

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-02/06**

Date: **27 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) and Regulation 35 to admit the prior recorded testimony of Witness P-0045’”, 23 January 2017, ICC-01/04-02/06-1741-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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**REGISTRY**

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Further to the “*Prosecution’s application under Rule 68(2)(b) and Regulation 35 to admit the prior recorded testimony of Witness P-0045*” submitted by the Office of the Prosecutor (“Prosecution”) on 9 January 2017 (“Prosecution Application”),<sup>1</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to “Prosecution’s application under Rule 68(2)(b) and Regulation 35 to admit the prior recorded testimony of Witness P-0045”**

**“Defence Response”**

**INTRODUCTION**

1. The Defence opposes the Prosecution Application.
2. The addition of Witness P-0045 on the Prosecution's list of witnesses after the 2 March 2015 deadline does not meet the terms of Regulation 35(2) of the Regulations of the Court (“RoC”). More importantly, adding Witness P-0045 is neither in the interests of justice and the determination of the truth nor consistent with the Chamber's obligation to ensure the fairness of the proceedings.
3. Indeed, in the guise of adducing the testimony of Witness P-0045 to repair and/or enhance the credibility of Witness P-0031, the Prosecution seeks to adduce additional evidence on facts that are materially in dispute, *in extremis*.
4. Accordingly, the Prosecution Application should be denied in its entirety.
5. Even if the Prosecution was authorized to add Witness P-0045 to its list of witnesses, Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”) is not appropriate for admission of his testimony. Indeed, the use of Rule 68(2)(b) to adduce the testimony of a witness who in 2013 informed the Prosecution “that [he] did not wish to testify in the

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<sup>1</sup> ICC-01/04-02/06-1709-Conf, “Prosecution Application”.

proceedings against the Accused given [REDACTED]”<sup>2</sup> is misguided.

6. What is more, *inter alia*, a significant portion of Witness P-0045's Statement goes to facts that are materially in dispute and which cannot be admitted without cross-examination.

## SUBMISSIONS

- I. **The addition of Witness P-0045 on the Prosecution's list of witnesses must be rejected**

7. When adjudicating the Prosecution's similar request to add Witness P-0551 to its list of witnesses (“Prosecution Witness P-0551 Request”), the Chamber held that:

In line with the approach taken by other chambers of this Court when faced with similar requests, the Chamber considers that additions to a list of witnesses after the relevant deadline may, in principle, be made when the terms of Regulation 35(2) of the Regulations are met or, even where the terms of that regulation have not been met, where to do so would nonetheless be in the interests of justice and the determination of the truth, and be consistent with the Chamber’s obligation to ensure the fairness of the proceedings, under Articles 64 and 69 of the Statute.<sup>3</sup>

8. The Prosecution Application fails to meet any of these requirements.

- A. **The terms of Regulation 35(2) RoC are not met**

9. Regulation 35(2) RoC provides that:

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable

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<sup>2</sup> Prosecution Application, para. 18, italics added.

<sup>3</sup> ICC-01/04-02/06-1733, para. 6.

to file the application within the time limit for reasons outside his or her control.

10. Thus, under Regulation 35(2) RoC, the Chamber may extend a time limit if good cause is shown. In this regard, the Appeals Chamber has held that:

[s]uch reasons as may found a good cause are necessarily associated with a party's duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.<sup>4</sup>

11. Significantly, when adjudicating Prosecution Witness P-0551 Request, the Chamber held that:

Pursuant to Regulation 35(2), in addition to showing 'good cause' for a variation of the time limit, the Prosecution is required to demonstrate that it was 'unable to file the application within the time limit for reasons outside [its] control', which, as held by the Appeals Chamber, requires the existence of 'exceptional circumstances'. The Chamber agrees with Trial Chamber V(B) that this condition will 'generally not be satisfied' when a party or participant requests to add evidence 'many months after the expiration of a deadline set in accordance with Rule 84 of the Rules.'<sup>5</sup>

12. On 9 October 2014, the Prosecution was ordered to provide by 2 March 2015 the final version of its list of witnesses and list of evidence.<sup>6</sup> Witness P-0045 did not appear on the Prosecution's 2 March list of witnesses.<sup>7</sup>
13. Having P-0045's statement in its possession since 2005, there is no justification for the Prosecution's failure to add Witness P-0045 to its list of witnesses before 2 March 2015. In fact, the Prosecution Application was filed almost two years after the 2 March 2015 deadline and no sound reason have been provided which would objectively provide justification for its inability to comply with the Chamber's order.

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<sup>4</sup> ICC-01/04-02/06-834, para. 7.

<sup>5</sup> *Kenyatta* Addition of Witnesses Decision, ICC-01/09-02/11-832, para. 10.

<sup>6</sup> ICC-01/04-02/06-382, p. 7.

<sup>7</sup> ICC-01/04-02/06-491-Conf-AnxA-Red

14. The Prosecution's submission that it was informed in 2013 that Witness P-0045 "did not wish to testify in the proceedings against the Accused given [REDACTED]"<sup>8</sup> certainly does not amount to exceptional circumstances.
15. As for the Prosecution's argument that "the importance of P-0045 only became entirely clear after P-0031 testified",<sup>9</sup> the Chamber has previously held when adjudicating Prosecution Witness P-0551 Request that:

The importance of a witness's evidence [having become] "only entirely clear after a specific witness's testimony, does not qualify as an exceptional circumstance, and, accordingly, the terms of Regulation 35(2) for a variation of the time limit have not been met".<sup>10</sup>

16. It follows that the terms of Regulation 35(2) are not met.

**B. Adding Witness P-0045 is neither warranted in the interests of justice nor for the determination of the truth**

17. When adjudicating Prosecution Witness P-0551 Request, the Chamber has previously held that:

When the terms of Regulation 35 are not met, a case-by-case assessment which balances the justification for the addition of new evidence against the potential prejudice which may be caused to the other party is required. In this context, the Chamber may consider a broad variety of factors, including: (i) the time elapsed since the original deadline and the stage of the proceedings at which admission of new evidence is sought; (ii) the reasons provided for not seeking addition of the new evidence at an earlier stage; (iii) the evidence already before the Chamber; (iv) the relevance and significance of the additional evidence to matters for determination by the Chamber; (v) whether the new evidence would bring to light a previously unknown fact which has a significant bearing upon the case; and (vi) the impact of the addition of the new evidence on the fairness and expeditiousness of the trial and rights of the accused. In respect of the rights of

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<sup>8</sup> Prosecution Application, para. 18, italics added.

<sup>9</sup> Prosecution Application, para. 25.

<sup>10</sup> ICC-01/04-02/06-1733, para. 12.

the accused, Trial Chambers V(A) and V(B) have emphasised the need to ensure the right of the accused to have adequate time and facilities for the preparation of the defence, as set out in Article 67(1)(b) of the Statute, and to determine 'whether the other party can be given adequate time to investigate the proposed new witnesses, bearing in mind the need to conduct the trial fairly and expeditiously'.<sup>11</sup>

18. First, the two-year period elapsed since the original deadline was set for the submission of the Prosecution's final list of witnesses and the fact that the Prosecution Application is submitted at a very late stage of the Prosecution's case, both militate in favor of denying the Application. Indeed, adding Witness P-0045 to the Prosecution's list of witnesses at this stage would, *inter alia*, be contrary to the right of the Accused to have adequate time and facilities for the preparation of his defence.<sup>12</sup> Prosecution Witness P-0045's statement was disclosed to the Defence pursuant to Rule 77 on 10 January 2014. It was not envisaged that Witness P-0045 would testify until the Prosecution Application was filed.
19. Second, for the reasons stated above,<sup>13</sup> as previously mentioned, the reasons provided by the Prosecution for not seeking addition of Witness P-0045 to its list of witnesses at an earlier stage are also unconvincing.
20. In fact, adding Witness P-0045 to the Prosecution's list of witnesses would not allow the Prosecution to achieve the aim of repairing or enhancing the credibility of Witness P-0031. It is significant in this regard that when cross-examining Witness P-0031, the Defence did not challenge the [REDACTED]. The aim of the Defence was rather to establish the circumstances of Thomas Lubanga [REDACTED] and that Thomas Lubanga did not [REDACTED].
21. Third, it follows from the above that the relevance and significance of the additional evidence proposed *i.e* the testimony of Witness P-0045 is very limited in relation to the

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<sup>11</sup> ICC-01/04-02/06-1733, para. 8.

<sup>12</sup> Article 67(1)(b) of the Rome Statute.

<sup>13</sup> See paras. 14, 15 above.

Prosecution's aim. In fact, the Prosecution has since adduced evidence during the testimony of Prosecution Witness P-0005 which – at least before the cross-examination of the witness – appears to fulfill the Prosecution's aim.<sup>14</sup>

22. Fourth, whether the Prosecution Application is in the interests of justice or the determination of the truth must also be assessed on the basis of the contents of Witness P-0045's statement, which is described at paragraph 15 of the Prosecution Application.
23. It is significant in this regard that Witness P-0045's statement goes way beyond the evidence necessary to accomplish the Prosecution's aim in relation to Witness P-0031. In fact, P-0045's statement comprises evidence related to issues in respect of which ample evidence has already been led by the parties, which are materially in dispute. These issues include, *inter alia*, the creation of the UPC, the members of the UPC including Thomas Lubanga and Adèle Lotsove, the purported UPC/Hema takeover in 2002 and the alleged burning of lendu houses.
24. It is thus evident that the aim of the Prosecution Application is not to bring to light a previously unknown fact which has a significant bearing upon the case. Other than allowing the Prosecution to lead additional evidence on aspects of the Prosecution's case already addressed, the Prosecution Application does not meet the threshold of being either in the interests of justice or of the determination of the truth.
25. Fifth, the addition of Witness P-0045 to the Prosecution's list of witnesses and allowing the Prosecution to adduce his evidence at this stage impact both the rights of the Accused as well as the expeditiousness of the trial.
26. Indeed, even though Witness P-0045's statement and most of the proposed associated material<sup>15</sup> were disclosed to the Defence in 2014, the Defence was not on notice of the

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<sup>14</sup> T-185-ENG-RT, p. 38.

<sup>15</sup> One of the proposed annexes, document DRC-OTP-0037-0527 was disclosed to the Defence on 4 January 2017.

Prosecution's intent to call Witness P-0045 to testify until the Prosecution Application was submitted on 9 January 2017. The fact that the Defence referred to the circumstances of Thomas Lubanga [REDACTED] has no bearing on the fact that the Defence did not anticipate having to challenge this evidence.

27. Adding Witness P-0045 on the Prosecution's list of witnesses at this stage implies that the Defence will have to investigate the issues raised in his statement – which as previously mentioned go beyond Thomas Lubanga [REDACTED] – at a critical time when it is both preparing for the cross-examination of Prosecution witnesses scheduled to testify during the eighth evidentiary block and increasing the pace of preparations for the presentation of the case for the Defence.
28. Whether Witness P-0045 testifies *viva voce* or via video-link allowing the Prosecution to adduce his evidence at this late stage will necessarily affect the expeditiousness of the trial.
29. As stated by the Chamber, the need to ensure the right of the Accused to have adequate time and facilities for the preparation of the Defence, as set out in Article 67(1)(b) of the Statute, and to determine whether the other party can be given adequate time to investigate the proposed new witnesses.
30. In sum, allowing the Prosecution to add Witness P-0045 to its list of witnesses and to adduce his evidence would not bring to light any previously unknown fact, which have a significant bearing upon the case while infringing on the rights of the Accused and having an impact on the expeditious conduct of the proceedings.
31. In these circumstances, it is evident that allowing the Prosecution Application is neither in the interests of justice nor of the determination of the truth, such that the Prosecution failure to meet the conditions of Regulation 35(2) RoC can be brushed aside.

32. Witness P-0045 should thus not be added to the Prosecution's list of witnesses and the Defence respectfully submits that there is no need to address the second prong of the Prosecution Application.

**II. The use of Rule 68(2)(b) to admit the Prior Recorded Testimony of Witness P-0045 is misguided**

33. Should the Chamber nonetheless be inclined to add Witness P-0045 to the Prosecution's list of witnesses, the Prosecution's request to adduce his evidence pursuant to Rule 68(2)(b) must be denied.

34. When adjudicating the Prosecution's request to admit the evidence of Witness P-0773, the Prosecution held that:

Under Rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the prior recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of 'a matter other than the acts and conduct of the accused';

35. And that:

As stated in prior jurisprudence of the Court, a chamber enjoys a certain degree of discretion in its decision of whether to introduce prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, when the relevant requirements are met. Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall bear in mind in the exercise of its discretion.

These factors include whether the prior recorded testimony: (i) relates to issues that are not materially in dispute; (ii) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (iii) relates to background information; (iv) is such that the interests of justice are best served by its introduction; and (v) has sufficient indicia of reliability.<sup>16</sup>

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<sup>16</sup> ICC-01/04-02/06-1667.

36. In this case, Witness P-0045's statement goes to proof of the acts and conduct of the Accused and fails to meet the other criteria allowing for his evidence to be adduced pursuant to Rule 68(2)(b).
37. First, contrary to the Prosecution's submission,<sup>17</sup> P-0045 statement does go to proof of the acts and conduct of the Accused. Indeed, bearing in mind the Trial Chamber's holding of the meaning to be given to 'acts and conduct of the Accused', Witness P-0045's proposed evidence comprises facts related to the acts and conduct of Mr Ntaganda, namely through [REDACTED] of Thomas Lubanga when [REDACTED]. If only for this reason, Rule 68(2)(b) is not the proper vehicle to adduce P-0045's statement and associated material.
38. Second, as set out above,<sup>18</sup> P-0045's statement goes way beyond the evidence necessary to accomplish the Prosecution's aim (in relation to Witness P-0031) in requesting to add Witness P-0045 to its list of witnesses.
39. In fact, Witness P-0045's statement and associated material tackle issues on which ample evidence has already been adduced which are materially in dispute.
40. Even though Witness P-0045's statement provides evidence in relation to issues already addressed, it cannot be said to be complementary and/or corroborative. The main reason for this is simply that the issues already addressed are materially in dispute. In other words, adducing the evidence of Witness P-0045 amounts to the submission of additional evidence on disputed issues at a time when the Prosecution is about to end the presentation of its case.
41. Third, in accordance with the right of the Accused to challenge evidence against him, if the Prosecution is to be permitted to adduce the evidence provided by Witness P-0045, the Defence must be given an opportunity to challenge the same in order to ensure the

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<sup>17</sup> Prosecution Application, paras. 12 and 13.

<sup>18</sup> Prosecution Application, para 22.

fairness of the proceedings.

42. Lastly, allowing the Prosecution to adduce the evidence of Witness P-0045 brings prejudice. To be sure, the Defence must investigate more thoroughly the evidence of Witness P-0045 which requires time and resources presently allocated to increasing the pace of preparations for the presentation of the case for the Defence.
43. Contrary to the Prosecution's submission, Witness P-0045's statement comprises evidence which cannot be challenged effectively, in accordance with the rights of the Accused to challenge evidence against him through the remaining Prosecution witnesses.
44. Also contrary to the Prosecution's submission, requesting the Defence to challenge the evidence of Witness P-0045 – which relates to issues materially in dispute – during the case for the Defence would also be contrary to the right of the Accused to full answers in Defence.
45. In addition, admitting the evidence of Witness P-0045 pursuant to Rule 68(2)(b) would also impact the expeditiousness of the proceedings as it would necessarily involve additional investigations as well as more Court time for the presentation of the case for the Defence.
46. It follows from the above that the criteria to be considered by the Chamber in determining whether Rule 68(2)(b) is appropriate if the Prosecution is exceptionally authorized to adduce Witness P-0045's statement and associated material, are not met.
47. Although the Prosecution did not raise the possibility of adducing the evidence of Witness P-0045 pursuant to Rule 68(2)(c), the Defence nonetheless takes the view that Rule 68(2)(c) would also not be appropriate for this purpose. Indeed, although the witness has informed the Prosecution that he is not willing to testify in the proceedings against the Accused [REDACTED], he does not meet the requirements to be declared

“unavailable” pursuant to this Rule.

48. Consequently, should the Chamber be inclined to allow the Prosecution to add Witness P-0045 to its list of witnesses, his evidence must be adduced either *viva voce* or pursuant to Rule 68(3).

### **CONFIDENTIALITY**

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

### **RELIEF SOUGHT**

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

**RESPECTFULLY SUBMITTED ON THIS 27<sup>th</sup> DAY OF FEBRUARY 2017**

A handwritten signature in dark ink, appearing to read 'S.B.' with a stylized flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands