

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **14 June 2016**

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 to file a reply to the "Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0315'"
(ICC-01/04-02/06-1386-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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Reparations Section**

Other

Introduction

1. Pursuant to regulation 24(5) of the Regulations of the Court ("Regulations"), the Office of the Prosecutor ("Prosecution") requests leave to file a reply to the "Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0315'" ("Response").¹
2. The Prosecution seeks to address six issues related to the admissibility of P-0315's evidence regarding: a) her interviews and interactions with Bosco NTAGANDA ("the Accused") and Thomas LUBANGA; b) Human Rights Watch reports and related statements; and c) her statement related to events occurring in North Kivu in 2006 and 2013.

Confidentiality

3. This filing is classified as "Confidential" under regulation 23bis(1) and (2) of the Regulations because it contains confidential information and in order to be consistent with the classification of the Response. The Prosecution will file a public redacted version of this filing.

Procedural Background

4. On 25 May 2016, the Prosecution submitted its application to admit the prior recorded testimony and associated documents of Witness P-0315 pursuant to rule 68(3) of the Rules of Procedure and Evidence ("Rules").²
5. On 10 June 2016, the Defence filed its Response in which it, *inter alia*, objects to the admissibility of certain evidence of Witness P-0315.

¹ ICC-01/04-02/06-1386-Conf.

² ICC-01/04-02/06-1333-Conf.

Prosecution's Submissions

6. Pursuant to regulation 24(5) of the Regulations, the Prosecution seeks leave to reply to the Defence submission on the admissibility of evidence regarding: a) her interviews and interactions with the Accused and Thomas LUBANGA; b) Human Rights Watch reports and related statements; and c) her statement related to events taking place in North Kivu in 2006 and 2013.
7. The Prosecution's reply, if allowed, will address the relevance and probative value of this evidence in addition to the issues raised by the Defence including:
 - a. *Issue one*: Whether the Defence is capable of exploring the issues it identified with P-0315's statement (paragraphs 81-97), especially the manner in which information was obtained from the Accused, during its cross-examination.³
 - b. *Issue two*: Whether the notes of a meeting with the Accused taken by a non-ICC, human rights researcher, constitute a prior statement of the Accused pursuant to rule 76 of the Rules.⁴
 - c. *Issue three*: Whether private, non-ICC, interviews conducted by a human rights researcher require compliance with article 67(1)(g) of the Rome Statute, in terms of the rights against self-incrimination of the Accused and Thomas LUBANGA⁵

³ See paras.3-7 of the Response.

⁴ See paras.8-9 of the Response.

⁵ See paras.3-9 (Accused) of the Response, and paras.10-11 (LUBANGA) of the Response.

- d. *Issue four*: Whether raising the speculative possibility that P-0315 was acting as a Prosecution "delegate" can be sustained without supporting evidence of the claim.⁶
- e. *Issue five*: Whether Human Watch Rights reports, including portions containing any accounts based on anonymous hearsay sources and/or relating to the Accused are admissible evidence, bearing in mind, *inter alia*: (i) article 69(3) to (5) and rule 63(2); (ii) well-established jurisprudence, including of this Court, regarding the admissibility of hearsay evidence; (iii) and the ability to cross-examine P-0315 regarding her methodology in collating such evidence that is *akin* to statistical evidence.
- f. *Issue six*: Whether the evidence of serious human rights violations by the Accused in North Kivu⁷ outside the temporal and geographical scope of the charges - including after the period of the charges - is relevant as admissible evidence, *inter alia*, of the Accused's intent and knowledge (including of his continued unwillingness to take all necessary and reasonable measures), as relevant information of background and context, and/or as similar conduct evidence as deemed admissible by Chambers of this Court and other international criminal tribunals.⁸
8. The reply will also deal with the issue of alleged prejudice.
9. The Prosecution submits that the request for leave to reply should be granted as the Defence has raised issues that go beyond a mere response to the Prosecution's application to use the procedures as outlined under rule 68(3) of the Rules. Instead, the Defence has raised separate and specific challenges to

⁶ See paras.3-9 (Accused) of the Response, and paras.10-11 (LUBANGA) of the Response.

⁷ See paras. 22-27 of the Response.

⁸ See e.g. ICC-01/04-02/06--269, paras.16-20.

the admissibility of aspects of Witness P-0315's evidence to which the Prosecution submits are important, including as regards future witnesses, and that it should have the opportunity to reply as it would were the Defence to have raised such an objection when the witness was testifying.

10. In particular, the Prosecution seeks authorisation to explain why applications under rule 68(3) of the Rules should not change the Chamber's prior orders regarding admissibility challenges pre-testimony;⁹ and that if any such change is entertained, for the sake of efficiency, the party applying under rule 68(3) should not be prejudiced and should have a separate ability to respond to any such objections. Parties applying under rule 68(3) of the Rules should not need to anticipate any, and all, potential challenges regarding admissibility. The rule 68(3) application process will otherwise become unduly cumbersome and unworkable.

11. 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.

12. Alternatively, the Prosecution requests that the Chamber defer its decision regarding the admissibility challenges to P-0315's evidence, so that the Parties have an opportunity to make their oral submissions in Court.

⁹ See *e.g.* ICC-01/04-02/06-619, paras.32-33.

Request

13. 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 14th day of June 2016
At The Hague, the Netherlands