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**International
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Date: 20 November 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 "Prosecution response to 'Request on behalf of Mr Ntaganda to admit prior recorded testimony of Defence Witness D-0251 pursuant to Rule 68(3)'" , 9 November 2017, ICC-01/04-02/06-2106-Conf

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

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Introduction

1. The Defence Request for the admission of Witness D-0251's prior recorded testimony pursuant to rule 68(3) of the Rules¹ should be rejected.

2. First, the majority of the issues addressed in Witness D-0251's prior recorded testimony are materially in dispute and central to the Accused's case. Witness D-0251 is being put forward as [REDACTED] who will testify about 15 of the 18 charges against the Accused. As an insider who allegedly was in close proximity to the Accused and will testify about his acts, conduct and behaviour during the temporal scope of the charges, her evidence is pertinent to both the crimes and the modes of liability that have been charged in this case. Further, a considerable part of Witness D-0251's statement directly refers to, and seeks to contradict the testimony of, Prosecution Witness P-0010 who testified entirely *viva voce*. Witness D-0251's evidence is not appropriate for admission under rule 68(3).

3. Second, it is necessary for the Chamber to test the veracity and spontaneity of Witness D-0251's prior recorded testimony by assessing her evidence in full and live. Witness D-0251's statement was obtained only one month ago, after the completion of the Accused's testimony. The timing of collection of the statement, the allegations of witness coaching and the fact that the statement's content completely aligns with the Accused's testimony, militate in favour of a full delivery of the witness's testimony. The passage of time between the giving of a statement and date of testimony is not an issue; the witness signed the statement very recently. Cross-examination alone is insufficient for the Chamber to evaluate the spontaneity and credibility of the witness's account.

4. Third, admitting Witness D-0251's statement pursuant to rule 68(3) would not significantly contribute to the expeditiousness of proceedings. Granting the

¹ ICC-01/04-02/06-2086-Conf; Rules of Procedure and Evidence.

Defence Request would save just 2 hours and 15 minutes of court time. While saving any amount of court time is generally favourable, it would not be in the interests of justice to grant the Defence Request in the present circumstances.

Confidentiality

5. In accordance with regulation 23*bis*(2) of the Regulations of the Court ("Regulations"), this response is classified as Confidential since it responds to a Confidential Defence Request.

Background

6. On 30 January 2017, the Chamber ordered the Defence, *inter alia*, to provide a further provisional list of witnesses as well as a summary of the anticipated testimony of the witnesses by 31 March 2017² and provide the final version of its list of witnesses and summaries of anticipated testimony, as well as its final list of evidence by 26 April 2017.³ The Chamber also set 26 April 2017 as the final deadline for all disclosure by the Defence.⁴
7. On 28 August 2017, the Chamber ordered the Defence to file an updated list of witnesses within two weeks of the completion of the Accused's testimony.⁵
8. On 27 September 2017, the Defence provided an updated list of witnesses and indicated that it would be filing requests to add new witnesses to its list.⁶
9. On 3 October 2017, the Chamber set 16 October 2017 as the deadline by which the Defence must file any requests pursuant to regulation 35(2) of the Regulations and/or rule 68(2) of the Rules.⁷

² ICC-01/04-02/06-1757, para. 10.

³ ICC-01/04-02/06-1757, para. 11.

⁴ ICC-01/04-02/06-1757, para. 14.

⁵ ICC-01/04-02/06-T-231-CONF-ENG ET, p. 4, ln. 24 – p. 5, ln. 5 (open session).

⁶ ICC-01/04-02/06-2045-Conf, para. 16 (c) and (e).

10. On 4 October 2017, the Defence requested, *inter alia*, the addition of D-0251 to its list of Witnesses and provided D-0251's statement to the Prosecution for the first time.⁸ The Prosecution opposed this request.⁹
11. On 20 October 2017, the Chamber granted the Defence's 4 October 2017 request.¹⁰
12. On 27 October 2017, the Defence filed the Defence Request.

Submissions

13. Article 69(2) provides that the "testimony of a witness shall be given in person". The Chamber has noted that admission pursuant to rule 68(3) "constitutes an exception to the principle of the primacy of orality before the Court" and that "a cautious, case-by-case assessment is therefore required, and the impact of any such request on the rights of an accused and the fairness of the proceedings more generally should be considered".¹¹
14. Rule 68(3) 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.
15. The Defence states that the Chamber's power to admit prior recorded testimony pursuant to rule 68(3) "is subject to no express conditions or criteria."¹² However, the Chamber's determination in relation to rule 68(3) must be "in accordance with article 69, paragraphs 2 and 4".¹³ Article 69(4) of the Statute requires the Chamber

⁷ Email from the Chamber to the Parties and participants dated 3 October 2017 at 10:17.

⁸ ICC-01/04-02/06-2052-Conf.

⁹ ICC-01/04-02/06-2064-Conf.

¹⁰ ICC-01/04-02/06-2079.

¹¹ ICC-01/04-02/06-845, para. 6; *See also* ICC-01/04-02/06-961, para. 8; ICC-01/05-01/08-1386 OA5 OA6, para. 76; ICC-01/09-01/11-2024 OA10, para. 84.

¹² Defence Request, para. 5.

¹³ Rule 68(1).

to take into account, *inter alia*, “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness” when ruling on the relevance or admissibility of any evidence.

I. D-0251’s evidence is materially in dispute and central to the Accused’s case

16. In rejecting Prosecution requests to admit the prior recorded testimony of witnesses pursuant to rule 68(3), the Chamber has noted, *inter alia*, the centrality of the witnesses’ prior recorded testimony to the case against the Accused and that the charges against the Accused and his alleged actions were discussed at length in the prior recorded testimony.¹⁴

17. The Chamber has also referred to the issue of whether or not the testimony of a witness is disputed as a factor relevant to admission of prior recorded testimony pursuant to rule 68(3).¹⁵ Indeed, the Appeals Chamber has held that:

where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally. This must be the Chamber’s overriding concern, in particular bearing in mind ‘the general requirement of in-court personal testimony’. Whether such testimony may be introduced under rule 68 (3) of the Rules will, therefore, depend upon the circumstances of the case.¹⁶

18. The Appeals Chamber also held that “the more important the Chamber assesses the evidence in question to be, the more likely it is that the Chamber will have to reject any application under [rule 68 (3)].”¹⁷

¹⁴ ICC-01/04-02/06-988, para. 11 ; ICC-01/04-02/06-961, para. 10.

¹⁵ See ICC-01/04-02/06-T-52-CONF-ENG CT, p. 35, ln. 22 – p. 36, ln. 1 (open session).

¹⁶ ICC-02/11-01/15-744, para. 69.

¹⁷ ICC-02/11-01/15-744, para. 71.

19. Witness D-0251 is the only [REDACTED] who are scheduled to testify on behalf of the Accused. Her statement relates to information that is relevant to several key issues in the proceedings which are in dispute and central to the Accused's case. As indicated in Witness D-0251's summary of anticipated evidence, she is expected to testify in relation to 15 of the 18 charges against the Accused.¹⁸
20. In granting the Defence's request to add Witness D-0251 to its list of witnesses, the Chamber noted that "Witness D-0251 is expected to provide exculpatory evidence on a number of issues of significance to the case, including [REDACTED]."¹⁹
21. While the Defence concedes that D-0251's testimony "is relevant to some important issues that are materially disputed",²⁰ it also attempts to downplay the relevance of Witness D-0251's evidence in order to admit her statement under rule 68(3).²¹ First, the fact that Witness D-0251's evidence does not concern the two charged attacks in the case against the Accused²² does not detract from its centrality to the Accused's case, in particular because the charges of enlistment, conscription and use of child soldiers, and their rape and sexual slavery span the entire period of the charges. Second, the assertion that Witness D-0251's prior recorded testimony does not directly address the charges of conscription, enlistment or use of child soldiers²³ is inaccurate since Witness D-0251 states that [REDACTED].²⁴ Third, Witness D-0251 is also expected to testify about the fact that [REDACTED]. It is particularly important to hear such evidence live given the potential relevance of such alleged conduct to the charges against the Accused. Moreover, the witness is expected to give evidence about the Accused's

¹⁸ See ICC-01/04-02/06-2052-Conf-AnxC, p. 2/4.

¹⁹ ICC-01/04-02/06-2079, para. 23.

²⁰ Defence Request, para. 13.

²¹ See Defence Request, paras. 2, 11, 13.

²² See Defence Request, paras. 2, 11.

²³ Defence Request, para. 2.

²⁴ See D-0251's statement, paras. 48-53.

whereabouts and behaviour. It is paramount that information relevant to the charged modes of liability - such as intent, knowledge, common plan and actions as a commander - be elicited in court for the Chamber to properly assess.

22. The fact that Witness D-0251's evidence is materially in dispute and central to the Accused's case, considered alone or in combination with the additional arguments set out below, should lead the Chamber to reject the Defence Request and order this witness to testify entirely *viva voce*.

II. D-0251's evidence is expected to directly contradict that of Witness P-0010

23. Whether a statement that a Party seeks to admit pursuant to rule 68(3) is "intended to be mainly corroborative in nature" is also a relevant factor.²⁵ While certain aspects of Witness D-0251's prior recorded testimony is corroborative of the evidence of certain Defence Witnesses, other parts of the statement will directly contradict the testimony of Witness P-0010 that was elicited entirely *viva voce* in this trial. Witness P-0010 provided direct and highly incriminating evidence, notably on the charges relating to children under the age of 15 in the UPC/FPLC, and the conduct of the Accused [REDACTED]. Accordingly, any evidence that is meant to undermine Witness P-0010's account should be elicited live in order to allow the Judges to properly assess it.

24. Witness D-0251's testimony will also contradict the evidence of other witnesses who testified that there were children under the age of 15 [REDACTED]²⁶ and that [REDACTED].²⁷

25. In setting out the primary topics that Witness D-0251's statement addresses,²⁸ the Defence does not specifically mention Witness D-0251's extensive reference to

²⁵ See ICC-01/04-02/06-1640-Conf, para. 9; ICC-01/04-02/06-1667-Conf, para. 21.

²⁶ [REDACTED].

²⁷ [REDACTED].

Witness P-0010. However, Witness P-0010 is a primary feature of Witness D-0251's statement where this witness states, *inter alia*, that: (i) [REDACTED];²⁹ (ii) [REDACTED];³⁰ (iii) [REDACTED];³¹ (iv) [REDACTED];³² and (v) [REDACTED].³³

26. All of the latter assertions, other than that [REDACTED], contradict Witness P-0010's testimony. In view of the potential detrimental effect that Witness D-0251's evidence could have on the Chamber's evaluation of Witness P-0010's evidence, it is appropriate and fair to elicit Witness D-0251's evidence completely *viva voce*.

27. The Defence notes that Witness D-0251's statements that [REDACTED] are corroborated by Witness D-0211's testimony.³⁴ However, these are but two of the numerous issues that Witness D-0251's statement addresses [REDACTED]. Further, Witness D-0251's anticipated evidence also contradicts other parts of the testimony of Witness D-0211 [REDACTED].³⁵

28. Critically, the Defence elicited Witness D-0211's evidence entirely *viva voce* but now seeks to admit Witness D-0251's evidence pursuant to rule 68(3). Witness D-0211, unlike Witness D-0251, [REDACTED]. Her evidence was essentially confined to issues related to [REDACTED]. Moreover, [REDACTED]. Witness D-0251's evidence is arguably more important than Witness D-0211's and should be elicited entirely *viva voce*.

²⁸ Defence Request, para. 12.

²⁹ See D-0251's statement, para. 50.

³⁰ See D-0251's statement, paras. 50-51.

³¹ See D-0251's statement, para. 76.

³² See D-0251's statement, para. 81.

³³ See D-0251's statement, para. 82.

³⁴ Defence Request, para. 14.

³⁵ [REDACTED].

III. The reliability of D-0251's prior recorded testimony needs full testing

29. In determining whether to admit prior recorded testimony pursuant to rule 68(3), the Chamber has considered its reliability³⁶ as well as its relative temporal proximity to the events described therein.³⁷
30. Witness D-0251's statement was obtained just over a month ago. This means that it is not at all temporally proximate to the events to which it relates, which took place between 14 and 15 years ago. This also means that the statement was obtained after the completion of the Accused's testimony, which was mainly conducted in open session and fully articulates the Accused's case.
31. In its request to add Witness D-0251 to its list, the Defence failed to adequately explain why there was a [REDACTED] lapse between the Defence's first contact with this witness in [REDACTED] 2017, [REDACTED], and the taking of her statement in October 2017, after the conclusion of the Accused's testimony.³⁸ In particular, the Defence provided no explanation as to why Witness D-0251's statement could not have been taken when three members of the Defence team met this witness on [REDACTED] 2017 and/or on [REDACTED] 2017,³⁹ while the Accused's testimony was still ongoing. Instead, the Defence waited until the end of the testimony of the Accused to obtain D-0251's statement.
32. Requiring Witness D-0251 to spontaneously give her evidence during examination-in-chief will substantially assist the Chamber in assessing her reliability and credibility.⁴⁰ As stated by Judge Ozaki in a Partially Dissenting Opinion while sitting on the Appeals Chamber, "[t]he primacy of the principle of orality is founded on the importance which should be attached to direct

³⁶ See ICC-01/04-02/06-1733, para. 25.

³⁷ See ICC-01/04-02/06-T-161-CONF-ENG ET, p. 28, Ins. 7-8 (open session); ICC-01/04-02/06-T-188-CONF-ENG ET, p. 3, Ins. 23-24 (private session).

³⁸ See ICC-01/04-02/06-2052-Conf, para. 11 and Annex A, p. 16/16.

³⁹ ICC-01/04-02/06-2052-Conf, Annex A, p. 2/16.

⁴⁰ See Defence Request, paras. 13, 16.

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."⁴¹

33. While there are numerous instances when admission of prior recorded testimony pursuant to rule 68(3) can be the most appropriate form of admission, the circumstances referred to above indicate that Witness D-0251 should testify entirely *viva voce* in order for the Chamber to be best placed to assess the witness's credibility.

IV. Admitting D-0251's statement pursuant to rule 68(3) would not significantly contribute to the expeditiousness of proceedings

34. The Defence misrepresents the jurisprudence that it cites to support its argument that "[t]he mere fact that testimony 'can be considerably shortened through the admission of prior recorded testimony can be, in itself, a sufficient reason for granting a Rule 68(3) request' as long as the formal requirements of admission are satisfied."⁴² While Trial Chamber VII did make such a statement, it went on to require that the additional factors referred to by the Appeals Chamber in this context also be borne in mind.⁴³ These additional factors include that the fairness of the trial generally is not prejudiced by the admission of the prior recorded testimony and that factors, including whether the evidence relates to issues that are not materially in dispute and whether the evidence is not central to core issues in the case, may be taken into account.⁴⁴

35. This Court's jurisprudence makes it clear that while expeditiousness is a relevant factor in relation to the admission of prior recorded testimony pursuant to rule

⁴¹ ICC-02/11-01/15-744-Anx, para. 8.

⁴² Defence Request, para. 6, fn. 8 citing to ICC-01/05-01/13-1478-Red-Corr, para. 48.

⁴³ ICC-01/05-01/13-1478-Red-Corr, para. 48, fn. 69 citing ICC-01/05-01/08-1386 (OA 5 & OA6), para. 78 with further jurisprudence cited therein.

⁴⁴ ICC-01/05-01/08-1386, para. 78.

68(3) it “cannot justify a deviation from statutory requirements.”⁴⁵ Therefore, the fact that a witness consents to the admission of his or her prior recorded testimony and is available for examination does not automatically mean that such requests should be granted if the testimony can be considerably shortened.

36. Regardless, 2 hours and 15 minutes, the time that the Defence posits would be saved should the Chamber grant the Defence Request,⁴⁶ is not a considerable shortening of the proceedings. While saving any amount of court time is generally favourable, it would not be in the interests of justice to grant the Defence Request in the present circumstances. As stated by Judge Ozaki in a Partially Dissenting Opinion, “[e]xpeditiousness must be achieved *in a manner consistent with the statutory framework* including, in particular, with the fairness and integrity of the proceedings.”⁴⁷

37. The Defence notes that the Chamber’s supplemental decision on matters related to the conduct of proceedings expressly directed the Prosecution to increase the use of rule 68(3).⁴⁸ This was one of the Chamber’s directions aimed at “significantly reducing the size of [the Prosecution’s] remaining case”.⁴⁹ The situation with the Defence case is wholly different, with a current total of 15 witnesses scheduled to be heard live on behalf of the Accused.⁵⁰ The Defence’s efforts to save 2 hours and 15 minutes of court time with such a central witness is inconsistent when one considers that the Defence used only two and a half of 19 days of court time during the fourth evidentiary block.

38. The Defence states that the concern for Witness D-0251 to return home as soon as possible is of particular importance given her circumstances and cites to “P-0010

⁴⁵ ICC-02/11-01/15-744, para. 62; ICC-01/05-01/08-1386, para. 55.

⁴⁶ Defence Request, para. 3.

⁴⁷ ICC-02/11-01/15-744-Anx, para. 6 (footnote omitted, emphasis in original).

⁴⁸ Defence Request, para. 15, fn. 22 citing ICC-01/04-02/06-1342, para. 15.

⁴⁹ See ICC-01/04-02/06-1342, para. 15.

⁵⁰ Several requests to admit witness statements under rule 68(2)(b) are pending. The Chamber may decide that some of these witnesses need to be heard *viva voce*.

Decision, para. 14".⁵¹ It is unclear to which decision the Defence refers. However, Witness P-0010 was ordered to testify entirely *viva voce* despite her personal circumstances and the fact that the Prosecution had requested the admission of her prior recorded testimony, [REDACTED].

39. Indeed, several Prosecution witnesses had to make arrangements related to their work and/or to the care of their children due to their need to testify in court for many more hours than Witness D-0251. Reducing Witness D-0251's testimony by 2 hours and 15 minutes would not cause undue inconvenience to this witness and any such inconvenience could be remedied through the assistance of the Victims and Witnesses Section [REDACTED].

V. The Defence provides no information as to why it would require 1 hour and 15 minutes for supplementary examination

40. The Defence requests one hour and fifteen minutes in order to conduct a supplementary direct examination as well as to conduct the necessary formalities associated with the admission of Witness D-0251's prior recorded testimony.⁵²

41. Since the only prior recorded testimony that the Defence seeks to admit is one 15-page statement, no longer than 15 minutes should be required for its admission pursuant to rule 68(3) especially since the statement was obtained just over a month ago, which indicates that the witness is unlikely to have much to change or add to it.

42. Parties must adequately establish the reasons for requiring a certain amount of time to conduct a supplementary examination of a witness whose testimony is admitted pursuant to rule 68(3) of the Rules.⁵³ The Chamber would only be in a

⁵¹ Defence Request, para. 17, fn. 24.

⁵² Defence Request, para. 1.

⁵³ See ICC-01/04-02/06-T-188-CONF-ENG ET, p. 5, ln. 23 – p. 6, ln. 3 (open session).

position to appropriately determine the length of any requested supplementary examination if it receives notice, as the Prosecution provided,⁵⁴ of the topics that the Party proposes to address during such examination.

43. However, the Defence fails to identify a single topic it intends to cover during the supplementary examination that it requests. In rejecting a Prosecution application for the admission of prior recorded testimony pursuant to rule 68(3), the Chamber noted, *inter alia*, that the Prosecution's submissions did not make it clear how the Prosecution proposed to limit the scope of its supplementary examination if the prior recorded testimony were to be admitted.⁵⁵ The Chamber should reject the Defence Request for the same reason.

44. Finally, should the Defence Request be granted, the Defence should be required to follow the established procedure in relation to the admission of the prior recorded testimony, including that any clarifications to it should be elicited in a non-leading manner.⁵⁶

VI. Time required for cross-examination

45. The Chamber has held that "Rule 68(3) procedures necessarily constitute exceptions to its general principle that cross-examination shall not last longer than examination-in-chief".⁵⁷ Therefore, should the Defence Request be granted, the Prosecution would not be limited to the abbreviated time allotted for examination-in-chief to conduct its cross-examination.

⁵⁴ See, e.g. ICC-01/04-02/06-1600-Conf, paras. 6, 36; ICC-01/04-02/06-1479-Conf, paras. 5, 25; ICC-01/04-02/06-1488-Conf, paras. 5, 44.

⁵⁵ ICC-01/04-02/06-961, para. 11.

⁵⁶ 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, p. 63, lns. 10-12 (open session).

⁵⁷ ICC-01/04-02/06-T-127-ENG ET, p. 72, ln. 22 – p. 73, ln. 3 (open session).

46. The Chamber also stated that although the initial time estimate provided by a Party for examination-in-chief without the use of rule 68(3) may be of guidance, the Chamber will consider on a case-by-case basis how much time it considers appropriate to grant for cross-examination.⁵⁸ The Defence estimated that it would require 3.5 hours to elicit Witness D-0251's entirely *viva voce*.⁵⁹

47. Should the Chamber grant the Defence Request, the Prosecution estimates that it would require 3.5 hours for D-0251's cross-examination in order to address [REDACTED], her anticipated evidence covering at least 15 of the 18 charged crimes and modes of liability, as well as her evidence intended to directly contradict Prosecution Witness P-0010's account.⁶⁰

Conclusion

48. For the foregoing reasons, the Chamber should reject the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 20th day of November 2017

At The Hague, The Netherlands

⁵⁸ ICC-01/04-02/06-T-127-ENG ET, p. 72, ln. 22 – p. 73, ln. 3 (open session).

⁵⁹ See the forthcoming witness list for the fifth evidentiary block attached to the email from the Defence to the Chamber, Prosecution and participants dated 27 October 2017 at 16:25.

⁶⁰ Paragraph 18 of the Defence Request refers to Witness D-0251 testifying “for up to four hours and fifteen minutes.” Since the Defence requests 1 hour and 15 minutes for its supplementary examination, this would only leave 3 hours for the Prosecution, rather than 3.5 hours. This seems to be an error in calculation. Regardless, the Prosecution requests 3.5 hours for cross-examination.