



Original: **English**

No.: ICC-01/04-02/06
Date: 30 September 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 Witness P-0014's prior recorded testimony and associated material'", 01 September 2016, ICC-01/04-02/06-1484-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 Witness P-0014’s prior recorded testimony and associated material”* submitted by the Office of the Prosecutor (“Prosecution”) on 22 August 2016 (“Prosecution Application”);¹ and (ii) Trial Chamber VI (“Chamber”)’s *“Supplemental decision on matters related to the conduct of proceedings”* issued on 27 May 2016 (“Supplemental Decision on the Conduct of Proceedings”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution application under Rule 68(3) to admit Witness P-0014’s prior recorded testimony and associated material”

“Defence Response”

1. The Defence acknowledges that the admission into evidence of the prior recorded testimony of Witness P-0014 might enhance the expeditious conduct of the present trial proceedings, insofar as it has the potential to result in a shorter examination-in-chief of the witness.
2. Nonetheless, the Defence deems necessary to recall that the principle of orality is a cornerstone of proceedings under the Rome Statute and that the admission into evidence of witnesses’ written statements is an exception to the latter as set out in Article 69(2) of the Rome Statute (“Statute”). Proceedings under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) should thus be kept to a minimum while ensuring that they do not impede on the rights of the accused to a fair trial.
3. In this case, the Defence partially agrees with the Prosecution Application subject to specific caveats set out herein.

¹ [REDACTED].

² ICC-01/04-02/06-1342.

4. More particularly, and without prejudice to its position on the probative value to be attached to this material, the Defence:
- (i) Does not oppose the admission into evidence, pursuant to Rule 68(3), of Witness P-0014's [REDACTED],³ save for questions and answers related to audio-video material⁴ used and referred by Witness P-0014 during his testimony.⁵
 - (ii) Does not oppose the admission under Rule 68(3) of exhibits DRC-OTP-0165-0861 and DRC-OTP-0165-0862, namely two sketches drawn by Witness P-0014 during his interview with the Prosecution and that were used and referred to with him in court, in [REDACTED].⁶
 - (iii) Opposes the admission under Rule 68(3) of exhibit DRC-OTP-0159-0441, namely a video used and referred to during the prior in-court testimony of Witness P-0014 in [REDACTED].⁷
 - (iv) Opposes the admission under Rule 68(3) of Witness P-0014's previous statements as well as the material (seven documents) referred to in the latter.⁸
 - (v) Does not oppose the Prosecution Application to be authorized to conduct a supplementary examination of 2 hours of Witness P-0014,⁹ subject to the Chamber's applicable guidance.¹⁰

³ Prosecution Application, Annex A, Section I(A).

⁴ DRC-OTP-0159-0441.

⁵ DRC-OTP-2057-0816, page 49, ln.13 to page 51 (at 0864-0866), ln.3; page 54, lns.2-5 (at 0869); page 56, ln.15 to page 59, ln.15 (at 0871-0874).

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ The Defence notes however that the time requested is more than what was allocated when previous witnesses testified pursuant to Rule 68(3).

¹⁰ Supplemental Decision on matters related to the conduct of proceedings, para. 17 and 18.

I. Prior in-court testimony of Witness P-0014 in [REDACTED] and associated material

A. Prior in-court testimony in [REDACTED]

5. In accordance with the procedure set out in the Decision on the conduct of proceedings,¹¹ the Prosecution has identified and seeks to admit in full, Witness P-0014's in-court testimony in [REDACTED], with the exception of lengthier procedural exchanges which would not impact on the witness' testimony.¹²
6. The Defence acknowledges that there is some benefit to removing from the prior in-court testimony of a witness, discussions on procedural matters. However, in many cases these passages concern important matters directly related to the relevance, admissibility and probative value, which can be attributed to the testimony of a witness, to which the parties might deem necessary to refer to in their oral and written submissions to the Chamber.
7. Consequently, considering the difficulties associated with the segregation of important and useful passages from the procedural exchanges that are not relevant to this case, the Defence posits that the transcripts of the prior in-court testimony of Witness P-0014 should be admitted in full.
8. One example of highly relevant procedural discussions in the [REDACTED] case, which should not be removed from the transcript of Witness P-0014's prior in-court testimony in [REDACTED] – contrary to the Prosecution Application¹³ – relates to the Prosecution request and the Defence objection to the use and admission of certain audio-video material in that case.¹⁴ These exchanges are important in light of the Defence objection to the admissibility of this audio-video material in this case, as set out in the next Section.

¹¹ Decision on the Conduct of Proceedings, para.42.

¹² [REDACTED].

¹³ The parts of the [REDACTED] transcripts related to this debate have been excluded from the passages selected by the [REDACTED].

¹⁴ See, e.g., [REDACTED].

9. Subject to the Chamber granting the Defence objection to the admissibility of the audio-video material used and referred to during Witness P-0014's prior in-court testimony in [REDACTED], the Defence request that the questions put to Witness P-0014 concerning this audio-video material as well as his answers¹⁵, be removed and not admitted pursuant to Rule 68(3).

B. Material referred to in [REDACTED] transcripts

10. Prosecution seeks to admit three items which were shown to and explained by Witness P-0014 during his in-court testimony in [REDACTED].
11. Regarding the second¹⁶ and third¹⁷ items in [REDACTED], even though these sketches had been drawn during the interviews of Witness P-0014, they were also shown to and commented by him during his *viva voce* testimony in [REDACTED]. Considering that this material is of assistance in understanding certain passages of the [REDACTED] transcripts, the Defence does not oppose their admission under Rule 68(3).
12. As for the first item (DRC-OTP-0159-0441), a video shown to Witness P-0014 during his prior in-court testimony in [REDACTED], the Defence opposes its admission pursuant Rule 68(3) on the basis that it is not admissible in this case.¹⁸
13. Pursuant to Decision on the conduct of proceedings, "if a party wishes to present audio-visual material to a witness, it must establish that the witness has personal knowledge of the making of the recording or its content".¹⁹
14. In this regard, the Defence underscores that when shown to Witness P-0014 during his prior in-court testimony in [REDACTED], it was established by the Prosecution itself, that Witness P-0014 was not present when the video was

¹⁵ [REDACTED].

¹⁶ DRC-OTP-0165-0861.

¹⁷ DRC-OTP-0165-0862.

¹⁸ Decision on the Conduct of Proceedings, para.56.

¹⁹ Decision on the Conduct of Proceedings, para.56.

filmed,²⁰ that he had never seen this video before, and that he had no knowledge of the making of this video.²¹

15. Even though the Prosecution argues that Witness P-0014 “identified the location of the video, stated that the soldiers in the video belonged to the UPC and recognised an individual who reported to UPC/FPLC authorities”,²² this is insufficient to meet the criteria established by this Chamber to show the video to the witness and to admit the same in evidence. It follows that if Witness P-0014 was to testify *viva voce* in this case, the Prosecution could neither show this video to him, nor ask Witness P-0014 questions on its content.
16. It is significant in this regard that the Prosecution itself concedes that certain parts of Witness P-0014’s prior recorded testimony concerns events, which he did not experience himself.²³ While the Prosecution does not identify these passages, the Prosecution observation clearly applies to the video it seeks to have to be admitted in this case.
17. In this regard, the Defence emphasizes that in these circumstances, the probative value which can be attached to observations made by Witness P-0014 on this audio-video material the Prosecution seeks to have admitted under Rule 68(3), is so low that it is clearly outweighed by the resulting prejudice to the Accused.
18. Consequently, admitting this audio-video material – bearing in mind its very low probative value and the fact that it could not be shown to Witness P-0014 if he was to testify *viva voce* before this Chamber – would be contrary to Rule 68(3), the purpose of which cannot be to admit evidence from a previous case,

²⁰ [REDACTED]

²¹ [REDACTED]

²² Prosecution Application, para. 16.

²³ Prosecution Application, para. 23.

which is inadmissible in this case. This would violate the rights of the Accused to a fair trial and is certainly not in the interest of justice.

19. Should the Prosecution deem necessary to have on the record the identification of one person whom the witness recognized on this video from different events and without remembering his name, this can be achieved by showing Witness P-0014 a picture of this individual, for identification purposes.

II. Passages of Witness P-0014's statements and associated material

A. Witness P-0014's statements

20. Prosecution seeks to admit seventeen paragraphs from Witness P-0014's statements pursuant to Rule 68(3).
21. The Defence opposes the admission of Witness P-0014's statements in all or in parts.
22. In this regard, the Defence underscores that:
 - (i) Witness P-0014's statements were obtained before he testified in court, under oath, in [REDACTED];
 - (ii) In the course of Witness P-0014's in-court testimony in [REDACTED], the Prosecution could neither use nor make reference to his statements save for memory refreshing purposes or to have him declared as an hostile witness, which it did not;
 - (iii) In the course of Witness P-0014's in-court testimony in [REDACTED], the Defence could and did refer to his statements on several occasions during cross-examination;

- (iv) Any reference made to Witness P-0014's statements during his in-court testimony in [REDACTED], is thus contained in the [REDACTED] transcripts;
 - (v) Witness P-0014's statements were not admitted into evidence in [REDACTED], regardless of the purpose, and;
 - (vi) Was Witness P-0014 to testify *viva voce* in this case, the Prosecution could neither use nor refer to his statements other than for the purpose of memory refreshing purposes or to have him declared hostile.
23. Consequently, Witness P-0014's statements should not and cannot be admitted, in addition to his prior in-court testimony in [REDACTED], pursuant to Rule 68(3).
24. Witness P-0014's prior in-court testimony in [REDACTED] is the best evidence available (best evidence rule) as it actually incorporates and thereby supersedes any information provided to the Prosecution before his *viva voce* testimony. It is significant in this regard that in [REDACTED], the parties had every opportunity to use the information provided by Witness P-0014 in his statements during their respective examinations. The fact that the duration of Witness P-0014 in-court testimony, *i.e.* during five days, supports this position. Witness P-0014's prior in-court testimony is thus the evidence that was considered and assessed by [REDACTED] in [REDACTED], and accordingly is the evidence that can be admitted under Rule 68(3).
25. Witness P-0014's statements not having been admitted in [REDACTED], they cannot be considered as material without which his prior in-court testimony would not be understandable. When deemed necessary by the Defence in [REDACTED], passages from Witness P-0014 were read into the record.
26. Consequently, to admit in this case, statements which the Prosecution: (i) did not and could not use in [REDACTED] and; (ii) could not use and refer to if

Witness P-0014 was to testify *viva voce* in the current case, would be contrary to the letter and spirit of Rule 68(3), the purpose of which cannot be to admit statements, which could not be used in a previous case and cannot be used in this case. This would violate the rights of the Accused to a fair trial and is certainly not in the interest of justice.

27. In this regard, it is noteworthy that for its previous 68(3) Requests concerning Witnesses P-0055²⁴ and P-0010²⁵, the Prosecution did not ask for any of the witnesses' statements to be admitted when seeking to admit their respective [REDACTED] testimonies pursuant to Rule 68(3).
28. Should the Prosecution wish to address information provided by Witness P-0014 in his statements, but that was not addressed during his prior in-court testimony in [REDACTED], it will have the opportunity to do so in the course of its supplementary examination, subject to the Chamber's applicable guidance.

B. Material referred to in Witness P-0014's statements

29. Prosecution seeks to admit seven items which were shown to and explained by Witness P-0014 in the seventeen paragraphs of his witness statements.
30. Subject to the Chamber granting the Defence objection to the admissibility of Witness P-0014's statements, the Defence opposes the admission of these seven items²⁶ unless: (i) they were used during Witness P-0014's in-court testimony in [REDACTED]²⁷, or; (ii) they are admitted in the normal manner during the Prosecution's supplementary examination.

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ DRC-OTP-0066-0031, DRC-OTP-0066-0039, DRC-OTP-0066-0047, DRC-OTP-0066-0048; DRC-OTP-0165-0890; DRC-OTP-0165-0890; DRC-OTP-0165-0896; DRC-OTP-0165-1103.

²⁷ See Defence Response, Section I(B) concerning second and third items.

III. Time and scope of the supplementary examination

31. The Defence posits in accordance with the Supplemental decision on matters related to the conduct of proceedings that the supplementary examination the calling party may conduct with a witness whose prior recorded testimony is admitted under Rule 68(3) must be limited both in terms of time and scope.²⁸
32. With respect to the time that should be allotted for the supplementary examination, the Defence underscores that the aim of admitting into evidence a witness' prior recorded testimony under Rule 68(3) is to enhance the expeditiousness of the proceedings.²⁹ Consequently, by nature, a supplementary examination should be limited in time as it is solely aimed at obtaining discrete clarifications from the witness, not repeating or expanding on the witness' statement, which is already on the evidentiary record.
33. The Defence underscores that the time requested by the Prosecution, *i.e.* 2 hours, is more than what was allocated for the last witnesses for whom previous testimony were admitted under Rule 68(3). Nonetheless, subject to the Chamber's applicable guidelines being adhered to, the Defence does not oppose the Prosecution Application in this regard.
34. As for the scope of the supplementary examination, the Defence stresses it must not go beyond the matters addressed in the admitted prior in-court testimony – Witness P-0014's statements and [REDACTED] transcripts included.
35. Should the calling party be allowed to address in its supplementary examination topics not covered in the prior recorded testimony – and accordingly not disclosed to the Defence – this would be contrary to the

²⁸ ICC-01/04-02/06-1342, para. 17.

²⁹ *Cf.* "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931", 21 September 2015, ICC-01/04-02/06-845, para.8.

fairness principle that the Prosecution should not seek new evidence from witnesses on the stand.³⁰

36. Regarding documents either provided by or related to Witness P-0014, but in relation to which he was never asked to provide additional information, and for which the Prosecution intends to ask Witness P-0014 about,³¹ the Defence would not oppose to such questions as long as these documents have been disclosed to the Defence and added to the Prosecution List of Evidence of 2 March 2015.
37. As for the duration of the Defence cross-examination, in light of the material related to Witness P-0014 – *inter alia*: (i) one first statement of 29 pages; (ii) a second statement of 103 pages, and; (iii) five days of *viva voce* testimony in [REDACTED] – the Defence will need eight hours to conduct its cross-examination. Indeed, even though Witness P-0014 was cross-examined in [REDACTED], Witness P-0014 prior testimony necessarily comprises: (i) issues addressed by the [REDACTED] Defence which the Defence would either not have addressed or addressed differently; and (ii) issues not addressed by [REDACTED] Defence which the Defence would have addressed.
38. As acknowledged by the Prosecution, since the case of Mr Ntaganda involves significantly more charges than the one of [REDACTED],³² issues to be addressed in this case are more elaborated than what was done in [REDACTED]. This supports the Defence request to be allocated 8 hours to conduct its cross-examination.

Moreover, considering that the Prosecution will be able to refer to any part of Witness P-0014's prior testimony in [REDACTED] in its final trial brief and

³⁰ Cf. "Witness preparation protocol", 16 June 2015, ICC-01/04-02/06-652-Anx, para.2.

³¹ Prosecution Application, para.27.

³² Prosecution Application, para. 26.

that the Chamber will be able to do the same in its trial judgment, the Defence has the duty and obligation to address every issue admitted on the record.

CONFIDENTIALITY

39. 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.

RELIEF SOUGHT

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

ADMIT the entirety of Witness P-0014's prior in-court testimony in [REDACTED], save for questions and answers related to audio-video material³³ used and referred by Witness P-0014 during his testimony;³⁴

ADMIT the second³⁵ and third³⁶ items attached to Witness P-0014's prior in-court testimony in [REDACTED];

DENY the admission of the first item³⁷ attached to Witness P-0014's prior in-court testimony in [REDACTED];

DENY the admission of Witness P-0014's statements³⁸ as well as the seven items³⁹ referred to in the latter;

³³ DRC-OTP-0159-0441.

³⁴ [REDACTED].

³⁵ DRC-OTP-0165-0861.

³⁶ DRC-OTP-0165-0862.

³⁷ DRC-OTP-0159-0441.

³⁸ DRC-OTP-0066-0002 and DRC-OTP-0165-0999.

³⁹ DRC-OTP-0066-0031; DRC-OTP-0066-0039; DRC-OTP-0066-0047; DRC-OTP-0066-0048; DRC-OTP-0165-0890; DRC-OTP-0165-0896; DRC-OTP-0165-1103.

DIRECT the Prosecution not to elicit from Witness P-0014 any evidence that was not disclose beforehand to the Defence.

RESPECTFULLY SUBMITTED ON THIS 30ST DAY OF SEPTEMBER 2016

A handwritten signature in black ink, appearing to read 'StB' with a small flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands