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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***

Public

Redacted version of "Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit the prior recorded testimony of Witness P-0010'", 23 October 2015

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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Other

Further to the submission of the “*Prosecution application under rule 68(3) to admit the prior recorded testimony of Witness P-0010*” by the Office of the Prosecutor (“Prosecution”) on 8 October 2015 (“Prosecution Application”),¹ 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 of Witness P-0010”

“Defence Response”

INTRODUCTION

1. The Defence hereby responds to the Prosecution’s application to admit in the present case, pursuant to Rule 68(3) of the Rules of Procedure and Evidence (“Rules”), Witness P-0010’s prior recorded testimony in the *Lubanga* case (“Witness P-0010 Prior Testimony”).²
2. The Defence reiterates its commitment to facilitating the swift and expeditious conduct of the present trial proceedings, which can be served, when appropriate, by recourse to Rule 68(3) to admit the prior recorded testimony of a witness.
3. However, in this particular case, the apparent advantage resulting from admitting Witness P-0010 Prior Testimony pursuant to Rule 68(3) – i.e. a *prima facie* economy of four to five hours of hearing time, unlikely to materialize – is far outweighed by the potential prejudice to and the disadvantages for the Accused.
4. Accordingly, for the reasons stated herein, the Defence opposes the Prosecution Application.

¹ ICC-01/04-02/06-890-Conf. A public redacted version of the Prosecution Application was submitted on 9 October 2015.

² ICC-01/04-02/06-890-Conf-AnxA, p.1.

OVERVIEW

5. The aim of Rule 68(3) is to save time by admitting the prior recorded testimony of a witness, in certain circumstances, provided that this is not prejudicial to or inconsistent with the rights of the Accused. Factors weighing in favour or against the admission of the prior recorded testimony of a witness in subsequent proceedings have been identified in the jurisprudence of the ICTY related to Rule 92*ter* of the ICTY Rules of Procedure and Evidence ("Rule 92*ter*"), a provision substantially similar to Rule 68(3) adopted in 2006 for the precise purpose of expediting the proceedings, without infringing on the rights of the Accused.
6. In the case at bar, analysis of these factors leads to the conclusion that recourse to Rule 68(3) is not appropriate and that it is in the interest of justice to hear the testimony of Witness P-0010 *viva voce*, in full.
7. The minimal overlap between the expected testimony of Witness P-0010 ("Witness P-0010 Expected Testimony") and her Prior Testimony militates strongly against admission of the latter pursuant to Rule 68(3). Indeed, although the totality of the evidence expected to be adduced by Witness P-0010 relates to events which took place in the same time frame, the Prosecution requests Trial Chamber VI ("Chamber") leave to conduct a 'supplementary examination' on 11 of the 17 topics of Witness P-0010 Expected Testimony for a duration of up to six hours ("Requested Supplementary Examination"). It is thus evident that the Prosecution is seeking to rely on Witness P-0010 to provide evidence going way beyond her Prior Testimony in the *Lubanga* case.
8. The fact that Trial Chamber I found Witness P-0010 Prior Testimony not reliable on many aspects of her testimony, also militates strongly against admission of this material pursuant to Rule 68(3). Indeed, in such circumstances, the Defence has the ethical obligation and the duty to ensure

that every factor which led to this conclusion is properly brought to the attention of the Chamber *via* the witness.

9. In addition, bearing in mind the Prosecution's extensive reliance on the evidence expected to be adduced by Witness P-0010 – who is described as [REDACTED] witness – it is in the interest of justice that her testimony be heard entirely *viva voce* rather than partly *viva voce* and partly pursuant to Rule 68(3).
10. Lastly, and more importantly, the fact that very little time, if any, would be saved by admitting Witness P-0010 Prior Testimony pursuant to Rule 68(3) while allowing the Prosecution to conduct an extensive 'supplementary examination', for a duration of up to six hours, weighs sturdily in favour of hearing the entire testimony of Witness P-0010 *viva voce*.

SUBMISSIONS

11. Rule 68(3) of the Rules, like ICTY Rule 92*ter*, is aimed at enhancing the expeditiousness of trial proceedings.³ However, in order to ensure that this objective is achieved and that any examination conducted by the calling party does not result in a lengthy testimony, the calling party must confine itself to putting to the witness only clarifying questions.⁴
12. The ICTY jurisprudence on requests pursuant to Rule 92*ter* provides useful guidance on the relevant factors which weigh against the admission of a prior recorded testimony in subsequent proceedings. These factors include *inter alia*: (i) a minimal overlap between the topics covered in the prior testimony and the topics anticipated to be covered during the witness's examination in

³ Cf. "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931", ICC-01/04-02/06-845 ("Preliminary Ruling on Prosecution First Application under Rule 68(3)"), para.6.

⁴ Cf. p.2 of the concurring opinion of Judge Jean-Claude Antonetti – who was at the origin of the adoption of Rule 92*ter* – appended to *Prosecutor v. Jadranko Prlić*, IT-04-74-T, "Decision on the application of Rule 92*ter* of the Rules", 25 June 2007.

- the instant case;⁵ (ii) the volume of the prior recorded testimony;⁶ (iii) the centrality of the issues covered in the prior testimony to the case against the accused;⁷ and (iv) the relatively short amount of time saved.⁸
13. Considering the significant similarities between Rule 92*ter* and Rule 68(3) of the Rules, the Defence submits that the above-mentioned factors apply *mutatis mutandi* and should be taken into consideration when determining whether the admission into evidence of a prior recorded testimony is appropriate pursuant to Rule 68(3).
 - I. **In the absence of a significant overlap between Witness P-0010 Prior Testimony and her Expected Testimony, admitting Witness P-0010 Prior Testimony would defeat the purpose of Rule 68(3) of the Rules**
 14. Admission into evidence of prior recorded testimony pursuant to Rule 68(3) may save time, but only when the scope and contents of the prior recorded testimony and the expected testimony significantly overlap, in which case there is no prejudice to the Accused, who can cross-examine the witness on topics comprised in her prior recorded testimony, subject solely to few clarifications.
 15. However, while a significant overlap between the prior and expected testimony weighs in favour of using Rule 68(3), a major difference between the two weighs against its use.
 16. In this case, there exists a significant difference between the scope of Witness P-0010 Prior Testimony and the scope of Witness P-0010 Expected Testimony.

⁵ See *a contrario* *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-T, “Decision on Prosecution Motion to Convert Seven *Viva Voce* Witnesses to Rule 92 *Ter* Witnesses”, 10 May 2011 (“*Tolimir* Decision”), paras.21, 25.

⁶ *Tolimir* Decision, paras.12, 29; *Prosecutor v. Vujadin Popović et al.*, IT-05-88-T, “Decision on Motion to Convert *Viva Voce* Witnesses to Rule 92 *ter* Witnesses”, 31 May 2007 (“*Popović* Decision”), p.3.

⁷ *Tolimir* Decision, para.29. See also *Popović* Decision, p.3; *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, “Order in Relation to Testimony of Rupert Smith and Berko Zečević”, 20 January 2011 (“*Karadžić* Decision”), para.2 (given the nature of the expected testimonies as well as the positions that the witnesses occupied during the period relevant to the indictment, the Trial Chamber found that it was in the interests of justice for their testimony to be heard entirely *viva voce*, rather than pursuant to Rule 92 *ter*).

⁸ *Tolimir* Decision, para.45. See also *Popović* Decision, p.3.

While Witness P-0010's summary of evidence indicates that the witness is expected to testify on no less than 17 topics,⁹ Witness P-0010 Prior Testimony is much more limited in scope, which results in the Prosecution seeking leave to conduct an extensive supplementary examination on 11 of the 17 anticipated topics.¹⁰

17. In fact, the Prosecution Application amounts to allowing Witness P-0010 to testify twice – once pursuant to Rule 68(3) concerning her testimony in the *Lubanga* case and a second time, *viva voce*, in respect of the contents of the interview conducted by representatives of the Prosecution [REDACTED] – with the Defence having to prepare for both. As further explained below, preparing and cross-examining a witness on his/her prior testimony is significantly different from preparing and cross-examining the same witness on an entirely *viva voce* testimony. Having to cross-examine in respect of both the witness's prior recorded testimony and the witness's extensive *viva voce* testimony, is even more difficult.

II. Admitting Witness P-0010 Prior Testimony would impose a much heavier burden on the Defence in preparing for, and conducting the cross-examination of Witness P-0010, which will inevitably require much more time

18. It is significant that during Witness P-0010 Prior Testimony, evidence was adduced and tested in a different context without any input from Mr Ntaganda as well as in the absence of anyone focusing on his interests. Regardless of the quality of the cross-examination conducted by the Defence team for Mr Lubanga ("Lubanga Defence"), Witness P-0010 Prior Testimony necessarily comprises: (i) issues addressed by the Lubanga Defence which the Defence would have either not addressed, or addressed differently; and (ii) issues not addressed by the Lubanga Defence which the Defence would have addressed.

⁹ ICC-01/04-02/06-491-Conf-AnxB, pp.26-28.

¹⁰ Prosecution Application, fn.19.

19. Moreover, it is noteworthy that as a result of admitting Witness P-0010 Prior Testimony pursuant to Rule 68(3), all of the witness's prior testimony becomes evidence. Considering that the Prosecution will be able to refer to any part of Witness P-0010 Prior Testimony in its final trial brief and that the Chamber will be able to do the same in its trial judgment – whether or not these parts are addressed by the Prosecution during its extensive supplementary examination – the Defence has the duty and obligation to address every issue admitted on the record, especially if the Defence was not present at the time. Such duty does not arise when the testimony is entirely *viva voce*.
20. In this particular case, Trial Chamber II found in its trial judgement that the internal contradictions in Witness P-0010's account, together with the "strength of the conflicting external evidence", meant that Witness P-0010 was "not a witness that the Chamber is able to rely on as regards many aspects of the relevant detail of her account".¹¹ In such circumstances, the Defence has the ethical obligation and the duty to ensure that every factor which led to this conclusion is properly brought to the attention of the Chamber *via* the witness, which significantly increases the Defence's burden of preparation for cross-examination.

III. Given the centrality of the issues covered in Witness P-0010 Prior Testimony, it is in the interests of justice that Witness P-0010's testimony be heard *viva voce* in its entirety

21. As noted by the Chamber, Rule 68(3) of the Rules constitutes an exception to the principle of the primacy of orality before the Court.¹² Before the ICTY, preference has been given to hearing a witness's testimony in its entirety *viva voce* when the topics covered in the witness's prior testimony were central to the subsequent case in which admission was sought.¹³

¹¹ ICC-01/04-02/06-2842, para.268.

¹² Preliminary Ruling on Prosecution First Application under Rule 68(3), para.6.

¹³ *Tolimir* Decision, para.29. *See also Popović* Decision, p.3; *Karadžić* Decision, para.2.

22. The more the expected testimony of a witness is central to the Prosecution's case – such as when the witness is labelled as an insider– the more it is in the interest of justice to hear the witness's testimony *viva voce* in full. This allows the judges to have the opportunity to assess the witness's evidence in full and to determine, in real-time based on their own assessment, the probative value it can be afforded.
23. The importance of the topics which were discussed in Witness P-0010 Prior Testimony to the instant case cannot be downplayed. In addition to having testified about three of the crimes charged in the present case – namely, those crimes charged under Counts 14, 15 and 16 – Witness P-0010 also provided evidence about a significant number of topics related to Mr Ntaganda's alleged criminal responsibility.¹⁴ The importance of Witness P-0010 Prior Testimony to the present case is further shown by the Prosecution's extensive reliance on it in its Pre-Trial Brief.¹⁵
24. In such circumstances, where the nature of Witness P-0010 Prior Testimony is of central importance to the issues in dispute in the instant case, the interests of justice militate in favour of hearing *viva voce* Witness P-0010's testimony in its entirety.

IV. Admitting Witness P-0010 Prior Testimony would result in little time saved, if any

25. In light of the above arguments, it is evident that the *prima facie* economy of four to five hours of hearing time will not materialize. In fact, it is likely that proceeding pursuant to Rule 68(3) in this case will, in the end, be more time-consuming than proceeding with hearing Witness P-0010's testimony *viva voce* in full.
26. Indeed, bearing in mind that:

¹⁴ Cf. Prosecution Application, para.16.

¹⁵ ICC-01/04-02/06-503-Conf-AnxA. Out of 122 references made to Witness P-0010's material in the Prosecution's Pre-Trial Brief, 26 of them refer to Witness P-0010 Prior Testimony.

- a. the Prosecution requires up to six hours for its extensive Requested Supplementary Examination;
- b. the Defence cross-examination of Witness P-0010 on her testimony given during the extensive Requested Supplementary Examination would require at least as much time, i.e. six hours;
- c. the Defence cross-examination linked to Witness P-0010 Prior Testimony will require at least as much time as the Lubanga Defence, i.e. approximately two hours; and
- d. proceeding pursuant to Rule 68(3) and allowing the Prosecution to conduct its extensive Requested Supplementary Examination will very likely lead to: (i) numerous objections being raised by the Defence as to what issues were previously covered in Witness P-0010 Prior Testimony which need not be raised again; as well as (ii) numerous objections being raised by the Prosecution as to what aspects of Witness P-0010 Prior Testimony were previously tested by the Lubanga Defence which in its view need not be tested again,¹⁶ all of which have the potential to use significant court time;

it is obvious that admitting Witness P-0010 Prior Testimony pursuant to Rule 68(3) and allowing the Prosecution to conduct its extensive Requested Supplementary Examination will not yield the desired result of saving time, and that the testimony of Witness P-0010 will necessitate at least as much time as proceeding *viva voce* in full, i.e. 20 hours, probably more.

27. Consequently, bearing in mind that proceeding pursuant to Rule 68(3) will in all likelihood not result in saving any hearing time, and taking into consideration additional relevant factors such as the centrality of the evidence expected to be adduced by Witness P-0010 and the fact Witness P-0010 Prior

¹⁶ Cf. Prosecution Application, para.18.

Testimony was found not reliable “on many aspects” by Trial Chamber I, it is evident that recourse to Rule 68(3) is not appropriate in this case and that it is in the interest of justice to hear the totality of Witness P-0010’s testimony *viva voce*.

CONFIDENTIALITY

28. 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. A public redacted version will be submitted separately.

RELIEF SOUGHT

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

DENY the Prosecution Application; and

ORDER Witness P-0010 to testify *viva voce* before the Chamber.

RESPECTFULLY SUBMITTED ON THIS 16TH DAY OF NOVEMBER 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands