

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **16 June 2016**

**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  
With Confidential Annexes A-E**

**Public redacted version of “Prosecution application under rule 68(3) to  
admit the prior recorded testimony and associated documents of  
Witness P-0894”, 19 May 2016, ICC-01/04-02/06-1326-Conf**

**Source:** Office of the Prosecutor

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

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**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## Introduction

1. The Office of the Prosecutor ("Prosecution") requests that Trial Chamber VI ("Chamber") admit into evidence the prior recorded testimony of Witness P-0894 under rule 68(3) of the Rules of Procedure and Evidence ("Rules").
2. Specifically, the Prosecution seeks to admit Witness P-0894's statement and the two sketches annexed to this statement, pursuant to rule 68(3) of the Rules as part of his testimony. These documents are relevant and Witness P-0894 will be asked to confirm their accuracy at the beginning of his testimony.<sup>1</sup>
3. Witness P-0894 will be the third witness to testify during the fifth evidence block, which is scheduled to commence on 6 June 2016. As such, the Parties and Chamber will have the opportunity to examine this witness in the course of these proceedings. The admission of the prior recorded testimony of Witness P-0894 will not be prejudicial to the rights of the Accused.
4. The admission of the prior recorded testimony of Witness P-0894 will enhance the expeditiousness of the proceedings by reducing the length of his in-court testimony. Should this application be granted, the Prosecution intends to conduct a brief supplementary examination of Witness P-0894, as provided for under rule 68(3), to elicit limited, focused *viva voce* evidence after Witness P-0894 has confirmed the accuracy of his prior recorded testimony.

## Confidentiality

5. The filing is classified as Confidential pursuant to regulation 23*bis* (1) of the Regulations of the Court because it contains confidential information relating

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<sup>1</sup> ICC-01/04-02/06-619, para.43.

to a Prosecution witness. The Prosecution will file a public redacted version of this filing.

### **Prosecution's Submissions**

6. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where the individual does not object, and the Parties and Chamber have the opportunity to examine the witness. The Prosecution considers that Witness P-0894 is an appropriate witness for the procedure under rule 68(3), which is consistent with the Chamber's guidance for the Prosecution to identify additional witnesses, including Witness P-0894, to whom this procedure may apply.<sup>2</sup>
7. In its Decision on the conduct of proceedings, the Chamber ordered that the calling party file an application with copies of the previously recorded testimony, identifying the precise passages it wishes to tender into evidence, and other materials referred to in these passages that are available to the calling party and, without which, the passages would not be understandable.<sup>3</sup>
8. Accordingly, attached as Annex A to this application, is a list of the materials that the Prosecution seeks to admit into evidence under rule 68(3). This list sets out the passages of Witness P-0894's witness statement<sup>4</sup> that the Prosecution seeks to admit and two sketches<sup>5</sup> by Witness P-0894, which are annexed to this statement.

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<sup>2</sup> Email from the Chamber to the Parties and participants on 4 May 2016 at 13:11.

<sup>3</sup> ICC-01/04-02/06-619, para.42.

<sup>4</sup> DRC-OTP-2076-0194.

<sup>5</sup> DRC-OTP-2076-0211 and DRC-OTP-2076-0212.

9. Also listed in Annex A to this application are the other materials necessary to understand Witness P-0894's prior recorded testimony, namely Witness P-0894's *Demande de participation pour les victimes* ("Victim Application Form").<sup>6</sup>
10. In the course of his interview with the Prosecution, Witness P-0894 was shown this Victim Application Form. He commented upon specific inconsistencies between the information recorded in this form and his statement, and provided an explanation for these inconsistencies.<sup>7</sup> As directed by the Chamber, the Prosecution attaches this document as it may be necessary for a complete understanding of the witness' prior recorded testimony.<sup>8</sup> However, the Prosecution is not seeking the admission of this document.
11. In his statement, Witness P-0894 provides information on, *inter alia*: the background to the conflict in Ituri and its ethnic dimension; two attacks by the UPC on Mongbwalu [REDACTED]; [REDACTED];<sup>9</sup> the death of Abbé Bwanalungbwa; and [REDACTED]. In his statement, Witness P-0894 also explains the accompanying sketches that he drew [REDACTED]. Finally, he explains certain inconsistencies in the information that was recorded in his Victim Application Form.
12. The Prosecution is seeking to admit the majority of Witness P-0894's statement into evidence under rule 68(3) of the Rules. This statement contains limited redactions to identifying and contact information of his family members and innocent third parties, and to the names of Prosecution staff who are based in or travel frequently to the field.

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<sup>6</sup> DRC-OTP-2090-0099.

<sup>7</sup> DRC-OTP-2076-0194 at 0208, paras. 62-68.

<sup>8</sup> ICC-01/04-02/06-619, para.42.

<sup>9</sup> ICC-01/04-02/06-503-Conf-AnxA, para. 142.

13. This statement was voluntarily given by Witness P-0894.<sup>10</sup> He attested to it being true to the best of his recollection and knowledge.<sup>11</sup> It is relevant and reliable. Further, Witness P-0894 will be asked to confirm the accuracy of his statement and the sketches annexed to it.<sup>12</sup>

14. The admission of Witness P-0894's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused. The Prosecution intends to call Witness P-0894 to provide *viva voce* testimony. As such, the Parties and the Chamber will have the opportunity to examine this witness during the proceedings and he will confirm whether he consents to the admission of his materials, in accordance with rule 68(3) of the Rules.

#### **Proposed procedure for the introduction of prior recorded testimony**

15. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0894's statement as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any, to his statement and the accompanying sketches.

16. During witness preparation, the Prosecution will ask Witness P-0894 to review his prior statements, advise of any corrections or clarifications he wishes to make to these materials, and then to confirm their accuracy.<sup>13</sup> In accordance with the Witness Preparation Protocol this session will be video-recorded and the Prosecution will disclose a log of the session clearly indicating any changes or corrections the witness makes.<sup>14</sup>

<sup>10</sup> DRC-OTP-2076-0194 at 0195, paras. 3, 8 and at 0209, para. 70.

<sup>11</sup> DRC-OTP-2076-0194 at 0195, para. 4 and at 0209 (witness acknowledgment).

<sup>12</sup> ICC-01/04-02/06-619, para.43.

<sup>13</sup> ICC-01/04-02/06-652-Anx, page 4, paras. 18-19.

<sup>14</sup> ICC-01/04-02/06-652-Anx, page 4, paras. 14-15 and page 6, paras. 31-32.

17. To enhance expeditiousness of his in-court testimony, the Prosecution proposes that it be permitted to use leading questions to elicit from the witness any corrections or clarifications identified during witness preparation, asking him to confirm that he wishes to make a particular change and asking him to explain the reason for the change or clarification.
18. After tendering his prior recorded testimony into evidence, with any changes or clarifications noted on the record, the Prosecution will then conduct a brief supplementary examination of Witness P-0894 to ask limited clarification questions and to solicit specific, focused aspects of his evidence *viva voce*, in accordance with rule 68(3) of the Rules. This supplementary examination will ensure that the key aspects of his evidence are suitably explored through a non-leading examination by the Prosecution, which will ensure that the Chamber is able to fully assess these aspects of his evidence with a greater degree of clarity and reliability.

**Specific areas of Witness P-0894's evidence to be provided *viva voce***

19. Following the introduction of his prior recorded testimony, the Prosecution seeks to be permitted to ask Witness P-0894 limited clarification questions, as well as specific, focused questions to explore what the Prosecution has identified to be the critical aspects of his testimony. This supplementary examination will be brief. Other Chambers of this Court have permitted supplementary questioning after the introduction of the prior recorded testimony.<sup>15</sup> Trial Chamber I expressly permitted the Prosecution to

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<sup>15</sup> Trial Chamber I permitted the Prosecution to admit the prior recorded testimony of three witnesses (by way of written statements, transcripts of in-court testimony and associated documents) and then to ask necessary supplementary questions in the course of the *Lubanga* proceedings (P-0043 and P-0293: ICC-01/04-01/06-1603, para. 25; P-0046: ICC-01/04-01/06-T-205-Red3, page 14, l.16 to page 19, l.9 (introduction of prior recorded testimony) and page 19, l.11 *ss* (supplementary questioning)). In *Katanga & Ngudjolo*, Trial Chamber II similarly permitted the Prosecution to admit certain portions of Witness P-0030 and P-0002's prior recorded testimony (ICC-01/04-01/07-2233-Corr, paras. 16-17 (P-0030) and ICC-01/04-01/07-2289-Corr-Red, page 17 (P-0002)), and allowed the Prosecution to ask supplementary questions to

supplement the admission of prior recorded testimony of witnesses present before the Chamber (under this rule) with “any necessary questioning.”<sup>16</sup>

20. [REDACTED]. [REDACTED],<sup>17</sup> the Prosecution wishes to examine the witness directly on this topic. In this way, the Prosecution will elicit this particular aspect of his evidence through non-leading questions and in a manner that ensures Witness P-0894’s testimony is provided in sufficient detail and with the greatest degree of clarity.

21. Accordingly, the Prosecution is not seeking to tender those portions of Witness P-0894’s witness statement that relate to this specific evidence, but will rather conduct a focused examination of the witness to obtain this specific evidence *viva voce*.

22. This supplementary questioning will be brief and focused and come within the time estimate provided by the Prosecution of one and a half hours for examination-in-chief.<sup>18</sup>

### Request

23. The Prosecution requests that the Chamber admit the witness statement of Witness P-0894 and the two sketches annexed to this statement, listed in Annex A to this application, as prior recorded testimony pursuant to rule 68(3) of the Rules.

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the witnesses (ICC-01/04-01/07-2233-Corr, paras. 16-17, ICC-01/04-01/07-T-176-Red-ENG (P-0030, questioned by Prosecution from page 23), ICC-01/04-01/07-T-184-Red-ENG (P-0002, questioned by Prosecution from page 24).)

<sup>16</sup> ICC-01/04-01/06-1603, para. 25.

<sup>17</sup> [REDACTED]; [REDACTED]. *See also*, [REDACTED].

<sup>18</sup> In accordance with ICC-01/04-02/06-619, para.16, the Prosecution provided a Forthcoming Witness List by email on 10 May 2016, in which it estimated that the examination-in-chief of Witness P-0894, including the required procedure under rule 68(3) of the Rules for the admission of his prior recorded testimony, would be completed in 90 minutes.



24. Further, the Prosecution requests to be permitted to conduct a brief supplementary examination of Witness P-0894 following the introduction of his prior recorded testimony, to elicit specific, focused aspects of his evidence *viva voce*.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 16<sup>th</sup> day of June 2016  
At The Hague, The Netherlands