



Original: English

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

Date: 8 April 2019

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

Prosecution's Response to the Defence "Request on behalf of Mr. Ntaganda seeking leave to reply to 'Prosecution's Response to the Defence 'Motion for Temporary Stay of Proceedings'", 8 April 2019, ICC-01/04-02/06-2331

Source: Office of the Prosecutor

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

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution opposes the Defence request for leave to reply (“Request to Reply”).¹
2. *First*, the Request to Reply contains submissions on the merits of the issues upon which the Defence seeks to reply, contrary to regulation 24(4) and (5) of the Regulations of the Court (“Regulations”). These submissions should be disregarded.
3. *Second*, the Request to Reply is flawed on its merits, since 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, any arguments in the interests of the completeness of the judicial record, or any novel or particularly important issue. Accordingly, the three points on which the Defence proposes to reply exceed the permissible scope of a reply and the Request to Reply should be dismissed.

Procedural History

4. On 1 April 2019, the Defence filed a request for disclosure to the Presidency.² On the same date, the Defence filed a request for a temporary stay of proceedings to Trial Chamber VI.³

¹ ICC-01/02-02/06-2331 (“Request to Reply”).

² ICC-01/02-02/06-2327 (“Defence Request for Disclosure”).

³ ICC-01/02-02/06-2328 (“Defence Request for a Stay”).

5. On 5 April 2019, the Prosecution⁴ and the Legal Representatives of Victims⁵ responded to the Defence Request for a Stay.
6. On 8 April 2019, the Defence requested leave to reply to the Prosecution Response.⁶

Submissions

The application should be dismissed in limine

7. The Defence identifies three issues on which it seeks leave to reply, namely: (i) whether the Judges have already considered all facts and arguments; (ii) the motion is not premature in the absence of a pending request for reconsideration; and (iii) the motion is not speculative merely because Judge Ozaki has not yet been disqualified. These three points were sufficiently outlined as areas upon which the Defence sought to reply in paragraph 5 of the Request to Reply. The Defence, however, thereafter impermissibly proceeded to make substantive submissions on all three issues, without first awaiting the Chamber's leave to do so. Regulation 24(4) and (5) of the Regulations stipulate that participants may only reply to a document *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 should be disregarded.

⁴ ICC-01/02-02/06-2329 (“Prosecution Response”).

⁵ ICC-01/02-02/06-2330.

⁶ ICC-01/02-02/06-2331.

The application should be rejected on its merits

7. Furthermore, the Request 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 Judges have already considered all relevant facts and arguments

8. Under the first issue, the Defence seeks to make further submissions that were entirely foreseeable at the time of its request for a temporary stay of proceedings, and indeed, that it already made at that time. The Defence contends that the Plenary “did not appear” to consider Judge Ozaki’s candour when deciding that her appointment as Ambassador of Japan to Estonia did not violate article 40.⁷ Yet, the Defence actually already referred to this point in its initial request for a temporary stay: “The Decision of the Judges underscores this non-disclosure by Judge Ozaki” and proceeded to cite a passage in the Plenary decision that suggests it already considered candour.⁸ A reply on this point should not be granted, as the Defence seeks impermissibly to repeat and supplement its original submissions.
9. Moreover, the Defence should have reasonably anticipated that the Prosecution would address the fact that these issues have already been decided by the competent judges.

Second issue: whether the motion is premature

10. Leave to reply should not be granted on this issue, as there is nothing in the Prosecution Response that the Defence could not have reasonably foreseen.

⁷ Request to Reply, para. 6.

⁸ ICC-01/04-02/06-2328, para. 9.

All relevant facts were known to the Defence at the time it filed its submissions and the Prosecution squarely addressed those facts.

11. Indeed, the Defence already indicated – in its request for disclosure – that it “intends to bring a request concerning this issue before the Presidency or other applicable body” and that “in preparation for this request, however, the Defence seeks to be fully informed of the relevant facts”.⁹ The Prosecution correctly cited this very paragraph in its response.¹⁰

12. If anything, the Defence is attempting to further clarify its original position by saying that “barring exceptional circumstances” it will file even without any further disclosure by the Presidency.¹¹ This is not the purpose of a reply.

Third issue: the motion for a stay is not speculative

13. Leave to reply should not be granted on this issue, as the Defence canvassed this issue at length in no less than seven paragraphs its original request on its claimed consequences of continuing deliberations, including extensive references to case law. There is nothing in the Prosecution Response that the Defence could not have reasonably foreseen, or did not already develop.

14. Again, the Defence seeks impermissibly to repeat and supplement its original submissions. A reply should not be granted on this basis.

⁹ ICC-01/04-02/06-2327, para. 8.

¹⁰ ICC-01/04-02/06-2329, paras. 2 and 14.

¹¹ Request to Reply, para. 8.

Conclusion

15. Based on the foregoing, the Prosecution requests that the Defence Request be dismissed.



Fatou Bensouda
Prosecutor

Dated this 8th day of April 2019
At The Hague, The Netherlands