

**Cour
Pénale
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**International
Criminal
Court**

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Date: 22 November 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-O**

Public redacted version of "Prosecution application under rule 68(3) and regulation 35 to admit Witness P-0012's prior recorded testimony and associated material", 1 November 2016, ICC-01/04-02/06-1600-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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Other

Introduction

1. Pursuant to rule 68(3)¹ and regulation 35,² the Prosecution requests that Trial Chamber VI (“Chamber”): (i) admit into evidence [REDACTED], as well as five documents that [REDACTED] and that are relevant to the case against the Accused; (ii) admit into evidence forty-five paragraphs from Witness P-0012’s [REDACTED] witness statement, as well as one document that is referenced and explained in three of these paragraphs and that is relevant to the case against the Accused; and (iii) grant the Prosecution leave to conduct a brief supplementary examination of Witness P-0012 (“Request”).³
2. In 2002, Witness P-0012 was a [REDACTED]. Between 2003 and 2005, Witness P-0012 [REDACTED].
3. As part of his role as [REDACTED]. Witness P-0012 was an eye-witness to the August 2002 attack on Bunia.
4. Witness P-0012’s prior recorded testimony and associated material primarily relates to: (i) the background to the conflict in Ituri; (ii) the creation, structure and policies of the UPC/FPLC; (iii) the role of the Accused and his alleged co-perpetrators; (iv) the attacks on Bunia and Songolo in August 2002, and Tchomia in October 2003; (v) the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC; and (vi) efforts at pacification in Ituri.
5. The material that the Prosecution seeks to admit is relevant and reliable. Witness P-0012 will be the sixth witness to testify during the seventh block of evidence, which is scheduled to commence on 7 November 2016. He will be asked to attest

¹ Rules of Procedure and Evidence (“Rules”).

² Regulations of the Court (“Regulations”).

³ See below and Annex A for details on the precise excerpts, paragraphs, and items that the Prosecution seeks to admit through this Request, and on the material that the Prosecution does not seek to admit but which is necessary to understand the prior recorded testimony of this witness.

to the accuracy of his prior recorded testimony at the beginning of his testimony⁴ and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

6. Based on past practice, approximately thirty to forty-five minutes will be required for the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits pursuant to rule 68(3) of the Rules. For this witness, the Prosecution estimates that approximately thirty minutes will be required for this exercise. The Prosecution seeks one additional hour to conduct a supplementary examination of this witness during which it will seek to elicit further information in relation to certain issues, including the role of the Accused in the UPC/FPLC and the UPC/FPLC's treatment of persons not of Hema ethnicity, which were only briefly addressed in his prior recorded testimony. While these, and other, issues [REDACTED], eliciting further information on these topics is important for the Prosecution's case against the Accused.
7. Pursuant to regulation 35 of the Regulations, the Prosecution seeks to vary the time limit of this application due to circumstances outside of its control. As set out in greater detail below, while the application was originally due on 1 November 2016, the unforeseen need to postpone the testimony of witnesses who were initially scheduled to appear before Witness P-0012 in the seventh block of evidence means that the application would have been due on 24 October 2016.
8. Granting the Request would not be prejudicial to the rights of the Accused and it would enhance the expeditiousness of the proceedings by reducing the length of Witness P-0012's examination-in-chief by four and a half hours.

⁴ ICC-01/04-02/06-619, para.43.

Confidentiality

9. The filing and its annexes are classified as “Confidential” pursuant to regulation 23bis(1) of the Regulations because they contain confidential information relating to a protected Prosecution witness. The Prosecution will file a public redacted version of this filing.

Prosecution’s Submissions

Regulation 35 request

10. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit “if good cause is shown”.⁵ The Chamber may extend a time limit after it has elapsed if it can be demonstrated that the extension of the time limit could not be sought prior to its expiration for reasons outside a participant’s control.
11. There is good cause for the Chamber to grant a variation of the time limit for Witness P-0012’s rule 68(3) application, and this request for the variation of the time limit could not have been sought prior to its expiration.
12. Based on the Prosecution’s 14 October 2016 updated forthcoming witness list for the seventh block of evidence,⁶ the Prosecution calculated that the rule 68(3) application for Witness P-0012 was due on 1 November 2016. However, in the past week the Prosecution: (i) was informed of an issue with [REDACTED]; (ii) determined that there was a need to meet with [REDACTED] before the witness begins witness preparation; and (iii) was advised that [REDACTED].

⁵ The Appeals Chamber has held that “[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations”, ICC-01/04-01/06-834, para.7. The Appeals Chamber has further decided to extend a time limit where it was in the “interest of justice”, *see* ICC-01/04-01/10-505, para.11; *See also* ICC-01/04-01/07-2325, para.15.

⁶ Email from the Prosecution to the Chamber, Defence and participants dated 14 October 2016 at 13:56.

13. The Prosecution will request to schedule the testimony of [REDACTED] *via* video-link and will re-schedule the testimony of [REDACTED] to the eighth evidentiary block. These changes have meant that [REDACTED] will no longer be called to testify before Witness P-0012, thereby rendering the rule 68(3) application for this Witness due on 24 October since he is expected to begin his testimony sooner than originally expected.
14. Granting the variation of time requested would not “derail the proceedings from their ordained course”⁷ and would not be unduly prejudicial to the Accused.
15. The Prosecution notes that it has been in communication with the Defence in order to provide information concerning changes to the seventh block of evidence. The Parties are currently in the process of finalising their discussions concerning the necessary changes to the Prosecution’s forthcoming witness list prior to submitting an update to the Chamber.

Rule 68(3) request

16. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the previously recorded testimony of a witness who is present before the Chamber where he/she does not object to the submission, and the Parties and Chamber have the opportunity to examine the witness.
17. Witness P-0012 provided statements to the Prosecution in [REDACTED]. The Prosecution identified Witness P-0012 as an appropriate witness for the procedure under rule 68(3) of the Rules.⁸

⁷ ICC-01/04-01/07-653, para. 6.

⁸ In accordance with ICC-01/04-02/06-619, para.16, the Prosecution provided a Forthcoming Witness List for the seventh evidentiary block by email on 7 October 2016, in which it indicated its intention to apply for the admission of Witness P-0012’s prior recorded testimony under rule 68(3) of the Rules.

18. The prior recorded testimony and associated material that the Prosecution seeks to admit pursuant to rule 68(3) relates, *inter alia*, to the: (i) witness's education and professional background, including his role as [REDACTED]; (ii) background to the conflict in Ituri; (iii) creation, structure and policies of the UPC/FPLC; (iv) role of the Accused and his alleged co-perpetrators; (v) the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC; (vi) attacks on Bunia and Songolo in August 2002, and Tchomia in October 2003; and (vii) efforts at pacification in Ituri.
19. 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 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.⁹
20. As set out in section I(A) of Annex A to this filing, the Prosecution seeks to admit Witness P-0012's [REDACTED].¹⁰ [REDACTED].
21. Section I(B) of Annex A to this filing sets out forty-five paragraphs that the Prosecution seeks to admit from Witness P-0012's [REDACTED] witness statement.¹¹ The Prosecution does not seek to admit the remainder of this [REDACTED] witness statement. As set out below, these paragraphs are relevant to this case, in particular to the contextual elements of the charged crimes, [REDACTED].
22. Paragraphs [REDACTED] of this statement contain detailed information regarding the UPC/FPLC's preparations for the attack on Bunia in August 2002 and on the attack itself. Witness P-0012 stated that he obtained this detailed

⁹ ICC-01/04-02/06-619, para.42.

¹⁰ [REDACTED].

¹¹ Copies of this statement are contained in Annex F. [REDACTED].

information from [REDACTED], and that he personally saw, *inter alia*, a large number of dead bodies, including those of women and children, in Bunia during the attack. [REDACTED]¹² [REDACTED].

23. In paragraphs [REDACTED]. [REDACTED].¹³ The Prosecution seeks the admission of these three paragraphs together with one of the reports referred to therein for the reasons set out below.¹⁴

24. Paragraphs [REDACTED] of this statement concern the attacks in Songolo in late August 2002 and in Tchomia on 31 October 2003. Witness P-0012 stated that [REDACTED]. Witness P-0012 stated that [REDACTED]. [REDACTED]. [REDACTED].¹⁵

25. Section II(A) of Annex A refers to five documents, which the Prosecution seeks to admit. These documents [REDACTED] are relevant to the case against the Accused. This Chamber has held that “exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced.”¹⁶

26. The first document¹⁷ is [REDACTED]. Witness P-0012 [REDACTED]. In view of its content and Witness P-0012’s explanation, this document is relevant, *inter alia*, to the mode of liability of co-perpetration, in particular to the requirement of establishing the existence of a common plan.

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ See para.31.

¹⁵ [REDACTED].

¹⁶ ICC-01/04-02/06-T-105-CONF-ENG ET, p.93, ln.24 - p.94, ln.7 (open session); See also ICC-01/04-02/06-1205, para.7; ICC-01/04-02/06-1029, paras.23, 35; ICC-01/09-01/11-1938-Corr-Red2, para.33.

¹⁷ See Annex G, [REDACTED]. The Prosecution has requested the Chamber to authorise the lifting of the one Category “F” redaction at [REDACTED] of this document. This redaction does not affect the substance of the document.

27. The second document¹⁸ is [REDACTED]. Witness P-0012 [REDACTED]. [REDACTED]. In view of its content and Witness P-0012's explanation, this document is relevant, *inter alia*, to the mode of liability of co-perpetration, in particular to the requirement of establishing the existence of a common plan.
28. The third document¹⁹ is [REDACTED]. The witness [REDACTED]. The witness explained [REDACTED]. In view of its content and Witness P-0012's explanation, this document is relevant, *inter alia*, to the crimes of persecution, murder and pillaging as well as to the mode of liability of co-perpetration, in particular to the requirement of establishing the existence of a common plan.
29. The fourth document²⁰ is [REDACTED]. Witness P-0012 [REDACTED]. The witness explained that [REDACTED]. In view of its content and Witness P-0012's explanation, this document is relevant, *inter alia*, to [REDACTED] and, as such, to the requirement of establishing the existence of a common plan, as well as to the contextual elements of the crimes with which the Accused has been charged.
30. The fifth document²¹ is [REDACTED]. The witness [REDACTED]. The witness explained that [REDACTED]. [REDACTED]. In view of its content and Witness P-0012's explanation, this document is relevant, *inter alia*, to [REDACTED] and, as such, to the requirement of establishing the existence of a common plan, as well

¹⁸ See Annex H, [REDACTED]. The Prosecution notes that this document was not previously disclosed to the Defence since another copy [REDACTED] was disclosed in July 2003 and is on the Prosecution's list of evidence. However, the Prosecution will disclose [REDACTED] forthwith [REDACTED]. The only difference between the two documents is that [REDACTED] contains a handwritten number and different contact information at [REDACTED].

¹⁹ See Annex I, [REDACTED].

²⁰ See Annex J, [REDACTED]. The Prosecution notes that this document was not previously disclosed to the Defence since a copy of [REDACTED] was disclosed in July 2013 and is on the Prosecution's list of evidence. However, the Prosecution will disclose [REDACTED] forthwith, for ease of reference [REDACTED]. The difference between the two documents is that [REDACTED] was provided by Witness P-0012 and contains the handwritten word [REDACTED] on the first page, and does not contain some of the [REDACTED].

²¹ See Annex K, [REDACTED]. The Prosecution notes that this document was not previously disclosed to the Defence since another copy of this [REDACTED] was disclosed in July 2013 and is on the Prosecution's list of evidence. However, the Prosecution will disclose [REDACTED]. The difference between the two documents is that [REDACTED] was provided by Witness P-0012 and does not contain the [REDACTED].

as to the contextual elements of the crimes with which the Accused has been charged.

31. Section II(B) of Annex A refers to one document, which the Prosecution seeks to admit. This document²² is [REDACTED]. The report includes information concerning reported killings, abductions, arrests, rapes and other crimes by several armed groups, including the UPC/FPLC. The information contained in the report, together with the witness's explanation of it, is relevant to establishing, *inter alia*, the protracted nature of the armed conflict.

32. Section III of Annex A refers to four documents that the Prosecution does not seek to admit, except to the extent noted in Section I(B), but which are necessary for a complete understanding of this witness's prior recorded testimony.²³ The first document is Witness P-0012's [REDACTED],²⁴ the second and third items are [REDACTED], and the fourth is a [REDACTED].²⁵ [REDACTED].

Witness P-0012's prior recorded testimony should be admitted pursuant to rule 68(3)

33. The prior recorded testimony and associated material set out in sections I and II of Annex A are relevant to establishing a number of crimes which the Accused has been charged with, including the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC. They are also relevant in relation to a number of elements of the modes of liability through which the Accused has been charged for a several crimes, including the existence of a common plan. Moreover, they are relevant to establishing the organised nature of the

²² See Annex L, [REDACTED]. The Prosecution notes that this document was disclosed to the Defence in May 2013 but is not currently on its list of evidence since an almost identical document [REDACTED] was also disclosed in May 2013 and is on the Prosecution's list of evidence. The Prosecution will add [REDACTED] to its list of evidence forthwith. The only difference between the two documents is that [REDACTED] contains signatures and identification codes added during Witness P-0012's [REDACTED] witness statement, and is missing the [REDACTED].

²³ See ICC-01/04-02/06-619, para.42.

²⁴ While the Prosecution is only seeking the admission of some of the paragraphs in this statement, the remaining paragraphs are necessary for a complete understanding of this witness's prior recorded testimony.

²⁵ Copies of these documents are provided at Annexes F, M-O.

UPC/FPLC, the role of the different alleged co-perpetrators, including the Accused and Thomas Lubanga, and the contextual elements of the crimes.

34. [REDACTED],²⁶ [REDACTED].²⁷ Further, Witness P-0012 will be asked to confirm the accuracy when he is called to provide *viva voce* testimony and to consent to further questioning by the Parties and the Chamber.²⁸ As such, the Parties, the participants if applicable, 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. Therefore, the admission of Witness P-0012's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

35. Should Witness P-0012's prior testimony and associated material be admitted into evidence, the Prosecution requests leave to conduct a brief supplementary examination in accordance with rule 68(3) of the Rules and the jurisprudence of this Court,²⁹ including from this Chamber.³⁰

²⁶ [REDACTED].

²⁷ The Chamber has previously admitted witness statements pursuant to rule 68(3) of the Rules, *see e.g.* ICC-01/04-02/06-T-106-CONF-ENG ET, p.90, ln.12 – p.91, ln.1 (open session); ICC-01/04-02/06-T-108-CONF-ENG ET p.96, ln.21 – p.101, ln.5 (open session). Other Chambers have also considered that witness statements may constitute prior recorded testimony, *see e.g.* ICC-01/04-01/06-1603, paras.18-19; ICC-01/09-01/11-1938-Corr-Red2, para.33.

²⁸ ICC-01/04-02/06-619, para.43.

²⁹ 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, p.14, ln.16 – p.19, ln.9 (introduction of prior recorded testimony) and p.19, ln.11 (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 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 p.23), ICC-01/04-01/07-T-184-Red-ENG (P-0002, questioned by Prosecution from p.24)). Trial Chamber I expressly permitted the Prosecution to supplement the admission of prior recorded testimony of witnesses present before the Chamber (under this rule) with "any necessary questioning", *see* ICC-01/04-01/06-1603, para.25.

³⁰ When admitting prior recorded testimony in full, the Chamber has previously stated that it would permit the Prosecution to seek to elicit further detail from the witness *viva voce* in relation to certain aspects of his/her testimony as long as this exercise does not merely repeat the information already contained in the witness's prior

36. The Prosecution seeks to elicit, *viva voce*, further details in relation to certain issues which were only briefly referred to [REDACTED], including the role of the Accused and his alleged co-perpetrators in the UPC/FPLC, and the UPC/FPLC's treatment of persons not of Hema ethnicity.
37. The Prosecution will ensure that the witness is not merely asked to repeat the information that he already provided [REDACTED]. This supplementary examination is necessary for the determination of the truth and to elicit further evidence specific to the *Ntaganda* case [REDACTED].
38. As previously indicated to the Chamber,³¹ the Prosecution intends to complete the process of admission of Witness P-0012's material as well as its supplementary examination within one and a half hours. Should the Chamber reject this Request in whole or in part, the Prosecution may require up to the six hours originally estimated for this witness's examination-in-chief.

Proposed procedure for the introduction of prior recorded testimony

39. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0012's prior testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.
40. During witness preparation, the Prosecution will ask Witness P-0012, *inter alia*, to review his prior testimony, advise of any corrections or clarifications he wishes to make to it, and then to confirm its accuracy.³² In accordance with the Witness Preparation Protocol this session will be video-recorded and the Prosecution will

statement, see ICC-01/04-02/06-T-110-CONF-ENG ET, p.34, lns.8-13 (open session); ICC-01/04-02/06-T-106-CONF-ENG ET, p.91, lns.2-4 and p.92, lns.12-25 (open session).

³¹ See email from the Prosecution to the Chamber, Parties and participants dated 7 October 2016 at 09:53.

³² ICC-01/04-02/06-652-Anx, page 4, paras.18-19.

disclose a log of the session clearly indicating any changes or corrections which the witness makes.³³

41. When Witness P-0012 appears in court, pursuant to the Chamber's previous guidance, the Prosecution will seek to elicit any clarifications noted by the witness during witness preparation "in a non-leading manner, by putting to the witness certain portions of the prior recorded testimony and asking the witness whether any clarifications to that portion are required to be made."³⁴ The Prosecution will then ask the witness whether he has any further changes or clarifications to make to his prior recorded testimony and to confirm his consent to be questioned by the Parties and the Chamber.
42. 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-0012 as outlined above.

Conclusion

43. For the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 22nd day of November 2016
At The Hague, The Netherlands

³³ ICC-01/04-02/06-652-Anx, page 4, paras.14-15 and p.6, paras.31-32.

³⁴ ICC-01/04-02/06-T-110-CONF-ENG ET, p.34, ln.23 – p.35, ln.1 (open session); *see also* ICC-01/04-02/06-T-106-CONF-ENG ET, p.91, lns.8-10 (open session); and ICC-01/04-02/06-T-99-CONF-ENG ET T-99, p.63, lns.10-12 (open session) where the Chamber stated that "While not forbidding leading questions entirely, the Prosecution is directed to first aim to elicit any clarifications to the witness statement in a non-leading fashion".