



Original: **English**

No.: **ICC-01/04-02/06**
Date: **8 September 2015**

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

**Response on behalf of Mr Ntaganda to “Prosecution application under rule 68(3)
to admit the prior recorded testimony and associated documents of Expert Witness
P-0931”**

Source: Defence Team of Mr Bosco Ntaganda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin
Me William St-Michel

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to the submission of the “*Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Expert Witness P-0931*” by the Office of the Prosecutor (“Prosecution”) on 24 August 2015 (“Prosecution Request”),¹ 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 documents of Expert Witness P-0931”

“Defence Response”

INTRODUCTION

1. The Prosecution seeks the admission into evidence of:
 - (i) Witness P-0931’s prior recorded testimony in the *Lubanga* case, more particularly the transcripts dated 17 and 18 June 2009 (Annexes B and C to the Prosecution Request); and
 - (ii) Three associated documents, namely:
 - a. Witness P-0931’s expert report in French and its translation in English (Annexes D and E to the Prosecution Request);
 - b. A map of the Democratic Republic of the Cong (“DRC”) (Annex F to the Prosecution Request); and
 - c. A report dated 27 March 2001 (Annex G to the Prosecution Request).
2. It is the Defence’s understanding that the Prosecution does not seek the admission into evidence of Annexes H and I to its Request.

¹ ICC-01/04-02/06-793.

SUBMISSIONS

3. While it recognises the benefits of admitting a prior recorded testimony under Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) to the expeditiousness of the proceedings, the Defence underscores that reliance on this Rule must remain the exception rather than the rule.
4. It is of paramount importance to meticulously assess the prior recorded testimony sought to be admitted by the Prosecution in order to ensure that: (i) the prior recorded testimony satisfies the requirements set out in Rule 68(3); and (ii) its admission is not prejudicial to the fair trial rights of the Accused.
5. Moreover, the Defence takes the view that only associated documents that have been discussed during, and admitted into evidence as part of the prior testimony of the witness may be admitted into evidence *via* Rule 68(3).
6. Considering that the documents appended in Annexes D, E, F and G to the Prosecution Request have been admitted into evidence in the *Lubanga* case, the Defence does not object to the introduction of these documents in the present proceedings under Rule 68(3).
7. Rule 68(3) provides that the trial chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber if: (i) the individual does not object to the submission of the previously recorded testimony; and (ii) the Parties and the trial chamber have the opportunity to examine the witness during the proceedings.
8. The Defence submits that the requirements set out in Rule 68(3) will be satisfied only if Witness P-0931 is *asked*, at the beginning of the proceedings, whether he stands by what he said during his previously recorded testimony

and whether he does not object to the admission into evidence in the present proceedings of the transcripts of his prior testimony as well as to the admission of the associated documents appended in Annexes D, E, F and G to the Prosecution Request.

9. The Prosecution intends to call Witness P-0931 as the third witness to testify during the first evidentiary block scheduled to commence on 15 September 2015. The Prosecution, the Defence and the Chamber will have the opportunity to examine Witness P-0931 on this occasion. The Defence insists on the necessity for the Prosecution to ask only general and short questions to Witness P-0931 in order to not distort the spirit of Rule 68(3). Such approach is necessary to avoid losing the benefit of expeditiously conducting the testimony of individuals who are present before the trial chamber and who previously testified in other proceedings, especially with respect to witnesses of fact.
10. Consequently, the Defence does not oppose the introduction in the present proceedings of the prior recorded testimony of Witness P-0931 as well as of the associated documents in Annexes D, E, F and G.
11. While it seeks to admit Witness P-0931's prior testimony in the *Lubanga* case *in full* pursuant to Rule 68(3),² the Prosecution asks to exclude some portions of the transcripts of 18 and 19 June 2009, as detailed in footnote 5 of the Prosecution Request and Annex A. The Prosecution clarifies that "the only portions of the transcripts of the prior recorded testimony that are excluded are those relating to other witnesses or administrative matters unrelated to Witness P-0931's evidence".
12. Having carefully reviewed the portions that Prosecution seeks to exclude from Annex B and C, the Defence submits that one extract should not be excluded from the transcript found in Annex C. The extract starting from

² Prosecution Request, para.7.

page 11, line 25 to page 14, line 4 of Annex C is indeed essential to understanding the overall context of Witness P-0931's prior testimony. In this extract, Witness P-0931 explains the contradictions between his report and that of Mr. Prunier concerning Hema ethnicity and the origins of the conflict. Contrary to the Prosecution's submissions, these questions are not limited to administrative matters and directly pertain to Witness P-0931's prior testimony.

13. Lastly, the above position must not be understood as acknowledging the merits of the Prosecution's alternative argument based on Articles 69(2) and (3). The Defence reserves its right to do so in the future.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

ORDER the admission of Witness P-0931's prior recorded testimony and associated documents, provided that Witness P-0931 does not object to their introduction; and

ADMIT into evidence the extract referred to in paragraph 12.

RESPECTFULLY SUBMITTED ON THIS 8TH DAY OF SEPTEMBER 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands