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**International
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Date: **5 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

Response to the Defence request for leave to reply 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), 30 March 2017, ICC-01/04-02/06-1840-Conf", (ICC-01/04-02/06-1848-Conf)

Source: Office of the Prosecutor

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Introduction

1. The Prosecution opposes the Defence request for leave to reply (“Application to Reply”).¹
2. First, the Application to Reply makes submissions on the issues upon which it seeks to reply, contrary to regulation 24(4) and (5) of the Regulations of the Court.
3. Second, the Application to Reply is flawed on its merits, as it seeks to make additional submissions which either 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 The Defence seeks to repeat arguments previously made and to supplement its original request. Regulation 24(5) of the Regulations of the Court (“RoC”) stipulates that a reply must be limited to new issues that could not reasonably have anticipated.
4. Accordingly, the nine points on which the Defence proposes to reply exceed the permissible scope of reply.

Confidentiality

5. Pursuant to regulation 23*bis* (2) of the RoC, this filing is classified as “*Confidential*” as it is in response to a Defence filing of the same classification. The Prosecution will file a public redacted version of this filing.

¹ ICC-01/04-02/06-1848-Conf.

² ICC-01/04-02/06-810, para.4.

Procedural History

6. On 20 March 2017, the Defence filed a request to stay the proceedings ("Defence Request").³
7. On 30 March 2017, the Prosecution responded to the Defence Request.⁴
8. On 3 April 2017, the Defence filed its Application to Reply.⁵

Prosecution's Submissions

9. The Defence identifies eight issues on which it seeks leave to reply - and a ninth issue for which it provides its reply without seeking leave - then proceeds to make substantive submissions on these issues without first awaiting the Chamber's leave to do so. Regulation 24(4) and (5) of the RoC stipulate that participants may only reply to a document, which itself is a response or reply, with the leave of the Chamber. The Defence has clearly not heeded the requirements of regulation 24(4) and (5).
10. Furthermore, 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, as set out below. In particular, regulation 24(5) of the RoC stipulates that "a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated". Such is not the case. The Defence seeks impermissibly to repeat and supplement its original submissions.

³ ICC-01/04-02/06-1830-Conf.

⁴ ICC-01/04-02/06-1840-Conf.

⁵ ICC-01/04-02/06-1848-Conf.

First Issue: Repeated and Supplementary Arguments; Arguments on the Merits

11. The Defence alleges that the Prosecution misconstrues its arguments on the basis of prejudice to the Accused and submits that it must reply to the Prosecution's "erroneous assertions" that there was no prejudice to the Accused.⁶
12. Leave to reply should not be granted on this point as additional submissions on the issue will not assist the Chamber in its determination. If the Prosecution's responses do not address the Defence's arguments, then there is no need to reply to them. Moreover, the Chamber can determine on its own whether the Prosecution's submissions are responsive to issues raised by the Defence, or not.
13. Second, the Defence seeks to repeat and supplement its initial arguments: it has already argued extensively that the Prosecution by-passed due process requirements,⁷ that it knew the type of information it would access,⁸ that it failed to impose a screening mechanism or follow the system set up by Trial Chamber VI ("Chamber"),⁹ and that the Accused did not know the Prosecution could access his calls.¹⁰
14. Lastly, the Defence impermissibly delves into the merits of the issues it seeks to address in this first issue.¹¹ Leave to reply on this issue should not be granted.

⁶ ICC-01/04-02/06-1848-Conf, para.9.

⁷ ICC-01/04-02/06-1830-Conf, para.4 : "*the Prosecutor proceeded with her request addressed to Pre-Trial Chamber II, blatantly ignoring due process requirements*". See also, para.65 ; "*The integrity of adversarial proceedings lies first and foremost on due process requirements being adhered to by the Parties.*" See also the title on page 15 regarding due process failures and following paragraphs ; See para. 72 : "*illustrates wilful disregard for due process requirements*".

⁸ ICC-01/04-02/06-1830-Conf, para. 4 : "*The Prosecution knew full well the type of information it would acquire as a result of its request to obtain all of Mr Ntaganda's non-privileged conversations from the Court's Detention Centre*". See also, para. 41.

⁹ ICC-01/04-02/06-1830-Conf, para. 4 "*without any restraint or the implementation of any filter or review mechanism to safeguard the rights of the Accused*". See also, paras. 42, 53 on the screening mechanism put in place by the Chamber.

¹⁰ ICC-01/04-02/06-1830-Conf, para. 51 : "*Mr Ntaganda was plainly unaware that all his Conversations were, or could be, disclosed to the Prosecution.*" See also, para. 52.

¹¹ ICC-01/04-02/06-1830-Conf, paras. 8, 11-12.

Second Issue: Repeated and Supplementary Arguments; Anticipated Arguments

15. The second issue on which the Defence seeks leave to reply is the Prosecution's response that there was no requirement for a separate review team.¹²
16. This issue was extensively canvassed by the Defence in the Defence Request,¹³ and any further arguments could have been anticipated at that time. The Defence further wishes to develop the point that the Accused suffered prejudice even if the accessed calls were not privileged.¹⁴ The Defence must have anticipated that the Prosecution would challenge his allegation of prejudice based on the non-privileged nature of the calls.
17. Accordingly, leave to reply should not be permitted on this point.

Third Issue: Repeated and Supplementary Arguments; Anticipated Arguments

18. The third issue on which the Defence seeks leave to reply is, again, an attempt to repeat and supplement arguments already made or that could have been anticipated in the Defence Request. In its request for a stay, the Defence argued that even if the Accused coached or interfered with witnesses, he is not responsible for and is prejudiced by the Prosecution's access to his non-privileged calls.¹⁵ Leave to reply should not be permitted to repeat or supplement prior arguments.

Fourth Issue: Repeated and Supplementary Arguments; Anticipated Arguments and Merits

19. The Defence seeks leave to reply to whether the Accused knew that his conversations could have been provided to the Prosecution.¹⁶ The Defence argued

¹² ICC-01/04-02/06-1848-Conf, paras. 14 and 15.

¹³ ICC-01/04-02/06-1830-Conf, paras. 4, 6, 7, 8, 41, 42, 45, 46, 47, 48, 49, 50, 55, 56, 57.

¹⁴ ICC-01/04-02/06-1830-Conf, para. 15.

¹⁵ ICC-01/04-02/06-1830-Conf, paras. 79, 80, 90, 91, 92.

¹⁶ ICC-01/04-02/06-1848-Conf, paras. 18-21.

this point extensively in the Defence Request¹⁷ and now seeks to impermissibly repeat and supplement its original arguments.

20. The Defence also delves into the merits of its anticipated arguments without first waiting for leave to do so, in the guise of a list of topic points it will later address.¹⁸ On these bases, leave to reply should not be granted on this point.

Fifth Issue: Repeated and Supplementary Arguments; Anticipated Arguments; Merits

21. The fifth issue for which the Defence seeks leave to reply relates to the legitimacy or not of the Defence strategy as set out in the Accused's non-privileged calls.¹⁹ The Defence already addressed this point extensively in the Defence Request (that the Defence strategy was legitimate),²⁰ and it could have anticipated the Prosecution's response that the discussed strategy was not legitimate and therefore no prejudice ensued. Indeed, the Defence already argued that the strategy was legitimate and that the issue is not about to whom the Accused spoke or whether he coached Defence witnesses.²¹ This is not a new issue; leave to reply should not be permitted for the Defence to repeat and supplement original submissions or arguments that it ought to have anticipated.

22. The Defence also impermissibly argues the merits of the issue.²²

Sixth Issue: Repeated and Supplementary Arguments; Anticipated Arguments; Merits

23. The Defence's proposed sixth issue it claims necessitates a reply is the Prosecution's alleged failure to explain the need for *ex parte* Article 70

¹⁷ ICC-01/04-02/06-1830-Conf, paras. 51, 52, 53.

¹⁸ ICC-01/04-02/06-1848-Conf, paras. 19, 20, 21.

¹⁹ ICC-01/04-02/06-1848-Conf, paras. 22-23.

²⁰ ICC-01/04-02/06-1830-Conf, paras. 2, 4, 6, 7, 53, 58-65, 69, 74, 75, 77, 79, 80, 81.

²¹ ICC-01/04-02/06-1830-Conf, paras. 79 and 91.

²² ICC-01/04-02/06-1848-Conf, para. 23.

investigations.²³ Not only does this mischaracterise the Prosecution's submissions which do address this point,²⁴ but also the Defence extensively addressed this issue in its original request.²⁵ Nothing new arises; all arguments were addressed or could have been anticipated.

24. The Defence claims that a reply is necessary because the Prosecution argued that the "Defence arguments do not meet the case law cited by the Prosecution"²⁶ but cites in support a paragraph of the procedural history of the Prosecution's response that does not refer to the Defence's arguments or to a failure to meet the case law.²⁷ The Defence also impermissibly delves into the merits of its response in the guise of the topic points it will address under this point.²⁸

25. The request for leave to reply to this point should be dismissed.

Seventh Issue: Repeated and Supplementary Arguments; Anticipated Arguments

26. The Defence submits that it must respond to "the Prosecution's failure to respond to its substantive arguments put forward by the Defence"²⁹ on the issue of the Prosecution's alleged access to Defence strategy.

27. This is an attempt to repeat and supplement original submissions. Indeed, as the above cite illustrates, the Defence acknowledges that it has argued this point in the Defence Request; it merely disagrees with the Prosecution's response. The Chamber will not be assisted by additional argument on the same issue. If the Prosecution failed to address any points, the Chamber may make such

²³ ICC-01/04-02/06-1848-Conf, paras. 24-25.

²⁴ ICC-01/04-02/06-1840-Conf, paras. 7, 67, 68, 69, 70.

²⁵ ICC-01/04-02/06-1830-Conf, paras. 4, 5, 6, 41, 42, 43, 44, 45, 56, 57, 67, 68, 71, 78, 79, 84.

²⁶ ICC-01/04-02/06-1848-Conf, para. 25.

²⁷ ICC-01/04-02/06-1848-Conf, para. 25, footnote 15.

²⁸ ICC-01/04-02/06-1848-Conf, para. 25.

²⁹ ICC-01/04-02/06-1848-Conf, para. 27.

determinations. No new points were raised that merit a reply and leave should be denied.

Eighth Issue: Repeated and Supplementary Arguments; Anticipated Arguments

28. The Defence seeks to reply to whether it had access to the two recently prepared transcripts by the Registry (and stored by the Registry in its TRIM folder of the Accused's non-privileged calls) at the same time as the Prosecution and seeks to note for the Chamber what search tools the Defence has at its disposal.³⁰ The request for leave to reply to this point should be dismissed.
29. First, this request mischaracterises the Prosecution's response, which neither addresses the specific timing of Defence access nor suggests that the Prosecution can conduct TRIM searches in audio recordings,³¹ as the Defence appears to imply.³² The Prosecution and the Defence are listed as having equal access rights to the Registry TRIM folder containing audio files, but also containing metadata for each call on excel spreadsheets, call records, and, it appears, these two transcripts. These records (the transcripts, the metadata spreadsheets, the call records) are searchable and there is no reason why the Defence cannot conduct searches there.
30. Second, these points are irrelevant to any issues necessary for adjudication by the Chamber and the need for the Defence to ensure that the Chamber "takes notice" of its search capacity is not a proper basis for reply.
31. Third, the Defence amply raised its arguments on the point in the original request.³³ Fourth, the issue is well-known to the Defence and any further information or argument it wished to include could have been anticipated at the

³⁰ ICC-01/04-02/06-1848-Conf, paras. 29-30.

³¹ See, ICC-01/04-02/06-1840-Conf, para. 75.

³² ICC-01/04-02/06-1848-Conf, para.30.

³³ ICC-01/04-02/06-1848-Conf, para. 89.

time of submitting the original request. The Chamber should deny the Defence's request on this point.

Ninth Issue: Arguments on the Merits without a request seeking leave to reply

32. The Defence impermissibly provides its full reply to the Prosecution's response on the nature of Annexes A and C and on the *ex parte* classification of Annex D, without articulating a request to seek leave to reply; and certainly without thereafter waiting for the Chamber's decision. The unauthorised substantive reply to these points should be disregarded entirely.

Conclusion

33. For the reasons set out above, the Prosecution requests that the Chamber dismiss the Defence's Application to Reply and disregard any unauthorised submissions.



**Fatou Bensouda,
Prosecutor**

Dated this 5th day of April 2017
At The Hague, The Netherlands