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Date: **24 January 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) to admit the prior recorded testimony of Witness P-0551'", 22 December 2016, ICC-01/04-02/06-1699-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 the "*Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0551*" submitted by the Office of the Prosecutor ("Prosecution") on 1 November 2016 ("Application")[1] and the Chamber decision granting the Defence's request for a variation of the applicable time limit to respond to the latter,[2] Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Response on behalf of Mr Ntaganda to "Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0551"

"Defence Response"

INTRODUCTION

1. The Defence opposes the Prosecution Application to admit Witness P-0551's statements and related annexes ("Witness P-0551's Prior Recorded Testimony") as evidence without cross-examination.

2. The addition of this witness is manifestly untimely. The Prosecution did not disclose this person's statements to the Defence – let alone list him as a witness – until 1 November 2016. The Prosecution was in a position to know, unlike the Defence, the relevance of this witness's statements but allowed witnesses to come and go without this person's statements being disclosed. The prejudice arising from this tardy disclosure and addition as a witness is as obvious as was the deliberateness of the Prosecution's previous choice not to call him as a witness. The Prosecution's claim that this witness's relevance was not "entirely clear" until "after P-0888 testified"[3] is an unduly low standard for the addition of witnesses that would undermine the fairness of the trial. The insufficiency of this standard is particularly evident here, given that the Defence could and probably would have included questions to certain witnesses if it had known that Witness P-0551 was to be a witness in this case, or even if it just had

[1] ICC-01/04-02/06-1611-Conf.
[2] Email from the Chamber to the parties and participants, 16 November 2016, 13h36.
[3] Prosecution Application, para.19.

disclosure of his statement. Adding this witness now is therefore concretely prejudicial and should not be permitted.

3. If the Chamber decides otherwise, cross-examination should be required. The interests of justice are not served by depriving the Defence of the opportunity to pose questions to the witness, *inter alia*, concerning issues that have arisen during the cross-examination of other Prosecution's witnesses. The witness's statements manifestly do not address many of those issues. Whether the witness himself, as the Prosecution claims, is unbiased or truthful is immaterial; what matters is whether cross-examination would ensure that a balanced picture emerges of the information of relevance. The need to do so here is particularly important not only in light of the circumstances described above, but also because the statement itself was conducted by the Prosecution *ex parte* and with no *verbatim* record of questions and answers.

PROCEDURAL BACKGROUND

4. On 9 October 2014, the Prosecution was ordered by the Chamber to provide by 2 March 2015 the final version of its List of Witnesses and List of Evidence.[4] On 22 April 2015, the Prosecution was ordered to "promptly file an updated List of Evidence into the case record whenever amendments to it are made" considering that it "was unnecessary to rule specifically on amendments to the List of Evidence". The Chamber also ruled that the "Defence may at any time challenge the use of items subsequently added to the list of evidence on the basis that it received unduly late notice of them or had inadequate time to prepare". In this regard, the "Chamber may consider, among other factors, how long after the Chamber's deadline the Prosecution took to add a particular item to its List, and the reason for that late notice, in its assessment as to whether the item can be used at trial".[5]

[4] ICC-01/04-02/06-382, p.7.
[5] ICC-01/04-02/06-T-19-ENG, 11:7-12:7.

5. Witness P-0551's Prior Recorded Testimony was disclosed to the Defence pursuant Rule 77 on 1 November 2016. This was after Witness P-0888 had already testified and just a week before the testimony of Witnesses P-0898, P-0758 and P-0883.

SUBMISSIONS

I. No good cause has been established by the Prosecution for the late addition of Witness P-0551 to its List of Witnesses

A. Applicable law and principles

6. Regulation 35(2) of the Court ("Regulations") permits a Chamber to:

> 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 to file the application within the time limit for reasons outside his or her control*.[6]

7. The addition of a witness on the Prosecution's List of Witnesses – particularly when combined with disclosure of two previously undisclosed statements – is prejudicial to the Defence and trial fairness. The Prosecution has been able to mould its case with knowledge of this witness's statements, and to defer the choice of whether to call this witness depending on how the case unfolds. Conversely, the Defence has conducted its cross-examinations in ignorance of the statements, let alone the Prosecution's choice to call this witness. These statements are manifestly relevant to the testimony of other witnesses, thus depriving the Defence (but not the Prosecution, which has known about these statements all along) of addressing those issues in its cross-examinations.

8. The criteria developed at the ICTY for deciding such a request include: (i) whether the party showed a good cause; (ii) the stage of the proceedings; (iii) whether granting the amendment would result in undue delay of the

[6] Italics added.

proceedings;[7] (iv) repetitive or cumulative nature of the testimony; (v) the complexity of the case; (vi) on-going investigations; (vii) translation of documents and other materials; (viii) whether the moving party has exercised due diligence in identifying proposed witnesses at the earliest possible moment in time;[8] and (xiii) the burden placed on the other party by the late addition of witnesses.[9]

9. The Chambers have thus denied motions for amendment of lists of exhibits and witnesses due to lack of good cause shown by the Prosecutor,[10] or the party's failure to provide convincing explanation for the inability to seek the addition of the witness to the list earlier.[11] The addition of one witness was denied, even in the absence of undue burden on the Defence, in light of the Prosecution's "failure to provide a convincing explanation for its inability to seek the addition of Slobodan Lazarević to its list of witnesses earlier".[12]

B. Permitting the addition of Witness P-0551 would prejudice the fairness of the trial

10. The Prosecution Application was filed long after the 2 March 2015 deadline for listing its witnesses. The deadline exists for the purpose of ensuring that the Defence, in principle, has knowledge of the entirety of the Prosecution case before it proceeds. This enhances various aspects of fairness in an adversarial

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[7] *See, e.g., Prosecutor v. Karadzić*, IT-95-5/18-T, Decision on Prosecution's Motion for Leave to Amend its List to Add Witness KDZ597, 30 June 2010, para.4.

[8] *See, e.g., Prosecutor v. Lukić et al.*, IT-98-32/1-T, Decision on Prosecution Motion to Amend Prosecution's Witness List (Dr. Fagel), 3 November 2008, p. 3.

[9] *Prosecutor v. Gotovina et al*, IT-06-90-T, Reasons for the Decision on the Prosecution's Motion to Amend Its Witness List", 27 May 2008, para.8; *Prosecutor v. Haradinaj et al*., IT-04-84-T, Decision on the Prosecution's Request to Add Two Witnesses to Its Witness List and to Substitute One Witness for Another, 1 November 2007, para.4; *Prosecutor v. Milutinović et al*., IT-05-87, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Philips and Shuan Byrnes, 12 March 2007, para.18; *Prosecutor v. Mrkšić et al.*, IT-95-13/1, Decision on Prosecution Motion to Amend Its Rule 65ter List", 6 June 2006, para.6.

[10] *Prosecutor v. Haradinaj et al*., IT-04-84-T, Decision on the Prosecution's Request to Add Two Witnesses to Its Witness list and to Substitute One Witness for Another, 1 November 2007, para.7;

[11] *Prosecutor v. Mrkšić et al*., IT-95-13/1, Decision on Prosecution Motion to Amend Its Rule 65 *ter* List, 6 June 2006, para.6.

[12] Prosecutor v. *Mrkšić et al.*, IT-95-13/1, Decision on Prosecution Motion to Amend Its Rule 65ter List", 6 June 2006, para.6.

trial, including allowing the Defence to conduct cross-examinations on the basis of the Prosecution case as it will be presented. The Prosecution waited not only until mid-way through its case, but until almost the end of its case and, in particular, after the testimony of witnesses who could have been cross-examined about Witness P-0551's statements, and, indeed, after most of its witnesses have been heard. The Prosecution nevertheless asserts that "it is in the interest of justice to vary the time limit of 2 March 2015 for submission of the Prosecution's list of witnesses and related evidence to allow admission of P-0551's prior testimony" and that "there is also good cause to do so".[13]

11. The Prosecution has failed to show good cause for its failure to add this witness much earlier. No explanation has been provided for not having disclosed Witness P-0551's statement earlier, let alone for its failure to have identified this person as an intended witness long before November 2016. Witness P-0551 was not a recently discovered witness; on the contrary, he gave his first statement to the Prosecution between 21 and 23 March 2010.[14]

12. The Prosecution also knew perfectly well the anticipated testimony of Witnesses P-0888, P-0758, P-0898 and P-0883. The Prosecution (unlike the Defence) was in a position to assess the relevance of Witness P-0551's potential testimony to those witnesses. Long before the filing of its List of Witnesses, the Prosecution had [REDACTED].[15] Further, the Prosecution knew from its experience in the *Lubanga* case that school records were an important element of its case.[16] The Prosecution, accordingly, had ample information to decide whether (or not) to list Witness P-0551 as a witness and, just as importantly, to subject itself to the obligation to disclose his statement to the Prosecution. It chose to do neither.

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[13] Prosecution Application, para.5.
[14] Annex 1, DRC-OTP-1054-0031.
[15] DRC-OTP-2090-0701.
[16] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 70 of the Statute, ICC-01/04-01/06-2842, para.161, 237, 342, 343, 399, 409, 411, 422, 439, 462, 463 and 464.

13. The Prosecution's claim that the witness's relevance only became "entirely clear" "[REDACTED]"[17] speaks for itself. The Prosecution evidently knew that Witness P-0551 was a relevant witness but made a tactical decision not to list the witness or to disclose his statement. Only after testimony turned out worse than expected for the Prosecution, apparently, did it decide that it needed to buttress the testimony of these witnesses with Witness P-0551. If "[REDACTED]"[18] then this should have been fully apparent before the testimony of these witnesses.

14. Permitting the Prosecution to proceed in this manner is highly prejudicial to the Defence and to the fairness of the proceedings. No showing at all has been made by the Prosecution explaining why the relevance of this witness's testimony only became apparent during their testimony in a way that was unforeseeable from their own statements. If the Prosecution wanted to call this evidence, then the Defence should have had equal access to the witness's statements and an equal opportunity to ask questions of other witnesses based thereon.

15. The Defence has been deprived of those opportunities. Such questions could have been posed both in order to test those witnesses credibility, but also to test Witness P-0551 credibility and reliability. The prejudice is particularly egregious given that the Prosecution itself justifies its application to add this witness based on the testimony of Witness P-0888.

II. Witness P-0551's Prior Recorded Testimony should not be admitted without cross-examination

16. The prejudice would be even greater if Witness P-0551's Prior Recorded Testimony is allowed into evidence without cross-examination. The prior recorded testimony of a witness who is not present before the Court can be admitted into evidence without cross-examination pursuant Rule 68(2)(b). A

[17] Prosecution Application, para.19.
[18] Prosecution Application, para.11. See also, para.19 and 20.

condition for such admission is that the statement "goes to proof of a matter other than the acts and conduct of the accused." Even if this condition is satisfied, Trial Chamber is further required to assess whether the statement:[19]

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

A. To be admitted pursuant Rule 68(2)(b) Witness P-0551's Prior Recorded Testimony must go to proof "other than the acts and conduct of the accused"

17. The phrase "acts and conduct" is assessed in relation to the charges against an accused person. The broader and more extended the forms of liability alleged, the greater the scope of information that will pertain to "acts and conduct." As stated by an ICTY Trial Chamber interpreting this identical phrase in a similarly-worded provision:

> Additional caution must be exercised where the Accused is charged with individual responsibility for the acts and conducts of others. The Appeals Chamber has held that the phrase "acts and conduct of the accused as charged in the indictment: in Rule 92 *bis* should also be interpreted to mean the acts and conduct of the accused "which establish his responsibility for the acts and conduct of … others." Thus, where – as here – a joint criminal enterprise theory of individual criminal responsibility is alleged, and the accused is "therefore liable for the acts of others in that joint criminal enterprise," Rule 92 *bis*(A) also excludes any written statement which goes to any act or conduct of the accused upon which the prosecution relies to establish:
>
> (a) that he had participated in that joint criminal enterprise, or
>
> (b) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[20]

[19] Rule 68(1) of the Rules.

[20] *Popovic et al*., Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92*bis*, 12 September 2006, para.12.

18. Witness P-0551's Prior Recorded Testimony is not limited to evidence related to school records and the school system in DRC. It includes accusations of criminal misconduct by UPC militiamen.[21] These may be allegations that encompass the actions of proximate subordinates of the Accused that could give rise to liability under Article 28. The Prosecution could avoid any trespass on the acts and conduct prohibition by expressly stating that none of Witness P-0551's testimony will be relied upon for this purpose, but has not done so. In the absence of such an affirmation, the contrary should be presumed for the purposes of the Prosecution Application.

B. Witness P-0551's statement is neither cumulative nor corroborative

19. A fair trial requires the Defence, and not just the Prosecution, to have an opportunity to ask questions to this witness.

20. Witness P-0551 is in a position to give information regarding school records that are a matter of interest not only to the Prosecution, but also to the Defence. The Defence may – and very likely will – wish to adduce additional information that is highly relevant to lines of cross-examination of Prosecution's witnesses. The Prosecution should not be permitted to unilaterally decide the scope of the witness's testimony merely by resort to not having the witness open for cross-examination. The information that could be adduced could be highly relevant to the cross-examinations of Witnesses P-0888, P-0758, P-898 and P-0883.

21. Admitting Witness P-0551's Prior Recorded Testimony pursuant 68(2)(b) would exacerbate the prejudice arising from the admission of his testimony in the first place.

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[21] Annex 2, DRC-OTP2095-0376, para.26 : « [REDACTED] » ; « [REDACTED] » ; para.32 : « [REDACTED] » ; para.35 : « [REDACTED] ». *See also* Prosecution Application, para.32 (iv) where the Prosecution itself refers to Witness P-0551's Prior Recorded Testimony describing "[REDACTED]".

C. The foregoing matters are disputed

22. School records used in Ituri, the way they are created, the impact of the conflict during the period of the charges on school attendance, administration of the schools as well as regulation of school records have been extensively discussed with several witnesses among whom the following alleged former child soldiers, namely Witnesses P-0888, P-0758, P-0883 and P-0898.

23. The Prosecution has challenged the reliability of the school records of these former child soldiers when the Defence used them to either demonstrate that these witnesses were aged 15 and over or for impeachment purpose regarding their presence in certain schools. Conversely, the Prosecution has tried to rely on these records when deemed favourable to its case.

24. Witness P-0551's testimony and its implications are, accordingly, disputed. The only proper way to admit this information onto the record is with the benefit of questions posed by the Defence, not only those questions that are not recorded in the witness' statements being tendered to the Trial Chamber.

D. Reliability of Witness P-0551's Prior Recorded Testimony

25. Witness P-0551's Prior Recorded Testimony meets – barely – the minimum threshold of reliability for admission pursuant to Rule 68(2)(b). However, the statements contain no verbatim record of answers, no verbatim records of questions, and were not conducted in the presence of any neutral third party, let alone anyone representing the interests of the Defence.

26. Further, his first statement contains no mention of certain militiamen's affiliation,[22] whereas these militiamen are suddenly identified as UPC in his

[22] Annex 1, DRC-OTP-1054-0031, para.14: « [REDACTED] » ; para.27 : «[REDACTED] »; para.30 : « [REDACTED] »

second statement.[23] He also provides little detail about how and why he was appointed to the poses that he held, nor is a detailed c.v. provided.

27. Finally, the Defence notes that the accompanying certification[24] does not indicate the basis of the certifiers alleged capacity to do so. The Defence posits that such information should be provided to the parties, participants and the Chamber.

E. Cross-examination is a minimum requirement of fairness under the circumstances

28. The Prosecution argues that "[a]dmitting the rule 68(2)(b) prior recorded testimony advances the interests of justice and contributes to a fair and expeditious trial by enabling the presentation of evidence in a more concise and streamlined manner without causing any prejudice to the fair trial rights of the Accused."[25]

29. As stated in the recent *Partially Dissenting Opinion of Judge Kuniko Ozaki* in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*,

> "[e]xpeditiousness must be achieved in a manner consistent with the statutory framework including, in particular, with the fairness and integrity of the proceedings.[26] Indeed, Rule 68 itself explicitly emphasises, both directly in Rule 68(1) and by way of reference to Article 69(2) and (4), the requirement that its application not be prejudicial to or inconsistent with the rights of the accused."[27]

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[23] Annex 2, DRC-OTP2095-0376, para.26 : « [REDACTED] » ; « [REDACTED] » ; para.32 : « [REDACTED] » ; para.35 : « [REDACTED] ». *See also* Prosecution Application, para.32 (iv) where the Prosecution itself refers to Witness P-0551's Prior Recorded Testimony describing "[REDACTED] ".

[24] DRC-OTP-2099-0023.

[25] Prosecution Application, para.29.

[26] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", ICC-02/11-01/15-744 ("Judgment, ICC-02/11-01/15-744"), para.62.

[27] *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b)

30. And,

> "Article 69(2) of the Statute gives effect to the principle of orality, 'making in-court personal testimony the rule'.[28] Departures from that principle, including through the use of Rule 68, are subject to a cautious case-by-case assessment to ensure that the approach is not prejudicial to or inconsistent with the rights of the accused, or with the fairness of the trial more generally[29]."[30]

31. In the view of Judge Kuniko Ozaki,

> "such a framework should also result in the admission of prior recorded testimony under Rule 68 being considered exceptional, and, as such, requiring especially careful reasoning on the part of a Trial Chamber. As previously expressed by the former,[31] the primacy of the principle of orality is founded on the importance which should be attached to direct observation and oversight on the part of a chamber of the giving of a witness's evidence, including from the perspective of evaluating the credibility of the account."[32]

32. In this regard, Judge Kuniko Ozaki drew a distinction between Rule 68(2) and (3),

> "noting that in the latter case the witness will be present before the chamber and both the parties and the Judges will have the opportunity to examine the witness."[33] Accordingly, "a 'greater discretion' is accorded in respect of the assessment under Rule 68(3)".[34]

33. The Defence commends these statements to the Trial Chamber as a correct statement of the law that expresses appropriate caution to the admission of

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and 68(3)", Partially Dissenting Oppinion of Judge Kuniko Ozaki, ICC-02/11-01/15-744-Anx, para.6 ("Partially Disenting Opinion, ICC-02/11-01/15-744-Anx").

[28] Judgment, ICC-02/11-01/15-744, para.65, citing to Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, para.76. *See also* Judgment, ICC-02/11-01/15-744, para.65 and 69, citing to Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, para.78 (referring to the 'general requirement of in-court personal testimony').

[29] Judgment, ICC-02/11-01/15-744, para.65 and 69, citing to Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, para.78 and 81, respectively.

[30] Partially Dissenting Opinion, ICC-02/11-01/15-744-Anx, para.7.

[31] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, ICC-01/05-01/08-1028, para. 7. *See similarly* Bemba OA5 OA6 Judgment, ICC-01/05-01/08-1386, para. 76.

[32] Partially Dissenting Opinion, ICC-02/11-01/15-744-Anx, para.8.

[33] Judgment, ICC-02/11-01/15-744, para.69 and 79.

[34] Partially Dissenting Opinion, ICC-02/11-01/15-744-Anx, para.10, quoting Judgment, ICC-02/11-01/15-744, para.68.

testimony without cross-examination, particularly in all the circumstances presented here.

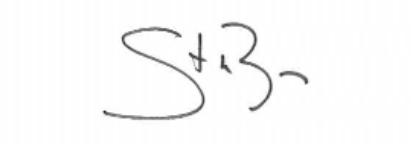
CONFIDENTIALITY

34. Pursuant to Regulations *23bis* (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

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

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF JANUARY 2017



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