



Original: **English**

No.: **ICC-01/04-02/06**
Date: **16 November 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 [REDACTED]’s prior recorded testimony and associated material”, 21 October 2016, ICC-01/04-02/06-1589-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 [REDACTED]’s prior recorded testimony and associated material”* submitted by the Office of the Prosecutor (“Prosecution”) on 10 October 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 [REDACTED]’s prior recorded testimony and associated material”

“Defence Response”

1. The Defence does not oppose the admission, pursuant to Rule 68(3), of the *verbatim* transcript of [REDACTED]’s prior testimony in [REDACTED],³ but does oppose the admission of a single paragraph from the witness’s [REDACTED] statement.⁴ The latter, given to investigators of the Office of the Prosecutor, contains no record of questions and answers and, accordingly, provides no assurance that the information was not elicited by way of leading questioning. The witness will, in any event, be allowed to see this paragraph prior to his testimony before the Trial Chamber and will, to that extent, already have had his memory refreshed by the time he gives his testimony. The impact on the spontaneity of the witness’s testimony arising from reviewing this paragraph during witness preparation will be mitigated by requiring the witness to provide his testimony concerning this event under the Trial Chamber’s direct observation. The Defence likewise opposes the admission of the photographs cited in that paragraph.

¹ ICC-01/04-02/06-1575-Conf.

² ICC-01/04-02/06-1342.

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

⁴ Prosecution Application, Annex A, Section I(B) and Section II.

2. The Defence does not consider, given the comprehensiveness of the witness's testimony in [REDACTED], that two hours of supplementary examination⁵ is either necessary or appropriate. Two hours of direct examination, rather than being necessary to adduce the additional testimony of relevance to this case, will likely encourage repetitive, leading and suggestive questioning.⁶

I. Passages of Witness [REDACTED]'s prior recorded testimony in [REDACTED]

3. The Defence does not oppose the request to tender Witness [REDACTED] testimony in [REDACTED]⁷ pursuant to Rule 68(3).

II. Passages of Witness [REDACTED]'s statement and associated material

4. The Prosecution seeks to tender a single paragraph from a fifty-five paragraph statement prepared by Prosecution investigators in [REDACTED]. The information, which concerns a self-contained event, will not take long to elicit directly from the witness. Allowing admission of the paragraph will, accordingly, not substantially expedite proceedings, but will introduce a substantially leading element in respect of a matter of which spontaneous recollection could be helpful for assessing reliability and credibility.
5. Although the Trial Chamber has previously admitted prior statements in conjunction with the admission of previously-recorded transcripts of testimony, it has never before admitted – nor has the Prosecution sought to tender – only one paragraph from a much longer statement that is otherwise comprehensively addressed by the witness's oral testimony. This request is, in this respect, unprecedented.
6. The three photographs cited in the paragraph should likewise be tendered in the course of the witness's testimony before this Trial Chamber. The

⁵ Supplemental Decision on matters related to the conduct of proceedings, para. 17-18.

⁶ T-110 43:22 ("The Chamber reiterates its previous finding that clarification should be sought in a non-leading manner, by putting to the witness certain portions of the prior recorded testimony and asking the witness whether any clarifications to that portion are required to be made.")

⁷ Prosecution Application, para.12.

admission of two of these photographs is otherwise objectionable on the basis that they contain annotations which corresponding to information provided by a non-trial witness.⁸

III. Time for supplemental direct examination

7. The purpose of admitting a witness's prior recorded testimony under Rule 68(3) is to enhance the expeditiousness of the proceedings.⁹ Allowing two hours for supplemental direct examination – in addition to the thorough direct examination conducted in the [REDACTED] – is likely to encourage questioning incorporating leading elements. Having chosen to tender the prior recorded testimony of the witness pursuant to Rule 68(3) – which also confers certain benefits to the tendering party – the Prosecution should not at the same time be permitted to engage in a lengthy re-direct examination.
8. The Defence further notes that it should have proper and full notice of the content of the witness's testimony. Permitting the Prosecution to embark on subject-areas that are not already covered by the prior testimony and statement would be inappropriate.¹⁰ The time necessary for direct examination should be assessed in this light.

CONFIDENTIALITY

9. 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.

CONCLUSION

10. The Defence does not oppose the Prosecution's request to tender Witness [REDACTED]'s *viva voce* testimony in [REDACTED] pursuant to Rule 68(3);

⁸ DRC-OTP-0150-0280.

⁹ 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.

¹⁰ Cf. "Witness preparation protocol", 16 June 2015, ICC-01/04-02/06-652-Anx, para.2.

opposes the admission of any other materials pursuant to Rule 68(3); opposes the Prosecution's request for two hours to conduct a supplemental examination, which is requested to be limited to one hour.

RESPECTFULLY SUBMITTED ON THIS 16TH DAY OF NOVEMBER 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