

**Cour
Pénale
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**International
Criminal
Court**

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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 application under rule 68(3) and regulation 35 to admit Witness P-0002's prior recorded testimony and associated material", 14 November 2016, ICC-01/04-02/06-1631-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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Other

Introduction

1. Pursuant to rule 68(3)¹ and regulation 35,² the Prosecution requests that Trial Chamber VI (“Chamber”): (i) admit into evidence [REDACTED] containing Witness P-0002’s [REDACTED], including [REDACTED] video excerpts and [REDACTED] photographs that Witness P-0002 [REDACTED] and that are relevant to the case against the Accused; (ii) admit into evidence 150 paragraphs from Witness P-0002’s three witness statements and five Annexes thereto, including four photographs, three video excerpts, and one document 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-0002. The Prosecution seeks to admit all of the video excerpts with audio and 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”).³
2. Witness P-0002 worked [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, probative and reliable. Witness P-0002 will be the 10th witness to testify during the seventh block of evidence, which commenced on 7 November 2016. He will be asked to

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

² Regulations of the Court (“Regulations”).

³ 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 R 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.

attest to the accuracy of his prior recorded testimony⁴ 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, the Prosecution estimates that it will require in total two hours for the examination-in-chief of P-0002: namely, approximately thirty to forty-five minutes for the formalities associated with the admission of a witness's prior recorded testimony and associated exhibits, and an additional one hour and thirty minutes to conduct a supplementary examination to elicit further focussed, limited *viva voce* evidence on topics not covered during [REDACTED].
6. Pursuant to regulation 35 of the Regulations, the Prosecution seeks to vary the time limit of this application because it has good cause to do so and it is in the interests of justice to allow the application. As set out in greater detail below, while the application was originally due on 7 November 2016, the unforeseen need to postpone the testimony of witnesses who were initially scheduled to appear before Witness P-0002 in the seventh block of evidence means that the application would have been due on 28 October 2016. Furthermore, the Prosecution only received a final confirmation of Witness P-0002's availability to testify on 10 November 2016. In any event, it is in the interests of justice to allow the application, to expedite the proceedings.
7. 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-0002's examination-in-chief by six hours.

⁴ 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

Regulation 35 request

9. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit “if good cause is shown”.⁵ The Appeals Chamber has held that “[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations”.⁶
10. The Appeals Chamber has further decided to extend a time limit where it was in the “interest of justice”.⁷
11. In this case there is good cause to vary the time limit for Witness P-0002’s rule 68(3) application, from 28 October 2016 to 11 November 2016.

⁵ The Appeals Chamber has held that “[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations”, ICC-01/04-01/06-834, para.7. The Appeals Chamber has further decided to extend a time limit where it was in the “interest of justice”, see ICC-01/04-01/10-505, para.11; *See also* ICC-01/04-01/07-2325, para.15.

⁶ ICC-01/04-01/06-834, para.7.

⁷ *See* ICC-01/04-01/10-505, para.11.

12. Based on the Prosecution's 14 October 2016 updated forthcoming witness list for the seventh block of evidence,⁸ the Prosecution calculated that the rule 68(3) application for Witness P-0002 was due on 7 November 2016. However, in the week of 31 October to 4 November 2016 a number of issues arose impacting on the availability of witnesses, including due to Witness P-0908's travel arrangements and Witness P-0918's inability to travel to The Hague as planned due to work commitments.
13. The Prosecution has re-scheduled the testimony of Witnesses P-0908 and P-0875 to the eighth evidentiary block in 2017. These changes have meant that Witnesses P-0908 and P-0875 will no longer be called to testify before P-0002, thereby rendering the rule 68(3) application for this Witness due on 28 October 2016, since he is expected to begin his testimony sooner than originally expected.
14. On 3 November 2016, the Prosecution was informed that P-0002 may not be available to testify during the seventh evidentiary block. Accordingly, the Prosecution was not in a position to submit its application pursuant to rule 68(3) until his availability was confirmed only on 10 November 2016.
15. Granting the variation of time requested would not "derail the proceedings from their ordained course"⁹ and would not be unduly prejudicial to the Accused.
16. Moreover, on 27 May 2016 the Chamber encouraged the Prosecution to admit the testimony of witnesses wherever possible pursuant to rule 68, including rule 68(3) of the rules.¹⁰ The Prosecution identified Witness P-0002 as an appropriate witness for the procedure under rule 68(3) of the Rules,¹¹ as his testimony would be considerably shortened by 6 hours. Accordingly, it would be in the interests of

⁸ Email from the Prosecution to the Chamber, Defence and participants dated 14 October 2016 at 13:56.

⁹ ICC-01/04-01/07-653, para. 6.

¹⁰ ICC-01/04-02/06-1342, para.15.

¹¹ 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-0002's prior recorded testimony under rule 68(3) of the Rules.

justice to allow the application to contribute towards the expeditiousness of the proceedings.

Rule 68(3) request

17. 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.
18. Witness P-0002 provided statements to the Prosecution in [REDACTED], [REDACTED], and [REDACTED].
19. 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-0002's professional background, [REDACTED]; (ii) meetings and other events related to the UPC/FPLC, [REDACTED]; (iii) [REDACTED]; 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.
20. 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.¹²
21. As set out in section I(A) of Annex A to this filing, the Prosecution seeks to admit Witness P-0002's [REDACTED].¹³ [REDACTED].
22. Section I(B) of Annex A to this filing sets out 150 paragraphs that the Prosecution seeks to admit from Witness P-0002's [REDACTED] witness statements and five

¹² ICC-01/04-02/06-619, para.42.

¹³ [REDACTED].

annexes thereto, as well as from his [REDACTED] statement.¹⁴ These paragraphs explain the witness's background and [REDACTED]. These paragraphs further explain [REDACTED] video excerpts, [REDACTED] photographs, and one document which the Prosecution also seeks to admit under rule 68(3), as set out in section II of annex A. The Prosecution does not seek to admit the remainder of this witness's statements or the other annexes thereto.

23. Section II(A) of Annex A refers to [REDACTED] video excerpts and [REDACTED] photographs, which the Prosecution seeks to admit. These excerpts and photographs were shown to and explained by Witness P-0002 [REDACTED] and are relevant to the case against the Accused. They were [REDACTED] explained in several paragraphs of his statements. Section II(B) of Annex A refers to [REDACTED] video excerpts, [REDACTED] photographs and one document that the Prosecution also seeks to admit. These materials were explained by Witness P-0002 in 117 paragraphs of his [REDACTED] and [REDACTED] witness statement and in one annex to his [REDACTED] statement, which the Prosecution also seeks to admit as set out in section I(B),¹⁵ and are relevant to the case against the Accused. Brief descriptions of Witness P-0002's explanation of the video excerpts and photographs listed in section II, their content, and their relevance to this case, are provided below.¹⁶

24. 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."¹⁷ This standard is applicable to documents of a written nature as well as to those of an audio-visual

¹⁴ Copies of these documents are contained in Annexes H-O.

¹⁵ See para.13, above, and Annex A, section I(B).

¹⁶ Copies of the nine video excerpts, six photographs and one document are contained in Annex S.

¹⁷ 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-0315.¹⁸

25. 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.

26. Witness P-0002 [REDACTED]. Judicial expediency warrants the admission of the video excerpts and photographs shown to him together with his related explanation. [REDACTED],¹⁹ [REDACTED].²⁰ [REDACTED].²¹

27. Section III of Annex A refers to three items that the Prosecution does not seek to admit, which are necessary for a complete understanding of this witness's prior recorded testimony.²² The first two items are handwritten notes made by Witness P-0002 [REDACTED]. The third item is a document referred to in P-0002's [REDACTED] statement. These three documents are appended in annexes P-Q.

¹⁸ ICC-01/04-02/06-T-105-CONF-ENG ET, p.95, lns.6-12 (open session).

¹⁹ [REDACTED].

²⁰ [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.

²¹ *See* [REDACTED].

²² *See* ICC-01/04-02/06-619, para.42.

Brief descriptions of the associated material

28. [REDACTED],²³ [REDACTED].

29. 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-0002 explained the video excerpts. [REDACTED].

30. Below, the Prosecution sets out details regarding the content and relevance of the [REDACTED] video excerpts, six photographs and one document which it seeks to admit as material associated with Witness P-0002's prior recorded testimony.

31. [REDACTED]:²⁴ [REDACTED].²⁵ [REDACTED],²⁶ [REDACTED].

32. [REDACTED]: [REDACTED].

33. [REDACTED]: [REDACTED].

34. [REDACTED]: [REDACTED].

35. [REDACTED]: [REDACTED].

36. [REDACTED]: [REDACTED].

37. [REDACTED]: [REDACTED].²⁷

38. [REDACTED]: [REDACTED].

39. [REDACTED]: [REDACTED].

²³ The Prosecution requests that DRC-OTP-2058-0251 be admitted in its entirety.

²⁴ The video excerpts' numbers and the scenes which the Prosecution seeks to admit therefrom are set out in Section II of Annex A. Annex B sets out references to the excerpts of the transcripts and statements where the video excerpts are explained by Witness P-0002.

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

40. [REDACTED]: [REDACTED].

41. [REDACTED]: [REDACTED].

42. [REDACTED]: [REDACTED].

Witness P-0002's prior recorded testimony should be admitted pursuant to rule 68(3)

43. 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. 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.

44. Witness P-0002 [REDACTED],²⁸ and provided his witness statement voluntarily and in accordance with the requisite formalities.²⁹ His prior recorded testimony is relevant and reliable. Further, Witness P-0002 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.³⁰ 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-0002's prior recorded testimony

²⁸ [REDACTED].

²⁹ 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.

³⁰ ICC-01/04-02/06-619, para.43.

under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

Supplementary examination

45. Should Witness P-0002'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,³¹ including of this Chamber.³²
46. The Prosecution would first seek to elicit, *viva voce*, further details in relation to certain issues which were only briefly referred to during Witness P-0002's prior recorded testimony, in particular the witness's knowledge about [REDACTED].
47. 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 [REDACTED]. [REDACTED].
48. As previously indicated to the Chamber,³³ the Prosecution intends to complete the process of admission of Witness P-0002'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 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.

³¹ 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].

³² 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).

³³ See email from the Prosecution to the Chamber, Parties and participants dated 2 November 2016 at 19:00.

Proposed procedure for the introduction of prior recorded testimony

49. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0002's prior testimony as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.
50. During witness preparation, the Prosecution will ask Witness P-0002, *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.³⁴ 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.³⁵
51. When Witness P-0002 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."³⁶ 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.
52. In order to save time, the Prosecution should not be required, for the purposes of admission, to show Witness P-0002 the video excerpts, which it seeks to admit through this Request, or even portions of these videos. [REDACTED].³⁷ [REDACTED] the Defence and the Chamber will be able to question him further in relation to them. [REDACTED].

³⁴ ICC-01/04-02/06-652-Anx, page 4, paras.18-19.

³⁵ ICC-01/04-02/06-652-Anx, page 4, paras.14-15 and p.6, paras.31-32.

³⁶ 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".

³⁷ [REDACTED].

53. 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-0002 as outlined above.

Transcripts and translations

54. The Prosecution seeks to admit all nine video excerpts with audio and 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. The relevant references to the transcripts and translations which the Prosecution seeks to admit are set out in Annex R.

Conclusion

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



Fatou Bensouda
Prosecutor

Dated this 13th day of December 2016
At The Hague, The Netherlands