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

Date: **02 March 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 motion under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0773’”, 21 November 2016, ICC-01/04-02/06-1642-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 motion under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0773*” submitted by the Office of the Prosecutor (“Prosecution”) on 4 November 2016 (“Motion”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution’s motion under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0773”

“Defence Response”

1. The Defence opposes the Prosecution request to admit Witness P-0773’s statement (“Statement”) as evidence without cross-examination.

PROCEDURAL BACKGROUND

2. After the Prosecution submitted its witness list for the 7th evidentiary block indicating Witness P-0758, Witness P-0773, and Witness P-0761 as *viva voce* witnesses,² the Trial Chamber recommended that the Prosecution consider whether Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”) could be used to facilitate submission of the evidence of Witnesses P-0761 and P-0773.³ On 4 November 2016, the Prosecution requested that only Witness P-0773’s Statement be received without cross-examination pursuant to Rule 68(2)(b),⁴ while proposing that Witness P-0761 be heard by the Chamber as a Rule 68(3) witness.⁵

SUBMISSIONS

3. 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) only where it “goes to proof of a matter other than the acts and

¹ ICC-01/04-02/06-1611-Conf.

² Email from the Prosecution to the Chamber, 7 October 2016, 9h53.

³ Email from the Chamber to the Parties and participants, 17 October 2016, 14h47.

⁴ ICC-01/04-02/06-1611-Conf.

⁵ ICC-01/04-02/06-1609-Conf.

conduct of the accused.” Even if this condition is satisfied, Trial Chamber is further required to assess whether the statement⁶:

- 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.

I. Witness P-0773’s statement is not confined to matters “other than the acts and conduct of the accused” as required by Rule 68(2)(b)

4. 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.⁷

⁶ Rule 68(1) of the Rules.

5. Witness P-0773's statement is not limited to matters "other than the acts and conduct of the accused." The statement is being used by the Prosecution to prove that Mr Ntaganda observed a person at a UPC training camp who was [REDACTED].⁸ The statement therefore goes to proof of his "requisite intent" in relation to a charged crime.
6. Witness P-0758's [REDACTED] at the relevant time depends on two facts: (i) [REDACTED]; and (ii) [REDACTED]. Witness P-0773 asserts that the former was "[REDACTED]"⁹ and that the latter was "[REDACTED]."¹⁰ The purported implication of Witness P-0773's statement is, accordingly, that Witness P-0758 was [REDACTED] at the time she was [REDACTED].
7. Mr Ntaganda alleged inaction in the face of such knowledge constitutes "acts and conduct." The statement is therefore not admissible under Rule 68(2)(b).

II. The criteria for admissibility under Rule 68(2)(b)(i) are not satisfied

8. The discretionary criteria set out in Rule 68(2)(b)(i) also do not favour the admission of Witness P-0773's statement.
- A. Witness P-0773's statement is neither cumulative nor corroborative; on the contrary, there are numerous contradictions, some of which need to be explored more fully**
9. The Prosecution asserts that "Witness P-0773's prior testimony is corroborative in nature" and is "confined to corroborating the expected *viva voce* testimony of Witness P-0758 and Witness P-0761."¹¹ This submission, in

⁷ *Popovic et al.*, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92bis, 12 September 2006, para.12.

⁸ Prosecution's Pre-Trial Brief, para.482 [REDACTED].

⁹ DRC-OTP-2057-0127 ("Witness P-0773's Statement"), para.14.

¹⁰ Witness P-0773's Statement, para.9.

¹¹ Prosecution Motion, para.3.

itself, bespeaks the need for cross-examination so that the Defence has a proper opportunity to show that this claim is incorrect.

10. Witness P-0773 contradicts the testimony of Witnesses P-0758 and P-0761, as well as the statement of Witness P-0806, in respect of almost every detail of which Witness P-0773 has direct knowledge:

- Witness P-0773 says that Witness P-0758 was living with [REDACTED] at the time of [REDACTED]¹² – a fact confirmed by Witness P-0806;¹³ Witness P-0758 claims that she was living with [REDACTED];¹⁴ even Witness P-0761, [REDACTED], gives a different account, saying that Witness P-0758 was living with someone named “[REDACTED]” who subsequently became Witness P-0761’s [REDACTED];¹⁵
- Witness P-0773 says that the town in which Witness P-0758 lived at the time of her [REDACTED] was [REDACTED],¹⁶ a fact confirmed by Witness P-0806,¹⁷ whereas Witnesses P-0758 and P-0761 both claim¹⁸ that Witness P-0758 was residing in [REDACTED] at the time;
- Witness P-0773 implicitly confirms that Witness P-0758 was abducted from Witness P-0806’s house,¹⁹ whereas Witness P-0758 claims that she was abducted at [REDACTED]; the Defence should have the opportunity of adducing further information from P-0773 on this important contradiction;²⁰
- Witness P-0773 says that “[Witness P-0758] had been taken very late,”²¹ apparently referring to the war and gives a description of conditions

¹² Witness P-0773’s statement, para.13: “[REDACTED]”.

¹³ DRC-OTP-2058-1087 (“Witness P-0806’s statement”), paras.12-17: “[REDACTED]”.

¹⁴ Witness P-0758’s statement, paras.7-8: “[REDACTED]”.

¹⁵ DRC-OTP-2054-8283 (“Witness P-0761’s statement”), para.11: “[REDACTED]”.

¹⁶ Witness P-0773’s statement, para.13: “[REDACTED]”.

¹⁷ Witness P-0806’s statement, paras.12-17: “[REDACTED]”.

¹⁸ Witness P-0758’s Statement, para.7: “[REDACTED]”.

¹⁹ Witness P-0773’s statement, para.13: “[REDACTED]”.

²⁰ Witness P-0758’s statement, paras.7-8: “[REDACTED]”.

²¹ Witness P-0773’s statement, para.15.

(as would be explored during cross-examination) that is not consistent with the year 2002; Witnesses P-0758 and P-0761 categorically assert, however, that she was [REDACTED] in [REDACTED], respectively, which is not consistent with the conditions described by Witness P-0773;²²

- Witness P-0773 says that Witness P-0758 had gone to secondary school for two years before being allegedly [REDACTED],²³ and Witness P-0806 confirms that Witness P-0758 was in [REDACTED] at the time and specifically states that the reason for Witness P-0758 going to live with her [REDACTED] was that so she could attend secondary school;²⁴ Witness P-0761, on the other hand, asserts that Witness P-0758 was still in [REDACTED] at the time of her [REDACTED];²⁵ and
- Witness P-0773 says that Witness P-0758 came to her immediately after her alleged escape from the UPC but stayed with her only briefly before [REDACTED] came to [REDACTED];²⁶ Witness P-0758 says that she went directly to [REDACTED] and then lived with [REDACTED],²⁷ who, curiously, makes no mention of Witness P-0758 living with him.²⁸

11. The Trial Chamber should have the opportunity of observing at least one of the two witnesses whose statement flatly contradicts the testimony of Witness P-0758 concerning the circumstances of her alleged [REDACTED]. None of the foregoing contradictions is explained, as the Prosecution tries to argue, “by the distance of Witness P-0773 to certain events, or her basis of knowledge”.²⁹ The mere fact that the Prosecution urges this explanation on

²² Witness P-0758’s statement, para.8: “[REDACTED]”.

²³ Witness P-0773’s statement, para.11: “[REDACTED]”.

²⁴ Witness P-0806’s statement, para.11 : “[REDACTED]”.

²⁵ Witness P-0761’s statement, para.10: “[REDACTED]”.

²⁶ Witness P-0773’s statement, paras.19-21: “[REDACTED]”.

²⁷ Witness P-0758’s statement, para.119: “[REDACTED]”.

²⁸ Witness P-0761’s statement, para.21: “[REDACTED]”.

²⁹ Prosecution Motion, para.16(ii).

the Trial Chamber – and asks that this explanation be accepted – further underscores the need for cross-examination.

B. The foregoing matters are disputed, as is the inference that the Prosecution wishes the Trial Chamber to draw

12. Witness P-0758's [REDACTED] at the time of [REDACTED] – which is a function of the date of [REDACTED] and [REDACTED] – is disputed. There are strong indications that her statement arises from concertation with [REDACTED] concerning [REDACTED] at the relevant time.
13. Witness P-0758's first victim application form indicates: (i) [REDACTED] as being [REDACTED] ; (ii) that the date of [REDACTED] was in [REDACTED] 2003; and (iii) that she was [REDACTED] at the time of that event.³⁰ She also confirms those facts in a statement to an NGO,³¹ which predated her first victim application form.³²
14. Only after the [REDACTED] Pre-Trial Chamber had rejected her application to participate on the basis that she was [REDACTED] at the time of the events did [REDACTED] and [REDACTED] change. A [REDACTED] was procured indicating [REDACTED] to be [REDACTED] rather than [REDACTED].³³ Witness P-0761 was apparently involved in procuring this document and he even acknowledges having had direct personal contact with the person responsible for issuing the [REDACTED] – “who came to see me that night.”³⁴ No [REDACTED] or [REDACTED] pre-dating the rejection of her victim application form appears to have been produced.

³⁰ DRC-OTP-2078-2255.

³¹ DRC-OTP-2062-0374, pages 12ff.

³² DRC-OTP-2066-0154.

³³ See DRC-OTP-2066-0172 and DRC-OTP-2066-0174.

³⁴ Witness P-0761's statement, para.8.

15. A cover letter to the Court written by a person whose identity has been redacted dated [REDACTED] providing this [REDACTED] gives no indication that Witness P-0758 erred as to date of her [REDACTED]. The first indication that the [REDACTED] occurred in 2002 rather than in 2003 is a “Declaration” by Witness P-0758’s [REDACTED], Witness P-0761, dated [REDACTED], stating that the [REDACTED] occurred on [REDACTED] 2002. Curiously, a new victim application form bearing this exact same date – [REDACTED] – was apparently signed by Witness P-0758 correcting the date of [REDACTED] to “[REDACTED] 2002”.³⁵
 16. Witness P-0758’s testimony is unreliable. Her assertions are therefore materially in dispute and there is a strong evidential basis for this dispute. Furthermore, there are indications that Witnesses P-0758 and P-0761 are concerting their stories. The fact that they [REDACTED] and that [REDACTED] makes it harder to uncover inconsistencies between the two witnesses in a way that will allow the Chamber to determine the reliability of their stories. In these circumstances, it is all the more important that the Defence be given the opportunity to cross-examine Witness P-0773.
- C. Witness P-0773’s statement is sufficiently reliable for admission, but adducing further information is in the interests of justice**
17. The Defence accepts that the statement is sufficiently reliable for admission pursuant to Rule 68(2)(b). Nonetheless, there are further details that could have been adduced that would shed further light on the potential for [REDACTED] between Witnesses P-0758 and P-0761, and the reliability of the former’s statement.

³⁵ See DRC-OTP 2098-0057, p.0055.

D. The interests of justice are not well-served by adducing the testimony of Witness P-0773 in a less expositive manner than the testimony of Witness P-0761

18. The Trial Chamber previously urged the Prosecution to consider whether Rule 68(2)(b) could be used to facilitate submission of the evidence of both Witnesses P-0761 and P-0773. Instead, the Prosecution chose to call the witness with whom there are evident indications of concertation, while sidelining the other whose testimony is more inconsistent with that of Witness P-0758. The consequence is that the Trial Chamber will be deprived of the opportunity of observing and asking question to the two witnesses who contradict Witnesses P-0758 and P-0761.
19. The consequence, if not the purpose, of these choices is not primarily to streamline proceedings but rather to diminish the contradictory information placed in front of the judges.³⁶ The Prosecution is perfectly entitled, arguably, to make such choices in an adversarial trial; however, the Chamber should insist that rule designed to save time does not have the effect of minimizing the weight that can be accorded to exculpatory evidence.

CONFIDENTIALITY

20. 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.

³⁶ Prosecution Motion, para.23.

RELIEF SOUGHT

21. In light of the above submissions, the Defence respectfully requests that the Chamber **REJECT** the Motion.

RESPECTFULLY SUBMITTED ON THIS 02ND DAY OF MARCH 2017

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands