

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 14 December 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) and regulation 35 to admit Witness P-0002’s prior recorded testimony and associated material’”, 25 November 2016, ICC-01/04-02/06-1654-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) and regulation 35 to admit Witness P-0002’s prior recorded testimony and associated material” submitted by the Office of the Prosecutor (“Prosecution”) on 14 November 2016 (“Prosecution Application”);¹ (ii) the “Addendum to the ‘Prosecution application under rule 68(3) and regulation 35 to admit Witness P-0002’s prior recorded testimony and associated material’” submitted by the Prosecution on 22 November 2016 (“Addendum”);² and (iii) 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”),³ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution application under rule 68(3) and regulation 35 to admit Witness P-0002’s prior recorded testimony and associated material”

“Defence Response”

INTRODUCTION

1. The Defence acknowledges that the admission into evidence of the prior recorded testimony of Witness P-0002 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

¹ ICC-01/04-02/06-1631.

² ICC-01/04-02/06-1644.

³ ICC-01/04-02/06-1342.

("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. The Prosecution requests the admission of the prior recorded testimony of Witness P-0002 pursuant to Rule 68(3) as follows: (i) [REDACTED] containing Witness P-0002's [REDACTED]; (ii) six video Excerpts that Witness P-0002 [REDACTED]; (iii) two photographs that Witness P-0002 [REDACTED]; (iv) 150 paragraphs from Witness P-0002's statements; (v) four photographs annexed to Witness P-0002's statements; (vi) three video excerpts to which Witness P-0002 provided observations in his statements; (vii) five annexes to Witness P-0002's statements; and (viii) one document annexed to Witness P-0002's statements. Furthermore, the Prosecution: (ix) seeks to admit all of the video Excerpts with audio and with the corresponding excerpts of the transcripts and translations; (x) requests to conduct a supplementary examination of two hours; and (xi) requests a variation of the time limit applicable for the submission of its Prosecution Application pursuant to Regulation 35.
4. In this case, the Defence opposes the Prosecution Application in part, as set out herein.
5. First, regarding the variation of time limit requested, the Defence opposes the Prosecution's request as no good cause has been shown. Accordingly, should the Prosecution's application be granted, Witness P-0012 should not begin his testimony before 12 December 2016.
6. Secondly, regarding the admission into evidence of the prior recorded testimony of Witness P-0002, pursuant to Rule 68(3), the Defence:

- (i) Does not oppose admission into evidence of the [REDACTED] Witness P-0002's [REDACTED], save for sections of the transcript related to video Excerpt 1;⁴
 - (ii) Opposes admission into evidence of 43 paragraphs taken from Witness P-0002's first and second [REDACTED] statements;⁵ and
 - (iii) Does not oppose admission into evidence of 108 paragraphs taken from Witness-P-0002's [REDACTED] statement.
7. Thirdly, regarding the admission into evidence of material associated to the prior recorded testimony of Witness P-0002, pursuant to Rule 68(3), the Defence:
- (i) Opposes admission into evidence of video Excerpt 1;⁶
 - (ii) Does not oppose the admission into evidence of video Excerpts 2 to 6⁷ which [REDACTED] Witness P-0002, [REDACTED] and on which he provided comments;
 - (iii) Does not oppose the admission into evidence of two photographs⁸ shown to him [REDACTED] on which he provided observations;
 - (iv) Opposes admission into evidence of video Excerpt 7⁹ and video Excerpt 9;¹⁰
 - (v) Does not oppose admission into evidence of video Excerpt 8;¹¹

⁴ [REDACTED].

⁵ Prosecution Application, Annex A, Section I (B: 1&2).

⁶ DRC-OTP-2055-1132 (ICC-01/04-01/06-T-162-CONF-FRA CT) p.1145, ln.3 to p.1158, ln.13.

⁷ DRC-OTP-0080-0002, DRC-OTP-0081-0007, DRC-OTP-0081-0006, DRC-OTP-0081-0002, DRC-OTP-0124-0002; Prosecution Application, Annex A, Section II(A).

⁸ DRC-OTP-0087-0275 and DRC-OTP-0087-0261, Prosecution Application, Annex A, Section II (A).

⁹ (DRC-OTP- 0082-0002), Prosecution Application, Annex A, Section II (B), Annex S.

¹⁰ (DRC-OTP-0082-0002), Prosecution Application, Annex A, Section II (B), Annex S.

¹¹ (DRC-OTP- 0082-0002), Prosecution Application, Annex A, Section II (B), Annex S.

- (vi) Opposes admission into evidence of five annexes to Witness P-0002's first and second [REDACTED] statements;¹²
 - (vii) Opposes admission into evidence of one document annexed to Witness-P-0002's [REDACTED] statement;¹³ and
 - (viii) Opposes admission into evidence, of four photographs annexed to Witness P-0002's first and second [REDACTED] statements.¹⁴
8. Fourth, the Defence opposes the Prosecution's request to conduct a supplementary examination of two hours.¹⁵
 9. Finally, as for the Addendum, the Defence underscores that the document annexed there to should have been disclosed much earlier.

SUBMISSIONS

I. The Prosecution has not shown good cause justifying a variation of the time limit

10. Pursuant to paragraph 41 of the Decision on the Conduct of Proceedings, a request seeking the introduction of previously recorded testimony of a witness pursuant to Rule 68(3) shall be filed "at the earliest opportunity, but no later than four week before the relevant witness is scheduled to testify".
11. Although the Defence acknowledges recent modifications to the order of appearance of Prosecution's witnesses for the 7th evidentiary block, it recalls

¹² Prosecution Application, Annex A, Section I (B: 9 to 13).

¹³ (DRC-OTP-0090-0428), Prosecution Application, Annex A, Section II (B), Annex S.

¹⁴ Prosecution Application, Annex A, Section II (B), Annex S.

¹⁵ Prosecution Application, para.5.

that by [REDACTED], Prosecution had identified Witness P-0002 as an appropriate witness for the procedure under Rule 68(3).¹⁶

12. The Prosecution posits that according to its calculation and following its Updated Forthcoming Witness List dated 14 October 2016, Rule 68(3) application for Witness P-0002 was due on 7 November 2016.¹⁷ In such instance, Witness P-0002 would testify on 5 December 2016.
13. However, looking at the Prosecution's Forthcoming Witness List dated 7 October 2016, Witness P-0002 was to testify on 1st December 2016. Hence, the Prosecution Application should have been filed on 2 November 2016, at the latest.
14. Besides, according to the progression of the 7th evidentiary block, Witness P-0002 could appear before the Court on 30 November 2016. Subsequently, the Prosecution Application should have been filed on 1st November 2016, at the latest.
15. Despite the re-scheduling of witnesses P-0908 and P-0875 to the 8th evidentiary block in 2017, and the changes pertaining to the testimony of Witness P-0918; the Prosecution Application should have been filed between 28 October 2016 and 2 November 2016, before the date at which Witness P-0002 is said to have informed the Prosecution about his possible unavailability to testify.
16. For all these reasons, the Defence submits that the Prosecution has shown no good cause justifying a variation of the time limit.

¹⁶ Prosecution email of [REDACTED] at 17:21 in which the Prosecution indicated its intention to apply for the admission of Witness P-0002's prior recorded testimony; ICC-01/04-02/06-1631, para 16.

¹⁷ Prosecution Application, para.12.

17. The four-week delay incorporated in the Decision on the Conduct of Proceedings is very important for the cross-examining party, if only because of the difference in preparing for the testimony of a witness pursuant to Rule 68(3) as opposed to preparing for the cross-examination of a witness testifying *viva voce*. Despite being on notice of the Prosecution's intention to request the admission of the prior recorded testimony of a witness pursuant to Rule 68(3), the Defence cannot assume that the Prosecution will do so before the submission of its formal application. The quantity of audio-video material associated with the prior recorded testimony of a witness the Prosecution seeks to have admitted is also an important factor. In this case, Witness P-0002 [REDACTED] about [REDACTED], which the Defence needs to analyse in order to conduct a thorough cross-examination. Also, the defence wishes to highlight the fact that analysing video material is a highly time consuming activity.

18. In these circumstances, the Defence respectfully submits that the Prosecution has not shown good cause to justify a variation of the time-limit which would allow Witness P-0002 to testify pursuant to Rule 68(3) less than four weeks following the filing of the Prosecution Application.

II. [REDACTED] and associated documents

19. The Defence does not oppose to the admission into evidence, pursuant to Rule 68(3), of [REDACTED], save for sections [REDACTED] related to video Excerpt 1.¹⁸

20. The Defence objects to the admission into evidence pursuant to Rule 68(3) of video Excerpt 1 (DRC-OTP-0082-0016), [REDACTED], during which he

¹⁸ DRC-OTP-0082-0016, DRC-OTP-2055-1132 (ICC-01/04-01/06-T-162-CONF-FRA CT) p.1145, ln.3 to p.1158, ln.13.

recognised the location and some of the individuals it depicts. However, this video was not [REDACTED].¹⁹

21. The Defence does not object to the admission into evidence, pursuant to Rule 68(3), of five video excerpts (Excerpts 2 to 6)²⁰ which [REDACTED] P-0002, used with the witness [REDACTED] and on which he provided comments. However, it is very likely that the Defence will seek, during cross-examination, to admit into evidence longer segments of these video excerpts.
22. 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. In this regard, the Chamber [REDACTED] was particularly wary of this danger.²¹ Thus, the Defence suggests that, in order to avoid the admission of duplicates, it might be simpler to wait until the end of Witness P-0002's testimony to rule on the admissibility of these excerpts.
23. The Defence does not oppose the admission into evidence, pursuant to Rule 68(3), of two photographs²² shown to him [REDACTED] on which he provided observations.

ICC-01/04-01/06-T-162-CONF-ENG CT, page 14, ln.1 to page 17, ln.17

²⁰ DRC-OTP-0080-0002, DRC-OTP-0081-0007, DRC-OTP-0081-0006, DRC-OTP-0081-0002, DRC-OTP-0124-0002.

²¹ [REDACTED] "Whilst the Court will focus ordinarily on the extracts that have been played in Court, the parties and the participants are entitled to rely on other sections of any relevant scene as part of the evidence in the case, not least because there is an inherent danger that by focusing on limited sections, their meaning and significance may have been distorted because they have been taken out of a wider relevant context."

²² DRC-OTP-0087-0275 and DRC-OTP-0087-0261, Prosecution Application, Annex A, Section II (A).

III. Passages of Witness P-0002's statements and associated material

A. First and second witness statements of [REDACTED] and annexes thereto

24. The Defence objects to admission into evidence, pursuant to Rule 68(3), of 42 paragraphs taken from Witness P-0002's first and second statements of [REDACTED].²³ The Defence underscores that:

- (i) Witness P-0002's [REDACTED] statements and annexes were obtained [REDACTED];
- (ii) [REDACTED];
- (iii) Witness P-0002's statements and annexes [REDACTED], regardless of the purpose; and
- (iv) If Witness P-0002 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 or to have him declared hostile.

25. Consequently, Witness P-0002's statement and annexes should not and cannot be admitted, [REDACTED], pursuant to Rule 68(3).

26. [REDACTED]

27. Witness P-0002's statement and annexes not [REDACTED], cannot be considered as material without which [REDACTED].

28. Consequently, admitting statements and annexes which the Prosecution: (i) [REDACTED] (ii) could not use and refer to if Witness P-0002 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

²³ Annex H and I.

[REDACTED] 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.

29. The Defence objects to the admission into evidence, pursuant to Rule 68(3), of video Excerpt 7 which [REDACTED] Witness P-0002 in [REDACTED], on which he provided observations, and which relates to events outside the temporal scope of the charges against the Accused.

30. The Defence also objects to the admission into evidence of video Excerpt 9 which [REDACTED] Witness P-0002, even though he provided observations in his [REDACTED] statement.

31. Furthermore and for the same reasons, the Defence opposes the Prosecution request to admit into evidence five annexes to the first and second statements of [REDACTED] and, more specifically:

- (i) Opposes the admission into evidence, pursuant to Rule 68(3), of Annex J,²⁴ a document in which Witness P-0002 provided comments concerning video DRC-OTP-0082-0016 (Excerpt 1). This video [REDACTED] and the witness was not present when it was shot;²⁵
- (ii) Opposes the admission into evidence, pursuant to Rule 68(3), of Annex K,²⁶ a document in which Witness P-0002 provides observations in relation to video Excerpt 2 for the reason that Witness P-0002's [REDACTED];
- (iii) Opposes, for the same reasons raised for video Excerpt 2, admission into evidence of Annex L,²⁷ in which Witness P-0002 provides observations in relation to video Excerpt 5;

²⁴ Prosecution Application, Annex A, Section I (B: 9).

²⁵ ICC-01/04-01/06-T-162-CONF-ENG CT page 14, ln.1 to page17, ln.17.

²⁶ Prosecution Application, Annex A, Section I (B: 10).

²⁷ Prosecution Application, Annex A, Section I (B: 11).

- (iv) Opposes the admission into evidence, pursuant to Rule 68(3), of Annex M,²⁸ in which Witness P-0002 provides observations in relation to video Excerpt 7, which [REDACTED] Witness P-0002 and [REDACTED], for the reason that this video [REDACTED] outside the temporal scope of the charges laid against the accused; and
- (v) Opposes the admission into evidence, pursuant to Rule 68(3), of Annex N,²⁹ in which Witness P-0002 provides observations in relation to video Excerpt 9.

32. The Defence opposes the admission into evidence of four photographs annexed to Witness P-0002's first and second statements of [REDACTED].

B. Witness Statement of [REDACTED] and an annex thereto

33. The Defence does not object to the admission into evidence of 108 paragraphs from Witness P-0002's [REDACTED] statement in which he provides observations in relation to video Excerpt 8 – [REDACTED] Witness P-0002 but [REDACTED].

34. The Defence objects to the admission into evidence of document DRC-OTP-0090-0428 commented by Witness P-0002's in his [REDACTED] statement as it:

- (i) Was not drafted by Witness P-0002;
- (ii) Was not signed by Witness P-0002;
- (iii) Is not a document without which the 108 paragraphs sought to be admitted cannot be understood; and

²⁸ Prospection Application, Annex A, Section I (B: 12).

²⁹ Prospection Application, Annex A, Section I (B: 13).

(iv) Was not established that a clear relationship between this document and Witness P-0002 exists.

35. Hence, document DRC-OTP-0090-0428 cannot be considered as an associated document pursuant to the meaning given to this term by the Chamber. Consequently, this document cannot be admitted into evidence pursuant to Rule 68(3).

IV. Transcripts and translations

36. 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.³⁰ Accordingly, the Defence 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.

³⁰ 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.”

V. Request for supplemental direct examination

37. The Defence opposes the Prosecution's request to conduct a supplementary examination of two hours.³¹

38. The purpose of admitting a witness's prior recorded testimony under Rule 68(3) is to enhance the expeditiousness of the proceedings.³² Allowing two hours for supplemental direct examination – [REDACTED] – is likely to yield questioning that incorporates leading elements as well as questions [REDACTED] Witness P-0002 [REDACTED].

39. Having chosen to tender the prior recorded testimony of the witness pursuant to Rule 68(3) – which would, if accepted, confer certain benefits to the tendering party – the Prosecution should not at the same time be permitted to engage in a lengthy supplemental examination.

40. The Defence further notes that it should have proper and full notice of [REDACTED]. Permitting the Prosecution to either embark on subject-areas that are not already covered by [REDACTED] statement³³ or to ask more questions on subjects that [REDACTED] should not be allowed as it would defeat the purpose of Rule 68(3). Consequently, the necessary time for supplemental examination by the Prosecution should be assessed in this light.

VI. Time for cross-examination

41. Considering: (i) the quantity of relevant material related to Witness P-0002, including [REDACTED]; (ii) the fact that there is a total of about 2 000 pages of written material; and (iii) evoking that [REDACTED] Witness P-0002

³¹ Prosecution Application, para.5.

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.

³³ Cf. "Witness preparation protocol", 16 June 2015, ICC-01/04-02/06-0652-Anx, para.2.

amount to [REDACTED], the Defence submits that a minimum of 10 hours will be required to cross-examine Witness P-0002 in this case.

42. This estimate is also based on the recognized advantage to the Prosecution of adducing the testimony of Witness P-0002 pursuant to Rule 68(3) and the fact that the Prosecution is seeking leave to conduct supplementary examination.

43. This estimate is further strengthened by the Prosecution's submission that [REDACTED].

VII. Response to the Addendum

44. On 22 November 2016, the Prosecution filed an addendum to its Prosecution Application.³⁴

45. The Prosecution annexed to its Addendum a 10 page document – that does not bear an ERN number – including two pages in which Witness P-0002 brings 13 corrections as well as nine clarifications and changes to: (i) his [REDACTED] statement; and (ii) [REDACTED].

46. The Defence wishes to recall that this document:

- (i) Was obtained by the Prosecution in [REDACTED]; and
- (ii) Contains information relevant to Witness P-0002 that were not disclosed to the Defence.

47. The Defence underscore that this is a serious violation of disclosure of evidence pursuant to Article 67(2) of the Statute which requires the Prosecution to disclose to the Defence, as soon as practicable, evidence in its

³⁴ ICC-01/04-02/06-1644.

possession or control which he believes may, *inter alia*, affect the credibility of Prosecution evidence.³⁵

48. The Defence further emphasises that this document should have been disclosed to the Defence as it is “material to the preparation of the Defence”.³⁶

CONFIDENTIALITY

49. Pursuant to Regulations 23bis (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.

³⁵ Rome statute, Article 67(2), Reply, ICC-01/04-02/06-718-Conf-Exp, para. 20 (*emphasis added*).

³⁶ Rule 77 of the Rome Statute.

RELIEF SOUGHT

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

REJECT the Prosecution's request for variation of the time limit applicable for the submission of the Prosecution Application;

REJECT the admission [REDACTED] related to video Excerpt 1;

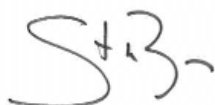
REJECT the admission of Excerpts 1, 7 and 9;

REJECT the admission of Witness P-0002's first and second statements of [REDACTED] as well as five annexes and four photographs attached thereto and Annexes H to N;

REJECT the admission of one document annexed to Witness P-0002's statement of [REDACTED]; and

ALLOCATE the Defence at least 10 hours to conduct its cross-examination.

RESPECTFULLY SUBMITTED ON THIS 14TH DAY OF DECEMBER 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands