

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 “Response to the Defence request for leave to reply to the “Prosecution Response to the Defence request seeking disclosure orders in relation to Witness P-901””, 10 September 2015, ICC-01/04-02/06-816-Conf-Exp

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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Introduction

1. The Prosecution opposes the Defence application for leave to reply to the Prosecution's Response to the Defence request seeking disclosure orders in relation to Witness P-901 ("Application to Reply").¹
2. The Application to Reply makes submissions on the issues it seeks to reply upon, contrary to regulation 24(4) and (5) of the Regulations of the Court ("RoC"). It is also 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 arguments 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.² Accordingly, the four points on which the Defence proposes to reply exceed the permissible scope of a reply.

Confidentiality

3. The Prosecution classified its response to the Defence request seeking disclosure orders in relation to Witness P-901 ("Defence Request") as Confidential, *EX PARTE* – only available to the Prosecution, Defence and Victims and Witnesses Unit ("VWU"), pursuant to regulation 23*bis*(1) and (2) of the RoC. This was not only because: (a) the Defence Request seeking disclosure orders in relation to Witness P-901 was filed on a confidential *ex parte* basis, obliging the Prosecution to adopt the same classification; but also because (b) the Defence Request and Prosecution Response referred to

¹ ICC-01/04-02/06-810.

² ICC-01/04-02/06-810, para.4.

confidential information related to witness security, namely: [REDACTED];³ and, [REDACTED].⁴

4. Accordingly, the Prosecution submits that the same classification should be used for any related filings and that the Defence's Application to Reply should be reclassified as Confidential *Ex parte*. The Prosecution will be filing a public redacted version of its prior response and of this filing.

Procedural History

5. On 28 August 2015, the Defence filed the Defence Request on a confidential *ex parte* basis. The Defence filed a public redacted version of its Request the same day.⁵
6. On 31 August 2015, Trial Chamber VI ("Chamber") ordered the Prosecution to file its response to the Defence Request by 7 September 2015.⁶
7. On 7 September 2015, the Defence filed its Application to Reply.⁷

Prosecution's Submissions

In limine

8. The Prosecution submits that the Application to Reply should be dismissed outright as it substantially elaborates upon the issues that the Defence has identified for further reply. The Defence identifies four issues on which it seeks leave to reply, asserting that the Prosecution Response: (i) misrepresents jurisprudence concerning the permissibility of withholding audio-recordings

³ [REDACTED].

⁴ [REDACTED].

⁵ ICC-01/04-02/06-800-Conf-Exp; *see also* ICC-01/04-02/06-800-Red.

⁶ Email from the Chamber on 31 August 2015 at 10:46 am.

⁷ ICC-01/04-02/06-808.

and transcripts of Prosecution interviews with Defence witnesses; (ii) ignores or misunderstands its obligation to comprehensively disclose its notes of witness statements; (iii) demonstrates that the Prosecution has already breached, and inconsistently applied, its obligation to disclose witness statements; and (iv) demonstrates that the undisclosed records of payments go far beyond the ordinary requirements of subsistence.

9. The Defence, in its Application, then goes on to make substantive submissions on the four issues it identifies, without first awaiting the Chamber's leave to do so. Indeed, the Application to Reply is more than 10 pages – longer than the number of pages it seeks for the Reply itself - and only one page short of the original Defence Request. Regulation 24(4) and (5) stipulate that participants may only reply to a document, which itself is a response or reply, with the leave of the Chamber. The Defence has clearly not heeded the requirements of regulation 24(4) and (5) and the Application to Reply should be rejected for this reason alone.

10. Furthermore, even on the merits of these unsanctioned submissions, the Application is flawed.

First Issue: Alleged misrepresentation of jurisprudence

11. The Defence takes issue with the non-disclosure of an audio-recording and related transcript of a security-related interview with P-901 [REDACTED], for which a written witness statement has been disclosed to the Defence.⁸ As explained in the Prosecution's Response, the interview solely related to security matters,⁹ so not to issues arising from charges brought in the main case against the Accused. Accordingly, as submitted in the Prosecution's Response

⁸ ICC-01/04-02/06-810, para.6; [REDACTED].

⁹ ICC-01/04-02/06-808-Conf-Exp, para.60.

this is not a “prior statement” within the meaning of rule 76 of the Rules of Procedure and Evidence (“Rules”); rather, disclosure of the information was made pursuant to rule 77.

12. Moreover, the Defence misunderstands the nature of the handwritten notes P-901 made during the standard security assessment.¹⁰ As explained in the Prosecution Response these notes do not relate in any way to P-901’s interview but were drawn during the confidential, standard security assessment [REDACTED]: matters that are wholly irrelevant to issues arising from the case and not material for the preparation of the Defence.¹¹ Further, this type of information falls under a standard redaction category approved by the Chamber.¹²

13. The Prosecution did not raise any matter regarding P-901’s security-related interview that could not have been foreseen in the original Defence Request. Moreover, the Prosecution has not misrepresented the jurisprudence regarding disclosure, and even quoted the relevant passage from *The Prosecutor v. Banda & Jerbo* in its Response.¹³ Accordingly, there is no justifiable basis for seeking leave to reply on this point.

Second Issue: Disclosure of notes from the Witness Preparation Session

14. The Defence has misconstrued or misunderstood the Prosecution’s straightforward comment,¹⁴ in response to the Defence request to disclose any notes from witness preparation sessions, that none exist at present but that the Prosecution will disclose any written notes made by the Prosecution during its

¹⁰ ICC-01/04-02/06-810, para.10.

¹¹ ICC-01/04-02/06-808-Conf-Exp, para.62, footnote 76.

¹² ICC-01/04-02/06-411, paras.29, 32-36; ICC-01/04-02/06-411-AnxA, paras.15-23.

¹³ ICC-01/04-02/06-808-Conf-Exp, para.61, footnote 71.

¹⁴ ICC-01/04-02/06-810, para.11.

preparation session with P-901.¹⁵ This does not constitute a blanket “acknowledgment that it has an obligation to disclose ‘notes made by the Prosecution’ during meetings with witnesses”,¹⁶ regardless of the nature of the contact with the witness.

15. This was not an issue relevant to the Defence Request in relation to P-901, as there are no outstanding screening notes or investigation notes still to be disclosed, or in relation to which the Prosecution opposes disclosure. Moreover, the Defence wrongly alleges that the Prosecution has taken a narrow approach to what it views as “notes” – as all communications with witnesses are recorded and all documents reviewed for potential disclosure purposes under rules 76, 77 and article 67(2) of the Rome Statute. The Prosecution will address in detail the issue of disclosure of investigator or screening notes in its response to the prior Defence request made for disclosure of all statements of trial witnesses.¹⁷

16. However, the Prosecution observes for the sake of clarity as to its position that there is jurisprudence from this Court – including from this Chamber - confirming that not any information provided by a witness during any contact with him or her requires disclosure.¹⁸ Moreover, certain notes have been viewed as covered by rule 81(1) of the Rules and accordingly either not subject to disclosure, or not in their entirety, depending on the content. Instead, relevant information under article 67(2) or rule 77 is disclosed by redacting the original document or by extracting the relevant information, as appropriate.¹⁹ The Prosecution observes that the six investigator notes recently disclosed are

¹⁵ ICC-01/04-02/06-808-Conf-Exp, para.21.

¹⁶ ICC-01/04-02/06-810, para.11.

¹⁷ ICC-01/04-02/06-795-Conf-Exp.

¹⁸ See e.g. ICC-01/04-02/06-731-Conf-Exp, para.19; ICC-01/05-01/08-750-Red, paras.29-37.

¹⁹ See e.g. ICC-01/05-01/08-3070, paras.19-27; ICC-01/05-01/08-750-Red, paras.29-37. See also e.g. ICC-01/09-01/11-743-Red.

not “screening notes” *per se* but relate to P-901’s security; and, in any event, have been disclosed under rule 77.

17. Again, there is nothing raised by the Defence on the second issue that could not have been anticipated in the original Defence Request, and accordingly should not be permitted by way of reply.

Third Issue: The recent disclosure of six additional Investigator Notes

18. The Prosecution does not agree with the Defence that it has violated its disclosure obligations; and that the Prosecution tacitly recognises this by recently disclosing six investigator notes.²⁰
19. The Prosecution explained in the Prosecution’s Response that the six additional investigator notes which it disclosed are all related to security matters raised by P-901 [REDACTED].²¹ Accordingly, these are not prior statements within the meaning of rule 76. However, the Prosecution agrees that the assessment of what constitutes material relevant to the Defence under rule 77 or article 67(2) is an ongoing obligation.²² Whilst at the time the notes were made the information contained in them may not have been material to the Defence for the purposes of the case against the Accused, the Prosecution agrees that they are now; especially in light of the Chamber’s conclusions regarding [REDACTED].²³ It is for that reason they have been disclosed to the Defence. In particular, the Prosecution agrees with the Defence that [REDACTED] may be appropriate matters to address with relevant witnesses, [REDACTED],²⁴ so the Prosecution disclosed these notes pursuant to rule 77.

²⁰ ICC-01/04-02/06-810, paras.13-14.

²¹ ICC-01/04-02/06-808-Conf-Exp, para.43.

²² ICC-01/04-02/06-810, para.14.

²³ ICC-01/04-02/06-785-Conf-Exp, paras.46-70.

²⁴ [REDACTED]

20. The Prosecution disagrees that these are matters that could not have been foreseen by the Defence in its original Defence Request. This should not be a point on which the Defence should be granted leave to reply.

Fourth Issue: Routine expenses made in relation to P-901

21. The Prosecution explained in detail in the Prosecution Response the types of expenses it considers to be routine and, therefore, not disclosable.²⁵ The Prosecution previously informed the Defence that it would not disclose those expenses it considers to be routine.²⁶ There is nothing in its Response that could not have been foreseen. For instance, the Defence already raised issues concerning appropriate levels of compensation for loss of income or daily expenses in its prior Defence request for disclosure of all payments related to witnesses.²⁷ The Defence has sought to incorporate by reference the arguments made in its previous request.²⁸ Accordingly, the request to reply on the scope of the Prosecution's routine expenses should be rejected.

22. Moreover, as regards the request to reply on the issue of VWU payments: any such points should have been addressed in the original Defence Request. The Defence Request was ambiguous as to whether the Defence was seeking information regarding VWU payments or not.²⁹ The Defence should not be entitled to address any shortcomings in its original Request by supplementing its submissions by way of any reply to the Prosecution's Response.

²⁵ ICC-01/04-02/06-808-Conf-Exp, para.49.

²⁶ ICC-01/04-02/06-795-Conf-Exp-AnxH.

²⁷ ICC-01/04-02/06-795-Conf-Exp, paras.27-29.

²⁸ ICC-01/04-02/06-800-Conf-Exp, para.15. Citing ICC-01/04-02/06-795-Conf-Exp, paras.4-12, 26-30.

²⁹ ICC-01/04-02/06-800-Conf-Exp, paras.32-35; *Contrast e.g.* ICC-01/04-02/06-795-Conf-Exp-AnxE, ICC-01/04-02/06-795-Conf-Exp-AnxF, ICC-01/04-02/06-795-Conf-Exp-AnxG.

Conclusion

23. For the reasons set out above, the Prosecution requests that the Chamber dismiss the Defence's Application to Reply.



Fatou Bensouda, Prosecutor

Dated this 29th day of September 2015

At The Hague, The Netherlands