

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 5 October 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***

**Public,
with Confidential Annexes A-Q**

**Public redacted version of “Prosecution application under rule 68(3) to admit the
prior recorded testimony and associated documents of Witness P-0055”,
2 October 2015, ICC-01/04-02/06-884-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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Introduction

1. The Prosecution requests that Trial Chamber VI admit into evidence the prior in-court testimony of Witness P-0055, under rule 68(3) of the Rules of Procedure and Evidence ("Rules") and the Decision on the conduct of proceedings.¹ Witness P-0055 testified as a Prosecution witness in the *Lubanga* case and he will testify as a Prosecution witness in these proceedings.² Witness P-0055 is scheduled to appear fourth in the upcoming second evidentiary block.³
2. The introduction of Witness P-0055's previous testimony under rule 68(3) will enhance the expeditiousness of the proceedings by reducing the length of his upcoming testimony. The Prosecution will, however, need to ask supplementary questions, as is provided for under rule 68(3) of the Rules, on areas of his evidence that were either not germane to the *Lubanga* case and not elicited or were addressed only briefly in that proceeding. Additional examination on such topics is necessary to the determination of the truth and to elicit evidence specific to the *Ntaganda* case, which has significantly more charges than those in the *Lubanga* case, and a different accused.
3. Admission of the prior recorded testimony is not prejudicial to the rights of the Accused. The Parties, the Legal Representatives of Victims, if applicable, and the Chamber will have an opportunity to examine the witness. His prior recorded testimony was given under oath, it is relevant and reliable; the witness will be asked to confirm its accuracy and that he does not object to its introduction.
4. The Prosecution also seeks to admit four documents referred to in P-0055's testimony, pursuant to rule 68(3) of the Rules or, in the alternative, pursuant to

¹ ICC-01/04-02/06-619, para. 43.

² ICC-01/04-02/06-560, para. 10 (i).

³ Due to commence on 19 October 2015.

article 69(2) and (3) of the Statute. These documents are relevant to the proceedings and to this witness' evidence.

Confidentiality

5. The filing is classified as Confidential pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, because it contains confidential information regarding a Prosecution witness. The Prosecution will file a public redacted version of the 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. In its Decision on the conduct of proceedings, the Chamber ordered that the calling party file an application together 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.⁴
7. Witness P-0055 was [REDACTED]. [REDACTED]. During the *Lubanga* trial, Witness P-0055 testified on matters such as the historical and political background of the conflict in Ituri, [REDACTED], [REDACTED], the role of [REDACTED], certain UPC/FPLC operations, [REDACTED], [REDACTED], [REDACTED].

⁴ ICC-01/04-02/06-619, para. 42.

8. Through the present application, the Prosecution seeks to introduce under rule 68(3), the in-court testimony of P-0055 during the *Lubanga* trial, and four documents admitted during that deposition.
9. To this end, attached as Annex A, is a chart of the materials which is referred to during the prior in-court testimony of P-0055. Within this annex, a first table records the relevant precise passages of the trial transcripts the Prosecution seeks to admit. A second table lists four associated documents that were admitted through Witness P-0055 in the *Lubanga* trial. The Prosecution seeks to admit those four documents in these proceedings. In the third table of Annex A is a list of items that the Prosecution does not seek to admit into evidence through this witness but that are necessary to understand his testimony.
10. Attached as Annexes B to G are the transcripts of Witness P-0055's prior in-court testimony in the *Lubanga* proceedings, which took place on 8, 14, 15, 19, 20, and 26 May 2009.⁵ The Prosecution seeks to admit Witness P-0055's prior recorded in-court testimony in full. The introduction of the entirety of the previous testimony is relevant, and preferable to an artificial fragmentation of the evidence provided by the witness in court. Examinations by the Prosecution, Defence for Thomas LUBANGA, Legal Representatives of the Victims and Trial Chamber I are included. The Prosecution has omitted purely procedural exchanges that occurred in the courtroom or were held in the absence of the witness.
11. Attached as Annexes H, I, J, and K are the four documents introduced through Witness P-0055's previous testimony, which the Prosecution also seeks to admit under rule 68(3) as part of the prior recorded testimony or, in the alternative, under article 69(2) and (3). All four documents were commented upon by the

⁵ Annex B: ICC-01/04-01/06-T-171-ENG, (DRC-OTP-2054-2801); Annex C: ICC-01/04-01/06-T-174-ENG, (DRC-OTP-2054-7317); Annex D: ICC-01/04-01/06-T-175-ENG, (DRC-OTP-2054-7428); Annex E: ICC-01/04-01/06-T-176-ENG, (DRC-OTP-2054-7605); Annex F: ICC-01/04-01/06-T-177-ENG, (DRC-OTP-2054-7791); Annex G: ICC-01/04-01/06-T-178-ENG (DRC-OTP-2054-7922).

witness during his testimony, and introduced as evidence through him. These are [REDACTED].⁶

12. In the course of his prior recorded testimony, Witness P-0055 was shown other material. As directed by the Chamber, the Prosecution attaches to this application these materials that may be necessary for a complete understanding of the witness' prior recorded testimony.⁷ They are listed and described in the chart attached as Annex A to this application, and the documents are attached as Annexes L to Q.⁸ The Prosecution is not seeking the admission of these documents at this time.

13. The admission of the prior recorded testimony and four related documents is not prejudicial to or inconsistent with the rights of the Accused. The Prosecution will call Witness P-0055 to provide *viva voce* testimony. As such, the Parties, the Legal Representatives for Victims, if applicable, and the Chamber will have the opportunity to examine him during the proceedings in accordance with rule 68(3) of the Rules. This testimony is relevant and reliable, and Witness P-0055 will be asked to confirm its accuracy.⁹ The four other associated documents are relevant; they were either produced or provided by the witness. These documents are also necessary to understand Witness P-0055's evidence.

14. The Prosecution seeks to be permitted to ask Witness P-0055 supplementary questions, following the introduction of his prior recorded testimony and associated documents as anticipated by rule 68(3). This supplementary examination is necessary to elicit the evidence that is specific to this case in terms of the charges and the Accused. Other Chambers of this Court have permitted

⁶ Annex H: DRC-OTP-0187-0031, Annex I: DRC-OTP-0187-0032, Annex J: DRC-OTP-0187-0033; Annex K: DRC-OTP-0185-0810.

⁷ ICC-01/04-02/06-619, para. 42.

⁸ Annex L is a collation of messages – extracted from the UPC/FPLC Logbook (DRC-OTP-0017-0033) – and which were shown to P-0055 during his testimony. The French translation of each excerpted message is provided for the benefit of the Chamber and participants (DRC-OTP-0171-0926).

⁹ ICC-01/04-02/06-619, para. 43.

supplementary questioning after the introduction of the prior recorded testimony.¹⁰ Trial Chamber I notably permitted the Prosecution to ask “any necessary questioning” after the introduction of the prior recorded testimony of a witness present before the Chamber.¹¹

15. The Prosecution will avoid eliciting evidence that is duplicative of the witness’ previous testimony, which is the very purpose of this application. However, because the people and general events are the same as in the *Lubanga* case, while the charges and the Accused are different, it is necessary to address in some level of detail certain topics that were only briefly touched upon during the previous testimony or that were not addressed at all during the testimony but were addressed with the witness in his prior interviews. During its examination-in-chief, the Prosecution will need to expand on those points in order to elicit the additional information necessary to prove its case against Bosco NTAGANDA. These areas of questioning will focus on the role and responsibility of the Accused, and the additional crimes charged in this case – including the attacks of interest.¹² A brief series of questions on the witness’ background to establish his basis of knowledge is also warranted.

16. Should the application be granted, the Prosecution sets out the areas upon which it will not ask extensive or any questions: [REDACTED], [REDACTED],

¹⁰ 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 (ICC-01/04-01/06-1603, para. 25; ICC-01/04-01/06-T-205-Red3, p. 14, ln. 16 to 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 witnesses P-30 and P-2’s prior recorded testimony (ICC-01/04-01/07-2233-Corr, paras. 16-17 (P-30) and ICC-01/04-01/07-2289-Corr-Red, p. 17 (P-2), 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-30, questioned by Prosecution from p. 23), ICC-01/04-01/07-T-184-Red-ENG (P-2, questioned by Prosecution from p. 24).

¹¹ ICC-01/04-01/06-1603, para. 25.

¹² The areas that the Prosecution intends to develop in its examination include the following points raised in the witness’ summary of evidence: ICC-01/04-02/06-491-Conf-AnxB, pp. 29-32, second paragraph of page 29, and points 1, 3, 7, 8, 16, 17, 18, 19, 20, 21, 22, 23.

[REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED],
[REDACTED], [REDACTED], [REDACTED].¹³

17. The Prosecution estimates that admitting the witness's prior recorded testimony will reduce its examination in chief by 4 or 5 hours. The Prosecution will provide the Chamber with an updated estimate of its anticipated length of examination in chief in advance of the witness' testimony.
18. The Defence will not be prejudiced as it will have an opportunity to cross-examine the witness, allowing the Defence to test the witness' evidence, particularly on information concerning the Accused and the charges against him. The Prosecution submits, however, that in the interest of the expeditiousness of the proceedings, virtually identical lines of questioning that were already covered by Mr LUBANGA's Defence, should be limited. Repetitive cross-examination on issues appropriately tested by the Defence of Mr LUBANGA, and that are neither specific to this case's charges nor to this Accused, should not be permitted.
19. In this Court, during joint trials, Chambers have limited subsequent cross-examination on "grounds already covered by a prior cross-examiner"¹⁴ or have simply forbidden repetitive questions.¹⁵
20. Should this application be granted, the Prosecution submits that only the references of the relevant portions of the transcript of the prior testimony, as identified in annex A should be read into the record, for efficiency purposes. This practice was followed by other Chambers in this Court.¹⁶

¹³ These points are set out in the witness' summary of evidence: ICC-01/04-02/06-491-Conf-AnxB, pp. 29-32, points 2, 4, 5, 6, 9, 10, 11, 12, 13, 14, and 15.

¹⁴ See ICC-01/09-01/11-847-Corr, para. 14 in *Ruto and Sang*.

¹⁵ ICC-01/05-01/13-T-10-CONF-ENG, p. 7, Ins. 13-20 in *Bemba, Kilolo, Mangenda, Babala and Arido*; ICC-01/04-01/07-1665 in *Katanga and Ngudjolo*.

¹⁶ See for example in *Lubanga*, admission of the testimony of Witness P-0046, made during the Confirmation of charges, ICC-01/04-02/06-T-205-Conf-ENG (Open session), DRC-OTP-2054-6568 at 6578-6582.

Request

21. The Prosecution requests that the Chamber admit the prior recorded testimony of Witness P-0055, as identified in the chart contained in Annex A pursuant to rule 68(3) of the Rules. It also requests that the Chamber admit four other associated documents attached in Annexes H-K, pursuant to rule 68(3) of the Rules or, in the alternative, article 69(2) and (3) of the Statute. Finally, the Prosecution requests to be permitted to conduct supplementary examination following the introduction of Witness P-0055's prior recorded testimony on areas of particular relevance to the present proceedings.



Fatou Bensouda, Prosecutor

Dated this 5th day of October 2015
At The Hague, the Netherlands