

**Cour
Pénale
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**International
Criminal
Court**



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No.: ICC-01/04-02/06
Date: 5 December 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-I**

**Public redacted version of “Prosecution application under rule 68(3) to admit
Witness [REDACTED]’s prior recorded testimony and associated material”,
2 November 2016, ICC-01/04-02/06-1606-Conf**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section Other Section

Introduction

1. The Prosecution requests that Trial Chamber VI ("Chamber") admit into evidence the prior recorded testimony and associated material of Witness [REDACTED] under rule 68(3) of the Rules of Procedure and Evidence ("Rules"). Specifically, the Prosecution seeks to admit: (i) [REDACTED], including the 39 paragraphs of his [REDACTED] witness statement [REDACTED];¹ (ii) 12 [REDACTED] paragraphs from his witness statement; and (iii) one document referred to in his witness statement, which was created by Witness [REDACTED] and annexed to his statement. The Prosecution also seeks to conduct a brief, focused supplemental examination.
2. Between [REDACTED] and [REDACTED], Witness [REDACTED]. During this time, [REDACTED].
3. This witness's prior recorded testimony and associated material primarily relates 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 [REDACTED] will testify during the seventh block of evidence, which is scheduled to commence on 7 November 2016. He will be asked to attest to the accuracy of his prior recorded testimony at the beginning of his testimony and to confirm his availability and willingness to be examined by the Parties, Legal Representatives (if applicable), and the Chamber.
5. The Prosecution estimates that it will require approximately thirty minutes for the formalities associated with the admission of Witness [REDACTED] prior recorded testimony and associated documents under rule 68(3) of the Rules. The

¹ [REDACTED].

Prosecution seeks one additional hour to conduct a supplementary examination of this witness during which it will seek to elicit further information in relation to certain issues, including [REDACTED], which was only briefly addressed in his prior recorded testimony. [REDACTED].

6. Granting this 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 [REDACTED] examination-in-chief by 90 minutes.²

Confidentiality

7. 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 about a Prosecution witness for whom in-court protective measures have been granted.³ The Prosecution will file a public redacted version of this filing.

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 the witness does not object to it being submitted into evidence, and the Parties and Chamber have the opportunity to examine the witness.

² ICC-01/04-02/06-491-Conf-AnxB, p. 137.

³ ICC-01/04-02/06-774 at para. 5.

9. Witness [REDACTED] provided a statement to the Prosecution in [REDACTED]. The Prosecution identified Witness [REDACTED] as an appropriate witness for the procedure under rule 68(3) of the Rules.⁴
10. The prior recorded testimony and associated material that the Prosecution seeks to admit pursuant to rule 68(3) relates, *inter alia*, to: (i) Witness [REDACTED] work with [REDACTED]; (ii) the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC, including the re-recruitment of some of the children who were repatriated from a military training camp in Uganda; and (iii) the absence of any formal demobilisation of child soldiers on the part of the UPC/FPLC.
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.⁵
12. As set out in Annex A to this filing, the Prosecution seeks to admit Witness [REDACTED].⁶ [REDACTED].
13. In section I(B) of Annex A to this filing, the Prosecution lists the 39 paragraphs of Witness [REDACTED]'s witness statement [REDACTED]⁷ [REDACTED] 12 paragraphs of his statement it seeks to admit under rule 68(3).⁸ The 39

⁴ In accordance with ICC-01/04-02/06-619, para.16, the Prosecution provided a Forthcoming Witness List for the seventh evidentiary block by email on 7 October 2016 (and then an updated version of this list on 14 October 2016), in which it indicated its intention to apply to admit Witness [REDACTED]'s prior recorded testimony under rule 68(3) of the Rules.

⁵ ICC-01/04-02/06-619, para.42.

⁶ The portions of Witness [REDACTED] that the Prosecution seeks to admit into evidence are set out in Annex A, Section I(A). [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED] are contained in Annexes B-G.

⁷ [REDACTED].

⁸ The entire witness statement is contained in Annex H.

paragraphs of Witness [REDACTED] relate to his education and professional background [REDACTED], the recruitment and military training of [REDACTED] individuals from Ituri in Tchankwanzi, Uganda, [REDACTED].

14. The paragraphs of Witness [REDACTED]'s statement that the Prosecution seeks to admit [REDACTED] are relevant to this case and relate to issues [REDACTED]. The information provided in these paragraphs is not [REDACTED]. The Prosecution does not seek to admit the remainder of Witness [REDACTED]'s witness statement.
15. [REDACTED]. This information is relevant to understanding the nature of the work [REDACTED] and Witness [REDACTED]'s role within [REDACTED] and his continued interactions with the organisation [REDACTED]. [REDACTED].
16. In paragraphs [REDACTED] of the statement, Witness [REDACTED] refers to [REDACTED] children whom he knew to have been sent for heavy weapons training, and then provides detail about the circumstances of these [REDACTED] children upon their return to Ituri [REDACTED]. [REDACTED].⁹
17. In paragraphs [REDACTED] of his statement, Witness [REDACTED]. [REDACTED]; [REDACTED].¹⁰ [REDACTED].
18. Finally, Section II(A) of the attached Annex A refers to one document that the Prosecution seeks to admit.¹¹ This document was created by Witness [REDACTED] during his [REDACTED] interview, provided to the investigators and annexed to his statement, as is set out in paragraph 18 of his witness statement. This document is dated and signed by the witness, and provides background information about the conflict in Ituri [REDACTED] children who

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ This document is contained in Annex I.

returned from Uganda with injuries and trauma, and [REDACTED] children who were re-recruited. [REDACTED].¹² This document nonetheless conforms with the provisions of rule 68(3) and can be admitted as a prior recorded statement should this Chamber deem it as such.

Witness [REDACTED]'s prior recorded testimony should be admitted pursuant to rule 68(3)

19. The prior recorded testimony and associated material set out in Annex A, sections I and II, are relevant to establishing the crimes of conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC, and the role of the Accused in these crimes. They are also relevant to establishing the role of different alleged co-perpetrators in the UPC/FPLC, including the Accused, Thomas Lubanga and Chef Kahwa, as well as the contextual elements of the crimes.

20. Witness [REDACTED]¹³ and provided his witness statement voluntarily and in accordance with the requisite formalities.¹⁴ His prior recorded testimony is relevant and reliable. Further, Witness [REDACTED] will be asked to confirm the accuracy of his testimony when he is called to provide *viva voce* testimony,¹⁵ and to consent to further questioning by the Parties, Legal Representatives (if applicable) and the Chamber. As such, the Parties, the participants 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

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ The Chamber has previously admitted witness statements pursuant to rule 68(3), *see e.g.* ICC-01/04-02/06-T-106-CONF-ENG, p. 90, ln. 12 to p. 91, ln. 1; ICC-01/04-02/06-T-108-CONF-ENG p. 96, ln. 21 to p. 101, ln. 5. 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.

¹⁵ ICC-01/04-02/06-619, para.43.

Witness [REDACTED] prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

21. Should Witness [REDACTED]'s prior testimony and associated material be admitted into evidence, the Prosecution requests leave to conduct a brief, focused supplementary examination in accordance with rule 68(3) of the Rules and the prior jurisprudence of this Court,¹⁶ including this Chamber's.¹⁷

22. The Prosecution would seek to elicit, *viva voce*, further details in relation to limited information which was only briefly referred to [REDACTED], including his knowledge of the role of the Accused in the UPC/FPLC and in the recruitment and training of children under the age of fifteen.

23. [REDACTED].

24. As previously indicated to the Chamber,¹⁸ the Prosecution intends to complete the process of admission of Witness [REDACTED]'s material as well as its supplementary examination within 90 minutes. Should the Chamber reject this Request in whole or in part, the Prosecution may require up to the three hours originally estimated for this witness's examination-in-chief.

¹⁶ 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 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 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, p. 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.

¹⁷ [REDACTED].

¹⁸ See email from the Prosecution to the Chamber, Parties and Participants dated 7 October 2016 at 9:53.

Proposed procedure for the introduction of prior recorded testimony

25. Should this Request be granted, the Prosecution submits that there will be no need to read into evidence Witness [REDACTED]'s prior recorded testimony.

26. During witness preparation, the Prosecution will ask Witness [REDACTED], *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.¹⁹ 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.²⁰

27. When Witness [REDACTED] 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."²¹ The Prosecution will then ask Witness [REDACTED] whether he has any further changes or clarifications to make to his prior recorded testimony, and to confirm its accuracy. Finally, the Prosecution will ask Witness [REDACTED] to confirm that he consents to be questioned by the Parties, Legal Representatives (if applicable) and the Chamber.

28. After tendering his prior recorded testimony into evidence, with any changes or clarifications noted on the record, the Prosecution will conduct its brief supplementary examination of Witness [REDACTED] as outlined above.

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

²⁰ ICC-01/04-02/06-652-Anx, p. 4, paras. 14-15 and p. 6, paras. 31-32.

²¹ ICC-01/04-02/06-T-110-CONF-ENG, p. 34, ln.23 to p. 35, ln.1; *see also* ICC-01/04-02/06-T-106-CONF-ENG, p. 91, lns. 8-10; and ICC-01/04-02/06-T-99-CONF-ENG, p. 63, lns. 10-12, 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

29. For the foregoing reasons, the Prosecution asks that the Chamber grant this application.



Fatou Bensouda
Prosecutor

Dated this 5th day of December 2016
At The Hague, The Netherlands