



Original: **English**

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

Date: **11 May 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***

Public

**Request for leave to reply to the “Prosecution’s response to the Defence motion to suppress non-privileged Detention Centre telephone conversations”, 8 May 2017,
ICC-01/04-02/06-1893**

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 motion to suppress non-privileged Detention Centre telephone conversations” submitted by the Office of the Prosecutor (“Prosecution”) of the International Criminal Court (“Court”) on 8 May 2017 (“Prosecution Response”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this :

**Request for leave to reply to the “Prosecution’s response to the Defence motion to suppress non-privileged Detention Centre telephone conversations”, 8 May 2017,
ICC-01/04-02/06-1893**

“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”), in relation to the following seven specific issues:

First Issue: The Prosecution’s incorrect submission at paragraph 21 that: “The Defence does not challenge the lawfulness of the Prosecution’s collection of the communications of the Accused.”

Second Issue: The Prosecution’s misconstrued understanding of the *Ngudjolo* Appeals Judgment², noting in particular paragraph 270 thereof, in which the Appeals Chamber held that: “it is not persuaded that the Trial Chamber acted unreasonably when it refused to grant the Prosecutor full access to the recorded conversations” and that “[a]s such no error in the Trial Chamber’s decision may be discerned.”

Third Issue: The Prosecution’s assertion at paragraph 21 that the Defence: “urges the Chamber to ignore clear Appeals Chamber jurisprudence” and the Prosecution’s argument at paragraph 28 that: “[a]fter discovering the Accused’s calls through lawful means, there is nothing inequitable in the Prosecution’s intent to use the Accused’s own voluntary words and conduct to cross-examine the implicated Defence witnesses.”

¹ ICC-01/04-02/06-1893.

² *Ngudjolo*, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 27 February 2015, ICC-01/04-02/12-271 (“*Ngudjolo* Appeals Judgment”).

Fourth Issue: The Prosecution's erroneous argument at paragraph 29 that: "Laws regulating rights and warnings given to suspects, and procedural requirements for taking statements, are not relevant in the present circumstances."

Fifth Issue: The Prosecution's argument at paragraph 30 that further to and as a result of the Trial Chamber's "Decision on Defence request for stay of proceedings with prejudice to the Prosecution" ("Decision Denying Stay")³, the Defence motion is overbroad and premature.

Sixth Issue: The Prosecution's submission at paragraph 33 – in response to the Defence argument that the prejudice to Mr Ntaganda far outweighs any probative value that the conversations may bear – that "the communications are central to the credibility of the implicated Defence witnesses and therefore, highly material and probative to the credibility of their respective testimonies" fails to take into account the specific circumstances of this case.

SUBMISSIONS

- I. ***First Issue* – The Prosecution's incorrect submission at paragraph 21 of the Prosecution response that: "The Defence does not challenge the lawfulness of the Prosecution's collection of the communications of the Accused."**
 - II. ***Second Issue* – The Prosecution's misconstrued understanding of the Ngudjolo Appeals Judgment, noting in particular paragraph 270 thereof in which the Appeals Chamber held that: "it is not persuaded that the Trial Chamber acted unreasonably when it refused to grant the Prosecutor full access to the recorded conversations" and that "[a]s such no error in the Trial Chamber's decision may be discerned."**
2. Regarding the first and second issues, it is noteworthy that the Defence Request did not address the legality of the manner in which the Prosecutor obtained the totality of the Conversations from the ICC Detention Centre. The Prosecution Response however, incorrectly stating that the Defence does not challenge the legality of the Prosecution's actions in this regard and referring to this incorrect statement as an argument, needs to be addressed.
 3. If granted leave to reply to issues one and two, the Defence will explain that the Single Judge's Decision granting the Prosecution request for access to the

³ ICC-01/04-02/06-1883.

totality of the Conversations departed from the *Ngudjolo* Appeals Judgment. The Defence will also underscore the impact of the *Ngudjolo* Appeals Judgment which affirmed Trial Chamber II's Decision to refuse the Prosecution's request for access to the totality of Mr Ngudjolo's conversations for the specific purpose of protecting his rights.

4. While the Prosecution's reference to the *Ngudjolo* Appeals Judgment was foreseeable, its misconstrued understanding of this Judgment must be addressed.

III. Third Issue – The Prosecution's assertion at paragraph 21 that the Defence: "urges the Chamber to ignore clear Appeals Chamber jurisprudence" and its argument at paragraph 28 that: "[a]fter discovering the Accused's calls through lawful means, there is nothing inequitable in the Prosecution's intent to use the Accused's own voluntary words and conduct to cross-examine the implicated Defence witnesses."

5. As for the third issue, contrary to the Prosecution's erroneous assertion, the facts of this case are clearly distinguishable from the situation addressed in the *Ngudjolo* Appeals Judgment regarding the conversations which the Prosecution was precluded from using in cross-examination. Whereas the conversations addressed in the *Ngudjolo* Appeals Judgment "had previously been screened as regards their content and information considered to relate to Mr Ngudjolo's private life or his defence strategy was withheld from the Prosecutor and consequently could therefore not have been used during cross-examination"⁴, the conversations in this case were obtained unfiltered and without the implementation of any review mechanism.
6. If granted leave to reply to this issue, the Defence will address the impact of this significant difference on the Prosecution's intended use of the conversations and resulting imbalance and violation of the rights of the Accused.

⁴ Para.27.

IV. *Fourth Issue* – The Prosecution’s erroneous argument at paragraph 29 that: “Laws regulating rights and warnings given to suspects, and procedural requirements for taking statements, are not relevant in the present circumstances.”

7. Regarding the fourth issue, while in paragraph 29 the Prosecution attempts to respond to an argument raised in the Defence Request (at paragraph 45), it fails to put forward any legal argument or to refer to any case law on point.
8. If granted leave to reply to this issue, the Defence will demonstrate that the Prosecution’s reasoning that: “absent prior notice to the Accused”, his words could never be used against him is groundless as well as why the right of the Accused to remain silent will indeed be violated in the event the Prosecution is authorised to use the Conversations during the cross-examination of Defence witnesses.

V. *Fifth Issue* – The Prosecution’s argument at paragraph 30 that further to and as a result of the Trial Chamber’s “Decision on Defence request for stay of proceedings with prejudice to the Prosecution” (“Decision Denying Stay”), the Defence motion is overbroad and premature

9. With respect to the fifth issue, the Defence submits that the Prosecution’s reference to the Chamber’s Decision Denying Stay could not be anticipated as this Decision had not been issued when the Defence Request was submitted on 25 April 2015.
10. It stems from the Prosecution Response that the Prosecution intends to submit requests to use the Conversations during the cross-examination of at least twenty Defence witnesses it has identified as being involved therein. There is no speculation here.
11. First, should the Chamber agree with the Prosecution’s understanding of the *Ngudjolo* Appeals Judgment, this would render the remedy ordered by the Chamber in its Decision Denying Stay virtually meaningless.

12. Second, the Prosecution response ignores that the Chamber ordered this remedy as an “alternative measure to ensure the fair and expeditious conduct of the proceedings”⁵ despite “the fact that the Prosecution has had access to such information is prejudicial to the accused as it places the Prosecution in an unduly advantageous position vis-à-vis the Defence”⁶.
13. Third, in light of the Prosecution’s intention described above, allowing the Prosecution to submit requests to use the conversations on a case by case basis rather than to adjudicate the Defence request at this time, will seriously impact the expeditious conduct of the proceedings and, more importantly, infringe on the rights of the Accused to have adequate time and facilities to prepare for his Defence.
14. If granted leave to reply, the Defence will underscore the impact of the material link, established by the Prosecution, between the Decision Denying Stay and the Defence Request to preclude the use of the Conversations during the presentation of the Defence.
15. Clearly, the Prosecution considers the remedy ordered by the Chamber as a mere additional procedural requirement leading to the use of the Conversations, which needs to be addressed by the Defence in reply.

VI. *Sixth Issue* – The Prosecution’s submission at paragraph 33 – in response to the Defence argument that the prejudice to Mr Ntaganda far outweighs any probative value that the conversations may bear – that “the communications are central to the credibility of the implicated Defence witnesses and therefore, highly material and probative to the credibility of their respective testimonies” fails to take into account the specific circumstances of this case

16. Regarding the sixth issue, while in paragraph 33 the Prosecution attempts to respond to an argument raised in the Defence Request (at paragraph 46), the failure of the Prosecution to address the following related circumstances is

⁵ Para.61.

⁶ Para.42.

such that a reply is required: (i) its submission that the Prosecution “has accessed records of Mr Ntaganda’s non-privileged communications solely with the purpose of protecting the witnesses in this case and investigating alleged violations of article 70 of the Statute.”⁷; (ii) the *Ngudjolo* Appeals Judgment which dismissed the Prosecutor’s ground of appeal holding that the Trial Chamber’s error when it refused to allow the Prosecutor to use Registry reports to impeach witnesses had no material impact on the acquittal decision⁸; (iii) the Prosecution’s submission that “The Defence contention that ‘[i]n the absence of directions issued by the Chamber regarding the use that can or cannot be made of the Conversations, it must be presumed that the Prosecution’s intended use of the conversations at trial significantly increased their materiality’ is [...] speculative and illogical”⁹; and (iv) the fact that precluding the Prosecution from using the conversations will not impede its duty to establish the truth concerning the charges laid against the Accused.

17. If granted leave to reply, the Defence will address, on the basis of these circumstances, that any probative value which can be attached to the use of the conversations is far outweighed by the potential prejudice to Mr Ntaganda.

VII. Conclusion

18. In light of the above submissions and arguments, the Defence respectfully requests leave to reply to the Prosecution Response. Replying to the above six issues will materially assist the Chamber in adjudicating the Defence Request.

⁷ ICC-01/04-02/06-1898, para.4.

⁸ *Ngudjolo* Appeals Judgment, para.294.

⁹ ICC-01/04-02/06-1845, para.19.

RELIEF SOUGHT

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

GRANT LEAVE TO REPLY to the Prosecution Response in relation to issues one to six.

RESPECTFULLY SUBMITTED ON THIS 11TH DAY OF MAY 2017

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands