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No.: ICC-01/04-02/06
Date: 14 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-0030’s prior recorded testimony and associated material’”, 14 September 2016, ICC-01/04-02/06-1503-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-0030’s prior recorded testimony and associated material”* submitted by the Office of the Prosecutor (“Prosecution”) on 2 September 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-0030’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-0030 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 opposes the Prosecution Application only in part as set out herein.

¹ ICC-01/04-02/06-1488-Conf.

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 the entirety of Witness P-0030's [REDACTED],³ save for sections [REDACTED].⁴
- (ii) Opposes the admission under Rule 68(3) of [REDACTED]⁵, [REDACTED].⁶
- (iii) Does not oppose the admission into evidence, pursuant to Rule 68(3), [REDACTED].⁷
- (iv) Opposes the admission under Rule 68(3) of excerpts of Witness P-0030's [REDACTED] statement as well as excerpts of Annexes II and III referred to in the latter.⁸
- (v) Opposes the admission under Rule 68(3) of material referred to in Witness P-0030's witness statement and annexes, namely [REDACTED] and three photographs.⁹
- (vi) Does not oppose the Prosecution Application to be authorized to conduct a supplementary examination of 2 hours of Witness P-0030, subject to the Chamber's applicable guidance.¹⁰
- (vii) Shall communicate directly with the Prosecution regarding the transcripts and translations relating to audio-visual excerpts sought to be admitted.¹¹

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

⁴ [REDACTED]

⁵ Prosecution Application, Annex A, Section II(A).

⁶ [REDACTED]

⁷ Prosecution Application, Annex A, Section II(A).

⁸ Prosecution Application, Annex A, Section I(B).

⁹ Prosecution Application, Annex A, Section II(B).

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

I. [REDACTED]

A. Prior [REDACTED]

5. In accordance with the procedure set out in the Decision on the conduct of proceedings,¹² the Prosecution has identified and seeks to admit in full Witness P-0030's [REDACTED].¹³
6. [REDACTED]. [REDACTED].
7. [REDACTED]. [REDACTED].
8. [REDACTED]¹⁴ [REDACTED].¹⁵ [REDACTED]. [REDACTED]
"[REDACTED]."¹⁶
9. Subject to the Chamber granting the Defence objection to the admissibility of [REDACTED]¹⁷ [REDACTED].

B. Material referred to in [REDACTED]

10. The Prosecution seeks to admit [REDACTED] video excerpts which were shown to and explained by Witness P-0030 [REDACTED].¹⁸
11. The Defence does not object to Excerpts [REDACTED] being admitted pursuant to Rule 68(3). However, it is very likely that the Defence will seek, during cross-examination, to admit into evidence longer segments of these audio-video excerpts. Indeed, the Defence notes that the manner in which the Prosecution selected its excerpts does not always reflect a fair and accurate picture of events depicted in these materials. [REDACTED].¹⁹ Thus, the

¹¹ Decision on the Conduct of Proceedings, para.57.

¹² Decision on the Conduct of Proceedings, para.42.

¹³ Prosecution Application, para.12.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ ICC-01/04-02/06-T-127-ENG RT, p.87, l.21-25.

¹⁷ [REDACTED].

¹⁸ Prosecution Application, Annex A, Section II(A).

¹⁹ [REDACTED].

Defence suggests that, in order to avoid the admission of duplicates, it might be simpler to wait until the end of Witness P-0030's testimony to rule on the admissibility of these excerpts.

12. As for Excerpt [REDACTED] the Defence opposes its admission pursuant Rule 68(3) on the basis that it is not admissible in this case.²⁰

13. Pursuant to the 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."²¹

14. Contrary to what is stated in the Prosecution's Application,²² Witness P-0030 [REDACTED]. [REDACTED].²³ [REDACTED].²⁴ [REDACTED].

15. In order to have Excerpt [REDACTED] admitted, the Prosecution argues that "[REDACTED]."²⁵ However, this is insufficient to meet the criteria established by this Chamber to show the video to the witness and to have it admitted into evidence. It follows that if Witness P-0030 was to testify *viva voce* in this case, the Prosecution could neither show this video to him, nor ask Witness P-0030 questions on its content or accuracy.

16. [REDACTED].²⁶ [REDACTED]. [REDACTED].

17. In these circumstances, the Defence emphasizes that Witness P-0030 is not the proper witness through whom this video should be admitted into evidence.

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-0030

"[REDACTED]"

²⁰ Decision on the Conduct of Proceedings, para.56.

²¹ Decision on the Conduct of Proceedings, para.56.

²² ICC-01/04-02/06-1488-Conf., para.34-35.

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ Prosecution Application, para.34.

²⁶ [REDACTED].

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 [REDACTED] 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. [REDACTED].

II. Passages of Witness P-0030's statement and associated material

A. Witness P-0030's statement and annexes

20. Prosecution seeks to admit twelve paragraphs from Witness P-0030's statement and certain excerpts from Annexes II and III of the latter pursuant to Rule 68(3).²⁷

21. The Defence opposes the admission of Witness P-0030's statement and annexes in all or in part.

22. In this regard, the Defence underscores that:

- (i) Witness P-0030's statement and annexes were obtained [REDACTED];
- (ii) [REDACTED];
- (iii) [REDACTED];
- (iv) If Witness P-0030 was to testify *viva voce* in this case, the Prosecution could neither use nor refer to his statement and annexes, other than for the purpose of memory refreshing purposes or to have him declared hostile.

23. Consequently, Witness P-0030's statement and annexes should not and cannot be admitted, [REDACTED], pursuant to Rule 68(3).

²⁷ Prosecution Application, Annex A, Section I(B).

24. Although the Chamber took a different position when admitting the prior statements and associated material of P-0014 – holding that “the Chamber considers the admission of the these passages of the witness statement a prior recorded testimony that may be considered for admission under Rule 68(3) together with the seven items discussed therein”²⁸ – the Defence posits that P-0030’s prior statement and annexes cannot be admitted for the following reasons.²⁹

25. [REDACTED]. [REDACTED]. [REDACTED].

26. Witness P-0030’s statement and annexes [REDACTED] cannot be considered as material without which his prior in-court testimony would not be understandable.

27. Consequently, admitting a statement and annexes which the Prosecution: (i) [REDACTED]; (ii) could not use and refer to if Witness P-0030 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 and annexes 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.

28. Should the Prosecution wish to address information provided by Witness P-0030 in his statement and annexes, [REDACTED], it will have the opportunity to do so in in the course of its supplementary examination, subject to the Chamber’s applicable guidance.

B. Material referred to in Witness P-0030’s statement and annexes

29. The Prosecution seeks to admit excerpts of [REDACTED] videos and three photographs which were shown to and explained by Witness P-0030 in the

²⁸ ICC-01/04-02/06-T-127-ENG RT, p.89, l.5-8.

²⁹ The Defence is considering whether to request leave to appeal the Chamber’s decision regarding the admission of P-0014’s prior statement.

twelve paragraphs of his 2006 Witness Statement and in the selected passages of Annexes II and III.

30. Subject to the Chamber granting the Defence objection to the admissibility of Witness P-0030's statement and annexes, the Defence opposes the admission of these five items³⁰ unless they are admitted following the procedure set out by the Chamber during the Prosecution's supplementary examination.

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.³¹
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.³² 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. Subject to the Chamber's applicable guidelines being adhered to, the Defence does not oppose the Prosecution Application requesting two hours supplementary examination.

³⁰ DRC-OTP-0151-0665, DRC-OTP-0127-0065, DRC-OTP-0128-0043, DRC-OTP-0128-0046; DRC-OTP-0128-0047.

³¹ ICC-01/04-02/06-1342, para.17.

³² 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.

34. As for the scope of the supplementary examination, the Defence stresses it must not go beyond the matters addressed in the prior in-court testimony – [REDACTED].

35. Should the calling party be allowed to address in its supplementary examination topics not covered in the witness' prior recorded testimony, and accordingly not disclosed to the Defence, this would be contrary to the fairness principle that the Prosecution should not seek new evidence from witnesses on the stand.³³

36. Regarding documents either provided by or related to Witness P-0030, but in relation to which he was never asked to provide additional information, and for which the Prosecution intends to ask Witness P-0030 about,³⁴ the Defence would not oppose 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-0030 – *inter alia*: (i) one statement of 38 pages;³⁵ (ii) four annexes totalizing 35 pages;³⁶ (iii) four transcripts of interview totalizing 74 pages;³⁷ (iv) [REDACTED],³⁸ (v) [REDACTED],³⁹ (vi) [REDACTED] photographs and (vii) [REDACTED] videos [REDACTED]⁴⁰ – the Defence will require a minimum of twelve hours to conduct its cross-examination.

38. It is noteworthy in this regard that the additional time requested will be used to view video excerpts. While the Prosecution seeks to have admitted

³³ Cf. "Witness preparation protocol", 16 June 2015, ICC-01/04-02/06-652-Anx, para.2.

³⁴ Prosecution Application, para.27.

³⁵ DRC-OTP-0151-0583.

³⁶ DRC-OTP-0151-0621; DRC-OTP-0151-0640; DRC-OTP-0151-0645.

³⁷ DRC-OTP-1047-0142; DRC-OTP-1047-0153; DRC-OTP-1047-0172; DRC-OTP-1047-0206.

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

[REDACTED] video excerpts totalizing approximately [REDACTED],⁴¹ it will undoubtedly be necessary to view much longer extracts during cross-examination of Witness P-0030.

39. Furthermore, even though Witness P-0030 [REDACTED]. [REDACTED]⁴² either by Rule 68(3), if granted, or during its supplementary examination.⁴³

40. As acknowledged by the Prosecution, since the case of Mr Ntaganda [REDACTED],⁴⁴ [REDACTED]. This supports the Defence request to be allocated twelve hours to conduct its cross-examination.

41. Moreover, considering that the Prosecution will be able to refer to any part of Witness P-0030's prior testimony [REDACTED] in its final trial brief and 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. The Defence notes that the Chamber granted 8 hours of cross-examination for Witness P-0014, a similar but far less voluminous witness.⁴⁵ Therefore, 12 hours of cross-examination is fully justified.

IV. Transcripts and translations

42. Regarding the admission into evidence of the transcripts and translations of the video excerpts, the Defence recalls that the Decision on the conduct of proceedings set out a specific procedure for the use of transcripts and translations relating to audio-visual material.⁴⁶ Accordingly, the Defence

⁴¹ Prosecution Application, Annex A, Section II(A).

⁴² Prosecution Application, Annex A, Section II(B).

⁴³ Prosecution Application, para.44.

⁴⁴ Prosecution Application, para.45.

⁴⁵ [REDACTED].

⁴⁶ Decision on the Conduct of Proceedings, para.57.

"To facilitate the presentation of audio-visual material in court, the party intending to use the recording shall, as early as practicable, indicate the sections of the transcript corresponding to the excerpts of the material it intends to use; as well as, if applicable, the corresponding sections of the translation. The parties shall then consult to try and resolve any disagreement as to the transcription or translation of the excerpts. If any disagreement cannot be resolved, the parties shall notify the Chamber, who may ask the Registry to advise on the transcription or translation."

posits that before admitting into evidence the proposed transcripts and translations, the Parties should first consult with the aim of reaching an agreement regarding the accuracy of the transcripts and translations.

CONFIDENTIALITY

43. 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

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

REJECT the admission [REDACTED] Witness P-0030's prior in-court testimony [REDACTED];⁴⁷

REJECT the admission of Excerpt [REDACTED];⁴⁸

REJECT the admission of Witness P-0030's statement as well as Annexes II and III;⁴⁹

REJECT the admission of video Excerpts [REDACTED] and the three photographs;⁵⁰

⁴⁷ [REDACTED]

⁴⁸ Prosecution Application, Annex A, Section II(A).

⁴⁹ Prosecution Application, Annex A, Section I(B).

⁵⁰ Prosecution Application, Annex A, Section II(B).

DIRECT the Prosecution not to elicit from Witness P-0030 any evidence that was not disclose beforehand to the Defence;

ALLOCATE the Defence at least 12 hours to conduct its cross-examination.

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF SEPTEMBER 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