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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

Public Redacted 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-0877” dated 10 June 2016, ICC-01/04-02/06-1387-Conf

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: (i) the *“Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0877”* submitted by the Office of the Prosecutor (“Prosecution”) on 26 May 2016 (“Prosecution Application”);¹ and (ii) Trial Chamber VI (“Chamber”)’s *“Decision on the conduct of proceedings”* issued on 2 June 2015 (“Decision on the Conduct of Proceedings”),² which provides that objections to applications under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) shall be raised in writing 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-0877”

“Defence Response”

1. Without prejudice to the Defence’s position on the probative value to be attributed to the material, the Defence does not oppose the admission into evidence, pursuant to Rule 68(3) of the Rules, of Witness P-0877’s prior recorded testimonies, namely: (i) Witness P-0877’s statement of [REDACTED] (“First Statement”)⁴ as identified in Annex B of the Prosecution Application; (ii) Witness P-0877’s statement of [REDACTED] (“Second Statement”)⁵ as identified in Annex F; and (iii) the five sketches annexed to the Statements.⁶
2. The Defence objects, however, to the admission of the Statements being limited to the sole passages selected by the Prosecution. Furthermore, the

¹ ICC-01/04-02/06-1335-Conf.

² ICC-01/04-02/06-619.

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

⁴ DRC-OTP-2069-2086.

⁵ DRC-OTP-2069-2086.

⁶ DRC-OTP-2069-2095 (Annex C), DRC-OTP-2069-2096 (Annex D), DRC-OTP-2069-2097 (Annex E), DRC-OTP-2077-0127 (Annex G) and DRC-OTP-2077-0128 (Annex H).

Defence opposes the Prosecution's request to use leading questions to elicit any corrections or clarification from the Witness.

3. In regards to the Witness' notebook as identified in Annex I of the Prosecution Application⁷ ("Witness's Notebook"), the Defence respectfully requests that the Chamber's decision on the admission of the seven entries of the Witness Notebook be deferred until the completion of the Defence cross-examination in order for further details to be obtained from the Witness first-hand.

A. Selection of passages of the prior recorded testimony the moving party wishes to tender into evidence

4. In accordance with the procedure set out in the Decision on the Conduct of Proceedings, the Prosecution has identified in its Application the passages of the Statement it wishes to tender into evidence.⁸ However, the Prosecution has excluded certain portions of the Statement, in relation to which it seeks to conduct a supplementary examination in court.
5. Like in the case of Witness P-0894,⁹ the mere fact that the Prosecution deems more appropriate to obtain certain evidence *viva voce*¹⁰ is insufficient to warrant the fragmentation of the Statements for the purposes of their admission into evidence under Rule 68(3). The Defence submits that it is in the interests of justice that the Statements be admitted as a whole.
6. The Defence underscores that Witness P-0877 clarified having signed the Second Statement after having reviewed the First Statement and provided any additional clarifications needed at that stage. Hence, it would be unnecessary and redundant for the Prosecution to conduct a supplementary examination on these matters.

B. Time and scope of the supplementary examination

⁷ ICC-01/04-02/06-1335, para 2.

⁸ Decision on the Conduct of Proceedings, para.42; ICC-01/04-02/06-1335 Annex A.

⁹ T-99-CONF-ENG RT, p.79, ll.8-16.

¹⁰ Prosecution Application, para 20.

7. The Defence further submits that the supplementary examination the calling party can conduct with a witness whose prior recorded testimony is admitted under Rule 68(3) must be limited in terms of both time and scope.
 8. The Defence notes that the Chamber has previously indicated that examination in chief in relation to Rule 68(3) evidence should be limited.¹¹ In the instant case, the Chamber 'strongly' encouraged the Prosecution to conduct a supplementary examination of a maximum of one hour.¹² The Defence sees no compelling reasons in the Prosecution Application warranting to depart from the one-hour guidance provided by the Chamber, in particular if the entirety of the Statements is admitted pursuant to Rule 68(3). As such, the Defence respectfully requests the Chamber to direct the Prosecution to complete its supplementary examination of Witness P-0877 in one hour.
 9. In addition, should the Chamber allow any supplementary examination, the Defence emphasises that it must not go beyond the matters addressed in the admitted prior recorded testimony. To elicit new evidence from the witness by *viva voce* testimony would be contrary to the purpose of Rule 68(3). The Defence submits that the supplementary examination should be limited to eliciting clarifications from the witness.¹³
- C. Use of leading questions to elicit corrections and/or clarifications brought by the witness to his prior recorded testimony**
10. The Defence opposes the use of leading questions for the purpose of eliciting from the witness any corrections or clarifications identified in the course of his witness preparation session.¹⁴

¹¹ T-99-CONF-ENG RT, p.79.

¹² E-mail from a Legal Officer of the Chamber to the parties and participants, 4 May 2016, 13h11.

¹³ Cf. "Witness preparation protocol", 16 June 2015, ICC-01/04-02/06-652-Anx, para.2.

¹⁴ Prosecution Application, para.16.

11. As directed by the Chamber in its oral ruling of 9 June 2016, the Prosecution should “first aim to elicit any clarifications to the witness statement in a non-leading fashion”.¹⁵ This is in line with the general practice that would permit the Chamber to properly assess the evidence presented naturally by the Witness.
12. The Defence contends that in accordance with the Decision on the Conduct of Proceedings¹⁶, certain matters, such as the general background, can be elicited by way of leading questions. However, considering that the clarifications sought would go to the substance of the Statements, the same must be elicited in a non-leading way in order to ascertain the probative value, if any, of the evidence.

D. Admission of the seven extracts of the Witness’ Notebook

13. The Defence respectfully requests that the Chamber defer its decision on the admission of the extracts of the Witness’s Notebook until the completion of cross-examination.¹⁷
14. Having reviewed the Witness’s Notebook as a whole in light of Witness P-0877’s Statements, the Defence will indeed be required to explore in cross-examination certain issues that may impact the admissibility of the Witness’s Notebook, including *inter alia* the circumstances in which the extracts sought for admission were scripted.

RELIEF SOUGHT

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

¹⁵ T-99-CONF-ENG RT, p.79, ll.17-19.

¹⁶ Decision on the Conduct of Proceedings, para.26.

¹⁷ Cf. T-29-Conf-ENG, p.47, ll.8-12.

DIRECT the Prosecution not to use leading questions when eliciting from Witness P-0877 any corrections or clarifications identified during his witness preparation;

ADMIT the entirety of the two statements pursuant to Rule 68(3) and its respective annexes;

DIRECT the Prosecution not to elicit evidence on matters already admitted pursuant to Rule 68(3);

DIRECT the Prosecution to complete its supplementary examination of Witness P-0877 in one hour; and

DEFER the admission of the Witness's Notebook entries after completion of cross-examination.

RESPECTFULLY SUBMITTED ON THIS 22TH DAY OF JULY 2016

A handwritten signature in black ink, appearing to read 'StB-' with a stylized flourish.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands