



Original: **English**

No.: **ICC-01/04-02/06**
Date: **20 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 application under rule 68(3) to admit the prior recorded testimony and associated document of Witness P-0043'", 16 January 2017, ICC-01/04-02/06-1718-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 the prior recorded testimony and associated document of Witness P-0043” submitted by the Office of the Prosecutor (“Prosecution”) on 22 December 2016 (“Application”)¹; (ii) Trial Chamber VI (“Chamber”)’s decision granting the Defence’s request for a variation of the applicable time limit to respond to the latter,² and; (iii) 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) to admit the prior recorded testimony and associated material of Witness P-0043”

“Defence Response”

1. The Defence does not oppose the admission of Witness P-0043’s testimony in the *Lubanga* case⁴ or Witness P-0043’s written statement⁵ (“Prior Recorded testimony”). The Defence does oppose, at this time, the document tendered as Annex F to the Application.⁶ Direct examination should be limited to thirty minutes total.⁷ Thirty minutes should be more than ample to complete all of the formalities required under Rule 68(3), while deterring the Prosecution from embarking on an inefficient and potentially unfair fishing expedition.

¹ ICC-01/04-02/06-1700-Conf.

² Email from the Chamber to the parties and participants, 4 January 2017, 17h13.

³ ICC-01/04-02/06-1342.

⁴ DRC-OTP-2054-5646 (Annex B) and DRC-OTP-2054-5546 (Annex C).

⁵ DRC-OTP-0126-0086 (Annex D) and DRC-OTP-0208-0164 (Annex E).

⁶ DRC-OTP-0126-0100 (Annex F).

⁷ Application, para.18 and 19.

I. Witness P-0043's written statement and testimony

Witness P-0043's written statement

2. The Defence does not oppose the admission of Witness P-0043's signed statement (Annex D)⁸ pursuant to Rule 68(3), provided that the requisite formalities are satisfied. The English translation appended as Annex E, however, is said to be a "draft" and contains various evident shortcomings.⁹ The Defence accordingly suggests that it would not be appropriate to seek a separate attestation from the witness in respect of Annex E, and that the latter should be admitted as nothing more than a draft translation of Annex D.

Witness P-0043's testimony in the Lubanga case

3. The Defence does not oppose the admission of Witness P-0043's testimony in the *Lubanga* case (Annexes B and C)¹⁰ pursuant to Rule 68(3), provided that the requisite formalities are satisfied. Both the English and French versions should be admitted as equally authentic records of the witness's testimony.

II. Associated UPC document

4. A pre-condition for the admission of an associated document is that it be necessary to understand the prior recorded testimony being introduced.¹¹ The regular requirements of admissibility under Article 69(4) must also, however, be satisfied.
5. Annex F is said to be a UPC document provided by Witness P-0043. Although the witness does appear to refer to the document at paragraph 39 of his

⁸ Annex D.

⁹ See for example, Annex E, para.49 : « [REDACTED] » (emphasis added); Annex D, para.49 : « [REDACTED] » (emphasis added). While the draft statement in English states that Witness P-0043 [REDACTED], Witness P-0043's statement originally taken in French just states the contrary.

¹⁰ Annex D.

¹¹ *The Prosecutor v. Ruto*, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, para.33. See *The Prosecutor v. Dordjević*, Decision on Prosecution's Motion for Admission of Evidence Pursuant Rule 92ter, 10 February 2009, para.5.

statement, there is no statement – contrary to the Prosecution’s submission¹² – that the witness provided the document. The provenance of the document should, accordingly, be established with the witness before the Trial Chamber rules on its admissibility.

III. Questioning on subjects outside of the scope of Witness P-0043’s written statement and testimony in the *Lubanga* case should be disallowed

6. Witness P-0043 was the Presiding Judge of the Tribunal de Grande Instance of Bunia from 2001 to 2003. He testified about his alleged arrest and detention in November 2002, and provided information on the functioning of the judicial system in Bunia in 2002 and 2003.
7. The Prosecution requests authorization to ask supplementary questions about: (i) the UPC/FPLC structure in Bunia in the period relevant to the charges; (ii) the UPC/FPLC’s August 2002 attack on Bunia; (iii) the UPC/FPLC’s behaviour in relation to human rights and humanitarian organisations, and; (iv) the nature and scale of the crimes reportedly committed by the UPC/FPLC.¹³
8. The Prosecution knows the areas on which it wishes to adduce additional information, but does not, apparently, know the witness’s answers. The Prosecution says that this fishing expedition is “necessary for the determination of the truth,”¹⁴ but apparently did not consider that the requirements of truth-finding required any supplemental interview with the witness in relation to this case.
9. The search for truth in an adversarial trial is undermined if the Defence does not have advance notice of the testimony to be adduced from witnesses. Such

¹² Application, para.2.

¹³ Application, para.18.

¹⁴ Application, para.18.

advance notice serves various purposes, including allowing the Defence time to identify and prepare information that may have already been heard from other witnesses, or seeking out contradictory information through investigations in the field. Information heard for the first time in court without advance notice deprives the Defence of the ability to engage in this preparation. The consequence is a pretence of cross-examination creating an appearance of credibility that may not be warranted. The search for the truth in an adversarial trial is damaged, not advanced, by hearing information of which there is no advance notice.

10. Unforeseen pronouncements from witnesses are, of course, sometimes inevitable. The difference here, however, is that the Prosecution is now prohibited by the terms of the Trial Chamber's decision on witness preparation from obtaining the information that it wishes to adduce in court.¹⁵ The consequence is that evidence will be heard of which notice could have been provided if the witness had been re-interviewed – including by telephone – but which is not provided. Deliberately allowing testimonial evidence of which there is no notice, on broad subject-areas such as those proposed by the Prosecution should not be permitted.
11. The witness has, in any event, already comprehensively described all the information within his knowledge, which renders lengthy supplemental examination inappropriate. Witness P-0043 [REDACTED];¹⁶ never attended any UPC meeting;¹⁷ did not know if and when Thomas Lubanga came back to Bunia;¹⁸ only remembered about one murder case for which he never implied

¹⁵ "Witness preparation protocol", 16 June 2015, ICC-01/04-02/06-652-Anx, para.2.

¹⁶ DRC-OTP-0126-0086, para.22.

¹⁷ DRC-OTP-2054-5622, p.5642, ll.1-4 and p.5740, ll.5-9.

¹⁸ DRC-OTP-2054-5546, p.5621, ll.10-18: "Q. May I just get one clarification from you, sir. I apologise. When -- well, let me ask you. Did Lubanga return from -- did he return to Bunia?

A. Well, I can't know. I can't know that. I know that the UPC took power on a Friday, the 9th of August, 2002, and we were received by Mr. Lonema and his entire team, and Lonema said the president, Mr. Lubanga, wasn't in Bunia and he said that he was the coordinator. When he returned -- well, I don't know. I couldn't tell you precisely when he returned."

that the UPC/FPLC was involved;¹⁹ and described all of his knowledge concerning the financing of the UPC.²⁰ Allowing the Prosecution substantial additional time to examine the witness is either a waste of time or unfair and, in either event, inappropriate.

12. For the same reasons, the Defence posits that the Prosecution should not be allowed to use and tender additional documents through Witness P-0043.

CONFIDENTIALITY

13. 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.

¹⁹ DRC-OTP-2054-5622, p.5621, ll.3-13: "Q. What were these delicate cases that you refer to? A. It was a difficult period. Mr. Litsha himself during that period -- well, his father was killed. He worked with Mr. Lonema. His very own father was killed by people that he perhaps knew, and as an example he mentioned the case of his father. To demonstrate, well, he said that he knew who had killed his father but he didn't want to go to court. That's the reason for which we left Bunia. The assassination case, Dedus (phoen), that's the name of the father. Well, when we left -- up until that time nothing had been done, no recourse to justice had been made. So that's one of the cases among many others. It's the only one I can refer to for the time being."

²⁰ DRC-OTP-2054-5622, p.5726, l.8-p.5727, l.10: "Q. At paragraph 35 you refer to a number of persons, those that were very close to UPC. Now, these persons are particularly interesting to us when it comes to the funding of UPC. We should like to know if as a president of the Tribunal de Grand Instance of Ituri, what were the information available to you at the time of the facts when it comes to the funding of financing the UPC?

A. (No interpretation) I know these persons very well, and these persons were in charge of finance. If you ask anyone in Ituri at the moment, if you ask them what do you mean by the Savo family, what does this name mean, well, they will tell you who they are unless they have changed. Because I left Ituri five years ago. I know that I was on very good terms with these persons. I said so in my statement. I knew their house and they knew my house. As to the financial situation, there was no secret, it was public. They would collect money from shopkeepers in broad daylight, then there was a system. We used to call it a pre-financing from the customs offices, and the custom offices would sometimes worry because the goods that had to be reported declared and for which there had to be taxes where no taxes were paid, because the owner of the goods, that's the Savo family, had already provided money to support the government. So they couldn't pay custom taxes. This is what they call the pre-financing system. So they had set out this practice, and it's no secrecy if you ask the customs office, they will tell you that this system functioned that way. That's how it operated. I mentioned the name of the Savo family because I knew them."

CONCLUSION

14. The Defence does not oppose the request to admit the prior testimony and statements of Witness P-0043 as described above. The Defence does oppose, pending further information about provenance, the admission of Annex F to the Application. The Prosecution's direct examination should be limited to a total of thirty minutes.

RESPECTFULLY SUBMITTED ON THIS 20TH 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