

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: **6 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 1-43**

**Public redacted version of “Prosecution application under rule 68(3) to admit
Witness P-0031’s prior recorded testimony and associated material”
7 November 2016, ICC-01/04-02/06-1615-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 [REDACTED], as well as eight documents that Witness P-0031 [REDACTED] and that are relevant to the case against the Accused; (ii) admit into evidence thirty paragraphs from Witness P-0031’s [REDACTED] witness statement, as well as nineteen documents 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-0031 (“Request”).²
2. Witness P-0031 [REDACTED]. Witness P-0031 [REDACTED]. He took part in a number of meetings during the temporal scope of the charges, including with Thomas Lubanga and other high-level UPC/FPLC members, [REDACTED].
3. Witness P-0031’s prior recorded testimony and associated material primarily relate to: (i) [REDACTED]; (ii) the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC; and (iii) the UPC/FPLC’s rape and sexual slavery of civilians.
4. The material that the Prosecution seeks to admit is relevant and reliable. Witness P-0031 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 testimony³ and to confirm his availability and willingness to be examined by the Parties, Legal Representatives if applicable, and the Chamber.

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

² See below and Annex 1 for details on the precise excerpts, paragraphs, and items that the Prosecution seeks to admit through this Request, and on the material that the Prosecution does not seek to admit but which is necessary to understand the prior recorded testimony of this witness.

³ ICC-01/04-02/06-619, para.43.

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. For this witness, the Prosecution estimates that approximately forty-five minutes will be required for this exercise. The Prosecution seeks an additional one hour and fifteen 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, in particular in relation to the conscription, enlistment and use of children under the age of fifteen, the rape and sexual slavery of UPC/FPLC child soldiers, and the UPC/FPLC's August 2002 attack on Bunia. These issues were only briefly referred to in this witness's prior recorded testimony. [REDACTED], eliciting further information on these topics is important for the Prosecution's case against the Accused.
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-0031'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 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

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 the submission, and the Parties and Chamber have the opportunity to examine the witness.

9. Witness P-0031 provided statements to the Prosecution in [REDACTED]. The Prosecution identified Witness P-0031 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) relate, *inter alia*, to: (i) [REDACTED]; (ii) the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC; and (iii) the UPC/FPLC's rape and sexual slavery of civilians.
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 seeks 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 section I(A) of Annex 1 to this filing, the Prosecution seeks to admit [REDACTED].⁶ [REDACTED].
13. Section I(B) of Annex 1 to this filing sets out thirty paragraphs that the Prosecution seeks to admit from Witness P-0031's [REDACTED] witness statement.⁷ The Prosecution does not seek to admit the remainder of this [REDACTED] witness statement. As set out below, these paragraphs are relevant, *inter alia*, to the charges of conscription, enlistment and use of children under the

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, in which it listed Witness P-0031 as a back-up witness and indicated its intention to apply for the admission of Witness P-0031's prior recorded testimony under rule 68(3) of the Rules.

⁵ ICC-01/04-02/06-619, para.42.

⁶ [REDACTED].

⁷ A copy of this statement is provided in Annex 14.

age of fifteen by the UPC/FPLC, and the charges of rape and sexual slavery of civilians.

14. In paragraphs [REDACTED].

15. In paragraphs [REDACTED]⁸ [REDACTED].

16. In paragraphs [REDACTED],⁹ the witness refers, *inter alia*, to [REDACTED]. The witness states that [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

17. In paragraphs [REDACTED].

18. In paragraphs [REDACTED].

19. Section II(A) of Annex 1 refers to eight documents, which the Prosecution seeks to admit. These documents [REDACTED] are relevant to the case against the Accused. 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.”¹⁰

20. As set out below, in view of their content and Witness P-0031’s explanation, all eight documents are relevant, *inter alia*, to the charges of conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC.

21. Witness P-0031 [REDACTED]¹¹ [REDACTED].¹²

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ 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.

¹¹ [REDACTED].

¹² [REDACTED].

22. Witness P-0031 recognised the second document¹³ [REDACTED]. The witness stated that he [REDACTED]. [REDACTED].
23. Witness P-0031 [REDACTED]¹⁴ and that it is an [REDACTED]. The witness stated that [REDACTED]. The Prosecution is also seeking to admit four paragraphs from Witness P-0012's statement which refer to this document, [REDACTED]. In these paragraphs, the witness states that [REDACTED].
24. Witness P-0031 [REDACTED]¹⁵ [REDACTED]. The Prosecution is also seeking to admit two paragraphs from Witness P-0012's statement which refer to this document, [REDACTED].
25. The witness recognised the fifth document¹⁶ and [REDACTED]. The witness stated that [REDACTED]. The witness also referred to and explained [REDACTED].
26. Witness P-0031 [REDACTED]¹⁷ and stated that [REDACTED]. [REDACTED]. The witness explained [REDACTED]. The witness explained that [REDACTED].
27. Witness P-0031 testified that he recognised the seventh document¹⁸ and stated that it was a [REDACTED]. The witness stated that [REDACTED]. The witness explained [REDACTED].
28. The witness recognised the eighth document¹⁹ and [REDACTED]. The witness stated that [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

29. Section II(B) of Annex 1 refers to nineteen documents, which the Prosecution seeks to admit. These documents and the witness's explanation thereof are relevant to the charges of conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC.

30. The first document²⁰ [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].²¹

31. The other eighteen documents²² are [REDACTED]. [REDACTED].

32. Section III of Annex 1 refers to three documents 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.²³ The first document is [REDACTED]. The witness [REDACTED].

Witness P-0031's prior recorded testimony should be admitted pursuant to rule 68(3)

33. The prior recorded testimony and associated material set out in sections I and II of Annex 1 are relevant to establishing a number of crimes which the Accused has been charged with, primarily the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC.

34. Witness P-0031 [REDACTED],²⁴ and provided his witness statement voluntarily and in accordance with the requisite formalities.²⁵ His prior recorded testimony is

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ See ICC-01/04-02/06-619, para.42.

²⁴ [REDACTED].

²⁵ 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.

relevant and reliable. Further, Witness P-0031 [REDACTED].²⁶ 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-0031's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

35. Should Witness P-0031'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 jurisprudence of this Court,²⁷ including from this Chamber.²⁸

36. The Prosecution seeks to elicit, *viva voce*, further details in relation to certain issues which were only briefly referred to during Witness P-0031's prior recorded testimony, including the role of the Accused in the UPC/FPLC, in particular in relation to the conscription, enlistment and use of children under the age of fifteen by the UPC/FPLC, the rape and sexual slavery of UPC/FPLC child soldiers, and the UPC/FPLC's August 2002 attack on Bunia.

²⁶ ICC-01/04-02/06-619, para.43.

²⁷ 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 (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.

²⁸ [REDACTED].

37. The Prosecution will ensure that the witness is not merely asked to repeat the information that 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].

38. As previously indicated to the Chamber,²⁹ the Prosecution intends to complete the process of admission of Witness P-0031'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.

Proposed procedure for the introduction of prior recorded testimony

39. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0031's prior testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.

40. During witness preparation, the Prosecution will ask Witness P-0031, *inter alia*, to review [REDACTED], advise of any corrections or clarifications he wishes to make to it, and then to confirm its accuracy.³⁰ 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.³¹

41. When Witness P-0031 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

²⁹ See email from the Prosecution to the Chamber, Parties and participants dated 7 October 2016 at 09:53.

³⁰ ICC-01/04-02/06-652-Anx, page 4, paras.18-19.

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

any clarifications to that portion are required to be made.”³² 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.

42. 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-0031 as outlined above.

Conclusion

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



Fatou Bensouda
Prosecutor

Dated this 6th day of December 2016
At The Hague, The Netherlands

³² 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”.