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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, *ex parte* – only available to the Chamber, Prosecution and Defence

Response on behalf of Mr Ntaganda to the “Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103”

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the submission of the *"Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103"* on 18 June 2015 (*"Prosecution Application"*),¹ Counsel representing Mr Ntaganda (*"Defence"*) hereby submit this:

Response on behalf of Mr Ntaganda to *"Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103"*

"Defence Response"

OVERVIEW

1. The admission of deceased witness statements under Rule 68(2)(c) of the Rules of Procedure and Evidence (*"Rules"*) is an exception to the general rule that witnesses should testify orally at trial and be subject to cross-examination.
2. In such circumstances, it is of paramount importance to meticulously assess the material sought to be admitted by the Prosecution (*"Material"*) in order to ensure that: (i) the Material satisfies the standard set out in Rule 68(2)(c); and (ii) its admission is not prejudicial to the fair trial rights of the Accused.
3. In the present instance, the Defence submits that the Material related to Witnesses P-0022, P-0041 and P-0130 fails to meet the conditions for admission set out in Rule 68(2)(c).
4. Indeed, the Defence posits that the Material:
 - (i) does not establish to a satisfactory extent that Witnesses P-0022 and P-0103 are unavailable to testify in court;
 - (ii) related to Witness P-0022 does not qualify as *"prior recorded statement"*;
 - (iii) lacks sufficient indicia of reliability; and

¹ ICC-01/04-02/06-706-Conf-Exp.

- (iv) goes directly to the acts and conduct of the Accused and that admitting such evidence would be highly prejudicial or inconsistent with the right of the Accused to a fair trial.

5. The cross-examination of a witness allows the Defence to challenge the evidence conveyed by a witness on all aspects. More importantly, it enables the Court to assess the credibility of the witness as well as the reliability and veracity of his evidence for the purpose of deciding whether it can be attributed any probative value. It necessarily follows that admitting the untested and unchallenged prior recorded statement of a witness, especially if it is of highly incriminatory nature and replete with references to the acts and conduct of the Accused, will undoubtedly be greatly prejudicial to Mr Ntaganda and contrary to his right to a fair trial.

6. Moreover, the Defence takes the stance that Rule 68(2)(c) applies as *lex specialis* and cannot be circumvented by relying on other more general provisions pertaining to the admission of evidence. Indeed, considering that the Material submitted in the Prosecution Application fails to meet the standard under Rule 68(2)(c), the Defence posits that the Prosecution cannot attempt to seek the admission of this Material pursuant to Articles 69(2), 69(4), 64(9)(a) of the Statute and Rule 63(2).

7. In the alternative, should the Chamber be inclined to consider, as requested by the Prosecution, the admission of the Material under these more general provisions, the Defence submits that it must still be denied as the prejudicial effect of admitting this untested and/or unchallenged Material significantly outweighs its probative value.

PROCEDURAL BACKGROUND

8. On 18 June 2015, the Prosecution submitted its Prosecution Application.²

² ICC-01/04-02/06-659.

9. On 9 July 2015, the Defence submitted an urgent motion seeking a limited variation of the time limit to respond to the Prosecution Application.³ On 10 July 2015, the Chamber granted an extension of time until 20 July 2015.⁴

SUBMISSIONS

I. The material related to Witness P-0022 should not be admitted

A. The unavailability of Witness P-0022 is not satisfactorily established

10. Rule 68(2)(c)(i) provides that the Chamber must be satisfied that the person whose “prior recorded statement” is sought to be admitted is unavailable to testify at trial.

11. In this regard, it is noteworthy that the Defence came across information that Witness P-0022 would not be deceased and thus would be available to testify a trial. While the Defence was not able to verify this information before the submission of the Prosecution Application, it is now precluded from doing so in the absence of team investigators.

12. Moreover, the Defence takes the view that the document provided by the Prosecution in support of its assertion that Witness P-0022 is deceased (Annex A1) does not bear sufficient indicia of reliability to be admitted under Rule 68(2)(c).

13. Indeed, the authenticity of the document is highly questionable in regard of its form and content. The identity of the person who prepared the declaration attesting P-0022's death is unknown to the Defence. In addition, the document refers to supplementary information that would be available in a “pv”, prepared by the intelligence component of a military brigade, which is not available to the Defence either. For these reasons, the document confirming the death of this witness should not be admitted. It follows as a result that the unavailability of P-0022 to testify in court would not be established to a satisfactory extent.

³ ICC-01/04-02/06-706-Conf-Exp.

⁴ Email from Trial Chamber VI Communications to the Parties, 10 July 2015, 16:03.

14. On the unique basis of this finding, the Defence respectfully requests the Chamber to reject all the Material related to Witness P-0022.

B. The first witness statement of P-0022 does not qualify as “prior recorded testimony”

15. As stated by the Prosecution in its Prosecution Application, in accordance with the *travaux préparatoire*, the terms “prior recorded statement” are intended to include prior transcripts and written statements taken by the parties or by, *inter alia*, authorities.⁵

16. Considering that P-0022’s first statement (Annex A2) was given to the non-governmental organisation named Lipadho – which is plainly neither a party nor an authority – the document does not qualify as “prior recorded testimony”. As a matter of fact, for a witness statement to be testimonial in nature, it must be given to a body authorised to collect evidence for use in judicial proceedings, with the knowledge of the interviewed person that the statement may be used in legal proceedings.⁶

C. The material sought to be admitted by the Prosecution in relation to Witness P-0022 lacks the required indicia of reliability

17. The Defence submits that the two witness statements provided by Witness P-0022 (Annexes A2 and A3) are not admissible since these two documents do not bear sufficient indicia of reliability in order to fulfil the conditions required under Rule 68(2)(c).

18. With regards to the first witness statement provided by P-0022 (Annex A2), the indicia of reliability is evidently very low and does not fulfill the standard required under Rule 68(2)(c).

⁵ ICC-ASP/12/37/Add.1, Annex II, A, Study Group on Governance Cluster I: Expediting the Criminal Process Working Group on Lessons Learnt Recommendation on a proposal to amend rule 68 of the Rules, paras. 3, 13 and 35.

⁶ ICC-01/04-01/07-2635, paras. 47-48.

19. Indeed, there is no proof of the authenticity of the statement since it is: (i) neither signed by the witness nor by the person taking the declaration, (ii) not dated; and (iii) not given under oath. The circumstances in which the declaration was given are very unclear and the methodology used to take the statement is unknown. What is more, it is highly significant that in her subsequent statement, P-0022 repudiates two important facts provided therein,⁷ thus affecting the reliability of the statement and its probative value. For these reasons, the Defence argues that this statement is plainly unreliable.

20. With respect to the second statement provided by P-0022 (Annex A3), the indicia of reliability are also very low.

21. It is important in this regard that P-0022 did not endorse important facts provided in her first statement, modifying both the location where the events would have taken place as well as her last name, which are in the submission of the Defence view significant modifications rather than minor corrections as stated by the Prosecution. These modifications strike at the heart of the accuracy, truthfulness and trustworthiness of the statement.

22. Moreover, although P-0022 made her declaration on her honour and conscience, the fact remains that her second statement was not given under oath, thereby affecting the truthfulness and trustworthiness of her declaration.

23. In the *Bemba* case, Honorable Judge Ozaki, in her dissenting opinion, elaborated on the lack of neutrality and impartial circumstances in which witness statements are taken by ICC representatives⁸. The Defence respectfully underscores the high relevance of Judge Ozaki's dissenting opinion, which must always be taken into consideration when assessing the reliability of this type of "prior recorded testimony".

⁷ Annex A3, para 14.

⁸ ICC-01/05-01/08-1028, Dissenting opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the Prosecution's list of evidence, para 11.

24. In addition, it must be noted that the two statements provided by P-0022 are not consistent with each other. As a matter of fact, in her first statement P-0022 did not mention having been raped, while she described this event in detail in her second statement.

25. The Prosecution relies on this information in support of the count of rape.⁹ In light of such significant omission in her first statement regarding a very serious allegation, the trustworthiness of her second statement is questionable. Such incriminating information ought to be cross-examined in order for the Court to assess the credibility of P-0022 as well as the reliability and veracity of the information provided. The admission of this statement under Rule 68(2)(c) would thus be highly prejudicial.

26. Lastly, the Prosecution incorrectly argues that there is no need for cross-examination on the basis that the evidence provided by P-0022 is corroborated.

27. To begin with, contrary to the Prosecution argument, it is significant that the P-0022's narrative is not corroborated by any other evidence part of the Prosecution's case. Moreover, it must be noted that alleged corroboration does not and cannot replace the need for cross-examination to verify, at a minimum, the reliability of the evidence provided by a witness.

28. On this basis, the Defence submit that P-0022's prior statements do not bear *prima facie* sufficient indicia of reliability and should thus be rejected.

D. The utmost importance of cross-examination

29. As stated by Honorable Judge Ozaki in her dissenting opinion, admission of certain statements without the witness testifying in-court constitutes "an

⁹ ICC-01/04-02/06-503, Prosecution Pre-Trial Brief.

infringement of the principle of primacy of orality, which is the corner-stone of the proceedings under the Rome Statute."¹⁰

30. In this regard, the Defence underlines that the admission of untested prior statements of highly incriminatory nature, replete with references to the acts and conduct of the Accused, is greatly prejudicial. Cross-examination of a witness is what allows the Defence to challenge the evidence of the witness on all aspects. More importantly, following cross-examination, "the Court is able to assess its accuracy, reliability and honesty, in part by observing the conduct and demeanour of the witness".¹¹

31. This was recognized by the Trial Chamber in the *Norman et al.* case before the Special Court for Sierra Leone, which held that "the Accused will be unfairly prejudiced if documents pertaining to their acts and conduct are admitted into evidence without giving the Defence the opportunity to cross-examination".¹²

32. Although the right to cross-examine is not an absolute right in all circumstances, there can be no doubt that it is essential in cases such as this one, where the evidence provided by P-0022 is not reliable, not corroborated, and includes internal inconsistencies.

E. The photographs sought to be admitted by the Prosecution in relation to Witness P-0022 do not meet the minimum requirements

33. The 14 photographs taken of P-0022 and her injuries (Annexes A4 to A17) cannot be admitted pursuant to Rule 68(2)(c), considering that they do not meet the requirements set out in the jurisprudence of international tribunals and the ICC. For an exhibit accompanying a witness statement to be admitted: (i) it should be an inseparable and indispensable part of the testimony, (ii) it should meet the

¹⁰ ICC-01/05-01/08-1028, para 8.

¹¹ ICC-01/04-01/06-1603, para 21.

¹² *Prosecution v Norman et al*, SCSL, Decision on Prosecution's Request to Admit into Evidence Certain Document Pursuant to Rule 92bis and 89(c), 14 July 2005, p. 5.

requirements of relevance and probative value, and (iii) the probative value should not be substantially outweighed by the need to ensure a fair trial.¹³

34. Witness P-0022 agreed to have photographs taken of her and confirmed that these photographs are the ones transferred on a CD-ROM attached to her declaration. However, contrary to the Prosecution assertion, P-0022 made no comment on the content of the photographs.¹⁴

35. The Defence takes the view that to be inseparable or indispensable to the testimony, the exhibit "should not merely have been mentioned during the course of that testimony, but rather have been used and explained by the witness"¹⁵, which is simply not the case.

36. Notwithstanding the potential relevance of these photographs, they do not meet the criteria that the document should be an inseparable and indispensable part of the testimony because P-0022 neither commented nor provided any details regarding the content of these photographs.

37. In this regard, the Defence posits, as stated by Trial Chamber II in the *Katanga* case, that it is not the task of the Chamber to speculate on the purpose of an exhibit in relation to the Prosecution's case.¹⁶

38. In sum, the fourteen photographs bring nothing substantial to the witness statement. For these reasons, the photographs should not be admitted.

F. The material sought to be admitted by the Prosecution in relation to Witness P-0022 goes to the acts and conduct of the Accused

¹³*Prosecution v. Radovan Karadžić*, IT-95-5/18-PT, Decision on Prosecution motion for admission of testimony of witness KDZ198 and associated exhibits pursuant to Rule 92 *quarter*, 20 august 2009; ICC-01/04-01/07- 2289, para 13.

¹⁴Annexe A3, para 49.

¹⁵ *Prosecution v. Radovan Karadžić*, IT-95-5/18-PT, Decision on Prosecution motion for admission of testimony of witness KDZ198 and associated exhibits pursuant to Rule 92 *quarter*, 20 august 2009, para 7.

¹⁶ ICC-01/04-01/07-2289, para 21.

39. While the Prosecution maintains that the material related to Witness P-0022 does not address the direct acts or conduct of the Accused, the Defence submits – in light of the way the Prosecution relies on P-0022 in its Pre-trial Brief and the numerous counts supported by statements made by P-0022 – that the use of her statements definitely goes to the acts and conduct of the accused¹⁷.

40. As stated by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"):

"[t]he exercise of the discretion as to whether the evidence should be admitted in written form at all becomes more difficult in the special and sensitive situation posed by a charge of command responsibility under Article 7.3 of the Tribunal's Statute. That is because, as jurisprudence demonstrates in cases where the crimes charged involve widespread criminal conduct by the subordinates of the accused (or those alleged to be his subordinates), there is often but a short step from a finding that the acts constituting the crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them."¹⁸

41. Mr Ntaganda is facing all eighteen charges as a direct perpetrator, direct and indirect co-perpetrator under Article 25(3)(a) and as a military commander under Article 28(a) of the Statute. The allegations contained in Witness P-0022 statements are so proximate to the Accused that the evidence of the acts and conduct which the Prosecution seeks to admit becomes sufficiently pivotal to the Prosecution's case that it would be unfair to the Accused to allow its admission.

42. According to the evidence provided by P-0022, UPC forces attacked Mongbwalu and she was raped and almost killed by UPC soldiers.

43. Indeed, taking into consideration the Prosecution's case, the alleged conduct of UPC forces against Witness P-0022 is sufficiently proximate to Mr Ntaganda, who is alleged to have commanded the attack on the village of Mongbwalu and other

¹⁷ ICC-01/04-02/06-503, Prosecution Pre-trial Brief, footnotes 268,416, 418, 482, 607, 627, 701,737, 738, especially footnotes 1133, 1316, 1630, which are intended to demonstrate the individual responsibility and responsibility as a co-perpetrator of Mr Ntaganda.

¹⁸ *Prosecutor v Stanislav Galić*, No. IT-98-29-AR73.2, Decision on interlocutory appeal concerning Rule 92bis (c), 7 June 2002.

locations within the Banyali-Kilo *collectivité* and to be responsible for the conduct of FPLC soldiers.¹⁹

44. Aside from the specific crimes, the fact that P-0022 alleged that she was chased by FPLC soldiers because she was a Lendu goes to the heart of the Prosecution's case, notably in light of the supposedly ethnical motivation underpinning the alleged common plan.²⁰ This allegation is therefore pivotal to the Prosecution's case and is highly prejudicial.

45. Although the fact that a statement going to the acts and conduct of the Accused is only one of the factors that favours the exclusion of a "prior recorded statement", in the particular circumstances of this case, the probative value of P-0022's evidence is significantly outweighed by its prejudicial effect.

II. The material related to Witness P-0041 should not be admitted

46. As a preliminary matter, the Defence does not oppose the document establishing the death of Witness P-0041 (Annexes B1 and B2). However, for the reasons set out below, the Defence opposes the admissibility of the Material related to this Witness.

A. The material sought to be admitted by the Prosecution in relation to Witness P-0041 lacks the required indicia of reliability

47. The statements provided by P-0041 (Annexes B3) and his in-court testimony (B4-B9) are not admissible since the documents do not bear sufficient indicia of reliability in order to fulfil the conditions required under Rule 68(2)(c).

48. First, P-0041's statement (Annex B3) was not given under oath, which in and of itself affects the truthfulness and trustworthiness of his declaration.

49. Second, the Defence recalls its previous argument pertaining to the lack of neutrality and impartiality with which witness statements are taken by Prosecution

¹⁹ ICC-01/04-02/06-503, Prosecution Pre-trial Brief, para 58.

²⁰ ICC-01/04-02/06-503, Prosecution Pre-trial Brief, paras. 2-3.

representatives. This, in the Defence's view, undermines the reliability of P-0041's statement.

50. Third, considering that P-0041 benefited from protective measures, the Prosecution's contention that he had no interest in giving his statement to the Prosecution is incorrect.

51. Lastly, notwithstanding the fact that Trial Chamber I had the opportunity to assess the credibility and reliability of the evidence provided by P-0041 in-court (Annexes B4 to B9), the Defence underscores that the cross-examination of the Witness conducted by the *Lubanga* Defence focused solely on the facts and issues relevant to that case.

52. Nonetheless, certain facts and matters raised in P-0041's testimony are proximate to the alleged acts and conduct of the Accused in the present case and have never been submitted to cross-examination, including *inter alia*: (i) the training of child soldiers in Mandro; (ii) the murder of the priest in Mongbwalu; and (iii) the alleged pillage by the accused himself.²¹ In the Defence's view, such untested and unchallenged information going to the acts and conduct of the Accused is evidently less reliable. Consequently, the admission of such evidence pursuant to Rule 68(2)(c) would necessarily be prejudicial and inconsistent with the right of Mr Ntaganda to a fair trial.

B. The material sought to be admitted by the Prosecution in relation to Witness P-0041 goes to the acts and conduct of the Accused

53. The Defence opposes the admission of the Material related to Witness P-0041 since it goes directly to the acts and conduct of the Accused with respect to many counts, including *inter alia*: murder, recruitment of child soldiers and pillage.²²

²¹Annexes B6 pp.52, 63 to 65, and B7pp.55.

²² ICC-01/04-02/06-503, Prosecution Pre-trial Brief, footnotes 99, 100, 358, 359, 360, 372, 395, 448, 1037, 1045, 1069, 1071, 1088, 1119, 1154, 1175, 1176, 1207, 1207, 1219, with a special attention to footnotes 1338, 1369, 1373, 1396, 1404, 1408, 1410, 1413, 1414, 1415, 1417, 1418, 1419, 1457, 1458, 1459, 1776, 1826

54. Mr Ntaganda is facing all eighteen charges as a direct perpetrator, direct and indirect co-perpetrator under Article 25(3)(a) and as a military commander under Article 28(a) of the Statute. The allegations contained in Witness P-0041 statements are so proximate to the Accused that the evidence of the acts and conduct which the Prosecution seeks to admit become sufficiently pivotal to the Prosecution's case that it would be unfair to the Accused to allow its admission.

55. As a matter of fact, Witness P-0041 addresses the background and foundation of the UPC/FPLC. Those allegations go directly to the heart of the Prosecution's case, notably in light of the supposedly ethnical motivation underpinning the alleged common plan. Those allegations are therefore pivotal to the Prosecution's case and thus the admission of P-0041 statements would be highly prejudicial.

56. The Witness also mentioned that Commandant Salongo was present during the attack on the village of Mongbwalu²³ as well as during the alleged massacre following the pacification meeting in Lipri. In light of the Prosecution's case - including allegations that Mr Ntaganda: (i) was in command of the attack on the village of Mongbwalu and the surrounding villages; and (ii) was personally involved in the attacks against Kobu - ²⁴ it follows that these allegations are also pivotal to the Prosecution's case. Consequently, the admission of P-0041's statements would be highly prejudicial.

57. Also, information pertaining to the acts and conduct of the Accused contained in the witness statement and the in-court transcripts of Witness P-0041 have not been submitted to cross-examination, including *inter alia*, the murder of the priest in Mongbwalu, the alleged pillaging by the Accused and members of the FPLC, and the recruitment and training of child soldiers²⁵. In this regards, the Defence recalls the utmost importance of cross-examination, especially in light of such incriminatory

which are intended to demonstrate the individual responsibility and responsibility as a co-perpetrator of Mr Ntaganda.

²³Annex B3, para 80.

²⁴ ICC-01/04-02/06-503, Prosecution Pre-trial Brief, paras. 58 and 59

²⁵ Annex B3, paras. 27, 32, 80, 166, 173; Annexes B6 pp.52, 63 to 65, and B7pp.55.

information. Moreover, while the Prosecution submits that the evidence provided by P-0041 is corroborated, the Prosecution does not support its submission with any examples.

58. What is more, while the Prosecution argues that the corroborating evidence put forward by other witnesses will be tested in court, the Defence posits that this is an erroneous understanding of the object and purpose of cross-examination, the main purpose of which is to test the witness on his personal knowledge and to allow the Court to assess his credibility and the reliability of his evidence. Clearly, the cross-examination of another witness on facts mentioned by P-0041 is not tantamount to cross-examining Witness P-0041.

59. It follows that the admission of P-0041's witness statement and the transcripts of his in-court testimony pursuant to Rule 68(2)(c) would necessarily be prejudicial and inconsistent with the right of Mr Ntaganda to a fair trial.

C. The documents sought to be admitted by the Prosecution in relation to Witness P-0041 do not meet the minimum requirements

60. Bearing in mind that the Defence is requesting the Chamber to reject in its entirety the witness statement and the in-court transcripts pertaining to Witness P-0041 (Annexes B3 to B9), the Defence takes the view that the entirety of the documents attached to the same (Annexes B10 to B62) should not be admitted.

61. In any event, even if the Chamber was inclined to admit the P-0041's statement and in-court transcripts, the Defence submits that only some of the related documents would fulfil the minimum standard established by the jurisprudence mentioned above.²⁶

62. Indeed, as mentioned previously, the Defence posits that documents either not mentioned or merely mentioned during the course of a witness' testimony

²⁶ Annexes B10 to B12, B14 to B16, B18, B20, B30- B31, B51, B56, B58, B61.

cannot be understood as being inseparable or indispensable.²⁷ For this reason, the Defence is of the view that the following documents do not meet the required criteria to be admitted under Rule 68(2)(c), namely: Annexes B25 to B27, B29, B32 to B50, B52 to B55 and B60.

63. In addition, the Defence is of the view that other documents: (i) are simply not relevant to the testimony; (ii) add nothing substantial to the testimony; and (iii) are of no help in better understanding the testimony. Accordingly, the Defence submits that the following documents do not meet the required criteria to be admitted under Rule 68(2)(c), namely: Annexes B13, B19 (which is also only an excerpt of a document), B21, B23, B24. Also, the Defence posits that the following documents are unreliable and bear no probative value since they are either unreadable and/or have been altered by P-0041 or another witness: B28, B57, B59.

64. Lastly, considering that documents B17, B22, B60 and B62 are directly related to the acts and conduct of the Accused, they must not be admitted as their prejudicial effect definitely outweighs their probative value, thereby undermining the right of the Accused to a fair trial.

III. The material related to Witness P-0103 should not be admitted

A. The unavailability of Witness P-0103 is not satisfactorily established

65. The Defence submits that for various reasons, the document tendered by the Prosecution to establish the death of Witness P-0103 (Annex C1) is unreliable and bears low probative value.

66. As a matter of fact, the Prosecution did not submit any death certificate. The Prosecution relied instead on a witness statement provided by Witness P-103's wife, namely P-0946, testifying on her husband death. While P-103 allegedly died in November 2010, P-0946's statement was given in April 2015. It is significant that it

²⁷*Prosecution v Radovan Karadžić*, IT-95-5/18-PT, Decision on Prosecution motion for admission of testimony of witness KDZ198 and associated exhibits pursuant to Rule 92 *quarter*, 20 august 2009, para 7.

took four years and a half for the Prosecution to obtain evidence purportedly establishing the death of one of its potential witnesses.

67. In addition, it is noteworthy that Witness P-0946 confirmed the possibility of obtaining a death certificate, as well as the availability of the hospital personnel who attended her husband at the hospital of Mongbwalu.²⁸

68. The Defence submits that the submission of a statement – in particular, when such statement was not given under oath – instead of a death certificate that is available, is not sufficient to establish in a satisfactory way the unavailability of Witness P-0103.

B. The material sought to be admitted by the Prosecution in relation to Witness P-0103 lacks the required indicia of reliability

69. The Defence submits that the witness statements provided by Witness P-0103 (Annexes C2) is not admissible since the document does not bear sufficient indicia of reliability in order to fulfil the conditions required under Rule 68(2)(c).

70. Although Witness P-0103 made his declaration on his honour and conscience, the fact remains that his statement was not given under oath, which negatively impacts its truthfulness and trustworthiness. In this regard, the Defence recalls Judge Ozaki's dissenting opinion pertaining to the lack of neutrality and impartiality with which witness statements are taken by Prosecution representatives.²⁹ This, in the Defence's view, undermines the reliability of the witness statement of P-0103.

71. Accordingly, the Material related to Witness P-0103 does not meet the required indicia of reliability.

C. The material sought to be admitted by the Prosecution in relation to Witness P-0103 goes to the acts and conduct of the Accused

²⁸ Annex C1, para 14.

²⁹ ICC-01/05-01/08-1028, Dissenting opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the Prosecution's list of evidence, para. 11.

72. P-0103 provided evidence related to the attack on the village on Mongbwalu³⁰ and the alleged massacre following the pacification meeting in Lipri. In light of the Prosecution's case – including allegations that Mr Ntaganda was in command of the attack on Mongbwalu and the surrounding villages and was leading the attacks against Kobu at this time – ³¹ the allegations contained in P-0103's statements are so proximate to the Accused that the evidence which the Prosecution seeks to admit becomes sufficiently pivotal to the Prosecution's case that it would be unfair to the Accused to allow its admission.

73. In respect of all eighteen charges laid against him, Mr Ntaganda is charged as a direct perpetrator, direct and indirect co-perpetrator under Article 25(3)(a) and as a military commander under Article 28(a) of the Statute. The allegations contained in Witness P-0103 statements are so proximate to the Accused that the evidence the Prosecution seeks to admit becomes sufficiently pivotal to the Prosecution's case that it would be unfair to the Accused to allow its admission.

D. The documents sought to be admitted by the Prosecution in relation to Witness P-0103 do not meet the minimum requirements

74. Bearing in mind that the Defence is respectfully requesting the Chamber to reject the witness statement pertaining to Witness P-0103 (Annexes C2), the Defence takes the view that the two documents attached thereto should not be admitted (Annexes C3 and C4).

75. Moreover, the documents annexed to the P-0103's statement should also be rejected on the basis that the witness does not elaborate on these documents in his statement. Hence, for the reasons mentioned above, these documents do not meet the required standard to be admitted under Rule 68(2)(c).

IV. Rule 68(2)(c) applies as *lex specialis*

³⁰ Annex B3, para 80.

³¹ ICC-01/04-02/06-503, Prosecution Pre-trial Brief, paras. 58 and 59.

76. The Defence takes the view that Rule 68(2)(c) applies as *lex specialis* and that as such, it cannot be circumvented by relying on other more general provisions pertaining to the admission of evidence.

77. Rule 68(1) provides that the Chamber must assess the impact of the admission of documents pursuant to that Rule on the rights of the Accused, in a similar way the Chamber would do so under Articles 69(2), 69(4), 64(9)(a) of the Statute and Rule 63(2).

78. However, Rule 68(1) also specifies that, in addition to assessing this general impact, it must also ensure that “the requirements of one or more of the following sub-rules are met”.³² Thus, in this case, the Chamber must be satisfied that the documents submitted by a party meet the requirements of Rule 68(2)(c) in order to admit the prior statements of a deceased witness.

79. Consequently, bearing in mind that the Prosecution Application fails to meet the standard under Rule 68(2)(c), the Defence submits that the Prosecution cannot seek the admission of the Material under Articles 69(2), 69(4), 64(9)(a) of the Statute and Rule 63(2) of the Rules, if only because the three-stage test for admitting “evidence other than direct oral testimony” is less restrictive than the test under Rule 68(2)(c).

80. Indeed, circumventing Rule 68 and having recourse to more general provisions to admit evidence provided by a person unavailable to testify – especially if it goes to the acts and conduct of the Accused – would clearly be prejudicial to the Accused and contrary to his right to a fair trial. Hence, it is of the utmost importance to consider any request by a party for the admission of evidence provided by a person unavailable to testify *viva voce strictly pursuant to Rule 68*.

81. This was confirmed by the Trial Chamber in *Katanga & Ngudjolo*, holding that: “Once the Chamber has determined that an out-of-court statement is testimonial,

³² Rule 68(1) of the Rules.

that statement can only be allowed into evidence under the conditions provided in rule 68."³³

82. In any event, even if the Chamber was inclined to consider the Prosecution Application on the basis of the general provisions dealing with the admission of evidence, the Defence respectfully submits that it must still be denied in its entirety as its prejudicial effect significantly outweighs its probative value.

CONFIDENTIALITY

83. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Request is submitted on a confidential *ex parte* basis – only available to the Chamber, Prosecution and Defence – as it refers to filings bearing the same classification.

RELIEF SOUGHT

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

DENY the Prosecution Application; and

RULE that the Material related to Witnesses P-0022, P-0041 and P-0103 is not admissible.

RESPECTFULLY SUBMITTED ON THIS 20TH DAY OF JULY 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

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³³ ICC-01/04-01/07-2635, para. 50.