

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 8 December 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***

Confidential

Prosecution request for leave to reply to the "Submissions concerning potential recall of Prosecution Witness P-0290", ICC-01/04-02/06-2143-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. Pursuant to regulation 24(5) of the Regulations of the Court ("Regulations"), the Prosecution requests leave to file a reply to the Defence "Submissions concerning potential recall of Prosecution Witness P-0290".¹

Confidentiality

2. This filing is classified as "Confidential" under regulation 23*bis*(1) and (2) of the Regulations consistent with the classification of the Defence Submissions.

Procedural Background

3. The Prosecution incorporates the procedural history set out in the "Prosecution's observations on the modalities of further testimony of Witness P-0290".²
4. On 6 December 2017, the Parties filed the Prosecution Observations and the Defence Submissions.

Prosecution's Submissions

5. The Prosecution submits that Trial Chamber VI ("Chamber") would be assisted by a reply to several issues raised in the Defence Submissions, which largely focused on the propriety of recalling Witness P-0290. The Prosecution's reply, if allowed, will address the issues below:
 - (i) whether it is correct that it is unprecedented for an international court or tribunal to recall a Prosecution witness after the Defence case to supplement his or her substantive testimony;³

¹ ICC-01/04-02/06-2143-Conf ("Defence Submissions").

² ICC-01/04-02/06-2144-Conf ("Prosecution Observations").

³ Defence Submissions, para. 2.

- (ii) whether it is correct that should *the Chamber* recall Witness P-0290, further to its authority to request the submission of all evidence that it considers necessary for the determination of the truth, Witness P-0290 “remains a Prosecution witness”⁴ and that any further examination of him will entail “the introduction of incriminating evidence”⁵;
- (iii) whether the Defence misrepresents case law from this Court and the *ad hoc* tribunals in which Prosecution witnesses who are recalled by a Trial Chamber continue to be considered “Prosecution witnesses”;⁶
- (iv) whether the timing of Witness P-0290’s recall is unusual in international Courts when Rules 85 and 98 of the rules of Procedure and Evidence at the *ad hoc* tribunals requires a Chamber to call evidence *proprio motu* after the presentation of evidence by the parties;⁷
- (v) whether the Defence is correct that calling a ‘new’ witness is at all different from recalling the witness of a party;⁸
- (vi) whether, as the Defence suggests, this situation involves the Prosecution supplementing evidence or re-opening its case, and whether the Defence is relying on authorities that are on point;⁹
- (vii) whether, as the Defence suggests, this situation is one of or even similar to *the Prosecution* seeking to call rebuttal evidence, and whether the Defence is relying on authorities that are on point;¹⁰

⁴ Defence Submissions, para. 3.

⁵ Defence Submissions, para. 17. *See also*: Defence Submissions, para. 15.

⁶ Defence Submissions, paras. 27-29.

⁷ Defence Submissions, para. 15.

⁸ Defence Submissions, para. 15.

⁹ Defence Submissions, paras. 16-17, 20-22, 26, 30, 32-33, 35, 37.

¹⁰ Defence Submissions, paras. 20, 23-25, 32-34, 36, 40-42.

(viii) whether the decision of Trial Chamber III in the *Bemba* proceedings to consider “re-opening” of the presentation of evidence is at all applicable here given that Trial Chamber III decided to recall Witness P-0169 after the filing of closing briefs while in this case the Defence case is not yet closed;¹¹ and,

(ix) whether the Canadian case relied upon by the Defence is at all applicable to the present situation.¹²

6. A reply by the Prosecution will assist the Chamber in its determination. Should the Chamber grant leave, the Prosecution will set out its substantive submissions in its reply.

Request

7. Based on the foregoing, and pursuant to regulation 24(5) of the Regulations, the Prosecution requests that the Chamber grant it leave to file a reply.



Fatou Bensouda
Prosecutor

Dated this 8th day of December 2017
At The Hague, The Netherlands

¹¹ Defence Submissions, para. 27.

¹² Defence Submissions, para. 17.