

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **27 March 2018**

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
26 March 2018 Defence Response (ICC-01/04-02/06-2262-Conf)**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section

Other

Prosecution's Submissions

1. The Prosecution seeks leave to reply to the 26 March 2018 Defence response¹ to Prosecution submissions² on disclosure, under regulation 24(5) of the Regulations.³
2. The Prosecution submits that the Chamber would be assisted by a reply to the following issues raised in the 26 March 2018 Defence Response:
 - (i) Whether the Chamber's finding that it considers that the information provided by a witness, on whom the Prosecution does not seek to rely in rebuttal, "**could** be *prima facie* material, and therefore, disclosable to the Defence" and that "[i]n these circumstances, the Chamber directs the Prosecution to review the information provided by the Individual with a view to identifying any information that is disclosable to the Defence, and, if applicable, disclose any such information without delay"⁴ is tantamount to the Chamber either having "found that the information obtained from the potential rebuttal witness was 'disclosable to the Defence.'"⁵ or having made a "fundamental finding that the information was '*prima facie* material'".⁶
 - (ii) Whether, further to its own order,⁷ and in view of its powers under articles 64 and 68 of the Statute,⁸ a Chamber's review of materials to determine disclosability or to decide a request for non-disclosure

¹ ICC-01/04-02/06-2262-Conf ("26 March 2018 Defence Response").

² ICC-01/04-02/06-2257-Conf-Red, filed on 15 March 2018.

³ Regulations of the Court.

⁴ ICC-01/04-02/06-2252, para. 24 ("9 March 2018 Decision", emphasis added).

⁵ See 26 March 2018 Defence Response, para. 1.

⁶ See 26 March 2018 Defence Response, para. 11.

⁷ 9 March 2018 Decision.

⁸ Rome Statute.

under rule 81(4) of the Rules⁹ is prejudicial to or inconsistent with an accused's fair trial rights,¹⁰ when Chambers engage in such a review routinely throughout the proceedings, including in relation to incriminatory material that is never subsequently disclosed.

- (iii) Whether the Prosecution "misread" or "misinterpreted" the 9 March 2018 Decision and "substantially undermines its purpose"¹¹ in view of the clear instructions contained in the 9 March 2018 Decision¹² and considering the specific information provided by the witness that rendered the provision to the Chamber of all information he provided both necessary and appropriate.

- 3. 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.

Confidentiality

- 4. This filing is classified as "Confidential" under regulation 23*bis*(2) of the Regulations since it refers to filings bearing the same classification. The Prosecution requests the Chamber's authorisation to reclassify this filing as "Public" since it contains no confidential information.

⁹ Rules of Procedure and Evidence

¹⁰ See 26 March 2018 Defence Response, paras. 14-15.

¹¹ 26 March 2018 Defence Response, paras. 13, 15.

¹² See 9 March Decision, paras. 22, 24-25.

Request

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



Fatou Bensouda
Prosecutor

Dated this 27th day of March 2018
At The Hague, The Netherlands