



Original: **English**

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

Date: **22 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
With public Annex A**

**Public redacted version of “Corrected 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-0315’”,
10 June 2016, ICC-01/04-02/06-1386-Conf”,
14 June 2016, ICC-01/04-02/06-1386-Conf-Corr**

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 the *“Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0315”* submitted by the Office of the Prosecutor (“Prosecution”) on 25 May 2016 (“Prosecution Application”);¹ and (ii) the *“Decision on the conduct of proceedings”* issued by Trial Chamber VI (“Chamber”) on 2 June 2015,² which provides that objections to applications under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) shall be raised by way of a written filing within 14 days of notification of the application,³ 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-0315”

“Defence Response”

INTRODUCTION

1. The Defence does not oppose the introduction, pursuant to Rule 68(3) of the Rules, of: (i) paragraphs 9 to 80 of Witness P-0315’s statement (“Statement”);⁴ (ii) paragraphs 98 and 99; (iii) the first two sentences of paragraph 140, and the twelve photographs related thereto;⁵ and (iv) Annex 1 of the Statement.⁶ The admission of all other portions of the Statement and “associated” documents is opposed, as more fully particularized below, either on the basis that they are not suitable for introduction by way of Rule 68(3), or are not suitable for admission through this witness.
2. The absence of objection to the introduction of testimonial or documentary evidence pursuant to Rule 68(3) does not, of course, imply acceptance of the truth or reliability of this material.

¹ ICC-01/04-02/06-1333-Conf, which was notified on 26 May 2016.

² ICC-01/04-02/06-619 (“Decision on the Conduct of Proceedings”).

³ Decision on the Conduct of Proceedings, para.42.

⁴ DRC-OTP-2058-0990 ([REDACTED]).

⁵ Photographs DRC-OTP-2058-1058 to DRC-OTP-2058-1069 ([REDACTED]).

⁶ DRC-OTP-2058-1020 ([REDACTED]).

SUBMISSIONS

- I. Objections to certain passages of the Statement being admitted into evidence through Rule 68(3)
 - A. **Portions of the Statement concerning Witness P-0315's direct interaction with Mr Ntaganda (paragraphs 81 through 97)**
3. The Statement tendered by the Prosecution is not a *verbatim* record of its interview with Witness P-0315. No indication is provided of: (i) the questions asked, including whether leading questions were posed; (ii) whether the witness refreshed her memory by resort to documents and, if so, which documents; or (iii) the ease and clarity with which her memories were recalled. The absence of these features makes it harder for the Chamber to assess the credibility and reliability of these memories as reflected in the Statement.
4. The spontaneity and specificity of a witness's unaided recollection of events can often be of capital importance in assessing the reliability and credibility of a witness's testimony. Although this could, to some extent, be re-created during cross-examination, doing so is time-consuming⁷ and unlikely to re-create the spontaneity that should be the hallmark of direct examination.
5. These concerns are of particular importance given that paragraphs 81 through 97 purport to describe the precise words and reactions of Mr Ntaganda, and in a negative and incriminating manner.⁸ In particular, Witness P-0315 asserts that Mr Ntaganda was "evasive";⁹ that, implausibly, he stated that he had

⁷ See "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055, 29 October 2015, ICC-01/04-02/06-961, para.10 ("It is further evident that that in the event of admission pursuant to Rule 68(3) of the Rules, the Defence would need to be granted a significant amount of time to cross-examine the Witness on the prior recorded testimony").

⁸ See "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010", 6 November 2015, ICC-01/04-02/06-988 para.11 ("In making its case-by-case assessment of the Request, the Chamber notes the centrality of the Witness's prior recorded testimony to the case against the accused").

⁹ Statement, para.95.

commanded the Mongbwalu attack from Aru;¹⁰ and fails to describe a single positive impression of Mr Ntaganda in the course of a three-hour interview whose ostensible purpose was to “hear his side of the story.”¹¹ Requiring direct testimony will better ensure, notwithstanding the refreshment of recollection that will undoubtedly occur during the witness preparation session, that Witness P-0315’s testimony better reflects her actual memory of events.

6. The transparency and accuracy of the record of questions and answers is a factor that should be considered in deciding whether a statement is suitable for introduction through Rule 68(3). At the ICTY, where the same admissibility considerations apply pursuant to Rule 92 *ter*, whether the witness has ever previously testified in court is a factor that weighs *against* the admission of a statement pursuant to the counterpart of Rule 68(3).¹²
7. The centrality of this portion of Witness P-0315’s testimony, combined with the opacity of the Statement, as well as its central importance as a purported record of admissions by Mr Ntaganda and stating adverse impressions, all militate against permitting the Prosecution to tender this portion of the Statement in written form, rather than orally.
8. The admissibility of the notes of Witness P-0315’s alleged encounter with Mr Ntaganda¹³ raises additional concerns under Article 67(1)(g) protecting an accused from self-incrimination. This factor should compel the exclusion of the notes (which are, in effect, a purported statement) or at the very least requiring deferring a final determination on admissibility until the circumstances of Witness P-0315’s interview of Mr Ntaganda are more fully

¹⁰ Statement, para.89 ([REDACTED])

¹¹ Statement, para.85.

¹² ICTY, *Stanišić & Župljanin* case, IT-08-91-T, “Decision Denying Prosecution Motion for Admission of Evidence of Pregrad Radulović”, 1 April 2010, para.10.

¹³ DRC-OTP-2062-0363 [REDACTED].

known. For example, [REDACTED].¹⁴ The notes contain no indication of what information was presented to Mr Ntaganda in this regard¹⁵ and whether the Prosecution in any way encouraged this interview to take place.

9. Finally, the notes are themselves a statement of Mr Ntaganda. They are accordingly not admissible unless they satisfy the requirements of Rule 68(3). Even if this is not the case, the notes are of such poor reliability that they are not worthy of admission even according to the liminal standards of admissibility set out in Article 69(4) of the Statute.

B. Portions of the Statement concerning Witness P-0315's meetings with Mr Thomas Lubanga (paragraphs 100 through 118)

10. The same considerations as described above apply in respect of Witness P-0315's account of her two meetings with Mr Thomas Lubanga. Mr Lubanga is an alleged co-perpetrator. The introduction of Witness P-0315's account of an alleged co-perpetrator's statement pursuant to Rule 68(3) raises the same concerns as does the admission of a statement imputed to the accused himself. The least that should be required in these circumstances is that the witness be required to present her account *viva voce*.

11. The admissibility of any notes arising from Witness P-0315's alleged encounters with Mr Lubanga¹⁶ are also not admissible as they do neither meet the requirements of Rule 68(3) nor, given their form and content, even the liminal threshold of Article 69(4).

C. Portions of the Statement describing the substance of three Human Rights Watch ("HRW") reports and interviews on which they are based (paragraphs 119 through 141)

¹⁴ Statement, paras.9-10.

¹⁵ See e.g., in relation to the **17 November 2010 interview**: Statement, para.95 [REDACTED]; Annex I, p.2-3 [REDACTED].

¹⁶ In this regard, the Defence observes that, contrary to what the Prosecution represents in its Application, [REDACTED].

12. The Prosecution seeks to tender some 265 pages of three HRW reports that Witness P-0315 was involved in researching,¹⁷ along with her description of the substance of these three reports.¹⁸ These reports rely on, and consist mainly of, interviews with persons whom HRW insists must remain anonymous.¹⁹ They also rely on information provided by other NGOs often without any specific information about the source of the information being tendered into evidence.²⁰ These reports are, accordingly, a synthesis of anonymous statements.
13. The Defence opposes the admission of these reports and opposes the introduction of the description of the content of those reports in paragraphs 119 through 141 of Witness P-0315's Statement. The opportunity to cross-examine the author of the report "does not overcome the absence of the opportunity to cross-examine the person who made them":

Where the material summarised consists of statements made by others (other than written statements by prospective factual witnesses for the purposes of legal proceedings), so that the material summarised would be admissible pursuant to Rule 89(C), the summary still consists of hearsay evidence of those statements made by others, and the reliability of the statements made by those other persons (which are themselves hearsay) is relevant to the admissibility of the summary. As stated in the *Aleksovski* Decision (in a passage upon which the prosecution did not rely), the Trial Chamber must consider whether the summary is "first-hand" hearsay (that is, whether the persons who made the statements summarised personally saw or heard the events recorded in their statements), and whether the absence of the opportunity to cross-examine those persons affects the reliability of their statements. *Contrary to the submission of the prosecution, the opportunity to cross-examine the person who summarised those statements does not overcome the absence of the opportunity to cross-examine the persons who made them.*²¹

¹⁷ DRC-OTP-0074-0797 ("*Ituri: Covered in Blood*") (Annex E to the Prosecution Application), DRC-OTP-0074-0628 ("*The Curse of Gold*") (Annex F to the Prosecution Application) and DRC-OTP-2003-0497 ("*Seeking Justice: The Prosecution of Sexual Violence in the Congo War*") (Annex G to the Prosecution Application), as well as their respective French translations.

¹⁸ Statement, paras.119-141.

¹⁹ Statement, para.40.

²⁰ Interviews conducted by an NGO called [REDACTED]

²¹ ICTY, *Milošević* case, IT-02-54-AR73.2, "Decision on Admissibility of Prosecution Investigator's Evidence", 30 September 2002, para.22 (emphasis added).

14. The *Milutinović* Trial Chamber applied this principle to HRW reports tendered through the lead HRW interviewer and author of the report. The Trial Chamber – noting in particular the anonymity of the interviewees – denied admission of the report on the basis that it was not “in a position to assess the reliability of the factual contentions contained therein”:

With regard to the excerpts of the challenged reports that are based on interviews and statements of persons who were reporting alleged crimes during the indictment period, however, these organisations’ careful methods can at best assure the *accuracy* of the process for recording the information contained in the eventual report, not the *reliability* of the material contents for the purposes of use in criminal proceedings. While both the challenged reports use extensive footnotes throughout these excerpts, they do not identify the persons interviewed, leaving the sources of this critical information largely anonymous. [...] Although Mr. Abrahams did testify that he personally interviewed some of the declarants, it is not possible to determine, by reading the report, which portions of the tendered excerpts from *Under Orders* are based *on* interviews he himself conducted. Most of the tendered excerpts of the challenged reports set forth allegations of criminal conduct made by persons who claimed to be the victims of, or witnesses to, these crimes. Not having had the opportunity of hearing any of the persons upon whose statements these excerpts are based, the Chamber is not in a position to assess the reliability of the factual contentions contained therein.²²

15. The Trial Chamber specifically held that:

neither the report’s acknowledgement of these problems, nor the opportunity to cross-examine on eof the authors and editors of the report, can adequately replace the opportunity o test the reliability of any of the person’s making the statements. The Trial Chamber does no have sufficient material to satisfy it of the general reliability of the information on which this report is based.²³

16. On the other hand, the Trial Chamber did permit a report to be admitted where the authors thereof relied not only on interviews, but were also “on the scene the day after the incident.”²⁴

²² ICTY, *Milutinović et al.* case, IT-05-87-T, “Decision on evidence tendered through Sandra Mitchell and Frederick Abrahams”, 1 September 2006 (“*Milutinović* Decision”), para.21 (emphasis added).

²³ *Milutinović* Decision, para. 22.

²⁴ *Milutinović* Decision, para. 23.

17. The reasoning denying admission of the HRW and OSCE reports in *Milutinović* applies with equal – if not greater – force to the three HRW reports tendered through Witness P-0315. The three reports contain at least eleven specific references to Mr Ntaganda by name (including a reference to someone named “Bosco Taganda” who is asserted to have been appointed “Assistant Minister of Defence”).²⁵ Even sections of these reports that do not mention Mr Ntaganda’s name contain references to events that the Prosecution has, and will, seek to attribute directly to Mr Ntaganda. Far from being merely “crime base” evidence, these three reports constitute evidence of direct concern to Mr Ntaganda. Witness P-0315 does not even seem to have had a significant role in one of the three reports being tendered.²⁶
18. As professional judges, the Chamber knows well that it will not be assisted by this huge volume of anonymous hearsay. Quite to the contrary, admitting such evidence will further complicate the truth-seeking function of the Chamber. Moreover, if admitted, the Defence will be compelled to cross-examine extensively on these allegations, as unsubstantiated as they may be, and to introduce counter-evidence during its case. The consequence will be a more inefficient trial involving a large volume of information with little or no probative value.
19. The three HRW reports should therefore be denied admission, whether introduced through Rule 68(3) or during Witness P-0315’s live testimony. Further, the extensive summarization of the content of interviewees’ statements at paragraphs 119 through 141 should not be allowed to be introduced through Rule 68(3). If the Prosecution seeks to elicit this information orally, the Chamber may decide whether to hear that evidence on a case-by-case basis.

²⁵ “*Ituri: Covered in Blood*”, DRC-OTP-0074-0797 ([REDACTED]), p.813.

²⁶ Significantly, Witness P-0315 admits herself that [REDACTED] Statement, para.28.

D. Portions of the Statement concerning events from 2006 through 2013 in North Kivu (paragraphs 142 through 151)

20. Witness P-0315 contends that her HRW ‘colleagues’ and herself also documented ‘serious human rights violations by NTAGANDA’ in North Kivu province from 2006 to 2013: ‘[REDACTED]’.²⁷
21. The Prosecution argues that the Statement is ‘relevant’ without explaining why.²⁸ In particular, the Prosecution fails to explain how evidence about alleged events taking place well after the temporal scope of the charges is relevant to any of the charges laid against Mr Ntaganda.²⁹
22. The events referred to in paragraphs 142 to 151 of the Statement, contrary to documentary evidence previously admitted by the Chamber,³⁰ did not take place ‘shortly’ after the temporal scope of the charges.³¹ They concern a different time period, in a different region of the Democratic Republic of the Congo, with different actors.
23. When the Prosecution attempted to lead evidence concerning a rape allegedly committed in 2004, the Chamber stopped the Prosecution in its track on the basis that the evidence sought to be elicited was of marginal relevance and insufficient probative value.³² Nonetheless, when the Prosecution sought to adduce evidence from [REDACTED] concerning a murder allegedly committed by Mr Ntaganda in February 2004, the Chamber allowed the Prosecution to do so, but nonetheless adding that even though the alleged

²⁷ Statement, paras.143-151.

²⁸ Prosecution Application, para.9.

²⁹ Cf. T-96-ENG-CONF RT, p.87, l.25 to p.88, l.2.

³⁰ “Decision on Prosecution’s first request for the admission of documentary evidence”, 19 February 2016, ICC-01/04-02/06-1181 (“First Bar Table Decision”), paras.19 (document DRC-OTP-0138-0257, dated 21 February 2005), 21 (documents DRC-OTP-0102-0038 and DRC-OTP-0141-0009, dated 12 May 2004 and 11 December 2004, respectively) and 23 (document DRC-OTP-0113-0131, dated 8 July 2004).

³¹ Cf. First Bar Table Decision, para.22.

³² [REDACTED].

murder had some relevance, the examination should focus on the context of the murder and not exceed too much beyond that.³³

24. In this case, the prejudice attached to admitting the evidence sought to be adduced pursuant to Rule 68(3) related to the events in North Kivu far outweighs any relevance or probative value that could be attached to this material.
25. Significantly, widening the scope of this case to North Kivu will compel the Defence to adduce evidence in response. Adducing purportedly prejudicial information in such marginal matters will require an evidential response that will make the proceedings less efficient and less focused on the issues of importance. What is more, it would not be surprising to see the case for the defence double in size. Allowing the Prosecution to venture into the events which took place in North Kivu years later is certainly not in the interests of justice.

II. Other objections related to the 'associated documents' sought for admission

A. Annex D to the Prosecution Application: document DRC-OTP-2058-1028, being Annex 2 to the Statement ("Annex 2")

26. Annex 2 is a 27-page long document that only lists Internet links referring to a large number of HRW 'publications' between 2003 and 2013, including press releases, letters and other submissions. According to Witness P-0315's Statement, the [REDACTED].³⁴
27. The Prosecution does not make clear whether it is merely tendering the links, or all of their materials accessible thereby. Either way, the Defence opposes its admission: if the former, the links have no probative value; if the latter, then introducing this massive volume of information is clearly inappropriate.

³³ [REDACTED].

³⁴ Statement, para.150.

28. Annex 2 does not meet the test articulated by the Chamber for the admission of ‘associated’ documents. Witness P-0315’s Statement can clearly be understood without the benefit of Annex 2.

B. Annex L to the Prosecution Application: document DRC-OTP-0136-0161, being a letter dated 1 October 2002 along with its annex (“Kilo-Moto Letter” and “Annex”, respectively)

29. Witness P-0315 says nothing about the provenance of the Kilo-Moto Letter or its Annex and provides no information of adequate specificity to enhance the reliability or authenticity of the document.³⁵ Admission of this document through this witness, especially if received pursuant to Rule 68(3), would be inappropriate. Once again, the Kilo-Moto Letter and its Annex are not necessary to understand Witness P-0315’s Statement.

C. Video DRC-OTP-2058-0251, being a video entitled “Mungwala: Après la guerre” (“Video”)

30. Parts of the Video have already been admitted into evidence through other witnesses who, by virtue of their presence in the Mongbwalu area at the relevant time, were in a position to provide comments on the contents thereof based on their alleged personal observations.³⁶

31. Witness P-0315 states only that: (i) [REDACTED]; (ii) the Video was used for an undated HRW clip; and (iii) the Video is 2:01:47 long.³⁷

32. The Defence underscores that [REDACTED] recognizes the Video as his ‘own material’, his own ‘record’.³⁸ In such circumstances, and in light of: (i) the fact that Witness P-0315 was not involved in any way in the shooting (making-of) of the Video; as well as (ii) the paucity of information provided in the Statement as to how Witness P-0315 obtained the Video, the Defence opposes

³⁵ Prosecution Application, para.12; Statement, para.138.

³⁶ Namely, Witnesses P-0768 (T-34-CONF-ENG, p.48, ll.7-9) and P-0886 (T-40-CONF-ENG, p.78, ll.19-20).

³⁷ Statement, para.139. The accompanying metadata of the Video indicates that the Video has been handed over on [REDACTED] by ‘HUMAN RIGHTS WATCH’ to a person whose name is redacted.

³⁸ [REDACTED].

the admission into evidence of the Video as a document ‘associated’ with Witness P-0315’s prior recorded testimony.

D. Annexes M and N to the Prosecution Application: documents DRC-OTP-2061-0719 and DRC-OTP-2078-2804, being Prosecution’s notes of meetings with Witness P-0315 (“Prosecution’s Notes”)

33. The “notes” being tendered appear, in themselves, to constitute a statement of Witness P-0315. The admissibility of such statements should not be assessed according to the “associated documents” standard, but are independently subject to Rule 68(3).³⁹

34. Even if the Prosecution had properly articulated its request, the Interview Notes should not be admitted. The notes are such a manifestly unreliable record of information that is, in substance, testimonial, that they do not meet, *inter alia*, the minimum probative value threshold pursuant to Rule 68(3).

III. The Prosecution should not be permitted to elicit corrections using leading questions

35. In its oral ruling of 9 June 2016 on the Prosecution’s application under Rule 68(3) seeking the admission into evidence of Witness P-0894’s prior recorded testimony, the Chamber directed the Prosecution to first aim at eliciting any clarifications to the witness statement in a non-leading fashion.⁴⁰ The Defence reiterates that: (i) insofar as the use of leading questions during examination-in-chief amounts to obtaining from the witness confirmation of a suggestion put to her, such a practice deprives the Chamber of the benefit of assessing the witness’s spontaneity, which is of paramount importance in direct

³⁹ ICTY, *Popović et al.* case, “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quarter*”, 21 April 2008, para.65.

⁴⁰ T-99-CONF-ENG RT, p.79.

examination;⁴¹ and (ii) for the purpose of eliciting clarifications and/or corrections, the use of leading questions is unlikely to save time.⁴²

CONFIDENTIALITY

36. 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

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

DENY admission into evidence, under Rule 68(3) of the Rules, of:

- a. paragraphs 81-97, 100-118, 119-141 and 142-151 of the Statement; and
- b. exhibits DRC-OTP-2058-1028; DRC-OTP-0136-0161; DRC-OTP-2058-0251; DRC-OTP-2061-0719; DRC-OTP-2078-2804; DRC-OTP-0074-0797; DRC-OTP-0074-0628 and DRC-OTP-2003-0497;

DEFER its decision on the admissibility of exhibits DRC-OTP-2062-0363; DRC-OTP-2062-0367 and DRC-OTP-0172-0296 until Witness P-0315's oral testimony; and

DIRECT the Prosecution not to use leading questions when eliciting from Witness P-0315 clarifications and/or corrections made to her Statement.

⁴¹ Cf. "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 ("Defence Response to Witness P-0894 68(3) Application"), paras.11, 12.

⁴² Cf. Defence Response to Witness P-0894 68(3) Application, paras.11, 13.

RESPECTFULLY SUBMITTED ON THIS 22ND DAY OF JULY 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