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

Date: **26 May 2016**

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

Public redacted version of "Request on behalf of Mr Ntaganda seeking leave to reply to 'Prosecution's response to the 'Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963'", 6 April 2016, ICC-01/04-02/06-1252-Conf

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to: (i) the *“Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963”* submitted by Counsel representing Mr Ntaganda (“Defence”) on 1 April 2016 (“Defence Expedited Request”);¹ and (ii) the *“Prosecution’s response to the ‘Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963’”* submitted by the Office of the Prosecutor (“Prosecution”) on 5 April 2016 (“Prosecution Response”),² the Defence hereby submits this:

Request on behalf of Mr Ntaganda seeking leave to reply to “Prosecution’s response to the ‘Expedited request on behalf of Mr Ntaganda seeking disclosure of audio-recording of Prosecution interview with Witness P-0963’”

“Defence Request for Leave to Reply”

1. The Defence respectfully requests Trial Chamber VI (“Chamber”) leave to reply to the Prosecution Response on the following two discrete issues:
 - a. The Prosecution’s erroneous reliance on Rule 77 of the Rules of Procedure and Evidence (“Rules”) as basis for adjudicating the Defence Expedited Request (“First Issue”); and
 - b. The Prosecution’s misrepresentation of Defence arguments related to Article 55 and Rule 112(1) of Rules (“Second Issue”).
2. Although limited in scope, the Defence Expedited Request raises an important principled issue, namely the disclosability of the audio-recording of an interview between the Prosecution and a witness. The Defence respectfully submits that in adjudicating the matter, the Chamber may benefit of additional submissions on the two above outlined issues.

¹ ICC-01/04-02/06-1242-Conf.

² ICC-01/04-02/06-1251-Conf.

SUBMISSIONS

A. First Issue

3. Referring to Rule 77 of the Rules, the Prosecution argues that the Defence Expedited Request fails to meet the test of 'materiality' identified in recent decisions of this and other Chambers of the Court.³ The Prosecution further contends that the Defence has not identified, in this regard, any specific areas of 'concern'.⁴
4. Additional submissions on the First Issue are necessary, if only because the Prosecution raises for the first time the applicability of Rule 77 to the disclosure of the audio-recording of the [REDACTED] interview. Indeed, the transcript of the interview and the related statement were not disclosed under this provision, but rather as 'incriminatory' material "pursuant to articles 64(3)(c) and 67(1)(a) and (b) of the Rome Statute".⁵
5. Should leave to reply be granted, the Defence will argue that: (i) the issue at stake is whether the Prosecution can withhold, without any compelling reason, the audio-recording of an interview, the transcript of which was disclosed as 'incriminatory' material; (ii) the Rule 77 'materiality' test is inapposite to the requested disclosure; and (iii) the burden rests with the Prosecution to establish persuasive reasons not to disclose the audio-recording, which the Prosecution Response plainly fails to do. The Defence will also distinguish the present case from the *Bemba* decision referred to by the Prosecution.⁶

³ Prosecution Response, paras.4, 22, 23, 25.

⁴ Prosecution Response, paras.27-29.

⁵ See "Prosecution's Communication of the Disclosure of Evidence", 14 December 2015, ICC-01/04-02/06-1054, para.1.

⁶ Prosecution Response, para.24.

B. Second Issue

6. In its Response, the Prosecution contends that Defence's reliance on Article 55 and Rule 112(1) of the Rules is 'misconceived' since neither of these provisions is applicable to the statement and transcript of Prosecution interview with Witness P-0963.⁷
7. The Second Issue requires a reply insofar as the Prosecution misrepresents the arguments put forward by the Defence in relation to Article 55 and Rule 112(1) of the Rules. Contrary to what the Prosecution contends, the Defence did not submit that the Prosecution conducted the [REDACTED] interview under the regime of Article 55 and Rule 112(1). Rather, the Defence referred to these provisions as an illustration of the very importance to disclose, in addition to the transcript, the audio-recording of an interview.

CONFIDENTIALITY

8. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Request for Leave to Reply is classified as confidential, as it refers to filings bearing the same classification.

RELIEF SOUGHT

9. In light of the above submissions, the Defence respectfully requests the Chamber to **GRANT** leave to reply to the Prosecution Response on the above outlined issues.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF MAY 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

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⁷ Prosecution Response, para.21.