

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **18 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**

**Response to the Defence request for leave to reply to the “Prosecution’s response to the ‘Request on behalf of Mr Ntaganda seeking leave to appeal ‘Decision on Defence request for stay of proceedings with prejudice to the Prosecution’ (ICC-01/04-02/06-1888), 9 May 2017, ICC-01/04-02/06-1898”, (ICC-01/04-02/06-1904)**

**Source:** Office of the Prosecutor

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

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**Victims Participation and Reparations  
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## Introduction

1. The Prosecution opposes the Defence request for leave to reply (“Application to Reply”).<sup>1</sup>
2. First, the Application 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, no reply is justified on the basis of the nine grounds proposed in the Application to Reply, which are not confined to issues which “could not reasonably have [been] anticipated”, as regulation 24(5) generally contemplates. Rather, the Defence merely seeks to supplement and elaborate upon its original request. This will not “materially assist the Chamber” in deciding the Defence request for leave to appeal,<sup>2</sup> nor is it consistent with principles of judicial economy.

## Procedural History

4. On 4 May 2017, the Defence sought leave to appeal the “Decision of Defence request for stay of proceedings with prejudice to the Prosecution” (“Defence Request”), in which it articulated eight ‘appealable issues’.<sup>3</sup>
5. On 9 May 2017, the Prosecution responded to the Defence Request (“Prosecution Response”).<sup>4</sup>
6. On 15 May 2017, the Defence filed the Application to Reply.<sup>5</sup>

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<sup>1</sup> ICC-01/04-02/06-1904.

<sup>2</sup> *Contra* Application to Reply, para. 2.

<sup>3</sup> ICC-01/04-02/06-1888.

<sup>4</sup> ICC-01/04-02/06-1898.

### Prosecution's Submissions

7. The Application to Reply makes submissions on the merits of the Defence Request, including references to case law, without leave of the Chamber. Regulation 24(4) and (5) stipulate that participants may only reply to a document, which itself is a response or reply, *with* 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. Indeed, very similar concerns were raised when the Defence previously sought leave to reply in support of its original request for a stay of proceedings.<sup>6</sup>
  
8. 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 and will not materially assist the Chamber. A reply is not necessary simply for one Party to reiterate its disagreement with the views of another. The Prosecution further notes that the Defence used the full page limit for its original motion (20 pages), and the Application to Reply (14 pages) appears to be used primarily as a vehicle to elaborate and expand upon original arguments.

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<sup>5</sup> ICC-01/04-02/06-1904.

<sup>6</sup> See ICC-01/04-02/06-1850, paras. 9-10 (recalling that the Chamber granted leave, in part, in ICC-01/04-02/06-1883, para. 16).

*i. First ground*

9. On the first ground, the Defence seeks leave to reply in order to clarify its selective citation of precedents concerning previous requests for leave to appeal decisions concerning stay of proceedings.<sup>7</sup> The Prosecution maintains its view that the narrow meaning apparently intended by the Defence was far from clear in the original motion<sup>8</sup>—but in any event, the matter is irrelevant as the Defence does not contest that the authorities cited by the Prosecution in response are accurate.<sup>9</sup> Instead, the Defence simply uses its Application to Reply to make additional submissions to try and justify its position on the merits, including with a lengthy excerpt of jurisprudence which is expressly intended as a *response* to the response made by the Prosecution,<sup>10</sup> contrary to regulation 24(2). These submissions should be disregarded.

10. Leave should not be granted as further submissions will not assist the Chamber in its determination. The Chamber is well-placed to assess the relevance and impact of the jurisprudence cited by each party. Additional assistance from the Defence is not required.

*ii. Second ground*

11. In respect of the second ground, the Defence simply disagrees with the view taken in the Prosecution Response, which it calls a “misunderstanding” of its “first appealable issue”.<sup>11</sup> If this is so, the Chamber can make such a determination based on the Defence Request and Prosecution Response; it does

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<sup>7</sup> Application to Reply, paras. 3-5.

<sup>8</sup> See Defence Request, para. 6.

<sup>9</sup> See Prosecution Response, para. 6.

<sup>10</sup> Application to Reply, para. 5 (concluding that, as a consequence of the jurisprudence cited, “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”).

<sup>11</sup> Application to Reply, paras. 6-7.

not require further assistance from the Defence in this respect—especially on matters already set out in its initial submissions.<sup>12</sup>

### *iii. Third ground*

12. The third ground not only disagrees with the Prosecution Response, but expressly seeks to “underscore[]” passages from the Chamber’s original decision which the Defence considers to assist its position on the merits.<sup>13</sup> The Defence does not explain why a reply is justified, beyond expressing an aspiration to “rectify” the Prosecution Response.<sup>14</sup> Again, the Chamber needs no assistance in weighing the merits of the Parties’ previously expressed positions,<sup>15</sup> let alone the significance in that context of its own views.

### *iv. Fourth ground*

13. The fourth ground simply opines that the Prosecution Response to the “third appealable issue” “makes [...] clear that this is indeed an appealable issue.”<sup>16</sup> The Application to Reply then proposes rearguing the merits of its previous arguments.<sup>17</sup> Either way, no further submissions by the Defence are shown to be required. No new or distinct issues were raised that merit a reply, and leave to reply on this ground should be denied.

### *v. Fifth ground*

14. The fifth ground criticises the way in which the Prosecution chose to frame the Prosecution Response, and contends erroneously that “the Prosecution

<sup>12</sup> See e.g. Defence Request, paras. 23-25.

<sup>13</sup> Application to Reply, para. 8.

<sup>14</sup> Application to Reply, paras. 8-10.

<sup>15</sup> See Prosecution Response, paras. 12-13 and Defence Request, paras. 28-29.

<sup>16</sup> Application to Reply, para. 12.

<sup>17</sup> Application to Reply, paras. 11-12. See Defence Request, paras. 31-33 and Prosecution Response, paras. 14-17.

misunderstands the Defence argument, which justifies the submission of a reply.”<sup>18</sup> The Defence fails to articulate how the Prosecution misunderstood (or misrepresented) its argument, or how further Defence submissions are necessary or would assist the Chamber. Regardless, a Party’s subjective view that they have been misunderstood does not itself justify a reply – whether a reply will materially assist the Chamber depends instead on the Chamber’s further appreciation of all the circumstances.

15. The Defence seeks to re-explain its arguments on the merits<sup>19</sup> and to elaborate upon them by referring to new legal authorities which it contends to be relevant to its original position, yet to which it did not refer.<sup>20</sup> Replies are not a vehicle for a Party to supplement or address shortcomings in its original submission.

#### *vi. Sixth ground*

16. The sixth ground takes issue with the characterisation of the “fifth appealable issue”, and again contends that the Prosecution Response “demonstrates that it is indeed an appealable issue.”<sup>21</sup> Yet the issue proposed for reply appears concerned instead with the significance of reasoning by the Chamber which the Defence claims that “the Prosecution Response does not even address”.<sup>22</sup> If this is so, the Defence need not reply to a matter on which the Prosecution was supposedly silent; if it is not so, then the Defence argument is plainly

<sup>18</sup> Application to Reply, paras. 14-16.

<sup>19</sup> Application to Reply, paras. 15-16.

<sup>20</sup> Application to Reply, para. 16 (fn. 8). There is no reference to this authority in the Defence Request.

<sup>21</sup> Application to Reply, para. 18.

<sup>22</sup> Application to Reply, paras. 19-21. *See* Prosecution Response, para. 21.

misconceived. The Defence, again, simply seeks to elaborate upon its original submissions, and to address any shortcomings.<sup>23</sup> This is impermissible.

17. Further, the Defence impermissibly delves into the merits of the issue it seeks to address in its reply,<sup>24</sup> and these submissions should be disregarded.

*vii. Seventh ground*

18. Beyond expressing its disagreement with the Prosecution Response, the seventh ground purports to address a difference of legal opinion between the Parties, concerning the requirements to certify an issue for appeal under article 82(1)(d).<sup>25</sup> The law in this respect is well established, and adequately addressed in the Parties' previous submissions,<sup>26</sup> and the Chamber requires no further assistance from the Parties in this respect. Nor can the applicable law be considered an issue which could not have been reasonably anticipated. Leave to reply should be denied.

*viii. Eighth ground*

19. The eighth ground merely disagrees with the Prosecution Response, and again claims that it "establishes that it is indeed an 'appealable issue'".<sup>27</sup> The issue proposed for reply is the very object of the original Defence Request—"the Defence will demonstrate that the appealable issue clearly arises from the Decision Denying Stay."<sup>28</sup> This should have, therefore, been fully argued in the Defence Request. It is apparent that the Defence seeks to reargue the merits of

<sup>23</sup> See e.g. Application to Reply, para. 21. See Defence Request, paras. 40-41 and Prosecution Response, paras. 21-24.

<sup>24</sup> Application to Reply, para. 21.

<sup>25</sup> Application to Reply, paras. 23-25.

<sup>26</sup> See e.g. Defence Request, paras. 1, 3-4, 14-17, 19-21, 25-26, 29, 33, 38, 42, 46, 49, 53-54 and Prosecution Response, paras. 1, 3, 5-8, 11, 13, 17, 20, 24, 26, 29, 31.

<sup>27</sup> Application to Reply, para. 26.

<sup>28</sup> Application to Reply, para. 27.



its original request<sup>29</sup>—which, indeed, it does in substantial part even in the Application to Reply itself.<sup>30</sup> This cannot materially assist the Chamber, and should be disregarded.

*ix. Ninth ground*

20. Finally, the ninth ground again constitutes a mere disagreement with the Prosecution Response, which the Defence characterises as a Prosecution “misunderstand[ing]”.<sup>31</sup> Although the Parties need not show that ‘appealable issues’ are well-founded on the merits, they must make a minimum showing in order to demonstrate that there is an ‘issue’—a matter more than mere subjective disagreement with the impugned decision. Furthermore, the Defence concedes that it has already “more than sufficiently highlighted” its view in this regard.<sup>32</sup> Consequently, the Chamber will not be assisted by further submissions on this issue, nor does the Chamber require assistance in identifying any relevant links between the submissions made by the Parties in the context of this litigation, and any other relevant submissions which may have been made.<sup>33</sup> In particular, it should be recalled, the Defence Request concerns the reasoning in this Chamber’s original decision, and not factors extraneous to that decision. Speculative and unfounded Defence submissions concerning the Prosecution’s decision not to appeal a different decision by the Chamber are one such example.<sup>34</sup>

<sup>29</sup> See e.g. Defence Request, paras. 25, 36, 37, 47, 48. See also Prosecution Response, paras. 27-29.

<sup>30</sup> Application to Reply, paras. 28-29.

<sup>31</sup> Application to Reply, para. 30.

<sup>32</sup> Application to Reply, para. 31.

<sup>33</sup> *Contra* Application to Reply, paras. 32-33.

<sup>34</sup> Application to Reply, para. 34.

## Conclusion

21. For all the reasons above, the Chamber should dismiss the Application to Reply, and disregard any submissions contained therein when deciding the Defence Request on its merits.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 18<sup>th</sup> day of May 2017  
At The Hague, The Netherlands