

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: 18 September 2013

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Confidential – Prosecution and Defence Only

Prosecution's Response to Bosco Ntaganda's Request to File a Reply

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 opposes the Defence's request to reply to the Prosecution's Response to the Defence Application for interim release ("Request").¹ First, the Defence has failed to set out the precise issues to which it seeks leave to reply and, in effect, seeks to obtain a blanket authorisation to reply to the entire Prosecution response ("Prosecution's Response").² Second, and contrary to the Defence's assertions, the Prosecution's Response does not raise new issues, and does not contain arguments that the Defence could not have anticipated in its Application for interim release ("Application").³ The Request should consequently be denied.

Confidentiality

2. Pursuant to Regulation 23*bis*, this present filing is classified as "Confidential" as it responds to a filing that bears that classification level. The Prosecution will file a public redacted version.

Procedural Background

3. On 22 August 2006 Pre-Trial Chamber I issued the first arrest warrant under seal against Mr. Ntaganda.⁴ On 28 April 2008, Pre-Trial Chamber I issued a public warrant of arrest against Mr. Ntaganda.⁵ On 13 July 2012, Pre-Trial Chamber II issued a second public arrest warrant against Mr. Ntaganda.⁶

¹ ICC-01/04-02/06-105-Conf.

² ICC-01/04-02/06-103-Conf.

³ ICC-01/04-02/06-87-Red.

⁴ ICC-01/04-02/06-2.

⁵ ICC-01/04-02/06-18.

⁶ ICC-01/04-02/06-36-RED-tFRA.

4. On 20 March 2013, Mr. Ntaganda met a representative of the Court at the United States Embassy in Kigali, Rwanda and confirmed his surrender to the Court.⁷ He was transferred to the Court on 22 March 2013.⁸
5. On 20 August 2013, Mr. Ntaganda submitted a request for provisional release.⁹ On 26 August 2013, the Single Judge requested observations from the Prosecution and the Kingdom of the Netherlands on the Request.¹⁰ The Prosecution filed the Prosecution Response on 6 September 2013.¹¹ On 13 September 2013, the Defence filed the Defence Request for leave to reply.¹²

Prosecution's Submission

The Defence fails to show good cause to obtain leave to reply

6. Parties and participants in proceedings before this Court do not have an automatic right of reply. Rather, Regulation 24(5) of the Regulations of the Court provides that "Participants may only reply to a response with the leave of the Chamber".
7. In order to obtain authorization to file a reply, a party must demonstrate good cause¹³ or that an issue arose from the response which it could not have anticipated in its initial submission.¹⁴
8. Given that there is no automatic right to reply, any party seeking relief is required to reasonably anticipate and address possible counter-arguments in its initial application and, when seeking leave to reply to a response, to formulate a sufficiently specific request enabling the Chamber to determine the precise basis for and scope of the intended reply.

⁷ ICC-01/04-02/06-44-Conf-Exp, para.1.

⁸ ICC-01/04-02/06-44-Conf-Exp, paras.3-4.

⁹ ICC-01/04-02/06-87-Red.

¹⁰ ICC-01/04-02/06-92.

¹¹ ICC-01/04-02/06-103-Conf.

¹² ICC-01/04-02/06-105-Conf.

¹³ ICC-01/05-01/08-294, para.3.

¹⁴ ICC-01/04-01/07-2792.

9. The Defence Request is only general in nature. It seeks to file a reply to "*certain arguments formulés par le Procureur*" on the basis that the Prosecution made "*de nombreuses nouvelles allegations [...] sur des sujets qui n'ont pas été abordés dans la Requête de la Défense*" in its Response, and referred to "*de nombreux articles de presse, rapports d'ONG et rapports de l'ONU auxquels il n'a jamais été fait référence auparavant dans le cadre de la présente affaire*".¹⁵ Such vague assertions are an inadequate foundation for leave to reply.
10. *First*, the Defence seeks to justify a reply on the basis that it is seeing the Prosecution's arguments and information in support thereof for the first time. This assertion in and of itself cannot be sufficient justification as it will always be the case when a party responds to certain arguments that the opposing party will see the rebuttal arguments and supporting information for the first time only once it is filed. If the Defence were correct, the mere response to an application for interim release would automatically give rise to a right to file a reply by the applicant.
11. *Second*, the Defence reference to new elements in the Prosecution's Response is incorrect and misleading. The arguments and factual allegations described in the Prosecution's Response are squarely limited to the issues arising from the Application, namely the three limbs of Article 58(1)(b) of the Rome Statute ("Statute") as well as the Defence's challenge of the factual findings of the Pre-Trial Chamber in its second arrest warrant decision.¹⁶
12. *Third*, the Prosecution's submissions and supporting information are neither novel nor unforeseeable by the Defence. To the contrary, the Defence ought to

¹⁵ ICC-01/04-02/06-105-Conf, paras 4-5.

¹⁶ In paragraphs 12-43 of its response, the Prosecution challenges the Defence submissions (1) that continued detention is not necessary to ensure the appearance of Bosco Ntaganda at trial (paragraphs 30-47 of the Defence Application and 12-25 of the Prosecution's response), (2) that detention is not necessary to ensure that Bosco Ntaganda does not obstruct or endanger the investigation or the Court proceedings (paragraphs 48-55 of the Defence Application and 26-33 of the Prosecution's response) and (3) that continued detention is not necessary to prevent the commission of crimes (paragraphs 56-59 of the Defence Application and 34-41 of the Prosecution's response). Lastly, in paragraphs 42-43, the Prosecution responded to the Defence's inappropriate challenge of the factual findings of the Pre-Trial Chamber in its second arrest warrant decision (paragraphs 34-38 and 60-62 of the Defence Application).

have fully explained why, in light of its understanding of the current factual circumstances, it finds that detention of Mr. Ntaganda is not justified under Article 58(1) of the Statute in the Application rather than waiting for the prospect of a reply. In effect, the Defence Request amounts to a request to do what it apparently chose not to do, in the original application, namely to address the issue of detention in light of the actual situation of Mr. Ntaganda and to enable the Pre-Trial Chamber to “address *anew* the issue of detention in light of the material placed before it” (emphasis added).¹⁷

13. The Prosecution further notes that the case-law cited by the Defence is unsupportive of a decision granting the Defence leave to reply in the present case. In particular, the Defence cites a decision in the case of *The Prosecutor v. Mbarushimana* granting the Defence leave to reply to the Prosecution’s response to the Defence application for interim release.¹⁸ While it is correct that leave to reply was granted and that Pre-Trial Chamber I took into account the Prosecution’s reference to “new developments and evidence” which “was not in the Prosecution’s possession at the time that it requested the arrest warrant”,¹⁹ this situation is in no way comparable to that which is before this Chamber. In *Mbarushimana*, the Defence requested leave “to file a short reply”²⁰ in relation to the specific arguments advanced by the Prosecution on the basis of new developments – the passing from an exclusively Rwanda-based investigation to one that included Eastern DRC, which impacted the security situation of witnesses and potential witnesses and confidential or private documents seized at the residence of the suspect – that, the Prosecution argued, heightened the risk of obstruction or endangerment of the investigation or the court proceedings by the suspect.²¹ In contrast to the situation before this Chamber, these new elements were indeed of such a nature that the Defence could not have been aware of them.

¹⁷ ICC-01/04-01/07-572, para. 10, 12; ICC-01/05-01/08-631-Red, para. 58.

¹⁸ ICC-01/04-02/06-105-Conf, para 3; ICC-01/04-01/10-111.

¹⁹ ICC-01/04-01/10-111, page 3.

²⁰ ICC-01/04-01/10-107, para 4.

²¹ ICC-01/04-01/10-101, paras 30-41.

The information supporting the Prosecution's arguments justifying Mr. Ntaganda's continued detention, on the other hand, stems from "*articles de presse, rapports d'ONG et rapports de l'ONU*",²² none of which the Defence could not have anticipated and addressed in its Application.

14. *Lastly*, the Prosecution submits that a reply cannot be justified based on general claims that the Defence intends to respond to "*certain arguments*" made by the Prosecution without indicating the specific arguments to which it wishes to reply. A vague and general intention to respond to unspecified arguments is an insufficient basis on which to conclude that a reply will be necessary or even helpful.

Conclusion

15. As no good cause for a reply has been shown, the Prosecution respectfully requests that the Chamber reject the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 18th Day of September 2013
At The Hague, the Netherlands

²² ICC-01/04-02/06-105-Conf, para 5.