

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

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

Date: **1 July 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-C**

**Public redacted version of “Prosecution application under rule 68(3) to admit the
prior recorded testimony and associated documents of Witness P-0850”,
2 June 2016, ICC-01/04-02/06-1361**

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. The Office of the Prosecutor (“Prosecution”) requests that Trial Chamber VI (“Chamber”) admit into evidence the prior recorded testimony of Witness P-0850 under rule 68(3) of the Rules of Procedure and Evidence (“Rules”).
2. Specifically, the Prosecution seeks to admit Witness P-0850’s statement and the accompanying sketch annexed to this statement, pursuant to rule 68(3) of the Rules as part of his testimony. These documents are relevant, and Witness P-0850 will be asked to confirm their accuracy at the beginning of his testimony.¹
3. Witness P-0850 will be the ninth witness to testify during the fifth evidence block, which is scheduled to commence on 6 June 2016. As such, the Parties and Chamber will have the opportunity to examine this witness in the course of these proceedings. The admission of the prior recorded testimony of Witness P-0850 will not be prejudicial to the rights of the Accused.
4. The admission of the prior recorded testimony of Witness P-0850 will enhance the expeditiousness of the proceedings by reducing the length of his in-court testimony. Should this application be granted, the Prosecution intends to conduct a brief supplementary examination of Witness P-0850, as provided for under rule 68(3), to elicit limited, focused *viva voce* evidence and confirm the accuracy of his prior recorded testimony.

Confidentiality

5. The filing is classified as Confidential pursuant to regulation 23*bis* (1) of the Regulations of the Court because it contains confidential information relating to a Prosecution witness. The Prosecution will file a public redacted version of this filing.

¹ ICC-01/04-02/06-619, para.43.

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. The Prosecution identified Witness P-0850 as an appropriate witness for the procedure under rule 68(3) of the Rules.²
7. 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.³
8. Accordingly, attached as Annex A to this application, is a list of the materials that the Prosecution seeks to admit into evidence under rule 68(3). This list sets out the passages of Witness P-0850's witness statement⁴ that the Prosecution seeks to admit and an accompanying sketch⁵ by Witness P-0850, which is annexed to his statement.
9. There are no other materials associated with Witness P-0850 or referred to in his statement that are necessary for a complete understanding of this witness' prior recorded testimony.⁶
10. In his statement, Witness P-0850 provides information on, *inter alia*: the background to the conflict in Ituri and its ethnic dimension; two attacks by the UPC/FPLC on Mongbwalu [REDACTED]; the UPC/FPLC attack on Kilo and

² In accordance with ICC-01/04-02/06-619, para.16, the Prosecution provided a Forthcoming Witness List for the 5th evidentiary block by email on 22 April 2016, in which it indicated its intention to apply under rule 68(3) of the Rules for the admission of Witness P-0850's prior recorded testimony.

³ ICC-01/04-02/06-619, para.42.

⁴ DRC-OTP-2067-1825.

⁵ DRC-OTP-2067-1836.

⁶ See ICC-01/04-02/06-619, para.42.

subsequent occupation of Kilo; UPC/FPLC patrols for Lendu, [REDACTED]; the murder of a Nyali man; his knowledge of mass graves around Kilo including near the UPC/FPLC headquarters in Kilo; and seeing Bosco NTAGANDA in Kilo in December 2002. In his statement, Witness P-0850 also explains the accompanying sketch that he drew [REDACTED].

11. In the “Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0877”, the Prosecution indicated that it did not intend to conduct a supplementary examination of Witness P-0850.⁷ Upon further review, the Prosecution confirms that whilst it will not elicit evidence of the occupation of Kilo from Witness P-0850 as *viva voce* testimony, it will seek to briefly examine him about his knowledge of: (a) UPC/FPLC patrols; (b) the murder of Lendu and Nyali individuals; and (c) his seeing Bosco NTAGANDA in Kilo in December 2002. [REDACTED].
12. The Prosecution is seeking to admit the majority of Witness P-0850’s statement and the accompanying sketch into evidence under rule 68(3) of the Rules. This statement contains limited standard redactions to [REDACTED].
13. This statement was voluntarily given by Witness P-0850.⁸ He attested to it being true to the best of his recollection and knowledge.⁹ It is relevant and reliable. Further, Witness P-0850 will be asked to confirm the accuracy of his statement and the sketch annexed to it.¹⁰
14. The admission of Witness P-0850’s prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused. The Prosecution intends to call Witness P-0850 to provide *viva voce* testimony. As such, the Parties and the Chamber will have the opportunity to examine this witness during the

⁷ ICC-01/04-02/06-1335-Conf at para. 19.

⁸ DRC-OTP-2067-1825 at 1826, para. 3 and at 1834, para. 63.

⁹ DRC-OTP-2067-1825 at 1826, para. 6 and at 1834 (witness acknowledgment).

¹⁰ ICC-01/04-02/06-619, para.43.

proceedings and he will confirm whether he consents to the admission of his materials, in accordance with rule 68(3) of the Rules.

Proposed procedure for the introduction of prior recorded testimony

15. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0850's statement as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any, to his statement and the accompanying sketch.
16. During witness preparation, the Prosecution will ask Witness P-0850 to review his prior statement and the annexed sketch, advise of any corrections or clarifications he wishes to make to these materials, and then to confirm their accuracy.¹¹ 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 the witness makes.¹²
17. To enhance expeditiousness of his in-court testimony, the Prosecution proposes that it be permitted to use leading questions to elicit from the witness any corrections or clarifications identified during witness preparation, asking him to confirm that he wishes to make a particular change and asking him to explain the reason for the change or clarification.
18. 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-0850 to ask limited questions and to solicit specific, focused aspects of his evidence *viva voce*, in accordance with rule 68(3) of the Rules. This supplementary examination will ensure that the key aspects of his evidence are suitable explored through a non-leading examination

¹¹ ICC-01/04-02/06-652-Anx, page 4, paras. 18-19.

¹² ICC-01/04-02/06-652-Anx, page 4, paras. 14-15 and page 6, paras. 31-32.

by the Prosecution, which will ensure that the Chamber is able to fully assess these aspects of his evidence with a greater degree of clarity and reliability.

Specific areas of Witness P-0850's evidence to be provided *viva voce*

19. Following the introduction of his prior recorded testimony, the Prosecution seeks to be permitted to ask Witness P-0850 limited clarification questions, as well as specific, focused questions to explore what the Prosecution has identified to be critical aspects of his testimony. This supplementary questioning will be brief and focused and come within the time estimate provided by the Prosecution of one hour for examination-in-chief.¹³
20. Other Chambers of this Court have permitted supplementary questioning after the introduction of the prior recorded testimony.¹⁴ 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."¹⁵
21. In particular, Witness P-0850 is expected to provide direct evidence about UPC/FPLC patrols in Kilo and [REDACTED] of Lendu and Nyali individuals being captured in these patrols. He will also testify about seeing the Accused in Kilo in December 2002.

¹³ In accordance with ICC-01/04-02/06-619, para.16, the Prosecution provided a Forthcoming Witness List by email on 22 April 2016, in which it estimated that the examination-in-chief of Witness P-0850, including the required procedure under rule 68(3) of the Rules for the admission of his prior recorded testimony, would be completed in one hour.

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, page 14, l.16 to page 19, l.9 (introduction of prior recorded testimony) and page 19, l.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, 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 page 23), ICC-01/04-01/07-T-184-Red-ENG (P-0002, questioned by Prosecution from page 24).)

¹⁵ ICC-01/04-01/06-1603, para. 25.

Request

22. The Prosecution requests that the Chamber admit the witness statement of Witness P-0850 and the accompanying sketch annexed to this statement, listed in Annex A to this application, as prior recorded testimony pursuant to rule 68(3) of the Rules.

23. Further, the Prosecution requests to be permitted to conduct a brief supplementary examination of Witness P-0850 following the introduction of his prior recorded testimony, to elicit limited, focused *viva voce* evidence.



Fatou Bensouda
Prosecutor

Dated this 1st day of July 2016
At The Hague, The Netherlands