

**Cour
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**International
Criminal
Court**

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

Date: **7 October 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-M**

**Public redacted version of “Prosecution application under rule 68(3) to admit
Witness P-0030’s prior recorded testimony and associated material”,
2 September 2016, ICC-01/04-02/06-1488-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. Pursuant to rule 68(3)¹, the Prosecution requests that Trial Chamber VI (“Chamber”): (i) admit into evidence the relevant excerpts from Witness P-0030’s [REDACTED], including [REDACTED] video excerpts [REDACTED]; (ii) admit into evidence twenty-two paragraphs from Witness P-0030’s [REDACTED] witness statement and Annexes II and III thereto, including three photographs and two video excerpts that are referenced and explained in these paragraphs and that are relevant to the case against the Accused; and (iii) grant the Prosecution leave to conduct a brief supplementary examination of Witness P-0030. The Prosecution seeks to admit some of the video excerpts with audio. In relation to the latter, the Prosecution also seeks admission, pursuant to articles 64(9), 69(2), (3) and (4) of the Rome Statute (“Statute”) and rule 63(2) of the Rules, of the excerpts of the transcripts and translations corresponding to those video excerpts (“Request”).²
2. Witness P-0030 worked as [REDACTED]. He [REDACTED].
3. This witness’s prior recorded testimony and associated material primarily relates to the structure and policies of the UPC/FPLC, and to the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC.
4. The material that the Prosecution seeks to admit is relevant and reliable. Witness P-0030 will be the thirteenth 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

¹ Rules of Procedure and Evidence (“Rules”).

² 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. See also Annex M setting out the relevant references to transcripts and translations of the excerpts from the videos which the Prosecution seeks to admit with audio in this Request.

against the Accused³ and to confirm his availability and willingness to be examined by the Parties, legal representatives if applicable, and the Chamber.

5. Based on past practice, approximately thirty to forty-five minutes will be 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.⁴ The Prosecution seeks one hour and thirty 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 role of the Accused in the UPC/FPLC and the May 2003 UPC/FPLC attack on BUNIA, which were only briefly addressed in his prior recorded testimony. While these, and other, issues [REDACTED], eliciting further information on these topics is important for the Prosecution's case against the Accused. The Prosecution also intends to question Witness P-0030 about [REDACTED].
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-0030's examination-in-chief by six hours.

Confidentiality

7. The filing and its annexes are classified as "Confidential" pursuant to regulation 23bis(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.

³ ICC-01/04-02/06-619, para.43.

⁴ This estimate depends, in particular, on the procedure which the Prosecution will be required to follow in relation to the admission of the associated material which it seeks to admit, *see* para.50 below.

Prosecution's Submissions

8. 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.
9. Witness P-0030 provided statements to the Prosecution in [REDACTED]. The Prosecution identified Witness P-0030 as an appropriate witness for the procedure under rule 68(3) of the Rules.⁵
10. 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-0030's professional background, [REDACTED]; (ii) meetings and other events related to the UPC/FPLC, [REDACTED]; (iii) the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC; and (iv) the UPC/FPLC's structure, composition, policies/aims and the leadership roles of the Accused and a number of his alleged co-perpetrators.
11. 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.⁶

⁵ 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-0030's prior recorded testimony under rule 68(3) of the Rules.

⁶ ICC-01/04-02/06-619, para.42.

12. As set out in section I(A) of Annex A to this filing, the Prosecution seeks to admit [REDACTED].⁷ [REDACTED].
13. Section I(B) of Annex A to this filing sets out twenty-two paragraphs⁸ that the Prosecution seeks to admit from Witness P-0030's [REDACTED] witness statement and Annexes II and III thereto.⁹ These paragraphs explain three photographs and two video excerpts, which the Prosecution also seeks to admit under rule 68(3), as set out in section II(B). The Prosecution does not seek to admit the remainder of this witness statement or the annexes thereto.
14. Section II(A) of Annex A refers to [REDACTED] video excerpts, which the Prosecution seeks to admit. These excerpts [REDACTED] are relevant to the case against the Accused. Section II(B) of Annex A refers to three photographs and a further two video excerpts that the Prosecution also seeks to admit. These photographs and video excerpts were explained by Witness P-0030 in the twenty-two paragraphs of his 2006 witness statement and Annexes II and III thereto, which the Prosecution also seeks to admit as set out in section I(B),¹⁰ and are relevant to the case against the Accused. Brief descriptions of Witness P-0030's explanation of the video excerpts and photographs listed in section II, their content, and their relevance to this case, are provided below.
15. 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."¹¹ This standard is applicable to documents of a written nature as well as to those of an audio-visual

⁷ [REDACTED].

⁸ More specifically, as set out in Annex A, the information is contained in twenty-one paragraphs and one row of information from a table.

⁹ Copies of these documents are contained in Annexes F-H.

¹⁰ See para.13, above, and Annex A, section I(B).

¹¹ 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.

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-0315.¹²

16. 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.

17. Witness P-0030 [REDACTED]. [REDACTED]- judicial expediency warrants the admission of the video excerpts and photographs shown to him together with his explanation thereof. [REDACTED]. [REDACTED],¹³ [REDACTED].¹⁴

18. Section III of Annex A refers to three items that the Prosecution does not seek to admit, except to the extent noted in Section I(B), but which are necessary for a complete understanding of this witness's prior recorded testimony.¹⁵ The first item is Witness P-0030's [REDACTED] witness statement [REDACTED]. The second and third items are Annexes II and III to Witness P-0030's [REDACTED]

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

¹³ [REDACTED].

¹⁴ [REDACTED]. ICTY Trial Chambers have noted the possibility of admitting prior recorded testimony together with video exhibits pursuant to rule 92*ter* of that tribunal's rules, which is comparable to rule 68(3) of the Rules, *see, e.g. Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Motion for Admission of Evidence of GH-016 pursuant to rule 92 *ter*, 2 November 2012, paras.3, 6-7. ICTY Trial Chambers have also noted the possibility of admitting prior recorded testimony together with video exhibits pursuant to rule 92*bis* of that tribunal's rules, which does not even require the attendance of the witness for the purposes of cross-examination, *see, e.g. Prosecutor v. Mladić*, IT-09-92-T, Decision on Prosecution eighth motion to admit evidence pursuant to Rule 92 *bis*: Srebrenica Survivors, 18 July 2003, paras.30, 32, pp.11-12.

¹⁵ *See* ICC-01/04-02/06-619, para.42.

witness statement. While the Prosecution is only seeking the admission of some of the paragraphs in these annexes, the remaining paragraphs are necessary for a complete understanding of this witness's prior recorded testimony.

Brief descriptions of the associated material

19. [REDACTED]. [REDACTED].

20. The relevant timestamps for the [REDACTED] video excerpts which the Prosecution seeks to admit are set out in Section II(A) and (B) of Annex A, which also provides references [REDACTED] where Witness P-0030 explained the video excerpts. [REDACTED]. [REDACTED].

21. The Prosecution notes that although Witness P-0030 [REDACTED].¹⁶ [REDACTED].

22. Below, the Prosecution sets out details regarding the content and relevance of the [REDACTED] video excerpts and three photographs which it seeks to admit as material associated with Witness P-0030's prior recorded testimony.

23. [REDACTED]:¹⁷ [REDACTED]. [REDACTED]. [REDACTED].

24. [REDACTED]:¹⁸ [REDACTED]. [REDACTED]. [REDACTED].

25. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

26. [REDACTED]. [REDACTED]. [REDACTED].

27. [REDACTED]. [REDACTED].

¹⁶ See ICC-01/04-02/06-T-48-CONF-ENG ET. p.3, ln.13 – p.17, ln.8 (private session); ICC-01/04-02/06-T-50-CONF-ENG ET, p.71, ln.11 – p.72, ln.25 (open session).

¹⁷ The video excerpts' numbers and the scenes which the Prosecution seeks to admit therefrom are set out in Section II of Annex A. This section also sets out references to the excerpts of the transcripts and statements where the video excerpts are explained by Witness P-0030.

¹⁸ [REDACTED].

28. [REDACTED]. [REDACTED]. [REDACTED].

29. [REDACTED]. [REDACTED].

30. [REDACTED]. [REDACTED].

31. [REDACTED]. [REDACTED].

32. [REDACTED]. [REDACTED]. The fact that the events depicted relate to 2004 and, as such, fall outside of the temporal scope of the charges, does not detract from their relevance,¹⁹ in particular since [REDACTED].

33. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

34. [REDACTED]. [REDACTED].

35. [REDACTED]. [REDACTED].

36. [REDACTED]. [REDACTED]. [REDACTED].

37. [REDACTED].

38. [REDACTED]. [REDACTED]. [REDACTED].

39. [REDACTED]. [REDACTED]. [REDACTED].

40. *Photographs 1-3*: In his witness statement and Annex II thereto, Witness P-0030 states that [REDACTED].²⁰ [REDACTED].

¹⁹ See, e.g. ICC-01/04-01/06-2842, paras.1022, 1352.

²⁰ [REDACTED].

Witness P-0030's prior recorded testimony should be admitted pursuant to rule 68(3)

41. 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, in particular the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC and persecution. 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 and other crimes, including the 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 Lubanga, and the contextual elements of the crimes.

42. Witness P-0030 [REDACTED],²¹ and provided his witness statement voluntarily and in accordance with the requisite formalities.²² His prior recorded testimony is relevant and reliable. Further, Witness P-0030 will be asked to confirm the accuracy of his testimony when he is called to provide *viva voce* testimony and to consent to further questioning by the Parties and the Chamber.²³ As such, the Parties, the participants if applicable, 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-0030's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

²¹ [REDACTED].

²² The Chamber has previously admitted witness statements pursuant to rule 68(3) of the Rules, see e.g. ICC-01/04-02/06-T-106-CONF-ENG ET, p.90, ln.12 – p.91, ln.1 (open session); ICC-01/04-02/06-T-108-CONF-ENG ET p.96, ln.21 – p.101, ln.5 (open session). Other Chambers have also considered that witness statements may constitute prior recorded testimony, see e.g. ICC-01/04-01/06-1603, paras.18-19; ICC-01/09-01/11-1938-Corr-Red2, para.33.

²³ ICC-01/04-02/06-619, para.43.

Supplementary examination

43. Should Witness P-0030'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,²⁴ including this Chamber's.²⁵
44. The Prosecution would first seek to elicit, *viva voce*, including [REDACTED], further details in relation to certain issues which were only briefly referred to during Witness P-0030's prior recorded testimony, including the role of the Accused and his alleged co-perpetrators in the UPC/FPLC, and the UPC/FPLC attack on Bunia in May 2003.
45. The Prosecution would ensure that the witness is not merely asked to repeat the information which he already provided in his prior recorded testimony. This supplementary examination is necessary for the determination of the truth and to elicit further evidence specific to the *Ntaganda* case, [REDACTED].
46. As previously indicated to the Chamber,²⁶ the Prosecution intends to complete the process of admission of Witness P-0030's material as well as its supplementary examination within two hours. Should the Chamber reject this Request in whole or in part, the Prosecution may require up to the eight hours originally estimated for this witness's examination-in-chief because of the time-consuming nature of seeking to admit the video excerpts as identified.

²⁴ 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)). [REDACTED].

²⁵ 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 *See* email from the Prosecution to the Chamber, Parties and participants dated 5 August 2016 at 17:21.

Proposed procedure for the introduction of prior recorded testimony

47. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0030's prior testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.
48. During witness preparation, the Prosecution will ask Witness P-0030, *inter alia*, to review his prior testimony, advise of any corrections or clarifications he wishes to make to it, and then to confirm its accuracy.²⁷ 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.²⁸
49. When Witness P-0030 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."²⁹ 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.
50. In order to save time, the Prosecution should not be required, for the purposes of admission, to show Witness P-0030 the video excerpts, which it seeks to admit through this Request, or even portions of these videos. [REDACTED] the Defence and the Chamber will be able to question him further in relation to them. [REDACTED].

²⁷ ICC-01/04-02/06-652-Anx, page 4, paras.18-19.

²⁸ ICC-01/04-02/06-652-Anx, page 4, paras.14-15 and p.6, paras.31-32.

²⁹ 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".

51. In terms of further procedure, 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-0030 as outlined above.

Transcripts and translations

52. The Prosecution does not seek to admit [REDACTED] video excerpts with audio. For those video excerpts which it does seek to admit with audio, the Prosecution also seeks admission of the corresponding excerpts of the transcripts and translations, pursuant to articles 64(9), 69(2) (3) and (4) of the Statute and rule 63(2) of the Rules.³⁰ The relevant references to the transcripts and translations which the Prosecution seeks to admit are set out in Annex M.

Conclusion

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



Fatou Bensouda
Prosecutor

Dated this 7th day of October 2016
At The Hague, The Netherlands

³⁰ Where no reference to transcript or translation is provided, the Prosecution seeks to rely on the visual images only, as indicated in Section II(A) of Annex A and in Annex M by notes stating “images only”.