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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 prior recorded
testimony and related documents of Prosecution Witness P-0016’”, 16 February
2017, ICC-01/04-02/06-1788**

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 prior recorded testimony and related documents of Prosecution Witnesses P-0016*” on 22 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)(c) to admit the prior recorded testimony and related documents of Prosecution Witness P-0016”

“Defence Response”

OVERVIEW

1. The Defence opposes the Prosecution’s request to tender Witness P-0016’s 48-page statement and some 200-transcript pages [REDACTED], with associated materials, in the [REDACTED]. Rule 68(2)(c) may only be used where “the necessity of measures under article 56 *could not be anticipated*.” The Prosecution not only *could* have anticipated, but *did* anticipate, the decline of the witness’s condition. Prosecution investigators purportedly observed that the witness was “[REDACTED] during” the witness’s March 2014 interview, at which time he was [REDACTED] years old. The Prosecution, instead of immediately triggering the Article 56 procedure or arranging for a medical assessment, chose not to contact the witness for twenty months.² Even after having re-established contact, at which time the need to invoke Article 56 should have been abundantly clear, the Prosecution delayed again for many months. The Prosecution – which has also failed to substantiate almost any factual claim in the Prosecution Application – could have anticipated the need of Article 56 measures long ago, which precludes resort to Rule 68(2)(c).
2. The statement and [REDACTED] are, in any event, not suitable for admission under Rule 68(2)(c). The 48-page statement – a non-*verbatim* record prepared

¹ ICC-01/04-02/06-1698-Conf.

² Prosecution Application, para. 16.

over seven days by no less than four Prosecution investigators – includes numerous references to Bosco Ntaganda’s alleged conduct and role in a variety of events, including his knowledge of the alleged Kobu massacre. The Prosecution – curiously – chose not to adduce information about the Kobu incident [REDACTED]. The supposed internal consistency of the statement³ is meaningless in the context of a seven-day interview reduced to non *verbatim* form by four Prosecution investigators. Much of the information is based on hearsay or unidentified sources, and there are insufficient indicia to allow the Trial Chamber to assess weight. Conversely, the statement includes assertions that are not corroborated – or flatly contradicted by – other evidence heard in this case, including the claim that the Kobu massacre was committed by gunfire.⁴ Admitting information of such inscrutable reliability combined with its highly prejudicial subject-matter, without any cross-examination by anyone, let alone the Defence of Mr Ntaganda, would be inappropriate, unfair, and unhelpful to the Trial Chamber’s search for the truth.

3. The witness’s [REDACTED] addresses at length, but not systematically, Mr Ntaganda’s functions and positions, as well as his role in some events, including the attack on Mongbwalu. This information goes to the heart of critical issues in this case. The [REDACTED] Defence was not concerned with those issues and devoted little if any attention to even clarifying the role of Mr Ntaganda. The transcript, accordingly, contains no meaningful [REDACTED] on issues vital to Mr Ntaganda, and the direct examination does not adduce a full narrative of Mr Ntaganda’s functions and role in various events.
4. The Prosecution cites Witness P-0016 as a source for propositions in its Pre-Trial Brief more than 200 times.⁵ His statement and transcripts [REDACTED] not only directly concern the acts and conduct of Mr Ntaganda but – if

³ *Id.* para. 25.

⁴ Statement, para.157.

⁵ ICC-01/04-02/06-503-Conf-AnxA.

accepted – might be treated as highly incriminating. Many of those propositions – as a review of the statement and {REDACTED} demonstrate – could have been clarified to be much less incriminating or even exculpatory and, in some cases, lacking any weight or reliability. The Prosecution’s dilatory conduct in failing to trigger Article 56 has deprived the Trial Chamber of the opportunity to hear these matters elaborated by the Defence. Admission of the material in these circumstances would not only violate the threshold requirement of Rule 68(2)(c), but would also not be in the interests of justice or the pursuit of truth in the context of an adversarial trial.

APPLICABLE LAW

5. Rule 68(2)(c) permits the admission of previously recorded testimony where:

(c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:

(i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, **that the necessity of measures under article 56 could not be anticipated**, and that the prior recorded testimony **has sufficient indicia of reliability**.

(ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

6. Article 56 (1) stipulates:

(a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

7. This Trial Chamber has previously held that the admission of evidence tendered under Rule 68(2)(c) is subject to the general evidential requirements that its introduction is “not prejudicial to or inconsistent with the rights of the accused” and that the requirements of Article 69 are “relevant in this context.”⁶ Article 69(4) provides, in particular, that a Trial Chamber may rule on the admissibility of evidence “taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness.”
8. The Trial Chamber has previously recognized that indicia of reliability are relevant not only to showing that a statement is worthy of admission, but also that sufficient information is available to provide a basis for a subsequent assessment of weight. Hence, the Trial Chamber has denied the admission of associated documents through Rule 68(2)(c) where there was a “lack of information regarding their reliability and authenticity.”⁷
9. The appropriateness of admission of a statement without cross-examination also includes consideration of whether the prior statement or testimony is “so proximate to the accused ... that it would be unfair to allow its admission.”⁸

SUBMISSIONS

- I. **The necessity of measures under Article 56 could have been – and were – anticipated**
10. The Prosecution acknowledges that, even before its March 2014 interview with Witness P-0016, it had “[REDACTED].”⁹ A psychological – but not a *medical* –

⁶ ICC-01/04-02/06-1029, para.12.

⁷ ICC-01/04-02/06-1653, para.23.

⁸ ICC-01/04-02/06-1029, para.26.

assessment was conducted. Past experience in this case suggests that psychological assessments, which are apparently not even carried out by psychologists, are relatively cursory.¹⁰ The Prosecution investigators purportedly observed that “Witness P-0016 was somewhat [REDACTED] during this interview”¹¹. Despite these direct observations, the Prosecution – far from immediately triggering Article 56 – failed to even contact the witness again for another twenty months – until November 2015. No adequate explanation has been provided for not having appreciated an immediate need to invoke Article 56. The alleged difficulties re-contacting the witnesses are not substantiated by any documentary foundation whatsoever and, in any event, could have been overcome with the exercise of reasonable diligence.

11. The Prosecution could have again anticipated the need for Article 56 measures in November 2015 when it renewed contact with the witness for the first time after 20 months. The Prosecution was informed as of that time that the witness was receiving medical care.¹² The Prosecution investigators also directly observed that the witness “[REDACTED]”.¹³ At this point, the Prosecution should have acted promptly to trigger Article 56 of the Statute or alternatively, to call the witness to testify before the court – in person or *via* video link in the first evidentiary block of 2016. A request for assistance to VWS was being prepared and the visa and travel arrangements were on their way.¹⁴ The Prosecution provides no explanation why Witness P-0016 was not scheduled to testify immediately or, alternatively, why the Trial Chamber was not seized with a request for measures under Article 56.

⁹ Prosecution Application, para.11.

¹⁰ See ICC-01/04-02/06-T-112-CONF-ENG, p.28 l.24- p.29 l.1; “[REDACTED]”; DRC-OTP-2093-0052 at 0054.

¹¹ Prosecution Application, para.30.

¹² Prosecution Application, para.15.

¹³ Prosecution Application, para.16.

¹⁴ Prosecution Application, para.16.

12. The Prosecution's lack of diligence continued even after November 2015. The Prosecution scheduled two further meetings, on 9 December 2015 and 29 February 2016 for the purpose of obtaining the witness's medical file from him.¹⁵ The Prosecution's internal medical adviser then took over four months to assess the file.¹⁶ More time unaccountably wasted without bringing an Article 56 request to the Trial Chamber.
13. The Prosecution has not shown, as required by Rule 68(2)(c), that "the necessity of measures under Article 56 could not be anticipated." This sequence of events, on the contrary, abundantly demonstrates that the need for Article 56 measures could have been, at numerous junctures, anticipated. Article 56, inspired by civil law systems based on a judicial search for the truth, empower judges to directly authorize and fashion techniques for preserving testimony in the best form possible for truth-finding. The imperative nature of this mechanism is reflected in the threshold requirement that is contained in Rule 68(2)(c). The threshold requirement is not satisfied in this case.
14. The burden to prove that Article 56 measures could not have been anticipated rests on the moving party. Proof on a balance of probabilities is the minimum necessary threshold. The potentially fact-intensive nature of the question requires appropriate documentation, not just submissions of counsel. The Prosecution has not submitted a single document upon which the Trial Chamber could make findings of fact. No contemporaneous investigator's note, correspondence with the witness, or even a *post facto* affidavit by an investigator has been submitted. No facts have been adduced indicating what the Prosecution investigators knew (or did not know), or when they knew (or did not know) particular information that would have caused them to anticipate (or not) the need for Article 56 measures. The absence of any such proper documentation, in itself, compels the conclusion that the Prosecution

¹⁵ Prosecution Application, para.17.

¹⁶ Prosecution Application, para.18.

has not met its burden of showing under Rule 68(2)(c) that measures under Article 56 could not have been foreseen. Such documentation is particularly vital where, as here, the Prosecution's own narrative of events points strongly to the contrary inference.

II. The material sought to be admitted by the Prosecution in relation to Witness P-0016 lacks sufficient indicia of reliability

A. *The 48-page Witness Statement goes to acts and conduct, is ostensibly incriminating, was never cross-examined, consists substantially of hearsay, and lacks any attributes that would permit the Trial Chamber to assess weight*

15. The witness statement addresses a much wider range of issues than are to be found in the [REDACTED] given before the [REDACTED]. Notably, the Witness statement embarks on a lengthy narrative of events in and around Kobu in February 2003. The source of the witness's information – and the only source expressly mentioned by the witness – is an individual named "[REDACTED]".¹⁷ "[REDACTED]" ostensibly told P-0016 such facts as that the pacification meetings was to take place in Kobu¹⁸ (not Buli or Sangi); that the killings were committed by gunfire¹⁹ (not machetes or clubs); implies that the killings happened one day after the UPC's arrival in Kobu²⁰ (not at least several days); and that the UPC forces went to Mongbwalu afterwards²¹ (not Bunia). All of these details contradict the prevailing story that witnesses have told about the alleged Kobu massacre and raise doubts about the reliability of the account provided by "[REDACTED]" – which is all that P-0016 appears to be able to rely on.
16. The Witness makes a host of statements about Mr Ntaganda coming to learn about this event after-the-fact, allegedly scolding Salumu for what he had done,

¹⁷ Statement, paras. 155, 158.

¹⁸ Statement, para. 157.

¹⁹ Statement, para. 157 ("[REDACTED]").

²⁰ Statement, para. 157 ("[REDACTED].")

²¹ Statement, para. 164.

and that he had wanted to do something good during this operation.²² The Witness offers no information whatsoever concerning the source of his information or even exactly what his statements mean. The Prosecution, conspicuously, did not adduce this evidence from Witness P-0016 in [REDACTED]. Did the Prosecution avoid this subject because it believed that it lessened his reliability? Was the subject avoided because Prosecution counsel [REDACTED] considered the account to be false? Whatever the reasons, the Witness's description of this event was not clarified, nor subject to any cross-examination whatsoever [REDACTED]. The statement, in this and in many other respects, has not been subject to any cross-examination or *verbatim* confirmation.

17. (i) Highly incriminating testimony, (ii) recorded in a non-*verbatim* format, by (iii) prosecution investigators rather than an impartial judicial authority, that (iv) appears to be largely based on hearsay and/or unknown sources, and (v) without any cross-examination, and that (incidentally) (vi) could have been tested in some way under Article 56 if the Prosecution had acted with greater diligence, should not be admitted as evidence. The potential for this information produced in these circumstances to mislead far outweighs any weight that could be placed on this information and its mere admission degrades the fairness of the trial and the integrity of the truth-seeking exercise.
18. The Witness's account of events in Mongbwalu in his witness statement is subject to the same considerations. His claims that (i) two weeks following the successful FPLC operation to take control of Mongbwalu, Lendu combatants regrouped in Saio and Pluto to launch a counterattack²³ involving some 5000 to 10000 Lendu combatants (some coming from Kobu, Lipri, Mbau, Katanga et Mulenda); (ii) the Lendu combatants maintained control of Mongbwalu

²² Statement, para.163.

²³ Annex A1, para.135.

between the period of November 2002 to February 2003²⁴; and (iii) that FPLC forces had to leave behind heavy weapons such as a “canon 750 recule”, a “Mi Point 60” and bombs²⁵ make it clear that the information he obtained is not plausible and is further not corroborated by the evidence on the record. No source for this information is provided in the witness statement, and the witness’s account of his [REDACTED] and departure for [REDACTED] seems to suggest that he was not present.²⁶

B. The Witness’s 2014 Statement Contradicts His [REDACTED]

19. The Prosecution has conspicuously not tendered the one and only statement taken from the witness for the specific purposes of this case. The investigators announced this purpose at the outset of their questioning of the witness:

[REDACTED]

[...]

[REDACTED].²⁷

20. The Prosecution has purported not to seek admission of this statement pursuant to Rule 68(2)(c) because “[REDACTED]”.²⁸
21. The Prosecution’s failure to tender the statement that was adduced for the purposes of this case is an unvarnished attempt to cherry-pick what it considers to be the version most incriminating of Mr Ntaganda. In fact, the failure to tender that statement suggests that the true reason for not invoking Article 56 at an earlier stage was to avoid the witness’s credibility being severely undermined during cross-examination, or the witness clarifying his testimony in Mr Ntaganda’s favour. The 2014 statement is also in various

²⁴ Annex A1, para.135-136.

²⁵ Annex A1, para 137.

²⁶ Annex A1, para.128.

²⁷ DRC-OTP-2067-2108 at 2116 l.263-273.

²⁸ Prosecution Application, para.30.

respects, contrary to the Prosecution's assertions,²⁹ inconsistent with this prior statement and [REDACTED]. For example:

- (i) In his 2005 Statement, Witness P-0016 claims to have prepared many [REDACTED] for operations in Fataki, Largu, Katoto et Linga.³⁰ However, in his 2014 Statement, Witness P-0016 says he only did [REDACTED] for two operations in Tchomia and Lipri.³¹
- (ii) In his 2005 Statement, Witness P-0016 claims to have [REDACTED] after receiving [REDACTED] on [REDACTED]³² and returned to [REDACTED] with Bosco Ntaganda.³³ During [REDACTED], Witness P-0016 said to have gone to [REDACTED] after [REDACTED], where he was [REDACTED] and had to leave [REDACTED].³⁴ In his 2014 Statement, he says to have returned to [REDACTED] alone from [REDACTED] on [REDACTED].³⁵
- (iii) During [REDACTED], Witness P-0016 says that the weapons were provided by the Americans,³⁶ whereas he later said they were dropped by the Rwandans.³⁷
- (iv) Witness P-0016 originally claims that he was [REDACTED] during the Mongbwalu operation in November 2002³⁸ but then claims to have gone to [REDACTED] in November.³⁹

²⁹ Prosecution Application, para.25.

³⁰ Annex A1, para.104.

³¹ DRC-OTP-2067-2196 at 2213 l.589-599.

³² Annex A1, para.87.

³³ Annex A1, para.88.

³⁴ Annex B3 at DRC-OTP-2054-1450 l.4-9.

³⁵ DRC-OTP-2067-2267 at 2275 l.279-282.

³⁶ Annex B3 at DRC-OTP-2054-1490 l.4-5 "[REDACTED]".

³⁷ DRC-OTP-2067-2138 at 2149 l. 398 to 2150 l. 418.

³⁸ Annex A1, para.127.

³⁹ DRC-OTP-2067-2267 at 2275 l.279-282.

22. These discrepancies are indicative of a general lack of reliability. Admitting the carefully selected prior recorded testimony under Rule 68(2)(c) without cross-examination of the Witness would be highly prejudicial to the Accused.

C. The associated documents sought to be admitted by the Prosecution in relation to Witness P-0016 lack sufficient indicia of reliability

23. The Prosecution's assertion that the associated documents are authentic and truthful⁴⁰ is without proper foundation. For example, during his 2014 Statement Witness P-0016 commented that the date of the document "[REDACTED]" (Annex B10 of the Prosecution Application)⁴¹ was incorrect.⁴² Witness P-0016 explained that he did prepare the document but that he did not insert the date and someone else did.⁴³ When asked if he noticed this during [REDACTED], he said that he did not see it.⁴⁴ The Prosecution seeks to admit this document under Rule 68(2)(c) even though the Witness himself explained that the date was incorrect and that this discrepancy had gone unnoticed during [REDACTED].

III. The extent to which the statement refers to acts and conduct disfavours admission

24. The Chamber has previously considered that "the 'acts and conduct of the accused' should be given its ordinary meaning and refers to the 'personal acts and omissions, which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged'".⁴⁵ Although such subject-matter does not preclude admission under Rule 68(2)(c), the degree to which such matters are addressed in an uncross-examined statement are a central consideration in assessing whether its admission is appropriate in accordance with the requirements of a fair trial and sound fact-finding.

⁴⁰ Prosecution Application, para.25.

⁴¹ Annex B10 at DRC-OTP-0091-0779.

⁴² DRC-OTP-2067-2334 at 2340, l.198 and 214-215 "[REDACTED]"; "[REDACTED]".

⁴³ DRC-OTP-2067-2334 at 2341, l.223 and 228-229 "[REDACTED] "[REDACTED]".

⁴⁴ DRC-OTP-2067-2334 at 2241, l.230-235 "[REDACTED]".

⁴⁵ ICC-01/04-02/06-1733, para. 22; ICC-01/04-02/06-1667, para.11.

25. The Prosecution's claim that "portions" of Witness P-0016's evidence goes to proof of the acts and conduct of the Accused⁴⁶ is a profound understatement. The witness purports not only to describe Mr Ntaganda's own acts, but also his knowledge at various moments and his attitude. The alleged knowledge in question is directly pertinent to criminal responsibility for the crimes charged.⁴⁷ The prejudicial effect of the admission of such material is not that the information is incriminating, but that this incriminating information will be admitted without any opportunity for the Trial Chamber to observe these incriminating claims being tested, explored and clarified. The Trial Chamber will be receiving the Prosecution's version – and only the Prosecution's version – of the witness's knowledge, with a false imprimatur of reliability.
26. The inappropriateness of admitting the statement in the present case is also reflected in the Prosecution's degree of reliance on this witness's testimony. Its Pre-Trial Brief relies on this witness no less than 200 times, for practically every count brought forth against Mr Ntaganda. As the Prosecution describes Witness P-0016 was [REDACTED] within the UPC and can provide "background information about the Accused, such as his relationship with [REDACTED], [REDACTED] and [REDACTED]".⁴⁸ The undoubtedly highly prejudicial effect to Mr Ntaganda of the admission of such evidence without cross-examination far outweighs any probative value and would be inconsistent with the rights of the accused.

IV. The [REDACTED] does not enhance reliability

27. [REDACTED].

⁴⁶ Prosecution application, para.6.

⁴⁷ See e.g. Annex A, para. 126.

⁴⁸ Prosecution Application, para.35.

CONFIDENTIALITY

28. 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.

CONCLUSION

29. Witness P-0016's 48-page statement and [REDACTED], as well as associated documents, should not be admitted pursuant to Rule 68(2)(c). The necessity of Article 56 measures could have been long ago anticipated which, as a threshold matter, compels denial of the motion. Even if assuming that those measures could not have been anticipated, the 48-page statement is replete with conclusory, unsourced, or hearsay information that is potentially highly incriminating, which is contradicted flatly by evidence heard in this case and that contains no attributes allowing the Trial Chamber to assess weight. The Witness's [REDACTED] concerns issues that go directly to the acts and conduct of the accused, but which was not subject to [REDACTED] that meaningfully [REDACTED]. The Prosecution Application, accordingly, should be rejected.

RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF MARCH 2017



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