

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 29 November 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

Public redacted version of "Prosecution response to the Defence's 'Response to 'Prosecution's submission pursuant to regulation 35 to vary a time limit and Request for leave to reply to Prosecution response to the Defence confidential redacted version of 'Request for in-court protective measures for Witness D-0038", (ICC-01/04-02/06-2047-Conf)", 5 October 2017, ICC-01/04-02/06-2053-Conf

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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Other

Introduction

1. The Prosecution requests that Trial Chamber VI (“Chamber”) reject the three grounds upon which the Defence has sought leave to reply (“Request”).¹ First, the Defence should have anticipated the argument regarding the impact on the Chamber’s ability to establish the truth if a witness knows that the veracity of their account will not be subject to public scrutiny. This point has been made in every Prosecution response to date to Defence requests for in-court protective measures.² Second, the Defence misstates the Prosecution’s argument regarding the security situation in Ituri. Third, the Defence is inappropriately seeking to add an argument regarding the claim made in their initial Request that the DRC criminal justice system is biased and partial.

Confidentiality

2. This filing is classified as “Confidential” under regulation 23*bis*(1) and (2) of the Regulations of the Court because it contains confidential information and in order to be consistent with the classification of the response.

Prosecution’s Submissions

3. The Chamber should reject all of the Defence’s grounds seeking leave to reply.
4. The first ground on which the Defence seeks leave to reply is the Prosecution argument that if a witness knows that the veracity of his account may not be subjected to the same level of public scrutiny because his identity is not known, this may impact on the Chamber’s ability to establish the truth and ensure the proper administration of justice.³

¹ ICC-01/04-02/06-2047-Conf.

² Request, para. 9.

³ Request, paras. 2 and 9.

5. The Defence should have anticipated this argument in their original Request and their failure to do so does not justify granting leave to reply on this ground. The Prosecution has consistently made this argument in every response it has made to date to Defence requests for in-court protective measures for its witnesses.⁴ This does not amount to an issue that raises novel consideration.
6. Second, the Defence seeks leave to respond to an alleged Prosecution argument that “an objectively justifiable security risk arises only if there is proof that a witness travels to, or resides in, a predominantly Lendu area”.⁵ This misstates the Prosecution’s argument. The Prosecution argued that the Parties “have not been provided with any information about where D-0038 resides or travels to”, but that if, for instance, he lived in a predominantly [REDACTED] area this should reduce the security risk.⁶ Again, this is an argument that the Defence should have anticipated.
7. The third ground on which the Defence seeks leave to reply is an inappropriate attempt to add an argument that should have been made in its original Request regarding its claim that the DRC criminal justice system is biased and partial.⁷ The Defence seeks to argue that the fact that the ICC has jurisdiction over the present case demonstrates that the DRC authorities were unable or unwilling to “dispense fair and equal justice in the case against Mr. Ntaganda”.⁸ Not only is this argument unfounded, but it also should have been made in the original Request.

⁴ See: ICC-01/04-02/06-1899-Conf, para. 11; ICC-01/04-02/06-1910-Conf, para. 10; ICC-01/04-02/06-1929-Conf, para. 9; ICC-01/04-02/06-2019-Conf, para. 12; ICC-01/04-02/06-2042-Conf, para. 13.

⁵ Request, paras. 2 and 10.

⁶ ICC-01/04-02/06-2042-Conf, para. 14.

⁷ Request, paras. 2 and 11.

⁸ Request, para.2.

Request

8. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request for leave to reply.



Fatou Bensouda
Prosecutor

Dated this 29th day of November 2017
At The Hague, the Netherlands