

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 27 July 2015

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***

Confidential, *EX PARTE* – only available to the Prosecution and Defence

**Prosecution request to file a reply to the “Response on behalf of Mr Ntaganda to the ‘Prosecution’s application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103’”,
ICC-01/04-02/06-736-Conf-Exp**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Prosecution's Submissions

1. Pursuant to regulation 24(5) of the Regulations of the Court ("Regulations"), the Office of the Prosecutor ("Prosecution") requests leave to file a reply to the "Response on behalf of Mr Ntaganda to the 'Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased witnesses P-22, P-41 and P-103'" ("Response").¹
2. On 18 June 2015, the Prosecution requested to admit the statements and related documents of three deceased Prosecution Witnesses, P-22, P-41 and P-103 ("Request").² The Prosecution made the Request under rule 68(2)(c) of the Rules of Procedure and Evidence ("Rules"), and additionally or alternatively, under articles 69(2), 69(4), 64(9)(a) of the Rome Statute ("Statute") and rule 63(2) of the Rules.
3. On 20 July 2015, the Defence filed the Response in which it makes a number of arguments to which the Prosecution seeks leave to reply.
4. First, the Defence argues that the Prosecution's reliance, additionally or alternatively, on the general provisions for the admissibility of evidence, articles 69(2), 69(4), 64(9)(a) of the Statute, and rule 63(2) of the Rules ("General Provisions"), is an attempt to circumvent rule 68(2)(c), which is *lex specialis*.³ The Prosecution seeks to address, in reply, whether this *lex specialis* – rule 68(2)(c) – applies if the conditions under rule 68(2)(c) are not met (for instance, because a document is found not to be prior recorded testimony). The Prosecution also seeks to address the issue as to whether even when a party fails to meet the conditions of rule 68(2)(c) with respect to prior recorded testimony, the Chamber

¹ ICC-01/04-02/06-736-Conf-Exp.

² ICC-01/04-02/06-659.

³ Response, paras.6, 76-81.

retains the powers vested upon it by articles 69(2), 69(4), and 64(9)(a) *despite* the amendment to rule 68, in light of the primacy of the Statute over the Rules.⁴

5. Second, the Defence asserts that the Prosecution has failed to establish that Witnesses P-22 and P-103 are unavailable to testify in court.⁵ The Prosecution seeks to address, in reply, what constitutes unavailability for the purposes of rule 68(2)(c), and how it can be demonstrated, in light of the fact that the rule applies not only where a person has died, but also where the person must be *presumed* dead or is otherwise unavailable due to obstacles that cannot be overcome with reasonable diligence.
6. Third, the Defence notes that it came across information to suggest Witness P-22 is alive, but that it is precluded from verifying the information in the absence of an investigator.⁶ The Prosecution seeks to address, in its reply, whether the Chamber ought to rule P-22's materials inadmissible in the absence of an unsubstantiated, unverified suggestion by the Defence, where it has also not shared the lead information with the Prosecution so that it can investigate it.
7. Fourth, the Defence argues that the 14 photographs of Witness P-22's injuries attached to her statement,⁷ the two documents attached to P-103's statement,⁸ and several documents referred to by Witness P-41 in his statement or during his testimony⁹ are inadmissible because they are not an inseparable and indispensable part of the statement or testimony, or because the witnesses did not sufficiently elaborate upon them. The Prosecution seeks to address, in reply, the difference between admitting materials referred to by the witnesses in their statements or testimony (i) for the truth of their content (in particular when the

⁴ Article 51(5) of the Statute.

⁵ Response, paras.4, 11-13 and 65-68.

⁶ Response, para.11.

⁷ Annexes A4-A17 to the Request; *see* Response, paras.33-36.

⁸ Annexes C3 and C4 to the Request; *see* Response, paras.74-75.

⁹ Annexes B25-B27, B29, B32-50, B52-55 and B60 to the Request; *see* Response, para.62.

documents speak for themselves) and (ii) for the sake of completeness, as a necessary component of the statements or testimony of the witness, without which the statements or testimony cannot be fully comprehended.

8. Fifth, the Defence argues that P-22's first witness statement¹⁰ is inadmissible under rule 68(2)(c) because it was not given to a party or authority.¹¹ The Prosecution seeks to argue, in reply, that Witness P-22's first statement is admissible because of its relationship to the second statement,¹² which *was* given to a party, and in which the witness refers to, clarifies and provides additional information concerning the incidents addressed in her first statement.
9. Sixth, the Prosecution seeks to reply to the Defence's assertion that, in her second statement, P-22 "repudiates two important facts" given in her first statement.¹³
10. Finally, the Defence argues that the statements of Witnesses P-22 and P-103 are inadmissible because they go to proof of the acts and conduct of the Accused.¹⁴ The Prosecution seeks to distinguish, in its reply, the jurisprudence from the International Criminal Tribunal for the Former Yugoslavia relied upon by the Defence, which pertains to a statutory provision that does not contain the same permissive language with respect to prior recorded testimony going to proof of the acts of conduct of the Accused as that in rule 68(2)(c)(ii).
11. The Prosecution's reply would assist the Chamber in its determination. Should the Chamber grant leave, the Prosecution will set out its substantive submissions in its reply without repeating any arguments contained in the Request.

¹⁰ Annex A2 to the Request.

¹¹ Response, paras.15-16.

¹² Annex A3 to the Request.

¹³ Response, paras.18-19.

¹⁴ Response, paras.39, 43-44, 72-73.

Confidentiality

12. This filing is classified as "Confidential, *EX PARTE* – only available to the Prosecution and Defence" under regulation 23*bis*(2) of the Regulations, to be consistent with the classification of the Response. The Prosecution will file a public redacted version of this filing.

Request

13. Based on the foregoing, and pursuant to regulation 24(5) of the Regulations, the Prosecution requests that the Chamber grant leave to file a reply.



Fatou Bensouda
Prosecutor

Dated this 27th day of July 2015
At The Hague, the Netherlands