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

Date: **22 April 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

**Response on behalf of Mr Ntaganda to “Prosecution’s application under
rule 68(2)(c) to admit the prior recorded testimony of Witness P-0039”**

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
Me William St-Michel

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’s application under rule 68(2)(c) to admit the prior recorded testimony of Witness P-0039”* submitted by the Office of the Prosecutor (“Prosecution”) on 30 March 2016 (“Prosecution Application”);¹ and (ii) the *“Response of the Common Legal Representative of the Victims of the Attacks to the ‘Prosecution’s application under rule 68(2)(c) to admit prior recorded testimony of Witness P-0039’”* submitted by the Common Legal Representative of the Victims of the Attacks on 21 April 2016,² 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 prior recorded testimony of Witness P-0039”

“Defence Response”

1. The Prosecution requests that Trial Chamber VI (“Chamber”) admit into evidence two written statements made by Witness P-0039 (“Witness P-0039’s Prior Recorded Testimony”) as ‘prior recorded testimony’ under Rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) or, in the alternative, pursuant to Articles 69(2), 64(9)(a) and 69(4) of the Statute as well as Rule 63(2) of the Rules.
2. For the reasons expressed below, the Defence opposes the Prosecution Application in its entirety.

SUBMISSIONS

3. The Defence acknowledges the principled benefits to the expeditious conduct of the proceeding of admitting the prior recorded testimony of witnesses under Rule 68 of the Rules. However, when such prior recorded testimony comes from a witness allegedly ‘unavailable’ to testify within the meaning of

¹ ICC-01/04-02/06-1238. The Prosecution Application was formally notified on 31 March 2016.

² ICC-01/04-02/06-1291.

Rule 68(2)(c) – the admission of which results in evidence not being tested through cross-examination – it is of paramount importance to meticulously assess whether: (i) the requirements of the sub-rule are met; and (ii) the admission of the prior recorded testimony is not prejudicial to, or inconsistent with, the rights of the Accused.³

I. Whether Witness P-0039 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence

4. The Prosecution posits that the combination of: (i) Witness P-0039's refusal to testify orally without face and voice distortion; (ii) the Chamber declining to grant such measures; and (iii) the Chamber declining to compel Witness P-0039 to testify, amounts to Witness P-0039 being 'unavailable' to testify orally before the Chamber within the purview of Rule 68(2)(c).⁴
5. The Prosecution further asserts that it has used reasonable diligence to pursue alternatives to Rule 68(2)(c)⁵ by: (i) (orally) seeking reconsideration of the Chamber's decision on its request for in-court protective measures;⁶ (ii) 'requesting' (in fact, suggesting) to compel Witness P-0039 to testify;⁷ (iii) seeking leave to appeal the Chamber's decision on its request for in-court protective measures;⁸ and (ii) submitting an 'additional' application for

³ Rule 68(1) of the Rules.

⁴ Prosecution Application, paras.5, 9.

⁵ Prosecution Application, para.7.

⁶ T-40-CONF-ENG, p.75, l.25 to p.77, l.7 ("Prosecution First Request for Reconsideration").

⁷ T-40-CONF-ENG, p.77, ll.8-10 ("Prosecution 'Request' to Compel Witness P-0039") ("One extra caveat: if you do not change the balance that you have struck, *we would ask* for a third option, which you haven't mentioned to the witness is that you actually compel him to testify. So you use your power under Article 64 to require his testimony.") (emphasis added)

⁸ "Prosecution applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the 'Decision on Prosecution's request for in-court protective measures for Witness P-0039'", 3 November 2015, ICC-01/04-02/06-973-Conf, paras.22-40.

protective or special measures in order to allow Witness P-0039 to testify,⁹ all of which have been rejected.¹⁰

6. Given that it deprives the Accused of the possibility of challenging incriminatory evidence through cross-examination, the Defence posits that admission of a witness's prior recorded testimony under Rule 68(2)(c) should only be envisaged as a means of last resort, only in situations of *averred* unavailability where *all* reasonable diligence has been exercised.
7. While the notion of 'unavailability' contemplated by Rule 68(2)(c) appears to be intended to cover more situations than that listed under Rule 92*quater* of the ICTY Rules of Procedure and Evidence,¹¹ the Defence submits that the situation where a witness *voluntarily refuses* to testify *solely* because he disagrees with the Chamber's decision of not granting him the full set of in-court protective measures (after careful assessment of his security situation) does not fall within the purview of 'unavailability' due to obstacles that cannot be overcome with reasonable diligence.
8. The Defence stresses that Witness P-0039 did not refuse to testify for reasons outside of his control; his refusal is voluntary and is solely grounded on his *own* perception of his security situation. More importantly, given the absence

⁹ "Prosecution applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the 'Decision on Prosecution's request for in-court protective measures for Witness P-0039'", 3 November 2015, ICC-01/04-02/06-973-Conf, paras.10-21, 40.

¹⁰ Oral decision on Prosecution First Request for Reconsideration: T-40-CONF-ENG, p.81, ll.2-12; Oral decision on Prosecution 'Request' to Compel Witness P-0039: T-40-CONF-ENG, p.81, ll.13-16; "Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039", 10 December 2015, ICC-01/04-02/06-1049 ("Decision on Prosecution Requests in Relation to Witness P-0039").

¹¹ Rule 92*quater* (A) of the ICTY Rules of Procedure and Evidence provides: "The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, [...], if the Trial Chamber: [...]" (emphasis added) In this regard, *see: Bemba et al.* case, "Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence'", 12 November 2015, ICC-01/05-01/13-1481-Red ("*Bemba et al.* Decision"), para.16.

of any evidence of immediate threat to his safety,¹² Witness P-0039's refusal to testify with the use of a pseudonym only is unjustified and unreasonable. It further appears that the Prosecution failed to properly explain to Witness P-0039 (and ensure that the witness had properly understood) that in-court protective measures are not automatically granted.¹³ In light of the above, Witness P-0039's unwillingness to testify before the Court certainly does not render him unavailable to testify.

9. The Defence also stresses that not all reasonable steps have been taken to secure Witness P-0039's oral testimony before the Chamber. Indeed, contrary to what it contends,¹⁴ the Prosecution did not formally request the Chamber to compel Witness P-0039. Rather, as part of its submissions further to the witness's refusal to testify, the Prosecution merely suggested the possibility of compelling the witness.¹⁵ The Defence further underscores that nothing in the Chamber's refusal to compel Witness P-0039 at the time of his appearance before the Court – when a number of technical difficulties arose, thereby making it difficult to properly assess Witness P-0039's attitude towards the possibility of being compelled to testify – can be assumed as being a definite position on whether the witness should be compelled or not *at all*.
10. Hence, before submitting an application pursuant to Rule 68(2)(c), the burden rests on the Prosecution – if it considers that admitting the statements of Witness P-0039 in evidence is essential to its case – to submit a request that the witness be compelled to testify. In this regard, the Defence observes that the Prosecution Application fails to identify any cogent reason which would militate against Witness P-0039 being compelled to testify.

¹² The Defence recalls that in its Decision on Prosecution Requests in Relation to Witness P-0039, the Chamber found no reason to reconsider its assessment of Witness P-0039's security situation: para.13.

¹³ Prosecution Application, para.10.

¹⁴ Prosecution Application, para.7.

¹⁵ Prosecution 'Request' to Compel Witness P-0039: "One extra caveat: if you do not change the balance that you have struck, *we would ask* for a third option, which you haven't mentioned to the witness is that you actually compel him to testify. So you use your power under Article 64 to require his testimony." (emphasis added)

II. Whether the necessity of measures under Article 56 could not be anticipated

11. While it acknowledges that the Prosecution could not anticipate the need to take evidence under Article 56 because it ‘reasonably’ expected Witness P-0039 to testify orally,¹⁶ the Defence takes issue with the Prosecution’s contention that it was unable to ‘predict’ that the Chamber would decline to order full in-court protective measures, which ignores that requests for in-court protective measures should not be routinely made in the expectation that they will be routinely granted.¹⁷

III. Whether Witness P-0039’s Prior Recorded Testimony has sufficient indicia of reliability

12. Additionally, the Defence takes issue with the Prosecution’s submission that Witness P-0039’s Prior Recorded Testimony bears sufficient indicia of reliability.
13. In particular, contrary to what the Prosecution argues,¹⁸ Witness P-0039 did not maintain consistency throughout his first and second statements; rather, his Prior Testimony is replete with inconsistencies.¹⁹ Moreover, Witness P-0039’s Prior Recorded Testimony was not taken under oath nor subject to cross-examination.²⁰

IV. Whether the admission of Witness P-0039’s Prior Recorded Testimony is prejudicial to, or inconsistent with, the rights of the Accused

14. Pursuant to Article 67(1)(e) of the Statute, Mr Ntaganda has the fundamental right to examine or have examined witnesses against him. The probative

¹⁶ Prosecution Application, para.10.

¹⁷ “Decision on request for in-court protective measures relating to the first Prosecution witness”, 15 September 2015, ICC-01/04-02/06-824, para.5.

¹⁸ Prosecution Application, paras.12, 15.

¹⁹ Compare e.g. Witness P-0039’s first statement (DRC-OTP-0104-0015), p.0019, para.22, with Witness P-0039’s second statement (DRC-OTP-2062-0244), p.0251, para.27. The Defence further notes the evolving nature of certain aspects of Witness P-0039’s evidence: Witness P-0039’s second statement, p.0251, paras.28-29, p.0252, paras.31, 33, 34.

²⁰ Cf. ICTY, *Karadžić* case, IT-95-5/18-T, “Decision on Accused’s Motion for Admission of Evidence of Radislav Krstić Pursuant to Rule 92*quater*”, 26 November 2013, para.12.

value of Witness P-0039's Prior Recorded Testimony, if any, is largely outweighed by the prejudicial impact of the admission into evidence of the prior recorded testimony of a witness unwilling to testify, whose statements include a number of inconsistencies that would remain unchallenged.

15. The need for Witness P-0039's evidence to be tested through cross-examination is further bolstered by the fact that his Prior Recorded Testimony only comprises statements, with no verbatim of the questions asked by investigators, thereby making it impossible to see whether there have been any suggestions that could lead to false memories.²¹

V. The Prosecution's additional, or alternative, request to admit Witness P-0039's Prior Recorded Testimony under Articles 69(2), 69(4), 64(9)(a) and Rule 63(2) of the Rules

16. In a decision on a previous request for admission of prior recorded testimony under Rule 68(2)(c), the Chamber has ruled that "Rule 68 should be considered as *lex specialis* and, where the conditions of that rule are not met, resort to broader powers would be inappropriate in the circumstances to introduce documents for the truth of their contents".²² To the extent that the Prosecution Application fails to meet the requirements under Rule 68(2)(c), the Prosecution's additional, or alternative, request must be rejected.
17. 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 rejected in its entirety as the prejudicial effect of admitting Witness P-0039's statements, without the possibility for the Accused to cross-examine the witness, significantly outweighs the probative value of the same.

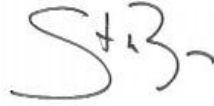
²¹ Cf. T-87-CONF-ENG (RT), p.52, ll.1-5.

²² "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103", 20 November 2015, ICC-01/04-02/06-1029, para.46.

RELIEF SOUGHT

18. In light of the above submissions, the Defence respectfully request the Chamber to **REJECT** the Prosecution Application.

RESPECTFULLY SUBMITTED ON THIS 22ND DAY OF APRIL 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