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No.: **ICC-01/04-02/06**
Date: **10 February 2017**

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’s application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0020, P-0057 and P-0932, and provision of certified declarations for Witnesses P-0551 and P-0773’”, 27 December 2016, ICC-01/04-02/06-1702-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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**Victims Participation and Reparations
Section**

Further to the “Prosecution’s application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0020, P-0057 and P-0932, and provision of certified declarations for Witnesses P-0551 and P-0773” submitted by the Office of the Prosecutor (“Prosecution”) on 2 December 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)(b) to admit the prior recorded testimony of Witness P-0020, P-0057 and P-0932, and provision of certified declarations for Witnesses P-0551 and P-0773”

“Defence Response”

1. The Defence opposes the request for admission of the testimony of three witnesses without cross-examination.
2. The Prosecution claims that P-0932’s prior testimony in the *Lubanga* case is “reliable.”² The Prosecution does not mention, however, that his reliability was seriously damaged during its own cross-examination of Witness P-0932 in the *Bemba et al.* case.³ The Prosecution demonstrated that Witness P-0932 had plagiarized portions of his expert report in that case.⁴ It is troubling that the Prosecution would suggest – without even informing this Trial Chamber of its own vigorous challenge in another case to Witness P-0932’s credibility – that this witness is so reliable that cross-examination in this case is unnecessary.
3. P-0057’s epic 38-page sweeping overview of many of the political and military situation in Ituri in 2002 and 2003 is full of speculation, conjecture, and opinion that requires cross-examination. Many of the propositions in the statement could colour the Trial Chamber’s perception of the context of the

¹ ICC-01/04-02/06-1668-Conf.

² Prosecution Application, para.36.

³ See ICC-01/05-01/13-T-45-ENG (15 March 2016).

⁴ ICC-01/05-01/13-T-45-ENG 79:1-25.

events charged in the Document Containing the Charges. The statement contains a somewhat prejudicial portrait of Mr Ntaganda that cannot be remedied by the Prosecution's vague invitation to the Trial Chamber to ignore anything that is deemed to go to "acts and conduct." The tendering party – not the Trial Chamber or the opposing party – has the responsibility to identify the portions being tendered. Furthermore, a statement of such broad sweep, with no record of questions and answers, and with no guarantee of exonerating circumstances having been explored equally during the witness's interview, should not be admitted without the opportunity of cross-examination or questioning by the Court.

4. P-0020's statement contains indications of unreliability that should not be admitted without cross-examination. The wording of the witness statement – taken more than ten years ago – suggests that the investigators were determined to place a particular spin on the witness's statement, and apparently did so. The danger of error, bias and unreliability is made more acute by the possibility that the investigators did not speak the languages used by the witness during the interview, and kept no verbatim record of questions or answers. Witnesses previously appearing before the Trial Chamber have demonstrated a lack of ownership over the content of such statements in the past that should be a cause of serious concern, which should be particularly acute given the characteristics of this particular statement.
5. The Prosecution Application should, accordingly, be rejected in its entirety.

APPLICABLE LAW

6. Rule 68(2)(b) permits the admission of testimony in written form without cross-examination. The Prosecution relies extensively on a single decision from Trial Chamber IX that the prohibition on "acts and conduct" should be

read narrowly as pertaining only to physical acts or omission.⁵ This Trial Chamber is not bound by that decision, which departs markedly from the established jurisprudence of the ICTY and ICTR Rules on which Rule 68(2)(b) is modelled. That extensive jurisprudence is summarized in *Popović*, which consisted of a bench of mixed common and civil law judges:

Additional caution must be exercised where the Accused is charged with individual responsibility for the acts and conducts of others. The Appeals Chamber has held that the phrase “acts and conduct of the accused as charged in the indictment” in Rule 92 *bis* should also be interpreted to mean the acts and conduct of the accused “which establish his responsibility for the acts and conduct of ... others.” Thus, where – as here – a joint criminal enterprise theory of individual criminal responsibility is alleged, and the accused is “therefore liable for the acts of others in that joint criminal enterprise,” Rule 92 *bis*(A) also excludes any written statement which goes to any act or conduct of the accused upon which the prosecution relies to establish:

- (a) that he had participated in that joint criminal enterprise, or
- (b) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.⁶

7. “Acts and conduct” has accordingly been found to encompass, in a case of superior responsibility, information showing that the accused knew or had reason to know that crimes were about to be or had been committed by his subordinates; or failed to take reasonable steps to prevent or punish.⁷ Inaction in the face of certain information, accordingly, falls within this prohibition.
8. Even where a statement does not violate the “acts and conduct” prohibition, a Trial Chamber should be alert to the prejudicial effect of admitting statement without cross-examination. Rule 68(2)(b) prescribes various criteria of analysis, including whether the prior testimony relates to issues that are not materially in dispute; is cumulative or corroborative nature, in that other

⁵ Prosecution Application, paras.18-21.

⁶ *Popović et al.*, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, 12 September 2006, para.12.

⁷ *Prosecutor v. Dordjević*, IT-05-97/1-T, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, 11 February 2009, para.5.

witnesses will give or have given oral testimony of similar facts; relates to background information. These three criteria suggest that greater caution must be exercised when the subject-matter of the testimony tendered for admission is controversial, significant and contested. The Trial Chamber is also required to attempt to assess, without the benefit of cross-examination, whether the tendered statement has “sufficient indicia of reliability.”

SUBMISSIONS

I. Witness P-0932’s credibility was challenged strongly, and undermined, by the Prosecution during the Bemba et al. case

9. Witness P-0932 appeared as an expert for one of the defendants in the *Bemba et al.* case. The Prosecution, rather than waiving cross-examination because the witness is so reliable that cross-examination is unnecessary, chose to cross-examine him vigorously. In the course of that cross-examination, the witness’s credibility was seriously damaged based on, *inter alia*, the allegation that he had plagiarized sections of his expert report.⁸
10. The Prosecution in this case, despite its position in the *Bemba et al.* case, now asserts that this witness’s testimony from *Lubanga* so “reliable”⁹ that cross-examination is not even necessary. This position is evidently contrary to that adopted in the *Bemba et al.* case. Remarkably, the Prosecution also failed to make a single reference to this witness’s testimony in its own closing brief in the *Lubanga* case.¹⁰ Not a single reference to this witness’s testimony is contained in the *Lubanga* Trial Judgment.¹¹

⁸ ICC-01/05-01/13-T-45-ENG 79:1 (“Professor, that’s word for word what appears in your report, isn’t it, word for word?”); 79:13 (“[REDACTED] wrote his piece in 2008. That’s eight years ago, eight years before you produced your report in this case. That’s correct, isn’t it?”); 79:17-83:1; 87:11 (“And you know as a professional academic that it’s not appropriate to appropriate someone else’s work to your credit, right?”); 90:24 (“You know what plagiarism is, right, Professor?”).

⁹ Prosecution Application, para.35.

¹⁰ ICC-01/04-01/06-2748-Conf.

¹¹ ICC-01/04-01/06-2842, Judgement pursuant to Article 74 of the Statute (“Lubanga Trial Judgement”).

11. The Trial Chamber has, in any event, already expressly acknowledged the need for cross-examination of this particular witness. After the Defence had challenged the witness's expertise and qualifications, the Prosecution asserted in response that "[t]he Defence will be able to question Professor Bwatshia on his credentials during cross-examination. Specifically, it can question him about the extent to which his knowledge of the administrative, cultural and social life in the DRC in general also extends to Ituri".¹² The Trial Chamber, in accepting the witness's qualification as an expert, nevertheless acknowledged that "any issues surrounding the sources used, or the referencing, structure or methodology of the report, are matters that can be addressed during cross-examination".¹³
12. The Prosecution offers no submissions demonstrating that the witness's testimony is corroborated by other testimony.¹⁴ Indeed, the Prosecution has not even specified to which witnesses this expert's testimony is supposed to be relevant.¹⁵
13. The formalities for certification are also lacking. The accompanying declaration does not correspond to the form¹⁶ approved by the Chamber.¹⁷ No information is provided concerning the person who witnessed the declaration, [REDACTED], or that he is a *fonctionnaire* possessing the authority to witness a declaration and attest to its conformity with the requirements of Rule 68.¹⁸

¹² ICC-01/04-02/06-1044, para.11.

¹³ ICC-01/04-02/06-1159, para.15.

¹⁴ Prosecution Application, para.40 and 41.

¹⁵ Prosecution Application, para.3.

¹⁶ ICC-01/04-02/06-657-AnxA.

¹⁷ ICC-01/04-02/06-729.

¹⁸ Rule 68(2)(b)(iii) states that « *Accompanying declarations must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State.* ». In this regard, the Defence recalls that in its Decision on Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules, the Chamber authorised the Registry Legal Counsel, or any appropriate person delegated by him, to be the person authorised to witness declarations made pursuant to Rule 68(2)(b) of the Rules for the purposes of this case.

II. Witness P-0020's Prior Recorded Testimony does not meet the criteria to be admitted under Rule 68(2)(b)

14. P-0020's statement is rife with ambiguities and contradictions that suggest that it is not a reliable record of what the witness said during the interview. In paragraph 12, the witness is recorded as stating that the UPC may have killed unarmed Lendu civilians during combat operations, but that such deaths were, in his view, "accidental." The very next paragraph – without further explanation – refers to these acts as "crimes."¹⁹ He also prefaces his comments about the age of "children" fighting with the UPC as being his "opinion."²⁰ The statement then goes on to give ages as if they were a fact, but with no transparent indication as to how the witness went from stating an opinion to stating a fact.²¹ These are all indications of a lack of transparency, and suggestive of an attempt by the investigators to adduce incriminating information at the expense of transparency.
15. Part of this may be explained by the fact that the interviewers do not appear to have been speaking the same language as the interviewee. Further, the statement was not translated into a language he could read or understand prior to signature. This means that the subject-matter had to be translated to the witness orally, with the accuracy thereof only being as good as the translation – for which there is no guarantee of accuracy whatsoever. The potential for translation error was not remedied at the time of attestation since the statement still does not appear to have been translated into a language understood by the witness. This omission is inexplicable and, in itself, should lead to denial of the motion.
16. The statement also manifestly trespasses on the "acts and conduct" prohibition, concerning Mr Ntaganda's alleged inaction in respect of the

¹⁹ Annex 2, para.13.

²⁰ Annex 2, para.21.

²¹ Annex 2, para.21.

witness's [REDACTED].²² The Defence takes note, however, of the Prosecution's submission that this account "cannot be relied upon to establish [Mr Ntaganda's] criminal responsibility for the crimes charged."²³

17. Witness P-0020's Prior Recorded Testimony also encompasses matters of importance that are not suitable for admission without cross-examination. In particular, the statement concerns [REDACTED].²⁴ Mr Ntaganda is alleged to be a co-perpetrator with Thomas Lubanga. The Prosecution may therefore attempt to rely on the acts and conduct of Thomas Lubanga to establish the responsibility of Mr Ntaganda.
18. The subject-matter of the statement is also contested and is seriously in dispute. In particular, the proposition (for which the witness's statement is relied upon in support) that "between on or about 6 August 2002 and 31 December 2003, the UPC/FPLC undertook a massive, organised campaign throughout Ituri to conscript and enlist soldiers in large numbers in order to increase its troop strength" is contested.²⁵ The Defence also contests the Prosecution's claim that: "(i) in September 2002 Thomas LUBANGA's troops had [REDACTED], and (ii) that soldiers in the UPC/FPLC were raping women and were involved in the death of civilians".²⁶
19. Other disputes include *inter alia* the following alleged facts: that Thomas Lubanga occupied a house in Mandro on [REDACTED] September 2002;²⁷ that [REDACTED] in September 2002;²⁸ and that there were armed children as young as eight years old in the UPC in Bunia.²⁹ All these allegations relate

²² ICC-01/04-02/06-491-AnxB, p.174.

²³ Prosecution Application, para.24.

²⁴ Prosecution Application, para.23. See also DRC-OTP-0071-0058 included at Annex 2 of the Prosecution Application.

²⁵ Prosecution's Pre Trial Brief, ICC-01/04-02/06-503-Conf-AnxA, para.365.

²⁶ ICC-01/04-02/06-491-Conf-AnxA, p.173-174.

²⁷ Witness P-0020's Statement, para.10.

²⁸ Witness P-0020's Statement, para.11.

²⁹ Witness P-0020's Statement, para.21.

to crimes committed by UPC/FPLC forces, and not only background information.

20. P-0020's statement is not "corroborated" in any meaningful sense of that word. The only account of rape, pillaging of [REDACTED] and killings in Witness P-0020's statement relate to events which occurred prior [REDACTED] September 2002.³⁰ In footnote 39 of the Prosecution Application, the Prosecution refers to the testimony of Witness P-0017 and P-0901 as example of corroborating evidence of pillage; yet Witness P-0017 testified about pillaging occurring after the Mongbwalu operation, and Witness P-0901 after the Buli operation: neither refer to pillaging of [REDACTED] occurring prior to [REDACTED] September 2002.
21. In footnote 40, the Prosecution refers to the testimony of Witnesses P-0901 and P-0010 as example of corroborating evidence of rape. Witness P-0901 refers to rapes which occurred at checkpoints in a general way, without mentioning any specific time or location details. Witness P-0010 refers to a rape of [REDACTED]. For these two instances, there is no indication that these two examples are corroborated by the general reference made to rape occurring prior to [REDACTED] September 2002 by Witness P-0020 in his statement.³¹
22. In footnote 41, the Prosecution refers to the testimony of Witnesses P-0017 and P-0859 as example of corroborating evidence of killings. Witness P-0859 refers to the killing of [REDACTED] during the first attack in Mongbwalu. Witness P-0017 testified about the killing of [REDACTED] after the attack in Kobu. These two instances of killings occurred in a period after [REDACTED] September 2002. Hence, Witness P-0020's statement does not corroborate this testimony.

³⁰ Annex 2, p.5, para.11 and 12.

³¹ Annex 2, p.5, para.11 and 12.

23. In footnote 42, the Prosecution refers to the testimony of Witnesses P-0055 and P-0190 as corroboration of conscription, enlistment and use of child soldiers by the UPC. Witness P-0055 testified seeing child soldiers in Mandro while Witness P-0014 testified [REDACTED] in March or April 2003. Witness P-0020 in his statement refers to child soldiers he would have seen in Bunia. Hence, Witness P-0020 does not corroborate these two testimonies.
24. Therefore, even though Witness P-0020's Prior Recorded Testimony relates to charges previous witnesses testified about, the facts described do not corroborate the testimony of witnesses who already testified.
25. If the Chamber decides to admit Witness P-0020's Prior Recorded Testimony without cross-examination, the Defence requests that the witnesses' investigation notes,³² the transcript of the [REDACTED] telephonic interview³³ and his victim participation form³⁴ also be admitted for the purposes of impeachment. The admission of these additional materials will give the Trial Chamber a fuller picture of the reliability of the prior testimony being admitted, and provide the Defence with a more realistic opportunity to make submissions about the witness's credibility even in the absence of his appearance before the Trial Chamber.
26. The Declaration provided by the Prosecution to accompany Witness P-0020's Prior Recorded Testimony does not correspond to the form³⁵ approved by the Chamber.³⁶ No information has been provided about the person performing the attestation, let alone that he has the authority to witness a declaration and attest to its conformity with Rule 68.³⁷

³² DRC-OTP-2090-0584 and DRC-OTP-2099-0159.

³³ DRC-OTP-0235-0081.

³⁴ DRC-OTP-2093-0031.

³⁵ ICC-01/04-02/06-657-AnxA.

³⁶ ICC-01/04-02/06-729.

³⁷ Rule 68(2)(b)(iii) states that « *Accompanying declarations must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State.* ». In this regard, the Defence recalls that in its Decision on Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules, the Chamber authorised the

27. There are serious indications from the *Lubanga* case that Witness P-0020 is not a reliable witness. Trial Chamber I concluded in its Judgment that “there are strong reasons to conclude [that P-0316] persuaded witnesses to lie as to their involvement as child soldiers within the UPC”.³⁸ P-0020 was one of the witnesses first met by P-0316,³⁹ and he was even present during the Prosecution’s first meeting with the witness.⁴⁰ Nonetheless, Witness P-0020 denied [REDACTED] that he had any knowledge of Intermediary P-0316.⁴¹ The lie suggests concealment of improper contacts for, potentially, an improper purpose.
28. Permitting the admission of the non-*verbatim* testimony of P-0020 in these circumstances and without the opportunity of cross-examination is not in the interests of a fair trial or justice.

III. Witness P-0057’s Prior Recorded Testimony does not meet the criteria to be admitted under Rule 68(2)(b)

29. The Prosecution acknowledges that “[c]ertain paragraphs of Witness P-0057’s statement refer to the Accused” but then casually invites the Trial Chamber, without further specificity, to simply ignore any passages that it might deem to fall afoul of the “acts and conduct” prohibition.⁴²
30. The burden does not rest on the Trial Chamber (let alone the Defence) to identify which passages are being tendered and which not. This is a matter for the Prosecution to articulate in its Application. It has not done so. The request to admit any portion of the 39-page statement should accordingly be rejected on this basis *in limine*.

Registry Legal Counsel, or any appropriate person delegated by him, to be the person authorised to witness declarations made pursuant to Rule 68(2)(b) of the Rules for the purposes of this case.

³⁸ Lubanga Trial Judgement, para.373.

³⁹ See List of individuals/entities facilitating initial contact with Prosecution witnesses, 17 May 2016, transmitted via email on 17 May 2016 at 17 :22. See also Lubanga Trial Judgement, para.295.

⁴⁰ See Investigation note DRC-OTP-2090-0584.

⁴¹ DRC-OTP-0235-0081, p.0104, l.770 to 774.

⁴² Prosecution Application, para.26.

31. The contours of the prohibited subject-matter are not self-evident. The Prosecution invokes P-0057's testimony broadly in its assertion that he has "knowledge of crimes committed by Bosco Ntaganda"⁴³ and that he substantiates the claim that "LUBANGA, KISEMBO and NTAGANDA worked closely together, and met frequently".⁴⁴ Indeed, the statement refers to [REDACTED] Thomas Lubanga and Chief Kahwa, who are both alleged co-perpetrators. The implication, depending on the nature of knowledge to be imputed to Mr Ntaganda, is that portions of the witness's statement addressing these matters may also, accordingly, trespass on the "acts and conduct" prohibition. The Prosecution's failure to specify which portions of the statement may be withdrawn on this basis is, accordingly, too vague to merit adjudication.
32. The substance of much of the P-0057's statement is in dispute. He claims, *inter alia*, that the UPC/FPLC was training child soldiers aged 15 in Mandro,⁴⁵ and using them in Bunia in May 2003.⁴⁶ Witness P-0057 also claims that Thomas Lubanga did not participate in the demobilisation process.⁴⁷ As illustrated by the cross examination of witnesses to date, these issues are materially in dispute, and relate to crimes allegedly committed by FPLC forces.
33. Conversely, the Prosecution fails to show that Witness P-0057's Prior Recorded Testimony is corroborated.⁴⁸ While a number of witnesses have referred to [REDACTED] during their testimony, the details of this event are of utmost importance in order to test the credibility of these witnesses. Moreover, Witness P-0057 refers in his Statement to [REDACTED]⁴⁹ and

⁴³ ICC-01/04-02/06-491-Conf-AnxB, p.141.

⁴⁴ ICC-01/04-02/06-503-Conf-AnxA, para.500.

⁴⁵ Witness P-0057 Statement, Annex 3, para.85.

⁴⁶ Witness P-0057 Statement, Annex 3, para.138.

⁴⁷ Witness P-0057's Statement, Annex 3, para.153.

⁴⁸ Prosecution Application, para.33.

⁴⁹ Witness Statement, para.31.

[REDACTED]. Witness P-0057 claims to have been [REDACTED], and [REDACTED].⁵⁰

34. The witness's screening note suggests that his statement is not reliable in various respects, including concerning the meetings of UPC members [REDACTED], [REDACTED],⁵¹ and [REDACTED].⁵²
35. Witness P-0057 provided to the Prosecution [REDACTED] videos and various documents related to the period of the charges.⁵³ The Defence should be permitted the opportunity to cross-examine Witness P-0057 concerning these documents and videos, as well as adducing contradictions with other key witnesses, in particular, [REDACTED].
36. If the Trial Chamber decides to admit this 39-pages, non-verbatim, epic overview of the political architecture of Ituri in 2002 and 2003, then the witness's screening note should also be admitted for impeachment purposes.
37. The Declaration provided by the Prosecution to accompany Witness P-0057's Prior Recorded Testimony does not correspond to the form⁵⁴ approved by the Chamber.⁵⁵ No information has been provided concerning the attestor, or that he has the authority to perform the attestation.⁵⁶

⁵⁰ See for instance, Witness Statement, para.32; 66-92; 98; 102-103.

⁵¹ See Screening note, DRC-OTP-2058-0025, p.0026, [REDACTED]. [REDACTED], [REDACTED], Annex 3, para.72.

⁵² See Screening note, DRC-OTP-2058-0025, p.0025, where it is indicated that [REDACTED]. [REDACTED], [REDACTED], Annex 3, para.63.

⁵³ Witness Statement, Annex 3, para.155-156.

⁵⁴ ICC-01/04-02/06-657-AnxA.

⁵⁵ ICC-01/04-02/06-729.

⁵⁶ Rule 68(2)(b)(iii) states that « *Accompanying declarations must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State.* ». In this regard, the Defence recalls that in its Decision on Prosecution's request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules, the Chamber authorised the Registry Legal Counsel, or any appropriate person delegated by him, to be the person authorised to witness declarations made pursuant to Rule 68(2)(b) of the Rules for the purposes of this case.

CONFIDENTIALITY

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

RELIEF SOUGHT

1. In light of the above submissions, the Defence respectfully request the Chamber to **REJECT** the Prosecution Request.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF FEBRUARY 2017

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

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands