



Original: **English**

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

Date: **21 July 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***

**Public**

**Public redacted version of “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-0894””,  
3 June 2016, ICC-01/04-02/06-1365-Conf**

**Source:** Defence Team of Mr Bosco Ntaganda

**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**

Me Stéphane Bourgon  
Me Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(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**

Further to: (i) the *“Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0894”* submitted by the Office of the Prosecutor (“Prosecution”) on 19 May 2016 (“Prosecution Application”);<sup>1</sup> and (ii) Trial Chamber VI (“Chamber”)’s *“Decision on the conduct of proceedings”* issued on 2 June 2015 (“Decision on the Conduct of Proceedings”),<sup>2</sup> which provides that objections to applications under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) shall be raised in writing within 14 days of notification of the application,<sup>3</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**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-0894”**

**“Defence Response”**

1. Without prejudice to its position on the probative value to be attached to this material, the Defence does not oppose the admission into evidence, pursuant to Rule 68(3) of the Rules, of Witness P-0894’s prior recorded testimony, more particularly: (i) the passages of Witness P-0894’s statement of [REDACTED] (“Statement”)<sup>4</sup> as identified in Annex A to the Prosecution Application; and (ii) the two sketches annexed to the Statement.<sup>5</sup>
2. The Defence acknowledges that the admission into evidence of the prior recorded testimony of Witness P-0894 can enhance the expeditious conduct of the present trial proceedings, insofar as it has the potential to result in a shorter examination-in-chief of the witness being conducted.

---

<sup>1</sup> ICC-01/04-02/06-1326-Conf.

<sup>2</sup> ICC-01/04-02/06-619.

<sup>3</sup> Decision on the Conduct of Proceedings, para.42.

<sup>4</sup> DRC-OTP-2076-0194.

<sup>5</sup> DRC-OTP-2076-0211 and DRC-OTP-2076-0212.

3. However, the Defence opposes certain aspects of the Prosecution's proposed procedure for the introduction of Witness P-0894's prior recorded testimony, as well as the scope of the supplementary examination the Prosecution seeks to conduct with the Witness on the ground of inadmissibility.

**I. Prosecution's proposed procedure for the introduction of Witness P-0894's prior recorded testimony**

4. The Defence notes the Chamber's invitation to the Prosecution to increase recourse to Rule 68(3) of the Rules for the presentation of the remaining of its case.<sup>6</sup> Considering that the Prosecution Application is the first Rule 68(3) application submitted further to the Chamber's invitation, the Defence deems appropriate to address, at this stage, certain procedural issues raised therein, which are likely to arise in future Prosecution applications.

**A. Selection of passages of the prior recorded testimony the moving party wishes to tender into evidence**

5. In accordance with the procedure set out in the Decision on the Conduct of Proceedings, the Prosecution has identified in its Application the passages of the Statement it wishes to tender into evidence.<sup>7</sup>
6. The Defence submits that while it may be warranted to remove from the prior recorded testimony of a witness parts thereof that include for instance procedural matters having little, if any, evidentiary value,<sup>8</sup> excluding any substantive parts would be contrary to both the letter and spirit of Rule 68(3) of the Rules, which does not provide a basis for such an exclusion. The Defence posits that the purpose of Rule 68(3) is to have admitted into evidence a witness's prior recorded testimony as a whole and not only the parts the moving party deems useful to its case.

---

<sup>6</sup> "Supplemental decision on matters related to the conduct of proceedings", 27 May 2016, ICC-01/04-02/06-1342, para.15.

<sup>7</sup> Decision on the Conduct of Proceedings, para.42.

<sup>8</sup> See, e.g., "Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0055", 2 October 2015, ICC-01/04-02/06-884-Conf, para.10.

7. However, an exception to this principle would be where part of the prior recorded testimony refers to inadmissible evidence, either by the calling party's own acknowledgement or pursuant to an objection raised by the opposing party and sustained by the Chamber. Manifestly, in such a case, the calling party should not be allowed to put any questions to the witness, in relation to the parts of his prior recorded testimony, ruled inadmissible, during its supplementary examination.
8. In the instant case, the Prosecution indicates that it is not seeking the admission into evidence of paragraphs 39 to 47 of the Statement given *inter alia* the Defence's previous objections to the 'relevance and admissibility of similar evidence'.<sup>9</sup> As argued below, the evidence contained in paragraphs 39 to 47 of the Statement is indeed inadmissible and no questions on this topic should be allowed when the Prosecution conducts a supplementary examination.

**B. Use of leading questions to elicit corrections and/or clarifications brought by the witness to his prior recorded testimony**

9. The Defence opposes the use of leading questions for the purpose of eliciting from the witness any corrections or clarifications he would bring to his prior recorded testimony in the course of his witness preparation session.<sup>10</sup>
10. The apparent benefits to the expeditiousness of the proceedings of putting leading questions to the witness to elicit such evidence are largely outweighed by the adverse impact of such a practice on the probative value to be attached to witness's answers on the corrections and/or clarifications he deemed necessary to bring to his prior recorded testimony during the preparation session.

---

<sup>9</sup> Prosecution Application, para.20. The Defence notes that the Prosecution also does not seek the admission into evidence of paragraphs 1 to 10 of the Statement, which relate to purely procedural issues discussed with Witness P-0894 during his interview with the Prosecution: Annex A, p.2; Statement, paras.1-10. Consistent with its above submissions, the Defence does not object to these paragraphs not being admitted into evidence.

<sup>10</sup> Prosecution Application, para.17.

11. Indeed, insofar as the use of leading questions during examination-in-chief amounts to obtaining from the witness confirmation of a suggestion put to him, such a practice deprives the Chamber of the benefit of assessing the witness's spontaneity, which is of paramount importance in direct examination. It is also significant that for the purpose of eliciting clarifications and/or corrections, the use of leading questions is unlikely to save time.
12. Of course, certain matters, peripheral to the witness's testimony, can be properly elicited by way of leading questions, such as the witness's background. However, to be attached a certain probative value, a witness's narrative must be elicited in a non-leading way.<sup>11</sup> The Defence submits that clarifications and/or corrections to a prior recorded testimony relate most of the time to key aspects of the witness's narrative.<sup>12</sup> Should the Prosecution be allowed to use leading questions as requested, this would result in the Prosecution adducing its own understanding of the witness's corrections and/or clarifications to the prior recorded testimony, not the corrections and/or clarifications themselves as provided by the witness. The probative value to be attached to the answers provided by the witness in such circumstances would be considerably diminished.
13. Furthermore, to the extent that: (i) witness preparation sessions take place shortly before testimony, as result of which witnesses are in a position, when testifying, to easily recall the corrections and/or clarifications identified during their preparation session; and (ii) the Prosecution can draw the witness's attention to the specific passages of the prior recorded testimony in

---

<sup>11</sup> G. Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford: Oxford University Press, 2013, p. 586 ("The prohibition on leading questions – i.e. questions suggesting a desired answer or assuming facts – on matters in dispute is an exception to the broad autonomy of parties in conducting examination-in-chief. This rule is rooted in the idea that it is the witness rather than the party examining that must be the source of the evidence; it may be impossible for the finder of fact to accurately weigh the answer that was not given spontaneously but prompted.")

<sup>12</sup> For instance, [REDACTED].

respect of which the witness made a correction and/or a clarification during his preparation session, the use of leading questions is unlikely to save time.

**C. Time and scope of the supplementary examination**

14. The Defence further submits that the supplementary examination the calling party can conduct with a witness whose prior recorded testimony is admitted under Rule 68(3) must be limited in terms of both time and scope.
15. With respect to the time that should be allotted for the supplementary examination, the Defence underscores that the aim of admitting into evidence a witness's prior recorded testimony under Rule 68(3) is to enhance the expeditiousness of the proceedings.<sup>13</sup> Hence, allowing the calling party to conduct a supplementary examination that is not substantially shorter than the initially requested time for direct examination would defeat the purpose sought to be achieved by admitting his prior recorded testimony. By nature, a supplementary examination should be limited in time as it is solely aimed at obtaining discrete clarifications from the witness, not repeating or expanding on the witness's statement, which is already on the evidentiary record.
16. In relation to the four Prosecution witnesses of the fifth evidentiary block in respect of whom the Chamber recommended the Prosecution to consider using Rule 68(3), the Defence notes that the Chamber 'strongly' encouraged the Prosecution to conduct a supplementary examination of a maximum of one hour.<sup>14</sup> The Defence sees no compelling reasons in the Prosecution Application warranting to depart from the one-hour guidance provided by the Chamber. Moreover, the Defence notes that applying, as a matter of principle, a one-hour limit to supplementary examinations of Rule 68(3) witnesses will not prejudice the Prosecution, as the same timeframe will also apply to the Defence if and when it will have recourse to Rule 68(3). For these

---

<sup>13</sup> Cf. "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931", 21 September 2015, ICC-01/04-02/06-845, para.8.

<sup>14</sup> E-mail from a Legal Officer of the Chamber to the parties and participants, 4 May 2016, 13h11.

reasons, the Defence respectfully requests the Chamber to direct the Prosecution to complete its supplementary examination of Witness P-0894 in one hour.

17. Regarding the scope of the supplementary examination, the Defence stresses it must not go beyond the matters addressed in the admitted prior recorded testimony. Should the calling party be allowed to address in its supplementary examination topics not covered in the prior recorded testimony, this would be contrary to the fairness principle that the Prosecution should not seek new evidence from witnesses on the stand.<sup>15</sup>

**D. Admission of documents ‘without which the passages would not be understandable’**

18. The Defence posits that if a party deems necessary to attach to its Rule 68(3) application any other material or parts thereof without which the passages of the prior recorded testimony ‘would not be understandable’, as instructed by the Chamber,<sup>16</sup> then it must also seek its admission into evidence in order to have on the evidentiary record all evidence enabling the Chamber to understand the prior recorded testimony.
19. In the instant case, the Prosecution posits that Witness P-0894’s “*Demande de participation pour les victimes*”<sup>17</sup> is such a document,<sup>18</sup> but does not seek to have this document admitted through Witness P-0894.<sup>19</sup> The Prosecution provides no compelling reason for excluding Witness P-0894’s “*Demande de participation pour les victimes*” from the scope of its Application. Consequently, should the

---

<sup>15</sup> Cf. “Witness preparation protocol”, 16 June 2015, ICC-01/04-02/06-652-Anx, para.2.

<sup>16</sup> Decision on the Conduct of Proceedings, para.42.

<sup>17</sup> DRC-OTP-2090-0099, appended as Annex E to the Prosecution Application.

<sup>18</sup> The Defence notes that in its Application, the Prosecution indifferently refers to Witness P-0894’s victim application form as being a document ‘without which, the passages would not be understandable’ (para.7), ‘necessary to understand Witness P-0894’s prior recorded testimony’ (para.9) and ‘necessary for a complete understanding of the witness’s prior recorded testimony’ (para.10). The Defence submits that these three phrases refer to three distinct thresholds, with only the first one accurately reflecting the standard set out by the Chamber in its Decision on the Conduct of Proceedings.

<sup>19</sup> Annex A to Prosecution Application, fn.1.

Chamber be minded to admit into evidence Witness P-0894's prior recorded testimony and the two associated documents, the Defence respectfully submits that the Chamber should additionally admit into evidence Witness P-0894's "*Demande de participation pour les victimes*".

**II. Submissions regarding the inadmissibility of the evidence contained in paragraphs 39 to 47 and 51 of the Statement**

20. The Prosecution intends to conduct a supplementary examination of Witness P-0894 on a single discrete aspect of his evidence, namely Mr Ntaganda having allegedly [REDACTED].<sup>20</sup> The corresponding portions of the Statement – [REDACTED] – are not sought for admission into evidence under Rule 68(3).<sup>21</sup>
21. As set out below, the evidence contained in these paragraphs of the Statement, as well as a passage of paragraph 51,<sup>22</sup> is inadmissible and, as such, must not be admitted into evidence. Accordingly, and in line with the above submissions,<sup>23</sup> the Prosecution should not be allowed to elicit such evidence from Witness P-0894 during its supplementary examination.
22. In its opening statement, the Defence indicated that it would object every time the Prosecution attempts to adduce evidence on crimes purportedly committed by Mr Ntaganda himself not specifically alleged in the Updated Document containing the charges ("UDCC"), including [REDACTED], which has been alleged for the first time in the Prosecution's pre-trial brief.<sup>24</sup>
23. Although the relevant witnesses were not expected to testify as to the identity of the perpetrator of this specific murder, the Defence objected on two occasions to evidence being adduced about [REDACTED].<sup>25</sup> In overruling the

---

<sup>20</sup> Prosecution Application, para.20.

<sup>21</sup> Prosecution Application, para.21.

<sup>22</sup> "[REDACTED]"

<sup>23</sup> *supra*, paras.5-8.

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

first Defence objection, the Chamber found the objection to be ‘premature’ as the question of prejudice did not arise with the witness, who was not expected to provide evidence about the identity of the direct perpetrator of [REDACTED].<sup>26</sup> The Chamber further indicated that it would ‘revisit’ the issue should it be necessary at a later stage.<sup>27</sup>

24. Considering that Witness P-0894 is the only Prosecution witness implicating Mr Ntaganda in [REDACTED] – as well as in that of four other individuals not mentioned in the UDCC<sup>28</sup> – the Defence respectfully submits that it is necessary at this juncture, before the commencement of the witness’s testimony,<sup>29</sup> to revisit the issue of admissibility of evidence of Mr Ntaganda having killed himself individuals not referred to in the UDCC.
25. As indicated by the Chamber in an analogical context, admissibility of evidence about a conduct not charged in the UDCC requires a ‘careful balancing’ on a case-by-case basis.<sup>30</sup> The Chamber emphasised that the ‘key’ determination is “whether the relevance and probative value of such evidence is outweighed by considerations such as unfair prejudice or undue delay”.<sup>31</sup>
26. The Defence underscores that the situation at hand significantly differs from the context which led the Chamber to find admissible [REDACTED] evidence about Mr Ntaganda having ‘wives’ amongst his escorts in relation to the crimes of rape and sexual slavery<sup>32</sup> or Witness P-0010’s evidence about the [REDACTED].<sup>33</sup>

---

<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> See Statement, para.44.

<sup>29</sup> Cf. remarks of the Presiding Judge regarding an objection of similar nature, T-46-CONF-ENG, p. 18, ll.2-4; p.19, ll.22-24.

<sup>30</sup> “Decision on the Defence’s request for clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda”, 30 October 2015, ICC-01/04-02/06-968 (“Decision on Admissibility of Evidence”), para.18.

<sup>31</sup> Decision on Admissibility of Evidence, para.14.

<sup>32</sup> [REDACTED]. See also Decision on Admissibility of Evidence.

<sup>33</sup> [REDACTED].

27. Indeed, whereas Mr Ntaganda is not charged with personal commission of the crimes of rape and sexual slavery, such a charge exists in relation to the crime of murder.
28. In such circumstances, the risk of prejudice or confusion resulting from the admission of evidence related to murders purportedly committed by Mr Ntaganda but *not* alleged in the UDCC – a risk which the Chamber found to be ‘significantly reduced’ in the case of evidence to the effect that Mr Ntaganda personally committed the crimes of rape and sexual slavery<sup>34</sup> – largely outweighs the relevance and probative value, if any, of such evidence.
29. The risk of unfair prejudice or undue confusion in the instant case results, in particular, from the Prosecution’s deliberate decision to circumscribe the charge of personal commission of the crime of murder to one single incident, namely the alleged murder of the priest of the Mongbwalu parish.<sup>35</sup>
30. Contrary to what the Prosecution contends,<sup>36</sup> not *all* acts of direct perpetration of murder – even those not specifically alleged in the UDCC – are relevant to the charge of personal commission of murder. In so arguing, the Prosecution blatantly fails to take into account that in a case where it is alleged that the accused did personally commit a crime, the material facts – *i.e.* the identity of the victim, the place and approximate date of those acts and the means by which the offence was committed – must be stated with the greatest precision in the indictment.<sup>37</sup> It follows that when an accused person’s criminal responsibility as a direct perpetrator is at stake, the interests of fairness dictate that the trial proceed on the sole basis of the incidents specifically alleged in

---

<sup>34</sup> Decision on Admissibility of Evidence, para.14.

<sup>35</sup> ICC-01/04-02/06-458-AnxA, para.71

<sup>36</sup> T-37-CONF-ENG, p.40, ll.3-5. *See also* Prosecution Application, para.20.

<sup>37</sup> ICTY, *The Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, “Decision on Preliminary Motion on Form of Amended Indictment”, para.18-C.

the Document containing the charges<sup>38</sup> – of which none of the alleged murders referred to in the Statement is part.

31. Accordingly, allowing evidence to be admitted about murders purportedly committed by Mr Ntaganda (but not specifically alleged in the UDCC) in support of the charge of personal commission of the crime of murder is bound to result in undue confusion as to the factual scope of this charge, against which Mr Ntaganda must defend himself and on the basis of which a conviction could be entered.
32. Such confusion would be highly prejudicial to Mr Ntaganda, as: (i) the charge of personal commission of the crime of murder is of particular objective gravity;<sup>39</sup> and (ii) defending oneself against a charge of personal perpetration is entirely different from answering to a charge of indirect perpetration.<sup>40</sup> Taking into consideration Mr Ntaganda's fundamental right to be informed promptly and *in detail* of the nature, cause and contents of the charges laid against him,<sup>41</sup> the alleged murder of the priest of the Mongbwalu parish cannot be just one mere illustrative incident, among other non-alleged incidents, of the charge of personal commission of the crime of murder against which Mr Ntaganda must defend himself.
33. The Defence underscores that the Chamber itself declined to find evidence about [REDACTED] to be of relevance to the charge of direct perpetration of the crime of murder.<sup>42</sup>

---

<sup>38</sup> Cf. "Decision on the updated document containing the charges", 6 February 2015, ICC-01/04-02/06-450, paras.51-52.

<sup>39</sup> In national and international jurisdictions, criminal convictions for personal commission of the crime of murder normally entail a sentence of life imprisonment. See e.g. ICTY, *The Prosecutor v. Lukić et al.*, IT-98-32/1-A, Judgement, 4 December 2012, p.221 (sentence of life imprisonment affirmed on appeal for, *inter alia*, a conviction on the charge of personal commission of the crime of murder).

<sup>40</sup> In order to counter the factual allegations brought forward by the Prosecution, the former requires the Defence to, *inter alia*, gather evidence about every material fact of the offence, whereas the latter can be addressed solely from the angle of the relationship between the accused person and the alleged perpetrators.

<sup>41</sup> Article 67(1)(a) of the Statute.

<sup>42</sup> [REDACTED].

34. The above prejudicial confusion also holds true if evidence of murders allegedly committed by Mr Ntaganda, but not charged in the UDCC, is admitted for the purposes of establishing Mr Ntaganda's intent and knowledge in relation to modes of liability other than direct perpetration, including indirect co-perpetration. Should such evidence be admitted in support of charges other than direct commission,<sup>43</sup> highly incriminating inferences could be drawn from evidence which Mr Ntaganda is not formally required to counter.
35. It was open to the Prosecution, if its investigations had revealed other murders purportedly committed by Mr Ntaganda, to seek to amend its Document containing the charges pursuant to the well-established procedure set out in Article 61(9) of the Statute. The Prosecution cannot cure, by the back door and under the guise of 'relevance', its omission to formally request the amendment of the Document containing the charges to add new murder incidents involving Mr Ntaganda as a direct perpetrator. Allowing the Prosecution to do tender evidence on such non-alleged incidents would render obsolete the procedure under Article 61(9).
36. Furthermore, the Defence observes that evidence of the purported [REDACTED] is already on the evidentiary record and notes that any further evidence would be unnecessarily duplicative. The Defence recalls the Presiding Judge's guidance to the Prosecution that it should avoid examining its witnesses on topics which have already been addressed by a number of previous witnesses and that it should rather focus on information that is really new and relevant to the case.<sup>44</sup>

---

<sup>43</sup> The Defence notes that in its Pre-Trial Brief, the Prosecution does not rely on [REDACTED] in support of the charge of indirect co-perpetration of the crime of murder. Significantly, [REDACTED]. See "Prosecution's Pre-Trial Brief", 9 March 2015, ICC-01/04-02/06-503-Conf-AnxA, paras.473-474 and the accompanying footnotes.

<sup>44</sup> T-94-CONF-ENG, p. 101, ll.3-11.

37. As regards the death of the four other individuals referred to in paragraph 44 of the Statement, although never touched upon in the testimony of previous witnesses, the probative value of evidence on the same, if any, is largely outweighed by the risk of prejudice to Mr Ntaganda, as set out above.

## **CONFIDENTIALITY**

38. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Response is classified as confidential, as it responds to a filing bearing the same classification.

## **RELIEF SOUGHT**

39. In light of the above submissions, the Defence respectfully requests the Chamber to:

**DIRECT** the Prosecution not to use leading questions when eliciting from Witness P-0894 any corrections or clarifications identified during his witness preparation;

**DIRECT** the Prosecution to complete its supplementary examination of Witness P-0894 in one hour;

**SUSTAIN** the Defence objection to the admissibility of evidence about Mr Ntaganda having allegedly killed himself certain individuals not referred to in the Updated Document containing the charges;

**DIRECT** the Prosecution not to elicit from Witness P-0894 any evidence on this topic during its examination-in-chief;

and, should it be minded to admit into evidence the Statement and the two associated documents,

**ADMIT** into evidence Witness P-0894's "*Demande de participation pour les victimes*"; and

**EXCLUDE**, in addition to paragraphs 39 to 47, the words “[REDACTED]” found in the first sentence of paragraph 51 of the Statement.

**RESPECTFULLY SUBMITTED ON THIS 21<sup>ST</sup> DAY OF JUNE 2016**

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands