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

Date: **15 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 on behalf of Mr Ntaganda seeking leave to reply to “Prosecution’s response to the ‘Defence Request on behalf of Mr Ntaganda seeking leave to appeal Decision on Defence request for stay of proceedings with prejudice to the Prosecution’” (ICC-01/04-02/06-1898)**

**Source:** Defence Team of Mr Bosco Ntaganda

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Ms Nicole Samson

**Counsel for the Defence**

Me Stéphane Bourgon  
Me Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the Prosecution's response to the 'Defence Request on behalf of Mr Ntaganda seeking leave to appeal the Decision on Defence request for stay of proceedings with prejudice to the Prosecution' submitted on 9 May 2017 (herein after "Defence Request for Stay"<sup>1</sup>, "Chamber Decision Denying Stay"<sup>2</sup>, "Defence Request Seeking Leave to Appeal"<sup>3</sup> and "Prosecution Response"<sup>4</sup>), Counsel representing Mr Ntaganda ("Defence") hereby submit this:

**Request on behalf of Mr Ntaganda seeking leave to reply to "Prosecution's response to the 'Defence Request on behalf of Mr Ntaganda seeking leave to appeal Decision on Defence request for stay of proceedings with prejudice to the Prosecution'" (ICC-01/04-02/06-1898)**

**"Defence Request for Leave to Reply"**

## OVERVIEW

1. Further to the submission of the Prosecution Response, the Defence requests leave to reply, pursuant to Regulations 24(5) and 34(c) of the Regulations of the Court ("RoC"), in relation to the following nine specific grounds:

*First ground:* The Prosecution's erroneous submission at paragraph 6 that "other Chambers have denied" applications for leave to appeal decisions concerning requests to stay the proceedings and that this "fatally undermines any view that the supposed "intrinsic significance to fairness and the outcome of proceedings" means that leave to appeal these decisions must *always* be granted".

*Second ground:* The Prosecution's incorrect submission at paragraph 9 that "The first issue is not 'appealable' because it addresses a matter which, as the Defence notes, did not need to be settled in order to decide the request for a permanent stay of proceedings. Nor does the issue genuinely arise from the Decision".

*Third ground:* The Prosecution's groundless submission at paragraph 13 that the Defence Request Seeking Leave to Appeal "is vague as to the

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<sup>1</sup> ICC-01/04-02/06-1830, 20 March 2017.

<sup>2</sup> ICC-01/04-02/06-1883, 28 April 2017.

<sup>3</sup> ICC-01/04-02/06-1888, 4 May 2017.

<sup>4</sup> ICC-01/04-02/06-1898, 9 May 2017.

impact of the proposed [second] issue on the fair and expeditious conduct of the proceedings”.

*Fourth ground:* The Prosecution’s incorrect submission at paragraph 14 that “the third proposed issue does not genuinely arise from the Decision” and the Prosecution’s related misplaced argument.

*Fifth ground:* The Prosecution’s erroneous submission that “the fourth proposed issue does not genuinely arise from the decision” and the Prosecution’s misunderstanding of the Defence fourth appealable issue.

*Sixth ground:* The Prosecution’s erroneous submission at paragraph 21 that “the fifth proposed issue misinterprets the Decision, and therefore does not genuinely arise from it” and the Prosecution’s mischaracterization of the defence fifth appealable issue.

*Seventh ground:* The Prosecution’s erroneous arguments at paragraph 26, in relation to the sixth appealable issue, that: “The Defence fails to develop any argument in this respect, but merely repeats the same vague reasoning as for other proposed issues” and “there is no basis to assume that the Decision would have reached a different outcome”.

*Eighth ground:* The Prosecution’s flawed and inaccurate submissions that: “[t]he seventh proposed [appealable] issue misrepresents the Decision (paragraph 27)”, which “must be understood to be based on a cumulative assessment (paragraph 28)”.

*Ninth ground:* The Prosecution’s misguided arguments at paragraphs 30 and 31, in relation to the eighth appealable issue, that “the Request does not articulate why the measures ordered ‘are neither proportional’ to the Chamber’s finding ‘nor adequately corrective’, retrospectively or prospectively” and that “[n]owhere in the Request does the Defence articulate a reasoned basis on why this approach is insufficient”.

2. The Defence respectfully submits that allowing it to reply on the above nine grounds will materially assist the Chamber in adjudicating the Defence Request Seeking Leave to Appeal.

## SUBMISSIONS

- I. ***First ground*** – The Prosecution’s erroneous submissions at paragraph 6 that “other Chambers have denied” applications for leave to appeal decisions concerning requests to stay the proceedings and that “this fatally undermines any view that the supposed ‘intrinsic significance to fairness and the outcome of proceedings’ means that leave to appeal these decisions must *always* be granted”.
3. Contrary to the Prosecution’s erroneous submission, what is significant regarding this ground is the fact that when requests to stay the proceedings have been granted by trial chambers, leave to appeal these decisions was indeed always granted.<sup>5</sup> The Prosecution Response fails to acknowledge this reality, which underlies its misunderstanding of the Defence argument.
4. If granted leave to reply, the Defence will highlight the impact of the Prosecution’s misunderstanding of the necessity to consider the parallel between the Chamber Decision Denying Stay – further to the Defence Request for Stay in which the Defence argued that “it has become impossible for the Chamber to ensure a fair trial for Mr Ntaganda”- and other decisions such as the Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect<sup>6</sup> denying Mr Barayagwiza’s request to terminate the proceedings, whereas leave to appeal the latter was recognised on the basis that:

“We find that the challenge to jurisdiction raised by the Appellant is consistent with the logic underlying the decision reached in the Tadić case. Given that the Appeals Chamber is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant’s appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights. Therefore, on the basis of these findings, the Appeals Chamber

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<sup>5</sup> See *inter alia* ICC-01/04-01/06-1417, and ICC-01/04-01/06-T-1314-ENG.

<sup>6</sup> *Barayagwiza*, ICTR-97-19-I, 17 November 1998.

will decline to exercise jurisdiction over the Appellant, on the basis of the abuse of process doctrine, as discussed in the following Sub-section.”<sup>7</sup>

5. In this case the Prosecution’s substantive argument in paragraph 7 clearly demonstrates the requirement for the Appeals Chamber to pronounce on the Chamber Decision Denying Stay and whether the proceedings should or should not continue.

**II. *Second ground* – The Prosecution’s incorrect submission at paragraph 9 that “The first issue is not ‘appealable’ because it addresses a matter which, as the Defence notes, did not need to be settled in order to decide the request for a permanent stay of proceedings. Nor does the issue genuinely arise from the Decision”.**

6. Regarding the second issue, a reply is necessary to rectify the Prosecution’s misunderstanding of the Defence first appealable issue. Contrary to the Prosecution’s assertions, the Chamber Decision Denying Stay clearly recognised “the availability of the remedy of a permanent stay of proceedings where it would be ‘repugnant or odious to the administration of justice to allow the case to continue’”. The Prosecution ignores that although a stay of proceedings can be granted even in the absence of a finding that the Prosecution acted in bad faith, such a finding would actually make it worse and odious to the administration of justice to allow the case to continue. This is exactly what the Defence argued, namely that the Prosecution knowingly sought to obtain confidential Defence information and presented the majority of its case while being in the possession of such confidential information, without informing the Defence.
7. If granted leave to reply, the Defence will explain why it was unavoidable for the Chamber to pronounce on the wilfulness of the Prosecution’s inappropriate conduct in order to decide on the Defence Request for Stay. Should the Appeals Chamber indeed find that the Prosecution acted wilfully

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<sup>7</sup> Barayagwiza, ICTR-97-19-AR72, 3 November 1999, para. 72.

in blatant disregard for due process requirement, this would inevitably impact its assessment as to whether this trial can proceed or not.

**III. *Third ground* – The Prosecution’s groundless submission at paragraph 13 that the Defence Request Seeking Leave to Appeal “is vague as to the impact of the proposed [second] issue on the fair and expeditious conduct of the proceedings”.**

8. Concerning the third issue, the Defence first underscores the Chamber’s holding that “it would have been preferable for the Prosecution to have engaged a separate team to conduct the Article 70 investigations flowing from the *Ntaganda* case. However, while noting that the Prosecution may not have followed best practice in this regard, the Chamber does not consider that, without more, it amounts to an abuse of process rendering a fair trial impossible.”
9. Certainly, in the event the Appeals Chamber was to find that no reasonable Trial Chamber - having duly considered all relevant specific circumstances of this case - could have concluded that the Prosecutor merely did not follow best practice - by failing to segregate the confidential Defence information obtained, from the Prosecution team in this case - this would assuredly impact its assessment as to whether this constituted an abuse of process.
10. If granted leave to reply, the Defence will rectify the Prosecution’s groundless submission regarding the vagueness of the Defence Request Seeking Leave to Appeal, which clearly sets out the issue, *i.e.* that the Chamber erred in the exercise of its discretion by limiting its assessment to the circumstances mentioned in paragraph 32 of the Decision Denying Stay, thereby failing to consider all specific and relevant circumstances.

**IV. *Fourth Issue* – The Prosecution’s incorrect submission at paragraph 14 that “the third proposed issue does not genuinely arise from the Decision” and the Prosecution’s related misplaced argument.**

11. It is evident on the basis of paragraphs 14 to 17 of the Prosecution Response – in which the Prosecution disputes the merits of the third appealable issue put forward by the Defence, referring to the Chamber Decision Denying Stay and the supporting material provided by the Defence – that the third appealable issue arises genuinely from the Chamber Decision Denying Stay.
12. If granted leave to reply, the Defence will first demonstrate the Prosecution’s misplaced argument, challenging the merits of the third appealable issue rather than attempting to show why it is not an appealable issue. The Prosecution’s approach, in and of itself, makes it clear that this is indeed an appealable issue.
13. In the event the Appeals Chamber was to find merit in the Defence argument – that the Chamber erred by finding that the confidential Defence information relevant to defence strategy which the Prosecution gained access to, was limited – this would undoubtedly impact its assessment as to whether the Prosecution’s actions amount to an abuse of process and whether the proceedings can continue or not.

**V. *Fifth Issue* – The Prosecution’s erroneous submission that “the fourth proposed issue does not genuinely arise from the decision” and the Prosecution’s misunderstanding of the Defence fourth appealable issue.**

14. Once again, the Prosecution challenges the merits of the argument put forward by the Defence instead of attempting to show that the fourth appealable issue is not an appealable issue. What is more, the Prosecution misunderstands the Defence argument, which justifies the submission of a reply.
15. If granted leave to reply, the Defence will demonstrate the Prosecution’s misunderstanding of the fourth appealable issue, which comprises two alleged reversible errors committed by the Chamber, namely: (i) the imposition of an



unreasonable burden on the Defence to provide 'concrete instances of the Prosecution having used the information in a manner resulting in undue prejudice'; and (ii) the Chamber's inequitable consideration of the Prosecution's submission that the confidential Defence information was not used for any litigation-related assessment, unsupported by any evidence.

16. Regarding the latter, the Defence submitted that no reasonable trial chamber - having duly considered all relevant circumstances, which the Chamber failed to do - could have accepted the Prosecution's submission in the absence of any supporting evidence. As for the former, the Defence explained why the burden imposed on the Defence amounted to a *probatio diabolica*<sup>8</sup>.

17. In both cases, should the Appeals Chamber find merit in one or more of the Defence arguments, certainly this would impact its assessment as to whether the Prosecution's deliberate actions amount to an abuse of process and whether the resulting prejudice to Mr. Ntaganda should result in a stay of proceedings.

**VI. Sixth ground – The Prosecution's erroneous submission at paragraph 21 that "the fifth proposed issue misinterprets the Decision, and therefore does not genuinely arise from it" and the Prosecution's mischaracterization of the defence fifth appealable issue.**

18. As a preliminary matter, the Defence underscores that the Prosecution Response once again addresses the merits of the Defence fifth appealable issue, which in and of itself, demonstrates that it is indeed an appealable issue.

19. Moreover, the Defence underscores that the Prosecution Response does not even address the Chamber's holding that "the Chamber is not competent to make any determination as to the reasons that justified non-disclosure of the materials related to the Article 70 proceedings".

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<sup>8</sup> See *Ngudjolo* Appeal judgment, ICC-01/04-02/12-271; Annex A, 7 April 2015.

20. If granted leave to reply, the Defence will explain the Prosecution's mischaracterization of the fifth appealable issue. The fifth appealable issue focuses on the impact of the Chamber's holding above, which led the Chamber to "focus [only] on assessing prejudice suffered by the accused in the *Ntaganda* case as a result of the maintenance of the *ex parte* nature of the proceedings until filing of the Notice" and to refrain from assessing the lack of justification and the Prosecution's wrongful conduct in presenting the majority of its case while being in possession of confidential Defence information, without informing the Defence.

21. It is significant in this regard that the Prosecution: (i) could not have applied to the Chamber *ex parte* to obtain all of Mr. Ntaganda's non-privileged conversations; (ii) could not have obtained all conversations, without restriction, from the Chamber; (iii) obtained the totality of the conversations, unfiltered and without any restriction as a result of a decision which constituted a marked departure from the Ngudjolo Appeals Judgment, rendered by one of the two dissenting Judges in that appeal.

22. It is thus necessary for the Appeals Chamber to pronounce on the Chamber's omission to consider all of these highly relevant circumstances, which would inevitably impact its assessment as to whether the proceedings should continue.

**VII. *Seventh Issue* – The Prosecution's erroneous arguments at paragraph 26, in relation to the sixth appealable issue, that: "The [d]efence fails to develop any argument in this respect, but merely repeats the same vague reasoning as for other proposed issues" and "there is no basis to assume that the Decision would have reached a different outcome—this follows not only from the multi-factored nature of the Chamber's analysis".**

23. The first of the Prosecution's arguments is misplaced and therefore requires a reply. Although the Prosecution Response erroneously challenges the merits of the Defence appealable issues on numerous occasions, this is not the purpose of applications seeking leave to appeal.

24. If granted leave to reply, the Defence will address the second Prosecution argument above. Whether there is a basis or not to assume that the Decision would have reached a different outcome is beside the point.

25. What matters is whether the appealable issue – the Chamber’s assessment of the prejudice resulting from the *ex parte* nature of the Article 70 proceedings – and whether it would impact the Appeals Chamber’s (and not this Chamber’s) assessment as to whether the Prosecution’s deliberate conduct amounts to an abuse of process and if it is necessary to terminate the proceeding on this basis.

**VIII. Eighth Issue – The Prosecution’s flawed and inaccurate submissions that:” [t]he seventh proposed [appealable] issue misrepresents the Decision (paragraph 27)”, which “must be understood to be based on a cumulative assessment (paragraph 28)”.**

26. Once again, the Prosecution challenges the merits of the seventh appealable issue which, in and of itself, establishes that it is indeed an ‘appealable issue’. More importantly, contrary to the Prosecution’s assertion, the seventh appealable issue does not misrepresent the Decision Denying Stay.

27. If granted leave to reply, the Defence will demonstrate that the appealable issue clearly arises from the Decision Denying Stay in which the Chamber clearly began its assessment by finding that “while noting that the Prosecution may not have followed best practice in this regard, the Chamber does not consider that, without more, it amounts to an abuse of process rendering a fair trial impossible”<sup>9</sup> and only then “[considered] that it is possible to continue conducting a fair trial in the present case”<sup>10</sup>.

28. The Prosecution misunderstands that the seventh appealable issue is aimed at the purported Chamber’s erroneous approach to the notion of abuse of process and its legal ramifications, whereas the alleged abuse of process in this case

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<sup>9</sup> Decision Denying Stay, para. 32.

<sup>10</sup> Decision Denying Stay, para. 61.

goes way beyond the Prosecutor's failure to segregate the conversations obtained, from the Prosecution's team in this case.

29. Should the Appeal's Chamber find merit in the arguments put forward by the Defence that the abuse of process in this case involves one or more of the following deliberate actions by the Prosecution - (i) The Prosecution's knowledge of the confidential Defence information comprised in the conversations; (ii) the Prosecution's knowledge that it could not have obtained the conversations, unfiltered and without any redactions, from the Chamber; (iii) the Prosecution's knowledge that it could not have obtained the conversations from the Chamber, without the Defence being informed; (iv) the Prosecution's forum shopping obtaining the conversations from the single Judge thereby depriving the Chamber of the ability to protect the rights of Mr. Ntaganda; (v) the Prosecutor's failure to segregate the conversations from the Prosecution team in this case; (vi) the Prosecution presenting its case while being in the possession of the conversations, without informing the Defence; (vii) the Prosecution's failure to observe and follow the Chamber's guidance – on at least two occasions - to inform the Defence without delay of the conversations it had obtained; (viii) the Prosecution's disclosure of the conversations at the very late stage of its case for the purpose of attempting to use these conversations during the presentation of the case for the Defence; (ix) the Prosecution's failure to provide any justification – other than to safeguard the integrity of its Article 70 investigation, without more – for the need to withhold from the Defence, the fact that it had obtained the conversations; and (x) the Prosecution strongly opposing the Defence's request to have the time necessary to review the conversations, only to make it clear that it intends to use the conversations when cross-examining Defence witnesses – this would certainly impact its assessment as to whether it is necessary to stay the proceedings as a result thereof.

**IX. *Ninth ground* – The Prosecution’s misguided arguments at paragraphs 30 and 31, in relation to the eighth appealable issue, that “the Request does not articulate why the measures ordered ‘are neither proportional’ to the Chamber’s finding ‘nor adequately corrective’, retrospectively or prospectively” and that “Nowhere in the Request does the Defence articulate a reasoned basis on why this approach is insufficient”.**

30. The Prosecution Response in relation to the eighth appealable issue is flawed.

The Prosecution misunderstands that a request seeking leave to appeal is not the place for the Defence to argue the merits of the appealable issues put forward.

31. Nonetheless, the Defence has more than sufficiently highlighted how the alternative measures ordered are not proportional to the prejudice identified by the Chamber and the fact that it does not remedy the Prosecution’s violation of the right of Mr Ntaganda to a fair trial.

32. More importantly, if granted leave to reply, the Defence will address the link to be made between the alternative measures ordered by the Chamber and the Prosecution’s understanding of the same as articulated in its response<sup>11</sup> to the ‘Defence request for an order precluding the use of Mr Ntaganda’s non-privileged telephone conversations’<sup>12</sup>, based on the Ngudjolo Appeal’s Judgment<sup>13</sup>.

33. In its response, the Prosecution makes it clear that: (i) it can use the conversations; (ii) it intends to use the conversations when cross-examining Defence witnesses; and (iii) the alternative measure ordered by the Chamber is but an additional procedural step.

34. The Prosecution’s decision not to seek leave to appeal the Chamber Decision Denying Stay in conjunction with its response to the ‘Defence request for an order precluding the use of Mr Ntaganda’s non-privileged telephone

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<sup>11</sup> ICC-01/04-02/06-1893, 8 May 2017.

<sup>12</sup> ICC-01/04-02/06-1878, 25 April 2017.

<sup>13</sup> *Ngudjolo*, ICC-01/04-02/12-271, 25 February 2015.

conversations' illustrate the disproportionality of the alternative measure on which the Appeal's Chamber must pronounce, a decision which would inevitably impact its assessment as to whether the proceedings should be stayed or if more stringent alternative measures are required.

## **X. Conclusion**

35. In light of the above submissions and arguments, the Defence requests leave to reply to the Prosecution Response. The Defence respectfully submits that allowing it to rely on the above nine grounds will materially assist the Chamber in adjudicating the Defence Request Seeking Leave to Appeal.

## **XI. RELIEF SOUGHT**

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

**GRANT LEAVE TO REPLY** to the Prosecution Response in relation to grounds one to nine.

**RESPECTFULLY SUBMITTED ON THIS 15<sup>TH</sup> DAY OF MAY 2017**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands