

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/04-02/06  
Date: 16 February 2017

**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***

**Confidential**

**Response on behalf of Mr Ntaganda to Prosecution's request pursuant to  
regulation 35 to submit evidence**

**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**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for the Defence**

Me Stéphane Bourgon  
Mr Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the "Prosecution's request pursuant to regulation 35 to submit evidence" submitted by the Office of the Prosecutor ("Prosecution") of the International Criminal Court ("Court") on 3 February 2017 ("Prosecution Request"),<sup>1</sup> Counsel representing Mr Ntaganda ("Defence") hereby submit this:

**Response on behalf of Mr Ntaganda to Prosecution's request pursuant to  
regulation 35 to submit evidence  
("Defence Response")**

**OVERVIEW**

1. The Defence hereby responds to the Prosecution Request, in which the Prosecution moves Trial Chamber VI ("Chamber") pursuant to Regulation 35 of the Regulations of the Court ("RoC") to grant a variation of the time limit to submit ten items of evidence from the bar table.<sup>2</sup> The Prosecution identifies these items as the transcriptions and translations of ten conversations between Mr Ntaganda and prospective Defence witnesses at the Detention Centre ("Material") and submits that they are admissible evidence.<sup>3</sup> The Prosecution argues good cause for the requested extension has been established in that the Material will only be finalised by 28 February 2017 and that it is preferable to seek admission of the fully transcribed and translated versions of the communications rather than the summaries of the calls.<sup>4</sup>
2. The Defence opposes the Prosecution Request. First, the Prosecution fails to demonstrate any good cause for the requested variation of the time limit. The Prosecution received the conversations of which the Material forms part on 30 September 2015. On 19 October 2016, it was informed by the Chamber that

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<sup>1</sup> ICC-01/04-02/06-1769.

<sup>2</sup> Prosecution Request, para.1.

<sup>3</sup> Prosecution Request, paras.21-24.

<sup>4</sup> Prosecution Request, para.1.

its deadline for requesting the admission of evidence as part of the Prosecution case, other than through the remaining witnesses it intended to call, was set for 3 February 2017 ("Deadline").<sup>5</sup> The Prosecution therefore had ample time to organise its abundant resources so as to finalise the Material before the Deadline if, as it claims, such Material was relevant. The Defence submits that for the same reasons, there exist no exceptional circumstances that demonstrate that the Prosecution was unable, for reasons outside its control, to fulfil the Deadline.

3. Second, the Prosecution Request fails to demonstrate that the admission of the Material, in the absence of a showing of good cause to vary the time limit, would be in the interests of justice.
4. In fact, considering that the Material sought for admission is inadmissible, allowing the Prosecution to request its admission three weeks after the Deadline, is certainly not in the interests of justice. Indeed, the Material is not relevant and its probative value is so minimal that it is far outweighed by the potential prejudice to Mr Ntaganda.

## CONFIDENTIALITY

5. Pursuant to Regulation 23*bis* (1) and (2) of the Regulations of the Court ("RoC"), this Defence Response is submitted on a confidential basis as it responds to a filing bearing the same classification. The Defence will file a public redacted version of this filing once the Prosecution has done the same.

## SUBMISSIONS

### I. Applicable law

6. Regulation 35 of the RoC provides that:

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<sup>5</sup> Corrigendum of 'Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution', 19 October 2016, ICC-01/04-02/06-1588, 12 December 2016, ICC-01/04-02/06-1588-Corr ("Order setting deadlines"), para.5.

*"1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.*

*2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control."*

7. The Chamber has held that for a variation of a time limit sought after the lapse of the time limit, in addition to showing good cause, the applicant is required to demonstrate that it was unable to file the application within the time limit for reasons outside its control, which, in the words of the Appeals Chamber, requires the existence of exceptional circumstances.<sup>6</sup>

## **II. The Prosecution Request fails to show good cause or exceptional circumstances outside of the Prosecution's control**

8. As a preliminary matter, the Defence stresses that since the Prosecution Request was filed on the day of the Deadline, it must be assessed through the lens of the standard set out in Regulation 35(2) for extension requests made after the lapse of time limits. Accordingly, in order to succeed, the Prosecution must show that it was unable, for reasons outside of its control, to file the application to vary the time limit at an earlier stage.
9. The Defence submits that the Prosecution Request fails on both prongs of the test.
10. First, the Defence submits that the Prosecution failed to provide any argument that could even remotely support a showing of good cause. As a reminder, on 30 September 2015, upon its request, the Prosecution was provided with access to the audio-files of the non-privileged conversations of Mr Ntaganda and Thomas Lubanga at the Detention Centre since March 2013 ("Conversations"). More than a year later, the Chamber set the deadline for

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<sup>6</sup> *Prosecutor v. Lubanga*, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007, 21 February 2007, ICC-01/04-01/06-834, paras.9-10.

the Prosecution's submission of evidence from the bar table at 3 February 2017. Strikingly, although the Conversations were in its possession for such a long time, the Prosecution waited until the last day of the Deadline to seek an extension of the time limit.

11. The Defence is of course cognisant of the fact that the Conversations are voluminous and that their review is time-consuming and resource intensive; such factors have placed a heavy burden on preparations for the case for the Defence, a matter which has been raised before the Chamber on numerous occasions.<sup>7</sup> However, the Prosecution had the Conversations in its possession for close to 18 months prior to the Deadline and there exists no worthy justification for the Prosecution not having finalised the Material within the time frame envisioned by the Chamber.
12. Informed on 19 October 2016 of the time limit for requesting the admission of evidence as part of its case, other than through the remaining witnesses it intended to call, the Prosecution had four months in which to have the Material ready in order to file the Prosecution Request in a timely manner. Having had the Conversations in its possession for more than a year, it cannot be argued—and the Prosecution does not—that the conversations in the Material had yet to be selected. Considering the quasi-unlimited resources at its disposal, four months was more than sufficient for the Prosecution to have ten of the Conversations transcribed and translated.
13. This is even more striking when consideration is given to the fact that when the Defence asked for reconsideration of the decision on the time limit in which to present its provisional list of witnesses on the basis that it had received the Conversations just a month prior, and needed time to review

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<sup>7</sup> Urgent Request for Stay of Proceedings, ICC-01/04-02/06-1629-Red, 14 November 2016; Request on behalf of Mr Ntaganda seeking leave to appeal oral decision on "Urgent request for stay of proceedings", ICC-01/04-02/06-1645, 22 November 2016; Expedited Request on Behalf of Mr Ntaganda Seeking Reconsideration of Order Setting certain Deadlines regarding the Presentation of Evidence by the Prosecution and the Defence case, ICC-01/04-02/06-1683-Conf, 14 December 2016; T159, p.10, l.10-19.

them, the Chamber rejected this application, holding that: "[n]or, in these circumstances, does the Chamber consider that simultaneous preparations for cross-examination of the nine witnesses, review of the recently disclosed material and continuation of preparations for the defence case would place an unfair burden on the Defence."<sup>8</sup> Equality of arms requires that the Prosecution be held to the same strict standard.

14. Second, with respect to the requirement that it was unable to file the Prosecution Request before the Deadline for reasons outside of its control, the Defence posits that beyond arguing that the review and prioritisation of the Conversations was time consuming, the Prosecution puts forth no additional argument. A party going through material, albeit voluminous, in its possession for 18 months, does not constitute something outside of its control. The Prosecution had the material, knew how voluminous it was from the start, could have anticipated the time necessary for the review, and should have organised its ample resources accordingly. This argument plainly fails to rise to exceptional circumstances that could justify a variation of the time limit under Regulation 35(2).

15. On this basis alone, the Prosecution Request should be rejected.

**III. Allowing the Prosecution to file its request for the admission of the Material from the bar table is not in the interests of justice**

16. By analogy with requests to add witnesses to the Prosecution's list of witnesses, when the requirements of Regulation 35(2) are not met, the Defence submits that a case by case analysis is required to determine whether allowing the Prosecution to submit its request for the admission of the Material from

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<sup>8</sup> Decision on Defence request for reconsideration of order setting certain deadlines, ICC-01/04-02/06-1688, 16 December 2016, para.8.

the bar table, after the Deadline, is justified against the potential prejudice which may be caused to the Defence.<sup>9</sup>

17. Applying the criteria developed in the Court's jurisprudence,<sup>10</sup> the Defence submits that it is not in the interests of justice to allow the Prosecution to request admission of the Material after the expiration of the 3 February deadline.
18. First, the stage of the proceedings at which admission of the Material is sought is significant. Admitting the Material at this time provides the Prosecution with an open door at the very last stage of the presentation of its case to adduce unchallenged evidence, which does not relate to any of the issues in its case. It further imposes a heavy burden on the limited resources available to the Defence. If only to make full and complete submissions on the admissibility of the Material, the Defence would have to review both the transcriptions and the translations prepared by the Prosecution against the relevant audio-records at a time when all of its resources must be concentrated on the preparation for the case for the Defence.
19. Second, although the Prosecution has had all of the Conversations in its possession for more 18 months, *i.e.* from the end of September 2015, it provides no reason, other than logistical constraints, for not seeking admission of the Material earlier. The Prosecution could and should have requested the admission of ten of these Conversations at a much earlier time. The prejudice associated with the Prosecution's late disclosure of the totality of the Conversations obtained *ex parte* as a result of its Article 70 investigation has already been raised on more than one occasion.<sup>11</sup>

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<sup>9</sup> Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, ICC-01/04-02/06-1733, 19 January 2017 ("P-0551 Decision"), para.8.

<sup>10</sup> P0551 Decision; Decision on Prosecution's request for admission of prior recorded testimony of P-0045, ICC-01/04-02/06-1785-Conf, 13 February 2017.

<sup>11</sup> See fn.7 *supra*.

20. Third, and of particular importance, the Material is neither relevant nor significant to matters for determination by the Chamber. In fact, in the context of denying various Defence requests for the purpose of having the time necessary to review the Conversations, the Chamber described these Conversations as relating to 'peripheral issues' and not having 'direct materiality to these proceedings'.<sup>12</sup>
21. Significantly, the Material is of no assistance in any shape or form in establishing the existence of a fact that must be proven by the Prosecution to meet its burden of establishing the responsibility of Mr Ntaganda beyond a reasonable doubt on the charges for which he stands trial, and the Prosecution's case is not further advanced by admission of the Material. What is more, the Prosecution's claim that "[t]he admission of evidence of attempts at witness tampering has the potential to create a deterrent effect and serve as a useful legal tool to discourage individuals from engaging the practice" makes it clear the Material is not relevant to the Prosecution's case.<sup>13</sup> It necessarily follows that the material sought for admission is not admissible evidence.
22. Many other reasons could be put forth to dispute the admissibility of the Material, including, *inter alia*, i) the persons involved in the ten Conversations are neither Prosecution witnesses nor have they been identified as Defence witnesses; ii) the ten Conversations are not contemporaneous to the events which gave rise to the charges against the Accused; and iii) admitting the Material would violate the right of the Accused to remain silent.
23. In any event, even if the Material were held to be relevant and to have some probative value, such value would be so low that it would be far outweighed by the potential prejudice to the Accused.

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<sup>12</sup> T.159, p.5, l.22-24.

<sup>13</sup> Prosecution Request, para.23.

24. With respect to the potential prejudice to the Accused, the Defence underscores, *inter alia*: i) the admission of unchallenged evidence at this late stage of the Prosecution case; ii) the admission of evidence in the possession of the Prosecution for 18 months but which the Defence did not have when cross-examining Prosecution witnesses; iii) the significant burden imposed on the Defence, and on the limited resources available to them, in particular at this crucial time; and iv) the impact of the Material on the preparations for the case for the Defence, in particular considering the absence of adequate time to prepare.
25. In sum, taking into consideration that: i) the requirements of Regulation 35(2) are not met; ii) the Material is neither relevant nor probative and therefore is inadmissible; iii) the admission of the Material violates the rights of the Accused; and iv) the resulting prejudice to the Accused far outweighs any probative value that can be attached to the Material, the Defence submits that allowing the Prosecution to tender the Material at this late stage of the proceedings is certainly not in the interests of justice.

## CONCLUSION

26. For these reasons, the Defence submits that i) there exist no good cause and no exceptional circumstances warranting an extension of the time limit pursuant to Regulation 35(2); and ii) it is not in the interests of justice to allow the Prosecution to tender the Material after the expiry of the Deadline.
27. The Prosecution Request must therefore be denied.

**RELIEF SOUGHT**

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

**DENY** the Prosecution Request.

**RESPECTFULLY SUBMITTED ON THIS 16<sup>TH</sup> DAY OF FEBRUARY 2017**

A handwritten signature in black ink, appearing to read 'S+B' with a flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands