



Original: **English**

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

Date: **1 May 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 'Motion under rule 68(3) to admit Witness P-0761's prior recorded testimony and associated material'", 14 November 2016, ICC-01/04-02/06-1632-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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**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to: (i) the *“Motion under rule 68(3) to admit Witness P-0761’s prior recorded testimony and associated material”* submitted by the Office of the Prosecutor (“Prosecution”) on 3 November 2016 (“Motion”),<sup>1</sup> and; (ii) Trial Chamber VI (“Chamber”)’s *“Supplemental decision on matters related to the conduct of proceedings”* issued on 27 May 2016 (“Supplemental Decision on the Conduct of Proceedings”),<sup>2</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Response on behalf of Mr Ntaganda to “Motion under rule 68(3) to admit Witness P-0761’s prior recorded testimony and associated material”**

**“Defence Response”**

1. The Defence does not oppose the admission of Witness P-0761’s signed witness statement to the investigators of the Office of the Prosecutor<sup>3</sup> but opposes the admission of: (i) the two unsigned investigator notes;<sup>4</sup> (ii) the alleged statements to NGO’s;<sup>5</sup> and (iii) the two alleged birth certificates.<sup>6</sup> The investigators’ notes were not affirmed by the witness and the witness does not appear to have any personal knowledge about the availability or otherwise of someone from the Prosecution to counter-sign his statement. The statements to the NGO’s are much more liable to suggestive, leading or even biased questioning than those given to investigators of the Office of the Prosecutor and are, accordingly, not appropriate for admission pursuant to Rule 68(3).<sup>7</sup> The admission of the two alleged birth certificates is not necessary to understand the content of the witness’s statement and the witness gives no

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<sup>1</sup> ICC-01/04-02/06-1609-Conf.

<sup>2</sup> ICC-01/04-02/06-1342.

<sup>3</sup> Witness statement (DRC-OTP-2054-8283).

<sup>4</sup> Screening Note (DRC-OTP-2053-0010) and Investigator’s Note (DRC-OTP-2054-8290).

<sup>5</sup> Witness P-0761’s interview by a non-governmental organisation reported in *“Rape and Sexual violence committed in Ituri, in the Oriental province of the Democratic Republic of Congo”* (DRC-OTP-2062-0374); Witness P-0761’s interview by a non-governmental organisation annexed to Witness [REDACTED]’s Application for victim participation and reparation and one-page note explaining that interview process (DRC-OTP-2066-0154).

<sup>6</sup> [REDACTED]’s birth certificates (DRC-OTP-2051-2066 and DRC-OTP-2054-8289).

<sup>7</sup> T-150 66:2 (“Our position is that this is not a Rule 68(3) governed piece of evidence. It’s not a statement prepared in anticipation of litigation.”)

details enhancing the reliability of those documents. Given the manifest indications that these documents are not reliable, the admissibility of these birth certificates should be assessed on their own merits on the basis of testimonial evidence.

2. The Defence also opposes the Prosecution's indication that it intends to ask questions outside of the scope of any of the Witness P-0761's statements.<sup>8</sup>

**I. Witness P-0761's statement, screening note and related investigator's note**

**A. The Signed Statement**

3. The Defence does not oppose the admission of the witness's signed statement<sup>9</sup> pursuant to Rule 68(3), provided that the requisite formalities are satisfied.

**B. The Investigator's Notes**

4. The two "notes" prepared by investigators cannot properly be described as being "previously recorded testimony" of the witness within the meaning of Rule 68(3). Neither of the statements is signed by the witness. The latter "Investigator's Note" is a statement by an investigator explaining the interview process and why someone was not available to counter-sign the statement.<sup>10</sup> The witness did not make this statement, nor is some of its content within his knowledge. The "Screening Note" was likewise not written, made or signed by the witness, and includes information that is probably beyond his knowledge.<sup>11</sup> These notes cannot properly be deemed "previously recorded testimony" of the witness.

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<sup>8</sup> Motion, para.25.

<sup>9</sup> DRC-OTP-2054-8283.

<sup>10</sup> DRC-OTP-2054-8290.

<sup>11</sup> DRC-OTP-2053-0010.

### C. Statements to NGO's

5. The conditions in which the two statements given to the NGO's were taken are entirely unknown. The witness never signed the alleged statement appearing within the document presented at Annex G<sup>12</sup>, and the name of the interviewer, interpreter or other persons involved in the interview is not provided. No guarantees are provided that the statement was not elicited by way of suggestive, leading or even biased questioning, let alone that the conditions of the interview were minimally necessary to avoid contaminating the witness's account.
6. The person involved in taking the statement behind Annex H<sup>13</sup> is likewise not identified.
7. Although these two documents are undoubtedly statements, the Trial Chamber has previously determined<sup>14</sup> – with which the Prosecution has agreed<sup>15</sup> – that they are to be assessed as “associated documents” as long as they were not themselves prepared for the purposes of litigation. A precondition for the admission of associated documents is that they be genuinely “associated” with the statement being tendered which requires, at the least, that they be necessary to understand the prior recorded testimony being introduced.<sup>16</sup> Neither of these two documents, however, is even mentioned in Witness P-0761's statement.

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<sup>12</sup> DRC-OTP-2062-0374.

<sup>13</sup> DRC-OTP-2066-0154.

<sup>14</sup> Trial Chamber VI, ICC-01/04-02/06-1029, Decision on Motion under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, para.23. See also.

<sup>15</sup> T-150 66:3.

<sup>16</sup> *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.

**D. The birth certificates should not be admitted as “associated documents”**

8. The standard for admitting a document through a witness should be no different whether the witness’s testimony is being received in writing or orally. The two birth certificates are of dubious provenance and reliability. The fact that they are referenced by the witness in his statement does not mean that the Trial Chamber should abdicate its usual evidential gate-keeping function in accordance with Article 69(4).
9. The Prosecution presents no justification for tendering these documents through Witness P-0761 rather than attempting to do so through Witness [REDACTED]. Witness P-0761 was shown one of two – and possibly both – of the birth certificates by the investigators of the OTP, rather than *vice versa*. He appears to have no knowledge of the origins of one of the two certificates, and does not appear to have any information affirming the accuracy of the information in the other birth certificate.<sup>17</sup> His testimony does not enhance the reliability or the admissibility of either birth certificate.

**E. Questioning on subjects outside of the scope of the witness statement and the Prosecution’s witness summary should be disallowed**

10. The Prosecution proposes to ask questions about the alleged presence of the UPC/FPLC and their possession of weapons in or near Bunia in March 2004 and about Mr Ntaganda’s alleged possession of cattle in 2004.<sup>18</sup> The former questions are to be based on a UNMILOB report dated 25 March 2004,<sup>19</sup> and the latter on the basis of a MONUC report from February 2004.<sup>20</sup>
11. The Defence has no notice of this subject-matter or the witness’s potential testimony in this regard. Seeking to elicit this testimony with this witness is

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<sup>17</sup> DRC-OTP-2054-8283, paras.8-9.

<sup>18</sup> Motion, para.25.

<sup>19</sup> Motion, para.25; DRC-OTP-0011-0476.

<sup>20</sup> Motion, para.25; DRC-OTP-0009-0146.

inappropriate, prejudicial and should be precluded.<sup>21</sup> Providing notice by way of a proofing note on the eve of the witness's testimony would also be insufficient and inappropriate.

**F. Variation of time limits under Regulation 35**

12. The Defence takes no position as to whether the Prosecution has established good cause for the lateness of the Motion.

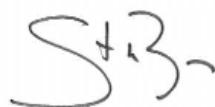
**CONFIDENTIALITY**

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.

**CONCLUSION**

14. The Defence does not oppose the Prosecution's request to tender Witness P-0761's signed witness statement under Rule 68(3); opposes the admission of any other materials pursuant to Rule 68(3), and; opposes the Prosecution's request to elicit subject-matter from a witness for which the Defence has no notice of the witness's anticipated testimony.

**RESPECTFULLY SUBMITTED ON THIS 1<sup>ST</sup> DAY OF MAY 2017**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

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<sup>21</sup> Cf. "Witness preparation protocol", 16 June 2015, ICC-01/04-02/06-652-Anx, para.2.