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

Date: **16 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**

**Reply on behalf of Mr Ntaganda to the Prosecution's response to the "Request on behalf of Mr Ntaganda for an order precluding the use during the Defence case of Mr Ntaganda's non-privileged telephone conversations from the Detention Centre" (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 submission of the “Request on behalf of Mr Ntaganda for an order precluding the use during the Defence case of Mr Ntaganda’s non-privileged telephone conversations from the Detention Centre” on 25 April 2017<sup>1</sup> (“Defence Request”), the “Prosecution’s response to the Defence motion to suppress non-privileged Detention Centre telephone conversations” submitted on 8 May 2017<sup>2</sup> (“Prosecution Response”), the “Request for leave to reply to the ‘Prosecution’s response to the Defence motion to suppress non-privileged Detention Centre telephone conversations’” filed on 11 May 2017<sup>3</sup> (“Defence Request Seeking Leave to Reply”) and Trial Chamber VI (“Chamber”)’s order communicated via electronic correspondence on 12 May 2017, granting in part the Defence Request Seeking Leave to Reply, Counsel representing Mr Ntaganda hereby submit this :

**Reply on behalf of Mr Ntaganda to the Prosecution’s response to the “Request on behalf of Mr Ntaganda for an order precluding the use during the Defence case of Mr Ntaganda’s non-privileged telephone conversations from the Detention Centre”**

**“Defence Reply”**

## INTRODUCTION

1. Pursuant to the Chamber’s authorization, the Defence hereby replies to the Prosecution Response in relation to issues 3, 5 and 6 identified in the Defence Request Seeking Leave to Reply.

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<sup>1</sup> ICC-01/04-02/06-1878.

<sup>2</sup> ICC-01/04-02/06-1893.

<sup>3</sup> ICC-01/04-02/06-1901.

## SUBMISSIONS

### I. Third Issue

2. Contrary to the Prosecution's assertion at paragraph 21, the Defence Request is not « urging the Chamber to ignore clear Appeals Chamber jurisprudence ». Indeed, the Prosecution's assertion fails to consider that the facts of this case are clearly distinguishable from the situation addressed in the Ngudjolo Appeals Judgement.<sup>4</sup>
3. The Ngudjolo Appeals Judgement denied the Prosecution's third ground of appeal, which comprised three sub-grounds. In essence, the Appeals Chamber held that the decision rendered by Trial Chamber II – acquitting Mr Ngudjolo – was not materially affected by the fact that the Prosecution was not authorized to use Registry Reports related to Mr Ngudjolo's non privileged conversations from the ICC Detention center to cross-examine witnesses.
4. In its first sub-ground, the Prosecution argued that Trial Chamber II erred by preventing the Prosecutor from getting access to Mr Ngudjolo's recorded conversations. Whereas Trial Chamber II indeed denied the Prosecutor's requests to gain access to the full recorded conversations of Mr Ngudjolo on two occasions, it is noteworthy that the Appeals Chamber found, on appeal from judgement (Prosecutor's second disclosure request) that Trial Chamber II had not erred by denying the Prosecutor full access to Mr Ngudjolo's recorded conversations. The Appeals Chamber noted that the Trial Chamber "refrained from providing full access to the recorded conversations on the basis that such information fell 'within the purview of article 8 of the European Convention on Human Rights or the right to mount [a] defence', which could only be

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<sup>4</sup> *Ngudjolo Appeals Judgement*, ICC-01/04-02/12-271.

interfered with ‘in accordance with the law and [if] necessary and proportionate to the legitimate aim pursued.’<sup>5</sup>

5. The significance of this holding when considering the Prosecution’s second sub-ground in relation to which the Appeals Chamber held that Trial Chamber II erred by denying the Prosecutor the opportunity to use the *Registry Reports* in the trial to cross-examine Mr Ngudjolo and witness D03-88, is paramount.
6. Indeed, the Appeals Chamber did not hold that the Prosecutor should have been allowed to use Mr Ngudjolo’s conversations to cross-examine him and another witness but rather that it should have been allowed to use redacted Registry Reports from which personal information and information concerning his defence strategy was redacted. The Appeals Chamber held that: “the appeals Chamber notes in this context that the Registry Reports, as mentioned above, had previously been screened as regards content and information considered to relate to Mr Ngudjolo’s private life or his defence strategy was withheld from the Prosecutor and consequently could not have been used during cross-examination.”<sup>6</sup>
7. What is more, the Prosecution in the Ngudjolo trial was seeking to use the Registry Reports for a limited number of witnesses – Mr Ngudjolo himself and Prosecution Witness P-250 – for the purpose of (i) assessing the credibility of, *inter alia*, Mr Ngudjolo; (ii) to cross-examine Mr Ngudjolo on his statement reflected in the recorded conversations concerning Mr Katanga’s possible participation in the attack on Bogoro; and (iii) to prove that witness D03-88 was in collusion with Mr Ngudjolo and was biased.<sup>7</sup>

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<sup>5</sup> *Ngudjolo Appeals Judgement*, ICC-01/04-02/12-271, paras. 267-268.

<sup>6</sup> *Ngudjolo Appeals Judgement*, para. 276.

<sup>7</sup> *Ngudjolo Appeals Judgement*, para. 271.

8. The situation in this case – considering, *inter alia*, (i) the fact that the Conversations sought to be used were obtained unfiltered, without any restrictions; (ii) the fact that the Conversations sought to be used comprise both personal information as well as information concerning Mr Ntaganda’s defence; (iii) the number of witnesses for whom the Prosecution intends to use Mr Ntaganda’s non-privileged conversations from the Detention Center (« Conversations »); (iv) “the fact that the Prosecution team in this case 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”<sup>8</sup>; and (v) the Chamber’s order deciding that “as an alternative measure to ensure the fair and expeditious conduct of the proceedings, the Chamber decides that the Prosecution shall not be allowed to use the material obtained in the context of the Article 70 proceedings during the Defence’s presentation of evidence unless specifically authorized by the Chamber as necessary for the determination of the truth pursuant to its duty under article 69(3) of the Statute, upon receipt of a substantiated request to be filed sufficiently in advance of the intended use”<sup>9</sup> – is entirely different.
9. It simply cannot be said that the Appeals Chamber would have adopted the same ruling in respect of the situation in this case. In fact, facing a similar situation, the Appeals Chamber would, in all likelihood, affirm a ruling precluding the Prosecution from using both the Conversations as well as the Registry Reports during the cross-examination of either Mr Ntaganda or other Defence witnesses.

## II. Fifth Issue

10. The 8 May 2017 Prosecution Response, referring to the 28 April 2017 Chamber’s “Decision on Defence request for stay of proceedings with prejudice to the

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<sup>8</sup> Decision Denying Stay, ICC-01/04-02/06-1883, para. 42.

<sup>9</sup> Decision Denying Stay, para. 61.

Prosecution”<sup>10</sup> (“Chamber Decision Denying Stay”), clearly displays the material relationship between the Prosecution Response and the Chamber Decision Denying Stay.

11. First, the Prosecution making it clear that it intends to use Mr Ntaganda’s Conversations to cross-examine no less than twenty Defence witnesses, while not seeking leave to appeal the Chamber Decision Denying Stay, establishes beyond doubt the Prosecutor’s view that the Chamber Decision Denying Stay introduces no more than a mere additional procedural step – *i.e.* the Prosecution having to submit a substantiated request sufficiently in advance – leading to the use of the Conversations.
12. This is significant if only because the aim of the measure imposed by the Chamber, as stated in the Chamber Decision Denying Stay, is to ensure the fair and expeditious conduct of the proceedings, as a result of the prejudice to Mr Ntaganda caused by the Prosecution having had access to information – including information on the whereabouts of the accused and other individuals at the relevant times, names of individuals who could have provided for the Defence and potential witnesses, and which may therefore be relevant to Defence strategy<sup>11</sup> - placing the Prosecution in an unduly advantageous position *vis-à-vis* the Defence.
13. Evidently, the alternative remedy ordered in the Chamber Decision Denying Stay is disproportionate in relation to the prejudice intended to be cured. Leaving open the possibility for the Prosecution to use the Registry Reports concerning Mr Ntaganda’s Conversations as well as the possibility for the

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<sup>10</sup> ICC-01/04-02/06-1883.

<sup>11</sup> The Defence recalls its submission in its Request Seeking Leave to Appeal (ICC-01/04-02/06-1888), paragraph 32) that “the Chamber failed to take important Defence submissions into consideration, namely that in the Conversations, Mr Ntaganda provided or received indications as to information that he considered useful in countering allegations made by the Prosecution and explained how such information could be obtained and indicated flaws in the Prosecution’s theory”.

Prosecution to use the Conversations as necessary for the determination of the truth pursuant to its duty under article 69(3) without any additional guidance, the Chamber Decision Denying Stay clearly does not go far enough. Hence the Defence Request.

14. Taking into consideration the Prosecution's statement, repeated on more than one occasion, that it 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, in conjunction with the failure of the Prosecution to provide any concrete information concerning its intended use of the Conversations to cross-examine Mr Ntaganda or Defence witnesses, it stems from the Chamber Decision Denying Stay that it is plainly insufficient to ensure the fair and expeditious conduct of the proceedings.
15. In fact, the Prosecution's stated aim to use the Conversations to cross-examine at least twenty Defence witnesses, regardless of the procedure put in place, demonstrates the Prosecution's intent to support its broad allegations of coaching of Defence witnesses, which in turn would seriously impact both the fairness and the expeditious conduct of the proceedings.
16. In light of the above, the Defence Request is certainly neither overbroad *nor* premature. The Chamber must adjudicate the Defence Request at this time, stopping the Prosecution in its tracks, by ordering that there be no use by the Prosecution of Mr Ntaganda's Conversations or Registry Reports related to the same during the presentation of the case for the Defence.

### III. Sixth Issue

17. Further to the Prosecution's disclosure of the recordings of Mr Ntaganda's Conversations towards the end of the presentation of its case - leaving aside for

the moment, the resulting prejudice to the Accused caused by, *inter alia* : (i) the Prosecution having knowingly obtained all of Mr Ntaganda's Conversations comprising detailed confidential Defence information; and (ii) the Prosecution having presented most of its case while being in the possession of confidential Defence information, without informing the Defence - the Defence argued that the right of Mr Ntaganda to have adequate time and facilities for the preparation of his defence, justified an extension of time to review and analyze the Conversations. The Defence submitted a number of related requests.

18. Despite having expressed the view that the Conversations were important for the Defence for various reasons, including for the selection of Defence witnesses, the Prosecution systematically opposed all Defence requests to have the time necessary to complete this task.
19. Even though the Defence managed to obtain additional resources from the Registry for the purpose of securing the services of additional team members to review the Conversations, all Defence requests for additional time were denied by the Chamber.
20. As a result, the Defence has been unable to review all of the Conversations before the dates set by the Chamber for the submission of the Defence further provisional list of witnesses and Defence final list of witnesses. Regardless, even though the Defence argued that it was not in a position to select Defence witnesses before completing its review of the conversations, the Defence was ordered to submit its final list of witnesses without having completed its review of the Conversations.
21. On 5 May 2017, the Defence managed to obtain further additional resources to extend the employment of the additional team members who joined the team

in January 2017 for a period of four supplementary months.<sup>12</sup> Regardless, even though the Defence explained that it was not possible to complete the review of the Conversations before the end of this additional four-month period and that as a result the Defence would not be ready to begin the presentation of its case – the Defence was ordered to begin the presentation of the case for the Defence on 29 May 2017.

22. The Chamber has expressed the view that the Conversations “must be considered in their appropriate context, noting that they do not relate directly to the charges and, are, for a large part, devoid of any direct materiality to these proceedings or relate to peripheral issues.”<sup>13</sup>
23. When the Defence argued, before the Chamber Decision Denying Stay was rendered, that the absence of directions issued by the Chamber regarding the use that can or cannot be made of the Conversations significantly increases their materiality based on the Prosecution’s expressed intent to use this material, the Prosecution submitted that the Defence argument was “speculative and illogical.”<sup>14</sup> The Prosecution’s submission compounds the argument that due process is not part of its *répertoire*.
24. At paragraph 34, the Prosecution advances that “If it is true that the implicated Defence witnesses were instructed, persuaded, or influenced through calls from the Accused (...) any evaluation of their testimonies without these facts would be inherently flawed.”<sup>15</sup> The Prosecution omits to consider in this regard that its allegations of coaching can be addressed when cross-examining Defence witnesses, including Mr Ntaganda should he elect to testify, without using the conversations. In particular, the « if » can only be

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<sup>12</sup> Decision on the request for additional investigative resources submitted by Counsel for Mr Bosco Ntaganda on 28 April 2017, 05 May 2017.

<sup>13</sup> ICC-01/04-02/06-1832, para. 17.

<sup>14</sup> ICC-01/04-02/06-1845, para. 19.

<sup>15</sup> ICC-01/04-02/06-1893, para. 34.

established based on a determination of the truth or falsity of the propositions which, in turn, is the very purpose of this trial. Introducing Mr Ntaganda's conversations on the supposition that the content of those conversations involves falsehoods is premature, prejudicial, and ultimately irrelevant to the determination of the truth or falsity.

25. More importantly, the Prosecution does not explain how this exercise – using conversations which took place many years after the facts of this case – would contribute to establishing the truth regarding the charges laid against Mr Ntaganda.
26. On the other hand, in addition to the factors mentioned above, the potential prejudice to Mr Ntaganda is clearly identified, if only because of, *inter alia* : (i) the volume of conversations; (ii) the fact that the Conversations comprise private information as well as detailed information related to Mr Ntaganda's defence; (iii) the insufficient time provided for the review and analysis of the Conversations; (iv) the fact that the Conversations have been in the possession of the Prosecution for a very long period of time during which it presented its case without the Defence being informed; (v) the fact that the original conversations are available only in audio-recording format; and (vi) the lack of reliability of the summaries/translations of the conversations produced within the Office of the Prosecutor; and (vii) the lack of reliability of the transcripts and translations of the summaries produced within the Office of the Prosecutor.
27. If the weight and the importance to be attached to the conversations was so high, the Prosecution should have requested an adjournment of the proceedings in this case for the purpose of adjudicating contempt charges *before* moving on to the merits of the charges laid.

28. The fact that Mr Ntaganda has not been provided with an opportunity to challenge the Prosecution's allegations of coaching and/or interference, in full respect of due process standards, is also an important component of the potential prejudice to him and the requirement to preclude the Prosecution from using this material during the presentation of the case for the Defence.

#### **RELIEF SOUGHT**

29. The Defence respectfully requests the Chamber to :

**TAKE INTO CONSIDERATION** the above submissions and arguments in reply to the Prosecution Response; and

**GRANT** the relief set out in the Defence Request.

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



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands