

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **3 April 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 with Confidential Annexes A and B

Request on behalf of Mr Ntaganda for leave to reply to "Prosecution's response to the 'Defence Request for Stay of proceedings with prejudice to the Prosecutor' (ICC-01/04-02/06-1830-Conf)", 30 March 2017, ICC-01/04-02/06-1840

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 the "Prosecution's response to the 'Defence Request for Stay of proceedings with prejudice to the Prosecutor' (ICC-01/04-02/06-1830-Conf)" submitted by the Office of the Prosecutor ("Prosecution") of the International Criminal Court ("Court") on 30 March 2017 ("Prosecution Response"),¹ Counsel representing Mr Ntaganda ("Defence") hereby submit this :

Request on behalf of Mr Ntaganda for leave to reply to "Prosecution's response to the 'Defence Request for Stay of proceedings with prejudice to the Prosecutor' (ICC-01/04-02/06-1830-Conf)", 30 March 2017, ICC-01/04-02/06-1840

"Defence Request for leave to reply"

OVERVIEW

1. Further to the submission of the Prosecution Response, the Defence hereby respectfully requests leave to reply pursuant to Regulations 24(5) and 34(c) of the Regulations of the Court ("RoC").
2. The Defence first submits that over and above the necessity to address the issues identified below in this Defence Request for leave to reply, allowing the Defence to reply to the Prosecution Response is essential in this particular case in light of the seriousness of the allegations made in the "Defence Request for Stay of proceedings with prejudice to the prosecutor" ("Defence Request for Stay") and the exceptional relief requested therein. Given the particularly grave nature of the abuse of process the Defence submits has irreparably damaged the proceedings, it is imperative that the Chamber has all of the necessary information at its disposal before adjudicating the Defence Request for Stay.
3. Second, the Defence underscores that the Prosecution Response misconstrues the premise for the Defence Request for Stay and fails to address its underlying reason, namely that the Prosecution knowingly obtained confidential Defence information at the very beginning of the presentation of

¹ ICC-01/04-02/06-1840.

its case without informing the Defence and that it pursued the presentation of its evidence without the Defence being aware that it was in possession of such material. This is what the Defence argues, in the Defence Request for Stay, constitutes an abuse of process in these proceedings.

4. Given that the Prosecution appears to completely misunderstand the Defence Request for Stay and its underlying premise, the Defence submits that it is essential for the Chamber to analyse the Conversations referred to in the Defence Request for Stay in order to fully grasp the extent of the confidential Defence information to which the Prosecution had access.
5. Finally, although it does not request leave to reply on this point and refers to its previous arguments, the Defence underscores that the Prosecution has also wholly misunderstood the Defence argument in the Defence Request for Stay related to the reasonable apprehension of bias on the part of the Judges, which the Prosecution has created.²

CONFIDENTIALITY

6. Pursuant to Regulation 23*bis* (2) of the Regulations of the Court ("RoC"), this Defence Request for leave to reply is submitted on a confidential basis as it addresses the Prosecution Response of the same classification. The Defence will file a public redacted version of this filing.

SUBMISSIONS

- I. The Prosecution Response misconstrues the overall premise for the Defence Request for Stay, namely the abuse of process resulting from the Prosecution team knowingly requesting and obtaining confidential Defence information during the presentation of its case without the Defence informed
7. In paragraphs 60 to 64, the Prosecution claims that there was no abuse of process and, accordingly, no prejudice to the Accused. The Prosecution states,

² Defence Request for Stay, paras.82-89.

inter alia, that (i) “it is not an abuse of process for the Prosecution to investigate serious allegations that the Accused disclosed confidential witness information”³, (ii) “nor is it unfair or prejudicial for the Prosecution to have accessed the main evidence of the criminal wrongdoing”,⁴ (iii) it “sought authorisation for further investigative steps from Pre-Trial Chamber II, including access to all the Accused’s non-privileged telephone calls”,⁵ (iv) it further explained its need to have unredacted access to the calls for a complete investigation into alleged under article 70,⁶ (v) “the process that the Trial Chamber adopted when reviewing a limited number of the Accused’s conversations in the context of a request to restrict his communications was inapplicable to the case of an investigation under Article 70 of the Statute to investigate the Accused’s culpability for criminal conduct”,⁷ and (vi) the Accused’s assertion that he simply had no way of knowing that everything he said in non-privileged conversations from the Detention Centre is contradicted by Defence arguments advanced in 2015.⁸

8. The Defence Request for Stay in no way suggests that the Prosecution cannot, or should not, conduct investigations into allegations of wrongdoings, including witness interference. Further, the Defence does not challenge, in its Defence Request for Stay, whether the Conversations were obtained lawfully. What the Defence takes issue with is that the Prosecution, knowing the nature of the information contained in the Conversations, requested and obtained unfiltered access to the same through the Article 70 investigation at the start of the presentation of the case for the Prosecution, that the Defence was not informed of this, and that the Prosecution continued presenting the large majority of its case while being in possession of this *ex parte* material. This is what the Defence argues constituted an abuse of process.

³ Prosecution Response, para.60.

⁴ Prosecution Response, para.60.

⁵ Prosecution Response, para.62.

⁶ Prosecution Response, para.62.

⁷ Prosecution Response, para.63.

⁸ Prosecution, para.64.

9. A reply is thus required to address the erroneous Prosecution's assertions and lack of understanding of the overall premise underlying the Defence Request for Stay.
10. If granted leave to reply, the Defence will address the following issues: (i) the Prosecution's duty to investigate serious allegations in no way allows the Prosecution to bypass due process requirements; (ii) whether or not the Prosecution legally obtained the Conversations has no bearing on the alleged abuse of process resulting from the Prosecution's actions; (iii) the Prosecution knew what type of information it would obtain when it sought unfiltered access to the Conversations from the Single Judge; (iv) the Prosecution failed to justify why the screening mechanism put in place by the Chamber in the context of the restrictions litigation was no longer applicable; and lastly (v) the Prosecution's arguments as to the Accused's knowledge that his Conversations could be obtained by the Prosecution are flawed.
11. Indeed, while the Accused was aware that the Prosecution obtained some of the Conversations further to the filter mechanism put in place by the Chamber, he had no knowledge that the Prosecution would seek to obtain additional Conversations once restrictions were imposed. He had no knowledge that the Prosecution could obtain more Conversations without him being informed. He had no knowledge that the Prosecution could obtain these additional conversations without any filter mechanism being applied.
12. The Prosecution fails to address the fact that, on the basis of one of the Conversations it had already received, the Prosecution very well knew that the Conversations to which it was seeking access through the Article 70 investigation would contain detailed confidential Defence information.

II. The Prosecution Response misconstrues the Defence argument pertaining to the lack of segregation between the main trial and the Article 70 investigation

13. In attempting to address the Defence argument in the Defence Request for Stay that the Article 70 investigation should have been segregated from the main trial from the start, the Prosecution Response merely emphasises the Prosecution's duty to investigate crimes within its competence in support of the fact that it received the Conversations, unfiltered and without the knowledge of the Defence.⁹
14. A reply is required on the Prosecution's argument that, in the present circumstances, there was no requirement for a separate review.¹⁰
15. A reply is required to address the Prosecution's erroneous arguments. If granted leave, the Defence will address the following issues: i) the fact that the Conversations were not Accused-Counsel privileged material has no bearing on the prejudice suffered; and ii) in the circumstances of this case, segregation of the Conversations obtained from the Prosecution team was necessary to ensure due process.
- III. The Prosecution Response fails to address the prejudice suffered by Mr Ntaganda as presented in the Defence Request for Stay arguing that he is somehow responsible for the problems he created**
16. The underlying premise of the Defence Request for Stay and the requested relief therein is that Mr Ntaganda suffered irremediable prejudice as a result of the lack of segregation between the Article 70 investigation and the main trial which resulted in the Prosecution having access to detailed confidential Defence information, without the Defence being aware.¹¹
17. If granted leave, the Defence will address the following issues: (i) that to somehow make Mr Ntaganda responsible in the present instance for the total disregard by the Prosecution to due process and fairness of trial principles is not only wrong but once again fails to address the underlying prejudice put

⁹ Prosecution Response, paras.10, 60-63.

¹⁰ Prosecution Response, paras.71-73.

¹¹ Defence Request for Stay, paras.7, 10, 12.

forth in the Defence Request for Stay; and (ii) the Prosecution's omission to even address the fact that Mr Ntaganda, in the context of adversary proceedings, had to face an opponent who was in possession of relevant information, *i.e.*, confidential Defence information, he was not aware his opponent had.

IV. The Prosecution Response incorrectly argues that Mr Ntaganda was aware the Conversations could be provided to the Prosecution

18. The Prosecution Response incorrectly argues that Mr Ntaganda knew from March 2013 that his non-privileged conversations from the Court Detention Centre could be provided to the Prosecution.¹²
19. The Defence requests to reply on this point to the effect that Mr Ntaganda was provided no official advice as to this possibility from the Court. Further, the Defence submission referred to by the Prosecution in paragraph 64 of the Prosecution Response is misplaced.
20. If granted leave to reply, the Defence will address the following issues: (i) the reference made in paragraph 64 dates from August 2015, more than two years after the first of the Conversations took place; (ii) this Defence submission was made in the context of generally explaining that the use of coded language is not necessarily indicative of any attempt to disclose protected witness information or of a scheme of witness intimidation but could also bear a whole range of other meanings, including the concern that the conversations might be disclosed to the Prosecution as had just occurred in the *Katanga* case; and (iii) any reliance by the Prosecution on the fact that Mr Ntaganda should have known his non-privileged communications from the Detention Centre may be communicated to the Prosecution given that this had occurred in the *Bemba* case is misplaced.¹³

¹² Prosecution Response, paras.64-66.

¹³ Prosecution Response, para.66.

21. Indeed, it is of the utmost importance that the standard the Chamber upholds for notice of rights to accused persons at the Detention Centre should be that received officially by them as opposed to indirectly imposing on them an obligation to assume that what has been ordered in another case may also be ordered in their respect.

V. **The Prosecution Response improperly makes references to “false Defence strategy”**

22. The Prosecution Response improperly disregards the Defence arguments in the Defence Request for Stay on the basis that in any event the material it had access to through the Conversations constitutes ‘illegitimate’ or ‘false’ Defence strategy.¹⁴

23. The Defence considers it is extremely important to reply on this issue. If granted leave, the Defence will specifically address (i) that it is not for the Prosecution to qualify the contents of the confidential Defence information it received and which is not on the record as evidence. Rather, it is for the Chamber to rule on the charges against the Mr Ntaganda at the end of trial on the basis of the evidence on the record; (ii) the crux of the matter is that the Prosecution did obtain confidential Defence information, which it does not deny having obtained, without the Defence being informed; and (iii) the qualification of the contents of the Conversations provided to the Chamber by the Prosecution as being a ‘false Defence strategy’ further deepens the abuse of process to which Mr Ntaganda has been subjected.

VI. **The Prosecution fails to adequately explain the necessity of the *ex parte* character of the Article 70 investigation**

24. The Defence Request for Stay had clearly indicated that in the specific circumstances at hand, maintaining the *ex parte* nature of the Article 70 investigation was unnecessary given that the Conversations already existed and could not be tampered with.

¹⁴ Prosecution Response, paras.79, 81.

25. If only due to the fact that the arguments put forward by the Prosecution that the Defence arguments do not meet the case law cited by the Prosecution,¹⁵ a reply to this submission is necessary. If granted leave, the Defence will address the fact that the Prosecution Response fails to (i) address the aforementioned argument and (ii) explain why in the specific circumstances the *ex parte* character was necessary to maintain the integrity of the proceedings and merely repeats a broad argument that the use of *ex parte* proceedings was appropriate.¹⁶

VII. Not denying being in possession of the Conversations, the Prosecution fails to specifically address any of the particular Conversations referred to by the Defence

26. Throughout the Prosecution Response, the Prosecution does not deny being in possession of confidential Defence information. Rather, as mentioned above, it submits that i) nothing prevented from having access to this information; ii) in any event, the information constitutes 'false Defence strategy'; iii) the Defence failed to show how the Prosecution made use of the information it received to its benefit; and iv) the Prosecution's review of a small portion of the Conversations was only completed well into the Prosecution case.

27. It is necessary to reply to the Prosecution's submissions which highlight the Prosecution's failure to respond to the substantive arguments put forth by the Defence.

28. If granted leave the Defence will address the following issues: (i) that in making such general arguments as to the contents of the confidential Defence information it received, the Prosecution fails to address with any precision the specific information from the Conversations referred to by the Defence,¹⁷ and (ii) while the Prosecution mocks the Defence for having sought an extension of the page limit for the Defence Request for Stay and only devoting seven

¹⁵ Prosecution Response, para.58.

¹⁶ Prosecution Response, para.67.

¹⁷ Defence Request for Stay, paras.58-64.

paragraphs to provide examples of the type of information to which the Prosecution had access to, the Prosecution omits to address the over 70 references provided by the Defence. Instead, it chose to broadly disregard them as “general statements without any further detail or precision”.¹⁸

VIII. The Defence did not have simultaneous access to the ‘two recent transcriptions of the Accused’s telephone calls prepared by the Registry’

29. The Prosecution claims that the Prosecution and the Defence obtained simultaneous access to two recent transcriptions of the Accused’s telephone calls from November 2016 prepared by the Registry.¹⁹ This is incorrect. The Defence only received access to the two transcriptions after steps were taken with the Registry.²⁰
30. In this regard, a reply is necessary to ensure that the Chamber takes notice of the Prosecution’s statement that it conducted a name search through the disclosed Detention Centre material on TRIM,²¹ and is fully informed that such a tool is not available to the Defence on TRIM. Thus, in order for the Defence to determine whether a certain individual is mentioned in any given conversation, all of the Conversations have to be reviewed.

IX. The Prosecution Response misconstrues the intention behind the annexes to the Defence Request for Stay

31. The Prosecution claims Annexes A and C contain argumentative material and should be disregarded.²² This is incorrect. Both Annexes are purely factual and recount the lengthy procedural background related to the Article 70 investigation and the restrictions litigation. No submissions are made therein and no arguments are put forth.

¹⁸ Prosecution Response, para.80.

¹⁹ Prosecution Response, para.75; *see also* Confidential Annex B.

²⁰ *See* confidential Annex A.

²¹ Prosecution Response, para.75.

²² Prosecution Response, para.13.

32. The Prosecution takes issue with the *ex parte* character of Annex D.²³ While the Prosecution has already had access to a colossal volume of confidential Defence information through the Conversations, the Defence does not wish to further assist the Prosecution by confirming which individuals mentioned in the Conversations are important to the Defence strategy.

X. Conclusion

33. For these reasons, the Defence requests leave to reply to the Prosecution Response. This requested Defence reply will materially assist the Chamber in adjudicating the Defence Request for Stay.

RELIEF SOUGHT

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

GRANT LEAVE TO REPLY to the Prosecution Response

RESPECTFULLY SUBMITTED ON THIS 3RD DAY OF APRIL 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

²³ Prosecution Response, para.81.