

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Public redacted version of "Prosecution response to the Defence 'Request for leave to reply to the 'Prosecution response to the Defence 'Request to Add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses'", ICC-01/04-02/06-2094-Conf", 6 November 2017, ICC-01/04-02/06-2098-Conf

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Prosecution opposes the Defence request for leave to reply to the Prosecution Response¹ regarding the addition of Witness D-0243 to the Defence list of witnesses.²
2. First, the Application to Reply contains substantive submissions on the merits of the first two of the three issues upon which the Defence seeks to reply, contrary to regulations 24(4) and (5) of the Regulations.³ These submissions should be disregarded.
3. Second, the Application to Reply is also flawed on its merits. It seeks to make additional submissions which 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 argument not reasonably foreseeable at the time of the Request, or any novel or particularly important issue. It would not assist the Chamber to receive further submissions on any of the three issues prior to its determination as to whether Witness D-0243 should be added to the Defence list of witnesses.
4. Accordingly, the three points on which the Defence proposes to reply exceed the permissible scope of a reply. The Application to Reply should be dismissed.

¹ ICC-01/04-02/06-2084-Conf (“Prosecution Response”).

² ICC-01/04-02/06-2094-Conf (“Application to Reply”).

³ Regulations of the Court.

Confidentiality

5. This filing is classified as Confidential pursuant to regulation 23*bis*(2) of the Regulations as it responds to a filing bearing the same classification.

Procedural Background

6. On 16 October 2017, the Defence requested the addition of Witnesses D-0185, D-0207 and D-0243 to its list of witnesses.⁴ The Prosecution opposed this request on 27 October 2017.⁵
7. On 2 November 2017, the Defence filed the Application to Reply.

Prosecution's Submissions

8. Pursuant to regulations 24(4) and (5) of the Regulations, a Party may only reply to a response with the leave of the Chamber unless otherwise provided in the Regulations. Therefore, a Party should not provide its substantive reply to a response in the guise of a request for leave to reply.
9. Further, leave to reply should not be granted to a Party that merely points to issues arising from a response without demonstrating why such issues are new and could not have reasonably been anticipated.⁶ Significantly, simply arguing that the issues sought to be addressed in reply could not have reasonably been anticipated without explaining *why* a reply to such issues is otherwise warranted does not suffice for a Party to be granted the leave sought.⁷ Nor

⁴ ICC-01/04-02/06-2065-Conf ("Defence Request").

⁵ Prosecution Response.

⁶ See ICC-01/04-02/06-1994, para. 13.

⁷ See ICC-01/04-02/06-1994, para. 14.

does mere disagreement with the opposite Party's response warrant granting leave to reply.⁸

I. The application should be dismissed *in limine* in relation to the first two issues

10. The Defence identifies three issues on which it seeks leave to reply, namely: (i) "[t]he timing of the death of the other prospective radio communications witness";⁹ (ii) "[t]he claim that the Prosecution did not cross-examine Mr Ntaganda on issues related to radio communications because of the absence of Witness D-0243's summary which, in turn, makes the addition of this witness unfair to the Prosecution";¹⁰ and (iii) "[t]he purportedly redundant or cumulative nature of Witness D-0243's anticipated testimony."¹¹

11. The Defence makes substantive submissions on the first two of the three issues it identifies, without first waiting for the Chamber's leave to do so.

12. The Defence provides the entirety of its substantive reply in relation to the First Issue in paragraph 8 of its Application to Reply. Indeed, after providing this substantive reply, the Defence states that "[l]eave should be granted to permit the Defence to place this clarification on record."¹² This is wholly inappropriate.

13. Under the guise of attempting to explain why the Defence could not have anticipated the Prosecution's argument in relation to the Second Issue, the Defence again provides its substantive reply on this topic, presenting the

⁸ See ICC-01/04-02/06-1994, para. 13.

⁹ Application to Reply, para. 1(a); *See also* paras. 6-9.

¹⁰ Application to Reply, paras. 1(b); *See also* paras. 10-13.

¹¹ Application to Reply, paras. 1(c); *See also* para. 14.

¹² Application to Reply, para. 9.

Chamber with all the information that the Defence would provide if leave were granted.¹³

14. Regulations 24(4) and (5) of the Regulations stipulate that participants may only reply to a document, which itself is a response or reply, *with the leave of the Chamber*. The application for such leave should not be used to circumvent these requirements. Since the Defence has clearly not heeded these requirements, its submissions on the merits of the first two issues should be disregarded and leave to reply should not be granted in relation to these two issues.¹⁴

II. The application should be rejected on its merits

15. 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.

First Issue: The timing of the death of the other prospective radio communications witness

16. As noted above,¹⁵ the Defence provided all substantive reply points in relation to the First Issue. Further, the Defence itself acknowledges that its original submissions on this issue were “ambiguous”.¹⁶ The purpose of a reply is not to seek to remedy shortcomings in the Party’s own original request. As such, the Application to Reply in relation to the First Issue should be rejected.

17. In view of the new information provided by the Defence- that it heard about the death of the other prospective witness in 2016, and that it was not

¹³ See Application to Reply, paras. 11-12.

¹⁴ See ICC-01/05-01/08-2985, para. 5; ICC-01/04-01/06-824, para. 68; ICC-01/09-96-Red, para. 21; ICC-02/05-03/09-242, para. 3.

¹⁵ See para. 12, above.

¹⁶ Application to Reply, para. 7; See also para. 2.

impossible to contact D-0243 between learning of the other witness's death and the filing of the Defence witness list-¹⁷ there is added reason for the Chamber to find that the Defence was able to include D-0243 on its list of witnesses by 27 April 2017 and to reject the Defence Request.

Second Issue: The claim that the Prosecution did not cross-examine the Accused on issues related to radio communications because of the absence of Witness D-0243's summary which, in turn, makes the addition of this witness unfair to the Prosecution

18. The Defence misrepresents the Prosecution's arguments in relation to the Second Issue. The Prosecution did not claim that it "did not cross-examine the Accused on issues related to radio communications because of the absence of Witness D-0243's summary".¹⁸ Neither did the Prosecution argue that it would have "substantially altered" its cross-examination of the Accused if it were in possession of Witness D-0243's summary at the time.¹⁹

19. Rather, the Prosecution argued that, when it cross-examined Defence witnesses, including the Accused, it did not know of the possibility that Witness D-0243 would testify and that this fact deprived it of the opportunity to cross-examine the Accused and other Defence witnesses about: (i) their potential knowledge of Witness D-0243; and/or (ii) specific aspects of the issues upon which Witness D-0243 would testify.²⁰

20. There is nothing "unreasonable" about this argument.²¹ Further, this argument is incontrovertible since the Defence only provided information regarding Witness D-0243's identity and anticipated evidence on 16 October 2017 in the

¹⁷ Application to Reply, para. 8.

¹⁸ See Application to Reply, para. 1(b).

¹⁹ Contra Application to Reply, para. 13.

²⁰ Prosecution Response, para. 32.

²¹ Contra Application to Reply, para. 2.

Defence Request and *via* email. The Defence should have anticipated this argument: the Defence itself made similar submissions in relation to a Prosecution request to add a witness to its list,²² and the Chamber specifically considered these submissions in its determination of the relevant request.²³

21. The fact that the Prosecution questioned the Accused about *some* matters to which Witness D-0243's anticipated testimony happens to relate and that the Prosecution led evidence about *some* of these matters does not cure the prejudice to the Prosecution.²⁴ The "maximum range of VHF audio communications"²⁵ is only part of one of fourteen topics that Witness D-0243 is expected to address.²⁶

22. The late addition of Witness D-0243 would still mean that the Prosecution would have been deprived of the opportunity to ask questions to other witnesses about who Witness D-0243 is, [REDACTED] and other pertinent issues relevant to his credibility. The Prosecution was certainly not in a position to explore, for example, whether any other witness knew if Witness D-0243 had, as he will assert, [REDACTED].²⁷

23. The Chamber would not be assisted by further Defence submissions concerning the alleged contradictory nature of the Prosecution's arguments relevant to the second and third issues.²⁸ The Chamber has the Prosecution's arguments before it and needs no assistance in reaching such a determination if that were the case, which it is not.

²² See ICC-01/04-02/06-1699-Red, paras. 7, 11-15.

²³ See ICC-01/04-02/06-1601-Conf, paras. 14, 17.

²⁴ *Contra* Application to Reply, para. 11.

²⁵ See Application to Reply, para. 12.

²⁶ See Defence Request, Annex C.

²⁷ Defence Request, Annex C, point 6.

²⁸ *Contra* Application to Reply, para. 2.

24. Finally, the Defence's proposed argument that the Prosecution's burden of proof imposes an obligation to cross-examine the Accused "on any and all topics essential to its case"²⁹ does not arise from the Prosecution Response. That the Prosecution could not have cross-examined the Accused or any Defence witness about Witness D-0243 is undeniable since the Defence only sought to add this witness to its list *after* the Prosecution conducted the cross-examinations at issue.

25. The Defence only argues that it could not have anticipated the Prosecution's argument related to the Second Issue, whose argument it misrepresents, and provides no explanation as to why a reply to this issue is otherwise warranted.³⁰ Accordingly, the Chamber should decline to authorise a reply on the Second Issue.³¹

Third Issue: The purportedly redundant or cumulative nature of Witness D-0243's anticipated testimony

26. The Chamber has clearly indicated that, in the context of requests for the addition of witnesses to a Party's list when that Party fails to meet the requirements of regulation 35 of the Regulations, the cumulative nature of evidence that a Party seeks to admit is a factor militating *against* granting such a request.³² Therefore, there is nothing "unreasonable" about the Prosecution's argument related to the Third Issue, and the Defence could reasonably have foreseen it.³³

27. The Defence seeks to draw an artificial distinction between the testimony of the Accused and that of other witnesses for the purposes of establishing the

²⁹ Application to Reply, para. 2.

³⁰ See Application to Reply, paras. 10-13.

³¹ See ICC-01/04-02/06-1994, para. 14.

³² See ICC-01/04-02/06-1785-Conf, paras. 13-14; ICC-01/04-02/06-1733, para. 8 (iii).

³³ *Contra* Application to Reply, paras. 2, 14.

cumulative nature of the proposed evidence.³⁴ However, the Defence draws no such distinction when it is arguing in favour of the admission of evidence pursuant to rule 68(2)(b), in which context the cumulative nature is a factor militating *in favour* of such admission, citing to the Accused's evidence in support of its argument that the evidence of proposed witnesses is cumulative of that already before the Chamber.³⁵

28. Yet again, the Defence only argues that it could not have anticipated the Prosecution's argument in relation to this issue and provides no explanation as to why a reply to this issue is otherwise warranted.³⁶ Accordingly, the Chamber should decline to authorise a reply on the Third Issue.³⁷

Conclusion

29. For the foregoing reasons, the Application to Reply should be rejected.



Fatou Bensouda
Prosecutor

Dated this 21st day of December 2017
At The Hague, the Netherlands

³⁴ Application to Reply, para. 14.

³⁵ See ICC-01/04-02/06-2066-Conf, para. 23, fn. 26, para. 56, fn. 70.

³⁶ See Application to Reply, para. 14.

³⁷ See ICC-01/04-02/06-1994, para. 14.