

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

**Public redacted version of “Prosecution reply to the ‘Response on Behalf of Mr Ntaganda to ‘Prosecution application under Rule 68(3) to admit Witness P-0014’s prior recorded testimony and associated material’”, 8 September 2016,
ICC-01/04-02/06-1496-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. Trial Chamber VI (“Chamber”) granted leave¹ for the Prosecution to reply to two issues raised in the “Response on Behalf of Mr Ntaganda to ‘Prosecution application under Rule 68(3) to admit Witness P-0014’s prior recorded testimony and associated material’” (“Response”):² (i) a request to be granted eight hours for Witness P-0014’s cross-examination; and (ii) an argument that a video shown to and explained by Witness P-0014 [REDACTED] is not admissible.
2. On the first issue, the Defence requests an additional two hours for the cross-examination of the witness but has not shown good cause to depart from the Chamber’s established principle that cross-examination shall not last longer than examination-in-chief, neither has it fulfilled the criteria previously set out by the Chamber for exceptions to this principle. P-0014’s materials are not voluminous, are duplicative [REDACTED], and the nature of his evidence does not require exhaustive cross-examination on every conceivable line of inquiry.
3. On the second issue, [REDACTED]. [REDACTED]. The Chamber’s decisions on admission of evidence permit the admission of the video on this limited basis. The Prosecution will thereafter seek to elicit additional details about the video during its supplementary questioning (identity of the armed group depicted, recognition of one individual in the video). The Defence has not explained how the admission of the video excerpt shown to and explained by Witness P-0014 [REDACTED] would be prejudicial to the Accused. Moreover, Witness P-0014 will be available for cross-examination regarding his prior recorded testimony and any supplementary evidence he provides.

¹ Email from the Chamber to the Parties and participants on 6 September 2016 at 11:31 a.m.

² ICC-01/04-02/06-1484-Conf.

Confidentiality

4. This filing is classified as “Confidential” pursuant to regulation 23*bis*(1) and (2) of the Regulations because it contains confidential information and in order to be consistent with the classification of the Response. The Prosecution will file a public redacted version of this filing.

Procedural Background

5. On 22 August 2016, the Prosecution filed a motion in which it requested the Chamber to admit Witness P-0014’s prior recorded testimony and associated material (“Motion”).³
6. On 1 September 2016, the Defence filed its Response. While the Defence does not oppose certain aspects of the Motion, it opposes others and requests additional time for Witness P-0014’s cross-examination.
7. On 5 September 2016, the Prosecution requested leave to reply to the Response.⁴
8. On 6 September 2016, the Chamber granted the Prosecution leave to reply on the first and third issues identified in its request for leave to reply.⁵

³ ICC-01/04-02/06-1479-Conf.

⁴ ICC-01/04-02/06-1492-Conf.

⁵ Email from the Chamber to the Parties and participants on 6 September 2016 at 11:31 a.m.

Prosecution's Submissions

The Defence has not justified its request for eight hours to cross-examine Witness P-0014

9. In its Response, the Defence requests eight hours to conduct its cross-examination of Witness P-0014.⁶ It seems that the Defence is requesting this additional time whether or not the Chamber accepts the rule 68(3) procedure. Regardless, the Prosecution opposes this request. It would mean granting the Defence two more hours than the estimate originally provided by the Prosecution for the examination-in-chief⁷ and the Defence's reasons do not justify the addition of two extra hours.

10. The Chamber's "Decision on the conduct of proceedings" establishes that "[i]n principle, cross-examination shall not last longer than the examination-in-chief" and goes on to state that "[t]he Chamber will decide on a case-by-case basis, and only after having heard the examination-in-chief, whether additional time for cross-examination may be warranted."⁸ Although there may be circumstances in which the Chamber may grant a request for cross-examination to extend beyond the time allotted for the examination-in-chief, the Defence has not shown good cause to depart from this general principle with regard to Witness P-0014.

11. The Chamber has previously held that specific justifications⁹ and "exceptional circumstances"¹⁰ are required in order for requests for additional time for examination to be granted. The Chamber has granted additional time for the examination of a witness, for example, when there were [REDACTED],¹¹ or when

⁶ Response, paras.37-38.

⁷ ICC-01/04-02/06-491-Conf-AnxB-Red, p.138.

⁸ ICC-01/04-02/06-619, para.29.

⁹ See [REDACTED]; ICC-01/04-02/06-T-49-CONF-ENG ET, p.52, lns.12- 17 (open session).

¹⁰ ICC-01/04-02/06-T-36-CONF-ENG ET, p.76, lns.1-3 (open session).

¹¹ [REDACTED].

special treatment of a witness is required- such as when a witness has difficulty understanding simple questions.¹² The Defence has not substantiated its request with these, or comparable, reasons.

12. The Defence's request for additional time is based on: (i) the amount of material related to Witness P-0014; (ii) the alleged need to address issues that [REDACTED] (iii) [REDACTED]; and (iv) the Defence's "duty and obligation" to address every issue arising in the witness's prior testimony.¹³ None of these reasons, taken alone or together, justify the Defence's request. In particular, the purpose of cross-examination is not for the Defence to "address every issue admitted on the record" in relation to Witness P-0014, or any other witness.¹⁴ Indeed, the Chamber has already stated that it is not necessary for the Defence to address every issue arising from a witness's prior testimony or examination-in-chief.¹⁵ The nature of the evidence of certain witnesses does not warrant extensive cross-examination.

13. Witness P-0014 has a significant, but not exceptional, amount of material. This amount of material does not warrant extending cross-examination by two hours. First, not all aspects of his two witness statements are relevant to the proceedings against the Accused. Second, there is considerable overlap between the information contained in the two witness statements [REDACTED].

14. Should the Chamber admit the witness's prior recorded testimony, it will be easier to prepare a streamlined cross-examination of the witness since the Defence would know, in advance, the majority of the testimony which it may decide to

¹² ICC-01/04-02/06-T-49-CONF-ENG ET, p.77, ln.22 – p.78, ln.8 (open session).

¹³ Response, paras.37-38.

¹⁴ *Contra*, Response, para.38.

¹⁵ The Presiding Judge has noted that examinations need to be conducted efficiently, and that, for example, asking a witness whether what he stated the day before is correct is an inefficient practice, *see* [REDACTED]; ICC-01/04-02/06-T-94-CONF-ENG ET, p.101, ln.19 – p.102, ln.2 (open session); *See also* ICC-01/04-02/06-T-55-CONF-ENG ET, p.10, ln.23 to p.11, ln.11 (open session).

challenge. The Prosecution's examination-in-chief will last no longer than two hours, about forty minutes of which will likely be spent on the procedure for the admission of the prior recorded testimony and associated material,¹⁶ which necessarily means that limited issues will be addressed *viva voce*.

15. Moreover, the main purpose for the admission of prior recorded testimony pursuant to rule 68(3) of the Rules is to save court-time. Reducing the amount of hours necessary for examination-in-chief through the admission of prior recorded testimony only to then increase the time available for cross-examination because of such admission would defeat this purpose.

The video shown to and explained by Witness P-0014 [REDACTED] is admissible

16. In its Response, the Defence argues that a video shown to and explained by Witness P-0014 [REDACTED], is inadmissible in this case.¹⁷ The Defence appears to suggest that the Chamber has articulated different and more stringent principles for the admission of evidence [REDACTED].¹⁸

17. The Prosecution clarifies that it seeks the admission of the video excerpt [REDACTED]¹⁹ for the limited purpose of establishing the location in which it was filmed. Admission of the video for this purpose would [REDACTED].²⁰ The Prosecution will thereafter ask supplementary questions on the video regarding the identification of the armed group and one individual in the video. No prior decisions of the Chamber in this case prohibit admission of an item for the limited purpose of identification of persons, locations, seals, signature or other details, provided the witness has established a sufficient basis – or connection – to the details he or she confirms or identifies.

¹⁶ See Motion, paras.5, 28.

¹⁷ Response, paras.4(iii), 12-19.

¹⁸ Response, paras.13, 18.

¹⁹ Minutes 00:00:43 – 00:04:36 (without sound) of DRC-OTP-0159-0441; See Motion, Annex A.

²⁰ [REDACTED].

18. Indeed, the Chamber has held that a party seeking to tender a video must establish that the witness has personal knowledge of the making of an audio-visual recording *or* of its content.²¹ Although Witness P-0014 is not able to testify about the making of the recording, he is able to identify the locations in which it was filmed, the group to which the soldiers depicted in the video excerpt belonged, and an individual who also features in the excerpt. This meets the standard established by the Chamber for the purposes of admission. The degree of connection required between a witness and audio-visual material for the purposes of admission should be no more onerous than that required for the admission of any other type of material.
19. The fact that the witness was not able to provide more information on the video excerpt is a matter which the Chamber could consider in determining what weight, if any, to attribute to it, and not whether it should or should not be admitted.
20. Lastly, the Defence fails to explain how the admission of this video excerpt is prejudicial to the Accused.

²¹ Response, para.13, fn.19 citing the Chamber's "Decision on the conduct of proceedings", para.56.

Request

21. Based on the foregoing, the Prosecution requests that the Chamber grant its Motion and that it reject the Defence's request for additional time for the cross-examination of Witness P-0014.



Fatou Bensouda
Prosecutor

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