

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 5 October 2015

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 to postpone Witness P-901’s cross-examination’”, 15 September 2015, ICC-01/04-02/06-825-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 to postpone Witness P-901's cross-examination ("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"). This is the second application for leave to reply, in less than a week, in which the Defence has failed to heed the requirements of regulation 24(4) and (5) of the 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 two points on which the Defence proposes to reply exceed the permissible scope of a reply.

Confidentiality

3. This filing is classified 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, because this filing responds to a Defence Request filed on a confidential *ex parte* basis; and because the related filings contain confidential information regarding P-901.³ The Prosecution will be filing a public redacted version of this filing.

¹ ICC-01/04-02/06-810.

² ICC-01/04-02/06-821-Conf-Exp, para.4.

³ See also ICC-01/04-02/06-800-Conf-Exp, paras.18, 34; ICC-01/04-02/06-808-Conf-Exp, paras.4, 11, 12, 13.

Procedural History

4. On 28 August 2015, the Defence submitted its request seeking disclosure orders in relation to Witness P-901 ("Disclosure Request").⁴
5. On 31 August 2015, Trial Chamber VI ("Chamber") ordered the Prosecution to file its response to the Defence Disclosure Request by 7 September 2015.⁵
6. On 7 September 2015, the Prosecution submitted its response to the Defence Disclosure Request.⁶
7. On 8 September 2015, the Defence submitted its request for leave to reply to the Prosecution's response to the Defence Disclosure Request ("First Application to Reply"),⁷ to which the Prosecution responded on 9 September 2015.⁸
8. On 9 September 2015, the Defence filed the Defence urgent request to postpone P-901's cross-examination ("Defence Request"),⁹ to which the Prosecution responded on 11 September 2015 ("Prosecution Response").¹⁰
9. On 14 September 2015, the Defence filed its Application to Reply.¹¹

Prosecution's Submissions

The Application should be dismissed in limine

10. The Prosecution submits that the Application to Reply should be dismissed outright as it substantially elaborates upon issues that the Defence has identified

⁴ ICC-01/04-02/06-800-Conf-Exp.

⁵ Email from the Chamber on 31 August 2015 at 10:46 am.

⁶ ICC-01/04-02/06-808-Conf-Exp. See Email from the Chamber on 31 August 2015 at 10:46am.

⁷ ICC-01/04-02/06-810.

⁸ ICC-01/04-02/06-816-Conf-Exp.

⁹ ICC-01/04-02/06-815-Conf-Exp.

¹⁰ ICC-01/04-02/06-817-Conf-Exp.

¹¹ ICC-01/04-02/06-821-Conf-Exp.

for further reply. The Defence identifies two issues on which it seeks leave to reply arising from the Prosecution Response: (i) the Prosecution's submission that no disclosure violation has occurred because the Prosecution had no obligation to disclose the recently-disclosed documents until now; and (ii) the Prosecution's submission that recalling the witness would undermine his welfare and his state of mind.¹²

11. The Application then goes on to make substantive submissions on the two issues it identifies, without first awaiting the Chamber's leave to do so. This is the second time that the Defence has adopted such an approach in less than a week.¹³ Indeed, the Application to Reply is approximately 10 pages long – longer than the number of pages it seeks for the Reply itself - and only three pages 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 – again - not heeded the requirements of regulation 24(4) and (5) and the Application to Reply should be rejected for this reason alone.

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

First Issue: Alleged failure to identify documents for disclosure

13. The Defence once more takes issue with: (a) 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; and (b) the basis for disclosure of six investigator notes.¹⁴ As explained

¹² ICC-01/04-02/06-821-Conf-Exp, para.1.

¹³ See ICC-01/04-02/06-810. See the Prosecution response to that request, ICC-01/04-02/06-816-Conf-Exp.

¹⁴ See ICC-01/04-02/06-821, paras.6-7. See also ICC-01/04-02/06-810, para.6; ICC-01/04-02/06-808-Conf-Exp, paras.31-33, 60.

in the Prosecution Response, the [REDACTED] interview and information contained in the six investigator notes solely related to security matters.¹⁵ They do not relate to any issues arising from the charges brought against the Accused. Accordingly, and as submitted in the Prosecution Response, neither of these documents is a “prior statement” within the meaning of rule 76 of the Rules of Procedure and Evidence (“Rules”). Indeed, disclosure of the information was made pursuant to rule 77, not rule 76.

14. Further, the Prosecution did not raise any matter regarding P-901’s security-related interview or contacts that could not have been foreseen in the original Defence Request. The Defence simply repeats arguments already made in the original Defence Request. Accordingly, there is no justifiable basis for seeking leave to reply on this point.

Second Issue: P-901’s welfare and state of mind

15. The Defence seeks leave to make submissions on the impact on P-901 of the postponement of his cross-examination;¹⁶ that are clearly matters that could – and should – have been anticipated in the Defence Request to postpone his cross-examination.
16. Moreover, the Defence seeks leave to provide jurisprudence, which it previously failed to do,¹⁷ to allegedly support its proposal to split P-901’s testimony and postpone his cross-examination.¹⁸ This jurisprudence, and any other relevant matter related to the Defence proposed course of action, should have been included and dealt with in the Defence Request. The Defence should not be

¹⁵ ICC-01/04-02/06-817-Conf-Exp, paras.45-50. See also ICC-01/04-02/06-808-Conf-Exp, para.60.

¹⁶ ICC-01/04-02/06-821-Conf-Exp, paras.11-15.

¹⁷ Prosecution Response, para.52.

¹⁸ Application to Reply, para.13; footnote 28.

entitled to address shortcomings in its original Request by supplementing its submissions under the guise of a reply to the Prosecution Response.

Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 5th day of October 2015

At The Hague, The Netherlands