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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***

Public

Response to the Defence request for leave to reply to the “Response to the Defence request for disclosure orders pursuant to rules 76 and 77 of the Rules of Procedure and Evidence (ICC-01/04-02/06-822-Conf-Exp)”

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 application for leave to reply to the Prosecution's Response to the Defence request for disclosure orders pursuant to rules 76 and 77 of the Rules of Procedure and Evidence ("Application to Reply").¹
2. The Application to Reply seeks to make additional submissions, which do not relate to any alleged misrepresentation, a new explanation or solution to a problem raised, any new or distinct issue, any new information previously unavailable to the Defence, any arguments not reasonably foreseeable at the time of the request, any arguments in the interests of the completeness of the judicial record, or any novel or particularly important issue.² Accordingly, the five points on which the Defence proposes to reply exceed the permissible scope of a reply.

Confidentiality

3. This filing is submitted as public even though the Application to Reply was filed as Confidential, *Ex Parte*, only available to the Prosecution, Defence and Victims and Witnesses Unit ("VWU"), because there is nothing of a confidential nature in these submissions.

Procedural History

4. On 25 August 2015, the Defence submitted a request for disclosure orders pursuant to rules 76 and 77 of the Rules of Procedure and Evidence ("Defence Request").³
5. On 9 September 2015, Trial Chamber VI ("Chamber") shortened the deadline for any response to the Defence Request to 14 September 2015, at midday.⁴

¹ ICC-01/04-02/06-832-Conf-Exp.

² ICC-01/04-02/06-832-Conf-Exp, para. 4.

³ ICC-01/04-02/06-795-Red.

⁴ Email from the Chamber, 9 September 2015, at 10:02am.

6. On 14 September 2015, the Prosecution filed its Response to the Defence Request (“Prosecution Response”).⁵
7. On 16 September 2015, the Defence filed its Application to Reply.⁶

Prosecution’s Submissions

8. The Prosecution submits that the Application to Reply should be dismissed because the points on which the Defence seeks to reply do not fall within the allowable grounds for reply. The Defence identifies five issues on which it seeks leave to reply, asserting that the Prosecution Response: (i) characterises the Defence Request as being for “communications” with witnesses instead of prior statements; (ii) cites partial case law in support of an alleged argument that the term “any prior statements” under rule 76(1) should be subject to a relevance criterion as assessed by the Prosecution; (iii) implies an alleged arbitrary scope of disclosure obligations, because the Prosecution allegedly views emails and handwritten notes categorically as internal work product and as not disclosable; (iv) states that the Defence has essentially acknowledged that allegations of witness interference against the Accused are relevant to his credibility and character; and (v) proposes an overly broad definition of “routine” expenses.⁷

First Issue: Alleged characterisation of the Defence Request as being for communications with trial witnesses instead of prior statements

9. The first issue raised by the Defence does not arise from the Prosecution’s Response, so no leave to reply should be granted on this point. The Prosecution did not assert that the Defence is requesting communications with trial witnesses instead of their witness statements.⁸ Instead the Prosecution observed that the Defence Request was overly broad, because the Defence tries to argue that all

⁵ ICC-01/04-02/06-822-Conf-Exp.

⁶ ICC-01/04-02/06-832-Conf-Exp.

⁷ ICC-01/04-02/06-832-Conf-Exp, para. 1.

⁸ ICC-01/04-02/06-832-Conf-Exp, para. 1.

communications with witnesses, regardless of their content, amount to prior statements under rule 76.⁹ In particular, the Defence Request was for “*any and all information provided to the Prosecution by the witnesses it intends to rely upon at trial, during any contact with these witnesses, regardless of the purpose.*”¹⁰

10. Moreover, the Defence should have been able to anticipate that the Prosecution would argue that this was an overly broad request, in particular given the Prosecution’s response to the Defence’s initial *inter partes* request for disclosure.

Second Issue: Alleged partial citation of case law in support of argument that concept of prior statements under rule 76 should be subject to relevance criterion

11. The second issue raised does not arise from the Prosecution’s Response and leave to reply should not be granted on this point. The Defence has misconstrued or misunderstood the Prosecution’s proposed definition of a prior statement under rule 76. Contrary to the Defence’s assertion, the Prosecution has not defined prior statements as being “*subject to a ‘relevance’ criterion, as assessed by the Prosecution*”.¹¹ The Prosecution instead proposed a definition of a prior statement as meaning an account of facts as presented by a witness relevant to their proposed testimony about the case.¹² The Prosecution cited the definition adopted by the Single Judge of Trial Chamber VII¹³ (and more recently this Chamber),¹⁴ that prior statements are made only when witnesses are “questioned about their knowledge of the case in the course of its investigation”. Moreover, contrary to the Defence’s assertion, the Prosecution did not partially cite the case law in support of its proposition.¹⁵

⁹ ICC-01/04-02/06-822-Conf-Exp, para. 13.

¹⁰ ICC-01/04-02/06-795-Red, paras. 13-14.

¹¹ ICC-01/04-02/06-832-Conf-Exp, para. 1.

¹² ICC-01/04-02/06-822-Conf-Exp, paras. 19-20.

¹³ ICC-01/04-02/06-822-Conf-Exp, para. 18; citing ICC-01/05-01/13-1227, para. 9.

¹⁴ ICC-01/04-02/06-840-Conf-Exp, para. 53.

¹⁵ ICC-01/04-02/06-832-Conf-Exp, para. 1. See e.g. ICC-01/04-02/06-822-Conf-Exp, paras. 19-26.

Third Issue: Alleged arbitrary scope of disclosure implied by assertion as to Prosecution's view of emails and handwritten notes

12. The third issue as stated does not arise from the Prosecution's Response, and leave to reply should not be granted on this point. The Prosecution did not state that "emails and 'handwritten notes' ...are categorically 'internal work product', and...there is no obligation to disclose statements of witnesses, even though they are relevant to the case, if they are recorded in an email or handwritten notes".¹⁶
13. The Defence has misconstrued and misstated the Prosecution's position based on the Prosecution's comments about internal work product, and specifically, the Prosecution's comment – based on jurisprudence of this Court - that "internal emails regarding an investigator's *interactions* with witnesses and handwritten notes regarding their *investigative activities* constitute internal work product".¹⁷
14. As is stated in the Prosecution's Response, the Prosecution agrees that it is not the form that determines whether a document is a "statement" within the meaning of rule 76.¹⁸ The Prosecution further stated that it disagrees that every communication with a trial witness constitutes a prior statement and must be disclosed under rule 76.¹⁹ Accordingly, where an internal email regarding an investigator's interaction with witnesses or handwritten note regarding their investigative activities, does not relate to a witness's knowledge of the case in the course of investigations,²⁰ that document will not constitute a rule 76 prior statement. It remains internal work product that is not subject to disclosure *under rule 76*.

¹⁶ ICC-01/04-02/06-832-Conf-Exp, para. 1.

¹⁷ ICC-01/04-02/06-822-Conf-Exp, para. 25.

¹⁸ ICC-01/04-02/06-822-Conf-Exp, para. 14.

¹⁹ ICC-01/04-02/06-822-Conf-Exp, para. 14.

²⁰ ICC-01/04-02/06-822-Conf-Exp, para. 18.

15. Nevertheless, contrary to the Defence's assertion, there is no "arbitrary scope of disclosure implied".²¹ As the Prosecution stated, regardless of whether statements or investigator notes constitute a prior statement under rule 76, information contained in the documents is disclosed if it is material to the Defence's preparation under rule 77 and/or contains potentially exculpatory evidence pursuant to article 67(2).²²
16. Moreover, there is nothing in the Prosecution's Response that could not have been anticipated by the Defence in their original Request. The Prosecution was responding to the Defence's specific request for emails or handwritten notes.²³

Fourth Issue: The Prosecution's comment that the Defence has essentially acknowledged that witness interference allegations are relevant to the Accused's credibility and character

17. The Defence takes issue with the Prosecution's interpretation of its comment that any information about threats to witnesses is material, especially where the Prosecution has sought to "connect these allegations to Mr. Ntaganda personally, which has a direct impact on his credibility and character".²⁴
18. However, this point as to how the Defence's comment can be interpreted – and the basis on which the Parties consider the materials should be disclosed – is not necessary for the Chamber to consider for its adjudication of the Defence's Request. This is because in the Prosecution's Response, the Prosecution agreed that where evidence of witness interference allegations is relevant to the Accused's credibility and character it should be disclosed pursuant to rule 77.²⁵ Accordingly, the Prosecution submits that it is not necessary for the Defence to respond on this point.

²¹ ICC-01/04-02/06-832-Conf-Exp, para. 1.

²² ICC-01/04-02/06-832-Conf-Exp, para. 26.

²³ ICC-01/04-02/06-795-Red, para. 17.

²⁴ ICC-01/04-02/06-832-Conf-Exp, para. 33.

²⁵ ICC-01/04-02/06-822-Conf-Exp, paras. 32-33.

Fifth Issue: The Prosecution's definition of routine expenses

19. As the Defence's Request includes a specific request for disclosure of witness expenses, there is nothing in relation to the Prosecution's response – including what constitutes a reasonable, routine, expense – that could not have been anticipated, particularly given the Prosecution's clear response to the Defence *inter partes* request for disclosure of witness expenses. For instance, the Defence foresaw and responded to issues related to daily subsistence allowances.²⁶ Moreover, the Defence has already had an opportunity to argue why it considers that payments that can be viewed as influencing a witness's testimony should be disclosable.²⁷ The Defence should not be entitled to address any shortcomings in, or to supplement, its existing submissions in the original Defence Request, by way of a reply.

Conclusion

20. For the reasons set out above, the Prosecution requests that the Chamber dismiss the Defence's Application to Reply.



Fatou Bensouda,
Prosecutor

Dated this 1st day of October 2015
At The Hague, The Netherlands

²⁶ ICC-01/04-02/06-795-Red, paras. 27-28.

²⁷ ICC-01/04-02/06-832-Conf-Exp, para. 1. See e.g. ICC-01/04-02/06-795-Red, paras. 26-29.