

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 14 October 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-J**

**Public redacted version of “Prosecution application under rule 68(3) to admit
Witness [REDACTED]’s prior recorded testimony and associated material”,
10 October 2016, ICC-01/04-02/06-1575-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 the Prosecution requests that Trial Chamber VI (“Chamber”): [REDACTED] admit into evidence one paragraph from Witness [REDACTED]’s [REDACTED] witness statement, as well as three photographs referred to in this paragraph that are relevant to the case against the Accused; and [REDACTED] grant the Prosecution leave to conduct a brief supplementary examination of Witness [REDACTED] (“Request”).
2. Between [REDACTED] and [REDACTED], Witness [REDACTED].
3. This witness’s prior recorded testimony and associated material primarily relates to the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC and to the UPC/FPLC’s persecution of the Lendu.
4. The material that the Prosecution seeks to admit is relevant and reliable. Witness [REDACTED] will be the first witness to testify during the seventh block of evidence, which is scheduled to commence on 7 November 2016. He will be asked to attest to the accuracy of his prior recorded testimony at the beginning of his testimony² and to confirm his availability and willingness to be examined by the Parties, legal representatives if applicable, and the Chamber.
5. 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 and a half hours to conduct a supplementary examination of this witness, during which it will seek to elicit further information in relation to certain issues, including the UPC/FPLC’s

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

² ICC-01/04-02/06-619, para.43.

treatment of Lendu persons and UPC/FPLC operations that the witness may have knowledge of [REDACTED]. [REDACTED].

6. 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 [REDACTED]'s examination-in-chief by two hours.

Confidentiality

7. The filing and its annexes are classified as "Confidential" pursuant to regulation 23bis(1) of the Regulations of the Court because they contain confidential information about a Prosecution witness for whom the Prosecution is requesting in-court protective measures. The Prosecution will file a public redacted version of this filing.

Prosecution's Submissions

8. 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.
9. Witness [REDACTED] provided a statement to the Prosecution on [REDACTED], and [REDACTED]. The Prosecution identified Witness [REDACTED] as an appropriate witness for the procedure under rule 68(3) of the Rules.³
10. The prior recorded testimony and associated material that the Prosecution seeks to admit pursuant to rule 68(3) relates, *inter alia*, to: (i) Witness [REDACTED] work with [REDACTED]; (ii) the conscription, enlistment and use of children

³ 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 [REDACTED]'s prior recorded testimony under rule 68(3) of the Rules.

under the age of fifteen by the UPC/FPLC; (iii) the UPC/FPLC's treatment of Lendu persons, including [REDACTED]; and (iv) the UPC/FPLC attack on Kobu.

11. 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.⁴

12. As set out in Annex A, to this filing, the Prosecution seeks to admit Witness [REDACTED].⁵ [REDACTED].

13. [REDACTED] seeks to admit one paragraph from Witness [REDACTED]'s [REDACTED] witness statement under rule 68(3), and three photographs referred to in that paragraph,⁶ as set out in Annex A.⁷ In the relevant paragraph of his witness statement, Witness [REDACTED] states that the photographs depict bodies of people [REDACTED]. The photographs, and Witness [REDACTED]'s comments on them, are therefore relevant, *inter alia*, to establishing the charges of murder and attacks against the civilian population.⁸

14. In Annex A, section III, the Prosecution has identified the portions of Witness [REDACTED]. As noted above, save for one paragraph, the Prosecution does not seek to admit the statement into evidence; but it is nevertheless necessary for a complete understanding of this witness's prior recorded testimony.⁹ The

⁴ ICC-01/04-02/06-619, para.42.

⁵ [REDACTED].

⁶ A copy of this statement is provided at Annex F. Copies of the photographs are provided at Annexes G, H and I.

⁷ See Annex A, sections I(B) and II(B). [REDACTED].

⁸ In his statement, the witness notes that [REDACTED].

⁹ See ICC-01/04-02/06-619, para.42.

Prosecution also references in Annex A, section III, a document referred to by Witness [REDACTED] which is necessary to understand his prior testimony.¹⁰

Witness [REDACTED]'s prior recorded testimony should be admitted pursuant to rule 68(3)

15. The prior recorded testimony and associated material set out in Annex A, sections I and II, are relevant to establishing a number of crimes which the Accused has been charged with, in particular the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC and persecution.

16. Witness [REDACTED],¹¹ and provided his witness statement voluntarily and in accordance with the requisite formalities.¹² His prior recorded testimony is relevant and reliable. Further, Witness [REDACTED] will be asked to confirm the accuracy of his testimony when he is called to provide *viva voce* testimony¹³ and to consent to further questioning by the Parties, Legal Representatives if applicable, and the Chamber. 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 [REDACTED]'s prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² 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); ICC-01/04-02/06-T-127-ENG ET, p.72, lns.10-18 (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.

¹³ ICC-01/04-02/06-619, para.43.

Supplementary examination

17. Should Witness [REDACTED]'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 prior jurisprudence of this Court,¹⁴ including this Chamber's.¹⁵
18. The Prosecution would first seek to elicit, *viva voce*, further details in relation to limited information [REDACTED], including in relation to the crimes of attacks against civilians, persecution, and pillaging by UPC/FPLC forces – [REDACTED].
19. [REDACTED].
20. As previously indicated to the Chamber,¹⁶ the Prosecution intends to complete the process of admission of Witness [REDACTED]'s material as well as its supplementary examination within two hours. Should the Chamber reject this Request in whole or in part, the Prosecution may require up to the four hours originally estimated for this witness' examination-in-chief.

Proposed procedure for the introduction of prior recorded testimony

21. Should this Request be granted, the Prosecution submits that there will be no need to read into evidence Witness [REDACTED]'s prior testimony.

¹⁴ 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 *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, p. 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.

¹⁵ [REDACTED].

¹⁶ *See* email from the Prosecution to the Chamber, Parties and participants dated 7 October 2016 at 09:53.

22. During witness preparation, the Prosecution will ask Witness [REDACTED], *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.¹⁷ 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 which the witness makes.¹⁸
23. When Witness [REDACTED] 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."¹⁹ 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 its accuracy. The Prosecution will also then ask the witness to confirm his consent to be questioned by the Parties, Legal Representatives if applicable, and the Chamber.
24. In terms of further procedure, after tendering his prior recorded testimony into evidence, with any changes or clarifications noted on the record, the Prosecution will conduct a brief supplementary examination of Witness [REDACTED] as outlined above.

¹⁷ ICC-01/04-02/06-652-Anx, p. 4, paras.18-19.

¹⁸ ICC-01/04-02/06-652-Anx, p. 4, paras.14-15 and p.6, paras.31-32.

¹⁹ 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".

Conclusion

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



Fatou Bensouda
Prosecutor

Dated this 14th day of October 2016
At The Hague, The Netherlands