

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 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***

**Confidential,
with Confidential Annexes A-F**

**Prosecution application under rule 68(3) to admit the prior recorded
testimony and associated document of Witness P-0043**

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

Detention Section

**Victims Participation and
Reparations Section**

Other

Introduction

1. The Office of the Prosecutor ("Prosecution") requests that Trial Chamber VI ("Chamber") admit into evidence the prior recorded testimony of Witness P-0043 and one associated document under rule 68(3) of the Rules of Procedure and Evidence ("Rules"); and permit the Prosecution to conduct a brief supplementary examination of the witness.
2. Specifically, the Prosecution seeks to admit (i) Witness P-0043's testimony in the *Lubanga* case ("previous testimony")¹ and (ii) his written statement,² which was previously admitted into evidence in the *Lubanga* case (jointly, the "prior recorded testimony"); and (iii) an associated UPC document provided by the witness and referred to in his statement.³ Witness P-0043 will be asked to attest to the accuracy of his prior recorded testimony at the beginning of his testimony,⁴ and to confirm his availability and willingness to be examined by the Parties, the Legal Representatives if applicable, and the Chamber.
3. Witness P-0043's prior recorded testimony is relevant. He was the Presiding Judge of the *Tribunal de Grande Instance* of Bunia from 2001 to 2003. He was arrested and detained by the UPC in November 2002. He also provides evidence on the functioning of the judicial system at the time when the UPC was in power in Bunia. He will be the sixth witness to testify during the eighth evidentiary block, which is scheduled to commence on 16 January 2016. As such, the Parties and the Chamber will have the opportunity to examine the witness in the course of these proceedings. The admission of the prior recorded testimony of Witness P-0043 will not be prejudicial to the

¹ The relevant portions of the French and English transcripts of the witness's testimony, DRC-OTP-2054-5646 (ICC-01/04-02/06-153-CONF-FRA) and DRC-OTP-2054-5546 (ICC-01/04-02/06-153-CONF-ENG).

² DRC-OTP-0126-0086, original French version; and DRC-OTP-0208-0164, English translation. See ICC-01/04-01/06-1603, para. 25.

³ DRC-OTP-0126-0100, "*Ordre de mission*", Direction Générale de Migration (DGM), UPC-RP, referred to in DRC-OTP-0126-0086, para. 39.

⁴ ICC-01/04-02/06-619, para.43.

rights of the Accused, as the Defence will be able to cross-examine the witness.

4. Rather, the admission of the prior recorded testimony under rule 68(3) will enhance the expeditiousness of the proceedings by reducing the length of his in-court testimony by one hour and a half. Should this application be granted, the Prosecution intends to conduct a brief supplementary examination of Witness P-0043, as provided for under rule 68(3), to last one hour.

Confidentiality

5. The filing is classified as Confidential pursuant to regulation 23*bis* (1) of the Regulations of the Court because it contains confidential information relating to a Prosecution witness. The Prosecution will file a public redacted version of this filing.

Prosecution's Submissions

6. Rule 68(3) of the Rules provides that the Chamber may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber where the individual does not object, and the Parties and Chamber have the opportunity to examine the witness. The Prosecution considers that Witness P-0043 is an appropriate witness for the procedure under rule 68(3).
7. 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 precise 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

8. Accordingly, attached as Annex A to this application, is a list of the materials that the Prosecution seeks to admit into evidence under rule 68(3). This list sets out the references to the witness's previous testimony (comprising the entirety of his questioning in court),⁶ his prior statement (to be considered for admission in full),⁷ and a UPC "*ordre de mission*"⁸ provided by Witness P-0043, that the Prosecution seeks to admit as a document associated to his previous testimony.⁹
9. In his statement and previous testimony, Witness P-0043 provides information on, *inter alia*: the UPC/FPLC seizure of power in Bunia, the policies it adopted, and the individuals appointed within the UPC; the authority of the Minister of Justice, TSHIBENGABO (a *non-originaire*), in the UPC/FPLC; the judicial system under the UPC/FPLC, the pressure exerted by the UPC/FPLC on the judiciary; the challenges surrounding the investigation of ethnic based crimes; the UPC/FPLC's control over detention centres; the arbitrary detentions by the UPC/FPLC, including of the witness and the use of "*cachots*" as UPC/FPLC prisons; the UPC/FPLC's intelligence service, known as "Bureau 2"; the interference of Ugandan military in the judicial system; and the UPC/FPLC's targeting of the non-Hema.
10. In his written statement,¹⁰ Witness P-0043 mentions an FPLC soldier and DGM civilian employees turning up at his home with a "warrant tasking them with apprehending the president of the *Tribunal de Grande Instance* for

⁵ ICC-01/04-02/06-619, para.42.

⁶ Relevant portions of DRC-OTP-2054-5646 and DRC-OTP-2054-5546, as identified in Annex A.

⁷ Entirety of Witness P-0043's statement: DRC-OTP-0126-0086 and DRC-OTP-0208-0164.

⁸ DRC-OTP-0126-0100.

⁹ See reference to the document in DRC-OTP-0126-0086, para. 39.

¹⁰ DRC-OTP-0126-0086 and DRC-OTP-0208-0164, paras. 17 and 39.

investigation purposes".¹¹ Witness P-0043 provided a copy of this document to the Prosecution on 16 September 2005, the final day of his interview.¹²

11. The Prosecution is seeking to admit the entirety of Witness P-0043's previous testimony, written statement, and associated document into evidence under rule 68(3) of the Rules. This material does not contain any redactions.

12. Witness P-0043 testified voluntarily and under oath,¹³ and provided his witness statement voluntarily and in accordance with the requirements of rule 111 of the Rules.¹⁴ In the *Lubanga* case, P-0043's written statement was admitted in full into evidence under *then* rule 68(b) of the Rules.¹⁵ The witness attested to its contents being true to the best of his recollection and knowledge; but added during his previous testimony that his father had died.¹⁶ Some portions of the witness's statement were read out in court by the Prosecution for the benefit of the public, after Witness P-0043 had concluded his previous testimony and was no longer on the stand.¹⁷ The Prosecution does not seek to admit this later transcript, as it seeks the admission of the entirety of the written statement. The prior recorded testimony is relevant and reliable.

13. Further, Witness P-0043 will be asked to attest to the accuracy of his prior recorded testimony when he is called to provide *viva voce* evidence, to consent to further questioning by the Parties and the Chamber, and to indicate whether he consents to the admission of his materials.¹⁸ As such, the Parties and the Chamber will have the opportunity to examine the witness during

¹¹ Cited from the English translation DRC-OTP-0208-0164, para. 39.

¹² See chain of custody metadata for DRC-OTP-0126-0100, available in eCourt.

¹³ DRC-OTP-2054-5646, at 5713, lines 18-19.

¹⁴ DRC-OTP-0126-0086, at 0047, para. 4 and at 0098.

¹⁵ ICC-01/04-01/06-1603, para. 25, ICC-01/04-01/06-T-154-Red3-ENG CT, page 6, lines 1-2.

¹⁶ DRC-OTP-0126-0086, at 0098; DRC-OTP-2054-5646, at 5714, lines 12-20.

¹⁷ ICC-01/04-01/06-T-154-Red3-ENG CT, page 6, line 7, to page 9, line 22.

¹⁸ ICC-01/04-02/06-619, para. 43.

the proceedings, in accordance with rule 68(3) of the Rules. The admission of Witness P-0043's prior recorded testimony under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

Proposed procedure for the introduction of prior recorded testimony

14. Should this application be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0043's prior recorded testimony, as he will be asked to confirm its accuracy and to provide any corrections or amendments, if any.
15. During witness preparation, the Prosecution will ask Witness P-0043 to review his prior recorded testimony and associated document, advise of any corrections or clarifications he wishes to make to these materials, and to confirm their 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 the witness makes.²⁰
16. When Witness P-0043 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 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.

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

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

²¹ 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-T106-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".

Supplementary examination

17. Following the introduction of his prior recorded testimony, the Prosecution seeks leave to ask Witness P-0043 limited clarification questions, as well as specific, focused supplementary questions to explore what the Prosecution has identified to be the critical aspects of his testimony. This supplementary examination will be brief. Other Chambers of this Court have permitted supplementary questioning after the introduction of the prior recorded testimony.²² 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.”²³

18. The Prosecution seeks to elicit, *viva voce*, further details in relation to certain issues which were only briefly referred to during Witness P-0043's prior recorded testimony, including the UPC/FPLC structure in Bunia in the period relevant to the charges, the UPC/FPLC's August 2002 attack on Bunia, the UPC/FPLC's behaviour in relation to human rights and humanitarian organisations, and the nature and scale of the crimes reportedly committed by the UPC/FPLC. 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, which involves significantly more charges than the *Lubanga*

²² 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, page 14, l.16 to page 19, l.9 (introduction of prior recorded testimony) and page 19, l.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, 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 page 23), ICC-01/04-01/07-T-184-Red-ENG (P-0002, questioned by Prosecution from page 24).)

²³ ICC-01/04-01/06-1603, para. 25.

case, as well as a different accused person. The Prosecution also intends to tender some additional documents through the witness.

19. The supplementary questioning will be brief and focused and come within the time estimate provided by the Prosecution of one hour for examination-in-chief. Overall, the Prosecution estimates that it will be able to complete the process of admission of Witness P-0043's material as well as its supplementary examination within an hour and a half.

Request

20. The Prosecution requests that the Chamber admit Witness P-0043's previous testimony, written statement and one associated document, as identified in Annex A to this application, pursuant to rule 68(3) of the Rules.

21. Further, the Prosecution requests to be permitted to conduct a brief supplementary examination of Witness P-0043 following the introduction of his prior recorded testimony, to elicit specific, focused aspects of his evidence *viva voce*.



Fatou Bensouda
Prosecutor

Dated this 22nd day of December 2016
At The Hague, The Netherlands