

**Cour
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**International
Criminal
Court**

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Date: **22 September 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-S**

**Public redacted version of “Prosecution application under rule 68(3) to admit
Witness P-0014’s prior recorded testimony and associated material”,
22 August 2016, ICC-01/04-02/06-1479-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 Office of the Prosecutor ("Prosecution") requests that, pursuant to rule 68(3) of the Rules of Procedure and Evidence ("Rules"), Trial Chamber VI ("Chamber"): (i) admit into evidence the relevant excerpts from [REDACTED], together with three items [REDACTED] which are relevant to the case against the Accused; (ii) admit into evidence seventeen paragraphs from Witness P-0014's [REDACTED] witness statements, together with the seven items which Witness P-0014 explains in these paragraphs and which are relevant to the case against the Accused; and (iii) grant the Prosecution leave to conduct a brief supplementary examination of Witness P-0014 ("Request").¹
2. Witness P-0014 worked as a [REDACTED] before and during the temporal scope of the charges against the Accused. [REDACTED]. He [REDACTED] was privy to information relevant to the charges against the Accused.
3. This witness's prior recorded testimony primarily relates to the background of the conflict in Ituri, the creation and structure of the UPC/FPLC during the earlier part of the temporal scope of the charges, and the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC. In his prior recorded testimony, the witness provides detailed information regarding the basis of his information.
4. The material which the Prosecution seeks to admit is relevant and reliable. Witness P-0014 will be the eighth witness to testify during the sixth block of evidence, which is scheduled to commence on 5 September 2016. He will be asked to attest to the accuracy of his prior recorded testimony at the beginning of his testimony against the Accused and whether he consents to admission of

¹ See Annex A for details on the precise excerpts, paragraphs, and items which the Prosecution seeks to admit through this Request and on the material which it does not seek to admit but which is necessary to understand the prior recorded testimony of this witness.

parts of his statement and agrees to be questioned.² As such, the Parties and the Chamber will have the opportunity to examine this witness in the course of these proceedings.

5. Based on the Prosecution's experience in this case, approximately thirty to forty five minutes are 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. However, this depends on the witness and the amount of material sought to be admitted. In this instance, the Prosecution considers it may need approximately forty minutes. The Prosecution requires the remainder of time of approximately one hour and twenty minutes 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 treatment of the non-Hema community, the August 2002 attack on Bunia, and the role of the Accused in the UPC/FPLC, which were only briefly addressed [REDACTED]. [REDACTED] eliciting further information in this case is essential for the Prosecution's case against the Accused. The Prosecution also intends to question Witness P-0014 about certain documents relevant to the charges against the Accused, which were provided by or relate to this witness but in relation to which he was not questioned to date.
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 P-0014's examination-in-chief by four hours.
7. The Prosecution would not oppose the admission of these statements in their entirety should the Chamber deem such an approach to be more beneficial. The Prosecution would still require time for focused supplementary questioning.

² ICC-01/04-02/06-619, para.43.

Confidentiality

8. The filing and its annexes are classified as “Confidential” pursuant to regulation 23*bis*(1) of the Regulations of the Court because they contain confidential information relating to a protected Prosecution witness. The Prosecution will file a public redacted version of this filing.

Prosecution’s Submissions

9. 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.
10. Witness P-0014 provided statements to the Prosecution in [REDACTED] and [REDACTED]. The Prosecution identified Witness P-0014 as an appropriate witness for the procedure under rule 68(3) of the Rules.³
11. The prior recorded testimony and associated material which the Prosecution seeks to admit pursuant to rule 68(3) relates, *inter alia*, to: (i) Witness P-0014’s educational and professional background, including his involvement with the UPC/FPLC; (ii) the general context of the conflict in Ituri leading to, and during, the temporal scope of the charges against the Accused; (iii) the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC; and (iv) the UPC/FPLC’s structure and the role of the Accused and a number of his alleged co-perpetrators.

³ In accordance with ICC-01/04-02/06-619, para.16, the Prosecution provided a Forthcoming Witness List for the sixth evidentiary block by email on 5 August 2016, in which it indicated its intention to apply for the admission of Witness P-0014’s prior recorded testimony under rule 68(3) of the Rules.

12. 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
13. As set out in section I(A) of Annex A to this filing, the Prosecution seeks to admit, in full, [REDACTED].⁵ [REDACTED].
14. Section I(B) of Annex A to this filing sets out seventeen paragraphs that the Prosecution seeks to admit from Witness P-0014's witness statements, which relate to seven items which the Prosecution also seeks to admit under rule 68(3).⁶ The Prosecution does not seek to admit the remainder of the two statements. The Prosecution would not oppose the admission of these statements in their entirety should the Chamber deem such an approach to be more beneficial to the establishment of the truth, in particular since, with regard to certain issues, the statements provide [REDACTED]. However, should the entirety of the two statements be admitted, the Prosecution would still require time for focused supplementary questioning since certain important issues referred to in this witness's prior recorded testimony need further clarification and elaboration.
15. Section II(A) in Annex A refers to three items which the Prosecution seeks to admit. The three items [REDACTED] are relevant to the case against the Accused.

⁴ ICC-01/04-02/06-619, para. 42.

⁵ [REDACTED].

⁶ See para.19, below, and Annex A, section II(B). The two witness statements are contained in Annexes G and H.

16. The first⁷ of these three items is a video [REDACTED]. This Chamber has held that “exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced.”⁸ This standard is applicable to documents of a written nature as well as to those of an audio-visual nature. This is evidenced by the Chamber’s reference to the same standard in rejecting a Prosecution request to admit a video through Witness P-0315.⁹

17. There is no reason to adopt any other test or standard for the admission of audio-visual as opposed to other types of material. Indeed, making any artificial distinction and requiring that a witness be questioned again about audio or video materials that he has previously been shown [REDACTED], would significantly undermine the expeditiousness of the proceedings. Audio-visual materials are the most time-consuming forms of documentary evidence to be shown and commented upon in court because, in contrast with other documentary evidence, they ordinarily require that the entirety of the relevant excerpts be played (and often replayed) to a witness and be interpreted for the Court record. In contrast, written documents can generally be read briefly by a witness without interpretation, before being questioned.

18. The second¹⁰ and third items¹¹ in section II(A) of Annex A are [REDACTED].

19. Section II(B) of Annex A refers to seven items which the Prosecution seeks to admit. These items were shown to and explained by Witness P-0014 in the seventeen paragraphs of his witness statements that the Prosecution seeks to

⁷ [REDACTED].

⁸ ICC-01/04-02/06-T-105-CONF-ENG ET, p.93, ln.24 - p.94, ln.7 (open session); *See also* ICC-01/04-02/06-1205, para.7; ICC-01/04-02/06-1029, paras.23, 35; ICC-01/09-01/11-1938-Corr-Red2, para.33.

⁹ ICC-01/04-02/06-T-105-CONF-ENG ET, p.95, lns.6-12 (open session).

¹⁰ [REDACTED].

¹¹ [REDACTED].

admit.¹² The first four¹³ of these items are [REDACTED]. The documents concern [REDACTED]. The fifth¹⁴ of these items is a document [REDACTED]. The sixth item¹⁵ is a document which [REDACTED]. The seventh item¹⁶ is a document which [REDACTED]. This item was disclosed to the Defence in January 2014 pursuant to rule 77. This item is not currently on the Prosecution's list of evidence but it will be added shortly.

20. Section III of Annex A refers to three items which the Prosecution does not seek to admit but which are necessary for a complete understanding of this witness's prior recorded testimony.¹⁷ The first two items are Witness P-0014's [REDACTED] witness statements [REDACTED].¹⁸ However, as noted above, the Prosecution would not oppose the admission of these statements in their entirety should the Chamber deem this beneficial. The third item is a piece of paper on which [REDACTED].¹⁹

Witness P-0014's prior recorded testimony should be admitted pursuant to rule 68(3)

21. The prior recorded testimony and associated material set out in sections I and II of Annex A are relevant to establishing a number of crimes which the Accused has been charged with, such as persecution and the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC. They are also relevant in relation to a number of elements of the modes of liability through which the Accused has been charged for those crimes, including the

¹² See para.14, above, and Annex A, section I(B).

¹³ [REDACTED]The Prosecution will provide the Chamber, Defence, and participants with typed versions of the handwritten documents which it seeks to admit for ease of reference in due course.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ As set out in para.14, above, and Annex A, section I(B), the Prosecution is seeking to admit only seventeen paragraphs from these statements. The statements are annexed in their entirety as Annex G and Annex H, respectively.

¹⁹ [REDACTED].

existence of a common plan. Moreover, they are relevant to establishing the organised nature of the UPC/FPLC, the role of the different co-perpetrators, including the Accused, Floribert KISEMBO and Thomas LUBANGA, and the contextual elements of the crimes; *inter alia*, with Witness P-0014's [REDACTED] account of the attack on Bunia in August 2002.

22. [REDACTED].²⁰ [REDACTED]. Further, Witness P-0014 will be asked to confirm the accuracy [REDACTED] when he is called to provide *viva voce* testimony and to consent to further questioning by the Parties and the Chamber.²¹ As such, the Parties 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 P-0014's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

23. The Prosecution notes that certain parts of Witness P-0014's prior recorded testimony concern events which he did not directly experience. However, the witness generally provides details on the sources from which he obtained the information which he provides on such events, as well as his process of confirming the veracity thereof. In line with the Court's regulatory framework²² and jurisprudence,²³ as well as the jurisprudence of the *ad-hoc* tribunals,²⁴ this may be relevant to the weight to be attributed to the prior

²⁰ [REDACTED].

²¹ ICC-01/04-02/06-619, para.43.

²² See article 69 (3) and (4) of the Rome Statute and rule 63 (2) of the Rules.

²³ See ICC-01/04-01/07-3436-tENG (*Katanga* Trial Judgement), paras.88-90; ICC-01/04-01/06-2842 (*Lubanga* Trial Judgment), paras.107-108. The Chamber has even previously admitted, pursuant to rule 68(3), material which contained anonymous accounts, explaining that this was without prejudice to the weight that will be attributed thereto, see ICC-01/04-02/06-T-105-CONF-ENG ET, p.94, lns.8-22 (open session).

²⁴ *Prosecutor v. Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, para.15; *Prosecutor v. Popovic et al.*, IT-05-88-A, Judgement, 30 January 2015, para.1307; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Appeals Chamber, Judgment, 1 June 2001, para. 292.

recorded testimony but not to its admissibility. Admission of such information is not prejudicial to the Accused in particular since [REDACTED], which the Prosecution also seeks to admit, and the Accused will be able to further test this evidence during Witness P-0014's cross-examination in this case. His evidence is corroborated by other evidence and the Chamber will be able to assess it together with such other evidence, at the end of the trial.

Supplementary examination

24. Should Witness P-0014'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,²⁵ including this Chamber's.²⁶

25. The Prosecution would first seek to elicit, *viva voce*, further details in relation to certain issues which were only briefly referred to [REDACTED], including the role of the Accused and his alleged co-perpetrators in the UPC/FPLC, the common plan, the UPC/FPLC's persecution of non-Hema people, his [REDACTED] account of the attack on Bunia in August 2002, and crimes committed by UPC/FPLC soldiers.

²⁵ 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, 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 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.

²⁶ When admitting prior recorded testimony in full, the Chamber has previously stated that it would permit the Prosecution to seek to elicit further detail from the witness *viva voce* in relation to certain aspects of his/her testimony as long as this exercise does not merely repeat the information already contained in the witness's prior statement, see ICC-01/04-02/06-T-110-CONF-ENG ET, p.34, lns.8-13 (open session); ICC-01/04-02/06-T-106-CONF-ENG ET, p.91, lns.2-4 and p.92, lns.12-25 (open session).

26. The Prosecution would ensure that the witness is not merely asked to repeat the information which he already provided [REDACTED]. Should the Chamber decide to admit the entirety of his two prior witness statements, the supplementary questioning would not be duplicative of anything contained in those statements. This supplementary examination is necessary for the determination of the truth and to elicit further evidence specific to the *Ntaganda* case, [REDACTED].

27. During its supplementary examination, the Prosecution also intends to ask Witness P-0014 about a number of documents which are relevant to the charges against the Accused and were either provided by or relate to Witness P-0014 but in relation to which he was never asked to provide additional information.

28. As previously indicated to the Chamber,²⁷ the Prosecution intends to complete the process of admission of Witness P-0014's material as well as its supplementary examination within two hours. Should the Chamber reject this Request in whole or in part, the Prosecution will require the six hours originally estimated for this witness's examination-in-chief.

Proposed procedure for the introduction of prior recorded testimony

29. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0014's prior testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any, thereto.

30. During witness preparation, the Prosecution will ask Witness P-0014, *inter alia*, to review his prior testimony, advise of any corrections or clarifications he

²⁷ See email from the Prosecution to the Chamber, Parties and participants dated 5 August 2016 at 17:21.

wishes to make to it, and then to confirm its accuracy.²⁸ 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.²⁹

31. When Witness P-0014 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."³⁰ 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 his consent to be questioned by the Parties and the Chamber.
32. 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-0014 as outlined above.

²⁸ ICC-01/04-02/06-652-Anx, p.4, paras.18-19.

²⁹ ICC-01/04-02/06-652-Anx, p.4, paras.14-15 and p.6, paras.31-32.

³⁰ 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

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



Fatou Bensouda
Prosecutor

Dated this 22nd day of September 2016
At The Hague, The Netherlands