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No.: ICC-01/04-02/06
Date: 17 September 2015

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

Request on behalf of Mr Ntaganda seeking leave to reply to “Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the Charges’, ICC-01/04-02/06-804”

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Legal Representatives of Victims

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to the submission of the *“Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document Containing the Charges’, ICC-01/04-02/06-804”* by the Office of the Prosecutor (“Prosecution”) on 11 September 2015 (“Prosecution Response”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Request on behalf of Mr Ntaganda seeking leave to reply to “Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the Charges’, ICC-01/04-02/06-804 “

“Defence Request”

INTRODUCTION

1. The Defence respectfully requests Trial Chamber VI (“Chamber”) to grant leave to reply to the Prosecution’s response to its *“Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges”*² on three discrete issues.
2. Rather than responding to the merits of the Defence Application, the Prosecution Response addresses ancillary issues, including *inter alia*: (i) whether the Defence Application is a proper jurisdiction challenge within the meaning of Article 19; (ii) whether the addition of new witnesses relevant to Counts 6 and 9 of the Updated Document containing the charges (“Updated DCC”) after the confirmation of charges is an ‘exceptional circumstance’ warranting leave to make a ‘second’ jurisdictional challenge; and (iii) whether granting the Defence Application will unduly delay trial proceedings.
3. For the reasons expressed below, the Defence respectfully submits that in pronouncing on the Defence Application, the Chamber may benefit from the

¹ ICC-01/04-02/06-818.

² ICC-01/04-02/06-804. (“Defence Application”).

additional arguments the Defence wishes to submit on the new and/or unforeseen Prosecution submissions.

APPLICABLE LAW

4. Parties are permitted, pursuant to Regulation 24(5) of the Regulations of the Court, to file a reply “with the leave of the Chamber” upon a showing of “good cause.” Past jurisprudence has clarified the circumstances in which a Chamber “may benefit from the Defence’s views”³ by way of reply:
 - a. “new issues” were raised in the response;⁴
 - b. information is relied on in the response that “was not available to the defence at the time of the request”;⁵
 - c. arguments are made in response that were not reasonably foreseeable at the time of the request;⁶

³ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Consolidated Response to the Defence Requests’”, ICC-01/05-01/08-3049, 17 April 2014, para. 5; *Bemba et al.*, Decision on the “Demande d’autorisation de répliquer à la ‘Prosecution Response to the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ of 16 December 2013 and its Addendum of 7 January 2014 (ICC-01/05-01/13 and ICC-01/05-01/13-69)”, ICC-01/05-01/13-112, 20 January 2014, p. 3 (considering that good cause exists when it “would be beneficial for the Chamber to receive further submissions prior to its disposal of the matter under consideration.”)

⁴ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Consolidated Response to the Defence Requests’”, ICC-01/05-01/08-3049, 17 April 2014, para. 5; *Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-61, 24 February 2011, p. 3 (granting the Prosecution’s leave to reply where the Defence Response raised “new and distinct issues of law and fact, which the Prosecutor had not had the opportunity to address”); *Bemba et al.*, Decision on the “Demande d’autorisation de répliquer à la ‘Prosecution Response to the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ of 16 December 2013 and its Addendum of 7 January 2014 (ICC-01/05-01/13 and ICC-01/05-01/13-69)”, ICC-01/05-01/13-112, 20 January 2014, p. 3 (holding that good cause exists “when one or more issues arising from the response could not have been anticipated in [the] initial submissions.”)

⁵ *Bemba*, Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence Request for Interim Relief’”, ICC-01/05-01/08-2985, 19 February 2014, para. 6 (“considering the defence’s assertion that part of the information relied upon by the prosecution was not available to the defence at the time of its request, the Chamber is of the view that it might benefit from the defence’s views on the four discrete issues set out in paragraph 3 above. Leave to reply will therefore be granted.”)

⁶ *Banda and Jerbo*, Order on the defence’s application for leave to reply, ICC-02/05-03/09-261, 24 November 2011, para. 5 (granting the defence leave to reply where the Prosecution’s response raised certain legal issues that were – as argued by the Defence – unforeseeable and warranted a reply).

- d. a new explanation or solution to a problem is raised in the response;⁷
 - e. “the interests of completeness of the judicial record” require additional submissions;⁸
 - f. the responding party has “misinterpret[ed] the applicable law and misrepresents the facts in an unanticipated way”;⁹ or
 - g. the issue in question is “novel or of particular importance”.¹⁰
5. The scope of the leave granted to reply may be limited by: (i) imposing a low page-limit;¹¹ (ii) limiting the subject-matter that may be addressed;¹² or (iii) directing that the reply be brief and focused.¹³

⁷ *Bemba*, Public Redacted Version of the Chamber’s 10 November 2011 Order granting leave to reply, ICC-01/05-01/08-1899-Red, 15 November 2011, para. 4.

⁸ *Ruto and Sang*, Decision granting the Government of Kenya leave to reply, ICC-01/09-01/11-757, 30 May 2013, para. 8.

⁹ *Banda and Jerbo*, Order on the defence’s application for leave to reply, ICC-02/05-03/09-261, 24 November 2011, para. 5 (granting a leave to reply in response to a Defence application that argued inter alia that the Prosecution’s response “raises various new issues of law, misinterprets the applicable law and misrepresents the facts in an unanticipated way”); *Situation in the Democratic Republic of the Congo*, Decision on the Prosecution’s Application for Leave to Reply, ICC-01/04-110-tEN, 1 February 2006, p. 2 (granting a leave to reply to “clarify what seems to be a misinterpretation of the Prosecution’s submissions”).

¹⁰ *Katanga*, Decision granting leave to reply, ICC-01/04-01/07-3382, 6 June 2013, para. 8; *Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC- 01/04-01/10-61, 24 February 2011, p. 4 (finding good cause in light of the importance and the potential effect of the issues raised).

¹¹ *Bemba*, Decision on “Defence Request for Leave to Reply to the ‘Prosecution’s Response to “Further Defence Request for Disclosure””, ICC-01/05-01/08-3279, 6 August 2015, para.7(c) (imposing a page limit of 8 pages).

¹² *Bemba*, Decision on defence request for leave to reply to “Prosecution’s Response to ‘Defence Request for Interim Relief’”, ICC-01/05-01/08-2985, 19 February 2014, para.7(a).

¹³ *Bemba*, Decision on “Defence Request for Leave to Reply to the Prosecution’s Response to ‘Defence request for a stay of proceedings and request for further disclosure’”, ICC-01/05-01/08-3272, 23 July 2015, para. 4 (imposing a page limit of fifteen pages but requiring, without further specificity, that the “reply must be narrowly tailored to only address new issues raised in the Defence Response”).

SUBMISSIONS

I. First issue

6. In its Response, the Prosecution argues that the Defence Application should be dismissed summarily on the ground that it “raises an issue of statutory interpretation that does not go to the Chamber’s competence over [the crimes charged in Counts 6 and 9 of the Updated DCC]”.¹⁴ Considering the Prosecution’s own view that the question whether the scope of Article 8(2)(e)(vi) extends to child soldiers or not is a matter of jurisdiction,¹⁵ the Prosecution’s argument that the Defence Application is not a challenge to the Court’s material jurisdiction is an issue of the highest importance which must be addressed in the interest of justice. Indeed, in assessing the merits of the Defence Application, whether it raises a genuine challenge to jurisdiction is a major consideration.
7. The Defence respectfully submits that in such circumstances, it is necessary for the Chamber to be fully briefed with the Defence’s view on the issue whether the Defence Application is a proper jurisdiction challenge pursuant to Article 19. If granted the opportunity to reply, the Defence’s reply will explain why the Defence Application is properly brought under Article 19 of the Statute and why it is not raising a question of statutory construction of the Statute. The Defence will further explain why the jurisprudence cited by the Prosecution does not apply to the Defence Application.

II. Second issue

8. In contending that there are no exceptional circumstances justifying a ‘second’ jurisdictional challenge, the Prosecution argues *inter alia* that “[t]he addition, after confirmation, of new witnesses who are either alleged to be victims of

¹⁴ Prosecution Response, para.23. *See generally* Prosecution Response, paras.20-24.

¹⁵ *See* DRC-OTP-2084-0059 (“Letter of Instructions for Expert on Children associated with armed groups in Armed Conflict and Violence against Women in Armed Conflict”), para.10.

Counts 6 and 9 or who are expected to give evidence in relation to those counts, is also not exceptional”.¹⁶ The Prosecution’s arguments in support thereof misconstrue the relationship between the new witnesses added to the Prosecution’s list of witnesses and the resulting prejudice to the alleged victims of these crimes, as well as to the Accused, if the Chamber was to hear the related evidence and ultimately determine that it does not have jurisdiction to render judgement on Counts 6 and 9.

9. Should leave to reply be granted, the Defence will explain why – in the event the Chamber considers that the jurisdiction of the Court has been challenged once pursuant to Article 19(4) – the addition of numerous Prosecution witnesses expected to provide evidence on Counts 6 and 9 is an exceptional circumstance justifying leave to raise a jurisdictional challenge at this time.

III. Third issue

10. In its Response, the Prosecution avers that “[i]t is not merely hypothetical that the Defence Application will delay the proceedings, if granted”.¹⁷ Considering that the Defence does not bear the burden of establishing that its jurisdiction challenge will not unduly delay the proceedings, the argument raised by the Prosecution is not one on which the Defence was expected to provide arguments.
11. The Defence respectfully submits that in such circumstances, it is necessary for the Chamber to be fully briefed with the Defence’s view on the issue whether the Defence Application will unduly delay the trial. Should leave to reply be granted, the Defence will underscore in its reply that far from delaying the proceedings, granting its Application at this stage will materially advance the proceedings, insofar as it will ensure that the trial against Mr Ntaganda proceeds on a sound legal basis and that no superfluous evidence is adduced.

¹⁶ Prosecution Response, para.29(ii).

¹⁷ Prosecution Response, para.38.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

GRANT the Defence leave to reply to the Prosecution Response on the three issues outlined above.

RESPECTFULLY SUBMITTED ON THIS 17TH DAY OF SEPTEMBER 2015

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands