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International Criminal Court

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Date: **12 October 2015**

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
Former child soldiers' response to the "Request on behalf of Mr Ntaganda seeking clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda"

Source: **Office of Public Counsel for Victims (CLR1)**

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

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I. INTRODUCTION

1. The Common Legal Representative of former child soldiers (the "Legal Representative") hereby submits her response to the "Request on behalf of Mr Ntaganda seeking clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda" (the "Request").[1]

2. The Defence requests the Trial Chamber (the "Chamber") to (i) "*clarify that evidence related to the commission, by Mr Ntaganda as an individual, of the crimes of rape and sexual slavery, is not admissible*"; and (ii) "*strike from the evidentiary record the answers given by Witness P-0901 to the questions put by the Prosecution in this regard*".[2] For the reasons outlined *infra*, the Legal Representative submits that both requests should be dismissed.

II. SUBMISSIONS

A. Request for clarification

3. As for the Defence's request for clarification, the Legal Representative notes that it is not the function of a Trial Chamber to provide legal advice or opinion for the parties. In this regard, the Appeals Chamber previously ruled "*that it is not an advisory body and does not deal with requests for clarification*".[3] It is submitted that a trial

[1] See the "Request on behalf of Mr Ntaganda seeking clarification of the admissibility of evidence related to any allegations of rape and sexual slavery committed personally by Mr Ntaganda", No. ICC-01/04-02/06-878, 30 September 2015 (the "Request").
[2] *Idem*, p. 6.
[3] See the "Decision further to the "Directions on the submissions of observations" issued on 31 August 2012 and on the Clarification Request of Mr Gbagbo" (Appeals Chamber), No. ICC-02/11-01/11-268 OA2, 18 October 2012, para. 3. See also the "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007" (Appeals Chamber), No. ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 30.

chamber, like the Appeals Chamber, is not an advisory body to inform the Parties, upon request, of its stance on hypothetical issues of fact or law. To the extent that the Defence seeks clarification as to the admissibility of potential items of evidence related to the direct commission by the accused of the crimes of rape and/or sexual slavery, the Legal Representative submits that the requested clarification does not relate to a live issue before the Chamber. At this stage, it would therefore be speculative and premature for the Chamber to make a decision on the admissibility of prospective items of evidence to be adduced by the Prosecution.

4. Moreover, the Chamber previously determined that the admission of evidence is to be considered on a case by case basis. It held that "[i]*n accordance with Articles 64(9)(a) and 69(4) of the Statute, the Chamber shall determine the admissibility of a document on the basis of its relevance, probative value, and any prejudice that its admission may cause to a fair trial or to the evaluation of the testimony of a witness*".[4] It is thus clear that the admissibility assessment cannot be conducted in the abstract. Rather, it requires a separate consideration of each piece of evidence in order to determine its relevance, probative value and the prejudice it may potentially cause to the rights of the accused.

5. Furthermore, the Request is improper in that it overlooks the procedure established for challenging the admissibility of evidence. In the Decision on the conduct of the proceedings, the Chamber specified that "[t]*he opposing party shall provide, by way of email, no later than two days prior to the start of the witness's testimony, notice of its objection to the use of any document with the witness, or to the document's admissibility*".[5] In addition, the Chamber clarified that "[t]*his is without prejudice to the possibility to object, during the testimony, to the manner in which the material is to be presented to the witness, or to a request to admit the document into evidence*".[6] The Defence

[4] See the "Decision on the conduct of proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, para. 36.
[5] *Idem*, para. 32.
[6] *Ibid*., para. 35.

has therefore ample opportunities to contest the admissibility of the evidence adduced. The established modalities also ensure that the admission process is fair and consistent with the rights of the accused.

B. Request for striking answers given by P-901

6. The Legal Representative submits that the Request is procedurally improper. Indeed, it seeks to strike certain answers given by Witness P-0901 to the Prosecution's questions, despite the Chamber having overruled the Defence objection regarding the same questions.[7] In fact, the Defence requests the Chamber to reconsider the oral decision overruling its objection. In this regard, the Legal Representative submits that the Request must be dismissed since it does not meet the requirement for reconsideration. Nor does the Defence even argue that the decision is "*manifestly unsound*" or that its "*consequences are manifestly unsatisfactory*".[8]

7. More generally, the Defence has not established that the specific answers concerned by its Request were either irrelevant to the charges, or otherwise lacking probative value. The mere fact that the Chamber ordered the Prosecutor to remove from the DCC specific allegations regarding the accused's direct participation in rape/sexual slavery does not render the evidence irrelevant. Indeed, such evidence may still be relevant in respect of other charges or modes of liability. This type of evidence may serve, *inter alia*, to establish (i) the mental element (*i.e.* the accused's knowledge and intent) of these crimes; (ii) the accused's contribution to the criminal plan and to the commission of the crimes charged; (iii) the accused's responsibility as

[7] See Transcript of the hearing on 21 September 2015, No. ICC-01/04-02/06-T-29-CONF-ENG ET, p. 59, lines 2-6. The Legal representative notes that the Defence constantly refers to discussions held in private session throughout its Request (see footnotes 1, 2, 3, 4, 7 and 10). Accordingly, she sees no reason to issue a redacted version of her observations, although she refers to a ruling issued in private session.

[8] On the legal standard applicable to requests for reconsideration, see the "Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010" (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, para. 18. See also the "Decision on the request to present views and concerns of victims on their legal representation at the trial phase" (Trial Chamber V), No. ICC-01/09-01/11-511, 13 December 2012, para. 6.

a commander and his failure to take appropriate actions to avoid the commission of the crimes; and (iv) the element of compulsion as a constitutive element of the war crime of conscription. Moreover, evidence concerning the commission of acts of rape/sexual slavery by UPC commanders, including the accused, will help elicit the wider context of the particular crimes charged and the actual objectives of the UPC/FPLC as an armed group. It will also be relevant to establishing the plan, policy, pattern and state of mind of the accused.

8. The Defence also incorrectly asserts that the admission of the relevant parts of P-901 testimony would cause "*undue delay* "and violates the accused's right to be on notice "*of the need to counter these specific allegations*".[9] In this regard, the Defence's contention fails to grasp the fundamental distinction between the facts and circumstances underlying the charges on the one hand, and the legal characterisation of those facts and circumstances on the other hand. While the Legal Representative agrees with the Defence that the accused should be properly informed of the nature and content of the charges brought against him, this, however, does not mean that this Chamber would be bound to adhere to the legal characterisation given to the mode of liability by the Pre-Trial Chamber. Indeed, barring evidence regarding certain modes of liability on account that the mode of liability has not been confirmed at pre-trial would be incompatible with the nature of the judicial process and would contravene the Court's duty to establish the truth. It is noteworthy that the Appeals Chamber dismissed similar arguments in the *Lubanga* case. In this respect, the Appeals Chamber noted that such an "*interpretation* […] *of the Statute bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial. This would be contrary to the aim of the Statute to 'put an end to impunity'*".[10]

[9] See the Request, *supra* note 1, paras. 9-11.

[10] See the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'(Appeals Chamber), No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 77.

9. Finally and incidentally, the request to disallow questions related to the direct commission by the accused of acts of rape and sexual slavery cannot be viewed in isolation from its more general challenge to the jurisdiction of the Court with respect to counts 6 and 9 of the DCC. The Chamber previously clarified that "*pending the decision* [on the Defence challenge] *it will allow the Prosecution to ask question, if any, and thus to elicit evidence on Counts 6 and 9*".[11] Through its Request, the Defence was effectively seeking to circumvent the Chamber's ruling and to re-litigate, at least in part, an issue already adjudicated, pending a final decision by the Chamber on the Defence's challenge relating to jurisdiction. Said decision was issued on 9 October.[12]

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to dismiss the Defence Request.

Sarah Pellet
Common Legal Representative of the
Child soldiers

Dated this 12th day of October 2015
At The Hague, The Netherlands

[11] See transcript of hearing on 17 September 2015, No. ICC-01/04-02/06-T-27-Red-ENG WT, p. 27, lines 11-13.
[12] See the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", No. ICC-01/04-02/06-892, 9 October 2015.