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No.: **ICC-01/04-02/06**
Date: **23 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 the
'Prosecution's application under rule 68(2)(c) to admit the statements and related
documents of deceased Witness P-0027'", 26 October 2016, ICC-01/04-02/06-1594-
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 the submission of the “*Prosecution’s application under rule 68(2)(c) to admit the statements and related documents of deceased Witnesses P-0027*” on 4 October 2016 (“Prosecution Application”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s application under rule 68(2)(c) to admit the statements and related documents of deceased Witness P-0027”

“Defence Response”

OVERVIEW

1. The Defence opposes the Prosecution’s request to tender Witness P-0027’s eighteen-page statement, and various associated documents, pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”). Amongst the absurdities in this statement is the assertion that the witness [REDACTED].² The witness, rather than [REDACTED]. His alleged memory of this [REDACTED].³ This preposterous account joins several other obvious lies, including the claim that [REDACTED];⁴ that the witness [REDACTED];⁵ and the [REDACTED].⁶
2. These obvious and invidious lies demonstrate that the remainder of the witness’s statement is unreliable. The details deviate in many respects from the testimony of other witnesses who have purported to describe the events surrounding the Kobu-Bambu-Lipri attack. The witness’s evident willingness to lie, combined with the lack of any *verbatim* record of the interview, the lack

¹ ICC-01/04-02/06-1559-Conf-Red.

² Annex A, para.54

³ Annex D.

⁴ Annex A, para.24.

⁵ Annex A, para.40.

⁶ Annex C.

of any oath, and the abundance of other evidence on the same subject-matter, render this statement unsuitable for admission without cross-examination.

3. The Prosecution has also failed to substantiate that Witness P-0027 is dead and that the Prosecution could not have foreseen the possibility of the witness's demise and consequently the need to trigger Article 56.

SUBMISSIONS

Preliminary remarks

4. The majority of this Trial Chamber has already made clear that Rule 68 is *lex specialis* for the admission of testimonial statements of witnesses.⁷ The Defence does not understand the Prosecution's reference to other statutory provisions⁸ as intended to circumvent or question this ruling and that the terms of Rule 68(3)(c) governs the admission of the statement and associated documents.

I. Witness P-0027's unavailability is not satisfactorily established

5. The documents as provided to the Defence do not establish Witness P-0027's death. The only official document provided is hand-written and the identity of the attestant has been redacted (without any redaction code being provided).⁹ The Defence has, accordingly, been deprived without justification of the opportunity to check with the alleged attestant concerning the circumstances of Witness P-0027's death. No explanation has been provided for not obtaining a death certificate, or a certificate from the hospital where he

⁷ Chamber's Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, ICC-01/04-02/06-1029, 20 November 2015, para.46. See also in *Katanga & Ngudjolo* where Trial Chamber II hold that "Once the Chamber has determined that an out-of-court statement is testimonial, that statement can only be allowed into evidence under the conditions provided in rule 68", ICC-01/04-01/07-2635, para.50.

⁸ Prosecution Application, para.1.

⁹ Annex H.

died, which is identified in Witness P-0027's [REDACTED]'s statement.¹⁰ Past experience shows that death certificates can be obtained from hospitals without undue difficulty.¹¹

6. Regarding Witness P-0027's [REDACTED] statement¹², it is noteworthy that:
 - (i) Witness P-0027's [REDACTED] mentions on two occasions that [REDACTED] does not remember the date when [REDACTED] died and was buried¹³, and; (ii) Witness P-0027's [REDACTED] did not meet personally with the [REDACTED] who established the *Acte de Décès* but that the document was handed over to her by [REDACTED] who [REDACTED] understood is the one who provided the necessary details to the *Chef de groupement* when the latter drafted the document.¹⁴ This raises doubts as to whether the *Acte de Décès* constitutes an independent attest action of the witness's death, or is merely an attestation of what the [REDACTED] told the Chef de groupement.
7. Moreover, Witness P-0027's [REDACTED]'s statement¹⁵ was not given under oath and, absent a good reason for the Prosecution not being able to obtain official documentation of death, should not be accepted as sufficient proof of death.

¹⁰ Annex F, para.10.

¹¹ See proceeding regarding the admission of Witness P-0103's prior recorded testimony for whom the Chamber invited the Prosecution to further substantiate its allegation regarding the witness's death (ICC-01/04-02/06-1029, para.43) followed by the *Prosecution submission of the death certificate of Witness P-0103* (ICC-01/04-02/06-1162; DRC-OTP-2090-0435).

¹² Annex F, DRC-OTP-2092-0129.

¹³ Annex F, DRC-OTP-2092-0129, para. 10 and 14.

¹⁴ Annex F, DRC-OTP-2092-0129, para.14.

¹⁵ Annex F, DRC-OTP-2092-0129.

II. In the alternative, assuming that Witness P-0027 is dead, the Prosecution was on notice of his declining health and should have triggered Article 56

8. The Prosecution was informed as of 22 May 2015 that Witness P-0027 was suffering from tuberculosis.¹⁶ Tuberculosis is one of the top 10 causes of death worldwide. While Tuberculosis is curable and preventable, over 95% of Tuberculosis deaths occur in low- and middle-income countries.¹⁷
9. As such, the Prosecution should have taken every measure possible and necessary to take Witness P-0027's testimony under Article 56 of the Statute or alternatively, should have called the witness to testify before the court – in person or *via* video link in the first blocks of evidence.
10. Prosecution investigators called Witness P-0027 two weeks before the start of trial, on [REDACTED]. Witness P-0027 informed them that he had been diagnosed with Tuberculosis in [REDACTED].¹⁸ Consequently, the Prosecution should have known – considering the environment of Witness P-0027 and the difficult access to medical care in the Democratic Republic of the Congo – that his life was in peril. Accordingly, the Prosecution should have taken measure to secure Witness P-0027's testimony or, in the alternative, to engage a procedure that would have allowed the Defence to cross-examine him in the context of a deposition. The lack of cross-examination is, accordingly, a direct consequence of the Prosecution's failure to act more promptly and not of unforeseeable circumstances.

III. The material sought to be admitted by the Prosecution in relation to Witness P-0027 lacks the required indicia of reliability

11. When assessing the reliability of a statement, the following factors may be taken into consideration: (i) whether the statement was made under oath; (ii)

¹⁶ Annex I, DRC-OTP-2091-0094, para.1.

¹⁷ World Health Organization, <http://www.who.int/mediacentre/factsheets/fs104/en/>.

¹⁸ Annex I, DRC-OTP-2091-0094, para.6.

whether the statement was signed with an acknowledgment that it was true; (iii) whether the statement was taken with the assistance of an interpreter qualified by the Registry; (iv) whether the statement was subject to cross-examination; (v) whether there is other evidence to the same events, and; (vi) other factors as manifest inconsistencies in the statement.¹⁹

A. The statement was not given under oath; contains no record of questions; contains no *verbatim* record of responses; and was not subject to cross-examination

12. Witness P-0027 at no point affirms the truth of the content of his statement under oath. In fact, the witness nowhere affirms in his statement that its content is truthful. Only in the interpreter's certification does the interpreter state that the witness had told him that its content was "the truth."²⁰
13. The statement contains no record of questions, and no *verbatim* record of the answers. These are not prerequisites for admission of a "prior recorded testimony" under Article 68(3)(c), but the absence of a fully accurate record of the witness's questions and answers diminishes its reliability which, in turn, is a factor in determining whether its content is suitable to be placed on the record as if it were testimony.
14. Recent testimony underscores the danger of accepting non-verbatim, investigator-prepared summary as witness testimony. A witness who was

¹⁹ *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 16 February 2007, para. 7; *Prosecutor v. Delic*, No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter, 9 July 2007, page 4; *Prosecutor v. Haradinaj et al*, No. IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 8; *Prosecutor v. Gotovina et al*, No. IT-06-90-T, Decision on the Admission of Statements of Two Witnesses and Associated Documents Pursuant to Rule 92 quarter, 16 January 2009, para. 13; *Prosecutor v. Dordjevic*, No. IT-05-87/1-T, Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 quarter, 5 February 2009, at para. 6; *Prosecutor v. Karadzic*, No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quarter, 20 August 2009, para. 5; *Prosecutor v. Tolimir*, No. IT-05-88/2-PT, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter, 25 November 2009, para. 29.

²⁰ Annex A, p.18.

interviewed in 2005 by the same Prosecution investigator²¹ as Witness P-0027 stated:

[REDACTED].²²

15. Prosecution investigators, as professional and impartial as they may be, may nonetheless be expected to iron out inconsistencies in witness statements; omit inexplicable or inconsistent statements; or suggest answers based upon information obtained during other investigations. They may even, as Judge Ozaki has observed, be susceptible to bias and lack of neutrality.²³ Witness P-0027's statement was also taken by a single investigator, further lessening its reliability or the possibility of confirming what was said.

B. The statement is replete with indications of lying and manipulation

16. Witness P-0027 purportedly averred that [REDACTED] ²⁴ Witness P-0127, a resident of [REDACTED].²⁵ On the contrary, Witness P-0127 was obliged to admit that [REDACTED].²⁶ Witness P-0027's claim that [REDACTED]²⁷ demonstrates an attempt to lie in order to demonize UPC forces.
17. The witness handed over a document during his interview that [REDACTED].²⁸ The Prosecution seeks to tender this document as authentic evidence. The document is [REDACTED] and includes a [REDACTED].²⁹ [REDACTED]. No reasonable person could fail to apprehend that this document is nothing more than scurrilous and invidious propaganda akin to

²¹ Namely [REDACTED].

²² T-149-CONF-ENG 83:8-12.

²³ ICC-01/05-01/08-1028, Dissenting opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the Prosecution's list of evidence, para. 11.

²⁴ Annex A, para.24.

²⁵ T-139-CONF-ENG; T-140-CONF-ENG.

²⁶ T-139-CONF-ENG 61:14-62:1.

²⁷ Annex A, para.24.

²⁸ Annex A, para.53.

²⁹ Annex C. [REDACTED]

document, as even cursory inspection reveals, is nothing more than propaganda which bears a disturbing resemblance has no more validity than the *Protocols of the Elders of Zion*. The witness's willingness to present this document to the OTP as an authentic document abundantly demonstrates his willingness to lie, to manipulate the investigators, and to pervert the course of justice.

18. Witness P-0027 claims that Annex D is his reproduction of a portion of a [REDACTED].³⁰ The witness claims that he [REDACTED] because "[REDACTED]" after the person who had found the document, "[REDACTED]", had "[REDACTED]".³¹ This story is implausible and verges on the absurd. It is simply inconceivable, as the witness claims, that [REDACTED]. The witness's [REDACTED] again demonstrates his willingness to lie and to present false evidence to the ICC.
19. Witness P-0027 offers an elaborate description [REDACTED]" The main purpose of the story appears to be to demonstrate his own cleverness in deceiving [REDACTED].³² The clever deceit involves [REDACTED]. [REDACTED].³³ Witness P-0027 then explains that his [REDACTED].³⁴ The entire story is a compelling demonstration of the witness's capacity to conjure fabrications that he believed – apparently, with justification – would be persuasive to ICC investigators.

³⁰ Annex A, para.54

³¹ Ibid.

³² Annex A, paras.35-39.

³³ Annex A, para.39

³⁴ Annex A, para.40.

Witness P-0027 does not corroborate the evidence already brought by other Prosecution's witnesses

20. Witness P-0027 claims that [REDACTED].³⁵ This information may be correct,³⁶ but has been the object of contrary testimony. Other witnesses whom the Prosecution has put forward as witnesses of truth have firmly denied that [REDACTED].³⁷
21. Witness P-0027's version of the sequence of events [REDACTED] deviates in various respects from the accounts given by other witnesses. For example, Witness P-0027's story is that [REDACTED];³⁸ Witness P-0015's story is that [REDACTED];³⁹ and Witness P-0127's story is that [REDACTED].⁴⁰ None of these accounts is accurate or reliable, and none should be admitted for its truth in the absence of cross-examination. The admission of Witness P-0027's statement without cross-examination would be no more appropriate than would have been the admission without cross-examination of the statements of Witnesses P-0018, P-0019, P-0113, P-0127, P-0301 and P-0792 – all of whose testimony can only be properly assessed in light of their oral testimony.

Witness P-0027 was in contact with other Prosecution's witnesses through Intermediary P-0154

22. Witness P-0027 is among the several witnesses from the area of [REDACTED] who were identified as potential witnesses by Intermediary P-0154.
23. In that connection, Witness P-0027 met collectively with Intermediary P-0154 and the following witnesses: (i) in [REDACTED] with Witnesses P-0100, P-

³⁵ Annex A, para.25.

³⁶ T-150-CONF-ENG, Testimony of Witness P-0792, 68:3-4, "[REDACTED]"

³⁷ T-150-CONF-ENG, Testimony of Witness P-0301, 11:6-8, "[REDACTED]"

³⁸ Annex A, DRC-OTP-0096-0052, para.26.

³⁹ DRC-OTP-0073-0381, para.33 ; DRC-OTP-2058-0002, para.29.

⁴⁰ DRC-OTP-0126-0107, para.39.

0113, P-0019, P-0106 and P-0107⁴¹; (ii) in [REDACTED] with Witnesses P-0106, P-0113, P-0100 and P-0039⁴²; (iii) in [REDACTED] with Witnesses P-0300, P-0127, P-0301, P-0103, P-0018, P-0039, P-0100, P-0113, P-0019, P-0106 and P-0108⁴³; (iv) in [REDACTED] with Witnesses P-0300, P-0127, P-0301, P-0103, P-0018, P-0039, P-0100, P-0113, P-0019, P-0106 and P-0108⁴⁴, and ; (v) in [REDACTED] with Witnesses P-0300, P-0127, P-0301, P-0103, P-0018, P-0039, P-0100, P-0113, P-0019, P-0106 and P-0108⁴⁵.

24. Previous cross-examination of some of these witnesses suggests a reasonable possibility, if not a likelihood, that contamination of testimony occurred during these meetings. The Chamber has heard details that appear canned, as if learned by rote; has heard a group of three witnesses all simultaneously come forward with allegations of [REDACTED] long after their initial statements; and has heard a curious attempt by witnesses to sequences events by reference to the days of the week without any plausible explanation. Conversely, when pressed on details that the witnesses have not rehearsed, the witnesses often give divergent or flatly contradictory accounts. Meanwhile, P-0154 is known to have [REDACTED].⁴⁶
25. Investigation notes⁴⁷ specifically report that Witness P-0027 was [REDACTED]. The least that may be inferred is that Witness P-0027 himself was interested in receiving money for his testimony.

⁴¹ DRC-OTP-2092-0325.

⁴² DRC-OTP-2092-0230 : [REDACTED].

⁴³ DRC-OTP-2092-0319.

⁴⁴ DRC-OTP-2092-0321.

⁴⁵ DRC-OTP-2092-0323.

⁴⁶ DRC-OTP-2090-0407.

⁴⁷ DRC-OTP-2090-0408 and DRC-OTP-2090-0409. See Prosecution Application, para.29.

Substantial inconsistencies between the statements given by Witness P-0027

26. Witness P-0027 first met with a representative of the non-governmental organisation [REDACTED], most probably Intermediary P-0154. A statement was taken at the time.⁴⁸
27. He was then met by the Prosecution's investigators. Another statement was taken.⁴⁹
28. Contrary to what the Prosecution asserts, the two statements are not consistent with each other, even taking into account the witness's self-serving repudiation of the [REDACTED] statement.
29. Below are a few examples of the inconsistencies between the statements:
 - (i) In the statement given to [REDACTED], Witness P-0027 explained that [REDACTED].⁵⁰ In the statement given to the Prosecution's investigator, Witness P-0027 [REDACTED].⁵¹
 - (ii) In the statement given to [REDACTED], Witness P-0027 explained that [REDACTED].⁵² In the statement given to the Prosecution's investigator, Witness P-0027 explained on the contrary, [REDACTED].⁵³
 - (iii) In the statement given to [REDACTED], Witness P-0027 explained that [REDACTED].⁵⁴ In the statement given to the Prosecution's investigators, Witness P-0027 explained that [REDACTED].⁵⁵

⁴⁸ See Annex B, DRC-OTP-0096-0068.

⁴⁹ See Annex A, DRC-OTP-0096-0052.

⁵⁰ Annex B, DRC-OTP-0096-0068, line 8.

⁵¹ Annex A, DRC-OTP-0096-0052, para.21.

⁵² Annex B, DRC-OTP-0096-0068, lines 17-20.

⁵³ Annex A, DRC-OTP-0096-0052, para.26.

⁵⁴ Annex B, DRC-OTP-0096-0068, lines 31-34.

⁵⁵ Annex A, DRC-OTP-0096-0052, para.57 and 58.

30. The Defence posits that these serious discrepancies render Witness P-0027's Material unreliable. Admitting this Material under Rule 68(2)(c) would thus be highly prejudicial to the Accused.

Without corroboration, the unique information provided by Witness P-0027 cannot be admitted into evidence

31. Some of Witness P-0027's statement – such as his alleged [REDACTED] – concerns information that is uncorroborated.⁵⁶ Consequently, if Witness P-0027 statement were to be admitted, the Defence would not be in a position to question the evidence on that subject but the Chamber would not be able neither to base this evidence to fund any conviction against Mr Ntaganda.

C. The documents sought to be admitted by the Prosecution in relation to Witness P-0027 do not meet the minimum requirements

32. For an exhibit accompanying a witness statement to be admitted: (i) it should be an inseparable and indispensable part of the testimony, (ii) it should meet the requirements of relevance and probative value, and (iii) the probative value should not be substantially outweighed by the need to ensure a fair trial.⁵⁷
33. Annex C has been previously addressed.⁵⁸ This scandalous document also bears no apparent connection to the witness's statement, aside from the

⁵⁶ *Prosecutor v. Lukic & Lukic*, No. IT-98-32/1-A, Judgement, 4 December 2012, para.570.

⁵⁷ *Prosecution v. Radovan Karadžić*, IT-95-5/18-PT, Decision on Prosecution motion for admission of testimony of witness KDZ198 and associated exhibits pursuant to Rule 92 *quarter*, 20 august 2009; ICC-01/04-01/07- 2289, para.13.

⁵⁸ DRC-OTP-0096-0070.

ludicrous and tenuous explanation as to the manner in which he obtained this document.⁵⁹

34. Annex D has also been previously addressed and, for those reasons, should not be admitted.⁶⁰

IV. The importance of cross-examination

35. The Prosecution incorrectly argues that there is no need for cross-examination on the basis that the evidence provided by Witness P-0027 should be accorded weight, bearing in mind their probative value and indicia of reliability, as well as being corroborative of other witness's testimony.⁶¹
36. There is simply no way to separate the wheat from the chaff of Witness P-0027's statement without cross-examination. His statement, accordingly, has no value as corroboration or contradiction of the testimony of other witnesses who were cross-examined. The issue is not so much the accused's right to cross-examine, as it is about the impact on the deliberative process of allowing information of such dubious provenance and quality onto the record without the filter of cross-examination.

CONFIDENTIALITY

37. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Request is submitted on a confidential as it refers to filings bearing the same classification.

⁵⁹ Annex A, DRC-OTP-0096-0052, para.53: "[REDACTED]".

⁶⁰ DRC-OTP-0096-0071.

⁶¹ Prosecution Application, para.27.

CONCLUSION

38. Witness P-0027's statement and associated annexes display significant indications of lying, manipulation and forgery. No portion of his statement, and no associated annex, is worthy of admission before this Court without cross-examination. Further, the Prosecution has failed to satisfy the pre-requisites for the application of Rule 68(2)(c), including a valid death certificate in due form, or the absence of opportunity to invoke Article 56. The Prosecution's request should, accordingly, be denied in its entirety with prejudice.

RESPECTFULLY SUBMITTED ON THIS 23RD DAY OF DECEMBER 2016

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands