* filings must be 'proportionate given the potential prejudice to the accused'.²⁵ The Chamber so far adopted a flexible approach, and considered that the other party should be notified, and the legal basis for the *ex parte* filing should be explained, unless to do so is inappropriate, for example when providing information about the procedure would risk revealing the very thing that must be protected.
13. In the present instance, having considered the Defence's submissions as to the reason for the *ex parte* classification of large portions of its submissions in relation to D-0308²⁶ and the proposed related material, the Chamber considers that such *ex parte* classification is, in part, warranted, as it pertains to private matters concerning an accused person in another case before the Court. The justification to redact this

²³ Defence Response, paras 7-8.

²⁴ Defence Response, para. 7.

²⁵ Decision on expedited Defence request for reclassification of *ex parte* documents, 15 February 2018, ICC-01/04-02/06-2230, para. 8; and Decision on Defence request for stay of proceedings with prejudice to the Prosecution, 28 April 2017, ICC-01/04-02/06-1883, para. 49, both referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for *ex parte* proceedings, 6 December 2007, ICC-01/04-01/06-1058, para. 12.

²⁶ Defence Request, para. 36; and Notice, para. 10.

information from the Prosecution and LRVs continues to exist, irrespective of the identity of D-0308 having become known to them.

14. However, the Chamber is of the view that not all redactions to the Defence Request and the Notice are necessary. While the *addendum* may provide further guidance as to the information which can be disclosed to the Prosecution and the LRVs, the Chamber considers that, in any case, the present redactions to paragraphs 5, 28 and 36, as well as footnote 20, of the Defence Request, and to paragraphs 5, 6, 8 and 10 of the Notice can be lifted. As for paragraph 27 of the Defence Request and paragraph 7 of the Notice, the redactions need only be limited to the information that would identify the individual concerned and/or which relates to private matters of individuals other than Mr Ntaganda.²⁷ Accordingly, the Defence shall file revised confidential redacted versions of the Defence Request and the Notice in line with the aforementioned instructions, and taking into account the information that will be provided in the *addendum*.
15. As for Annex C to the Defence Request, which was intended to corroborate and contextualise the evidence the Defence sought to present through D-0308, the Defence may no longer wish to lead such corroborating material, given the manner in which the information to be provided by D-0308 will be placed on the record. Should the Defence nonetheless wish to do so, the Chamber recalls that according to its Order Setting a Deadline, any requests for admission of documentary evidence other than through witness are to be filed by 30 August 2019.
16. The Chamber considers that the *addendum* to the Registry Report, which is to be filed confidentially in the case record, will sufficiently allow all parties and participants to file submissions in relation thereto, should they wish to do so. To the extent that it contains private or privileged information about another detained person other than Mr Ntaganda, redactions will be permitted in case the relevant person does not agree to disclosure of such information to the Prosecution and the LRVs. In the circumstances, the Chamber does not consider that either the Prosecution or the LRVs

²⁷ For paragraph 27 of the Defence Request, ‘a member of the Registry, who is well-aware of the acts and conduct of Mr. Ntaganda’ must therefore be unredacted, while for paragraph 7 of the Notice only the name of the other accused person may remain redacted.

will be hampered in their ability to make meaningful submissions on the Registry Report, the *addendum* thereto, or Mr Ntaganda's conduct in detention in general.

17. The Chamber further notes that the Prosecution indicated that it will file a public redacted version of its request to submit additional evidence on sentencing.²⁸ It further notes that the Defence also indicated that, after the filing of the *addendum*, it will undertake a review of its confidential filings for the purpose of preparing public redacted versions thereof.²⁹ Mindful of the deadline set for the filing of the *addendum*, the Chamber hereby instructs all parties and participants to file public redacted versions of their filings related to sentencing before the start of the sentencing hearing.

²⁸ Prosecution's request to submit additional evidence on sentencing, ICC-01/04-02/06-2368-Conf, para. 3.

²⁹ Defence Response, para. 8.

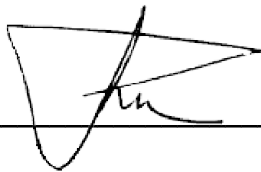
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request for Access and the Reclassification Request, in part;

INSTRUCTS the Defence to file revised confidential redacted versions of the Defence Request and the Notice, in accordance with paragraph 14 above, by 6 September 2019; and

INSTRUCTS the parties and participants to file public redacted versions of their filings related to sentencing by 17 September 2019.

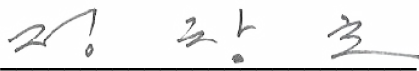
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 29 August 2019
At The Hague, The Netherlands