

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 27 January 2017

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 the “Response of the Common Legal Representative of the Victims of the Attacks to the Prosecution’s application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0039”, 8 November 2016, ICC-01/04-02/06-1619-Conf

Source: Office of Public Counsel for Victims (CLR2)

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

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**Unrepresented Applicants
(Participation/Reparation)**

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**The Office of Public Counsel for the
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) hereby submits his response to the “Prosecution’s application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0039”¹ (the “Prosecution Application”), as he represents P-0039 in his capacity of participating victim [REDACTED] in the present proceedings.

2. The Legal Representative supports the Prosecution Application.

II. PROCEDURAL BACKGROUND

3. On 28 October 2015, the Chamber partially granted the Prosecution’s request for protective measures for P-0039 and ordered the use of pseudonym for the duration of the trial.²

4. Prior to the scheduled commencement of Witness P-0039’s testimony on 28 October 2015, the Presiding Judge explained the practical implications of the Impugned Decision to the witness. Witness P-0039 then refused to testify in the absence of the protective measures of face and voice distortion.³

5. The Prosecution subsequently moved for reconsideration of the Chamber’s Decision,⁴ which was denied orally the same day.⁵ The Chamber, however, indicated that it was open to the Prosecution to *“think about other legal measures how to get this testimony into evidence”*.⁶

¹ See the “Prosecution’s application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0039”, No. ICC-01/04-02/06-1585-Conf, 17 October 2016 (the “Prosecution Application”).

² See the “Decision on Prosecution’s request for in-court protective measures for Witness P-0039”, No. ICC-01/04-02/06-956-Conf, 28 October 2015.

³ See the transcript of the hearing of 28 October 2015, No. ICC-01/04-02/06-T-40-Red-ENG ET, p. 75, lines 2-3.

⁴ *Idem*, p. 77, lines 5-8.

⁵ *Ibid.*, p. 81, lines 7-21.

⁶ *Ibid.*, lines 17-18.

6. On 3 November 2015, the Prosecution submitted an application for protective and special measures and request for leave to appeal the 28 October decision on protective measures.⁷

7. Leave to appeal was denied on 10 December 2015.⁸

8. On 30 March 2016, the Prosecution requested that Witness P-0039's prior recorded testimony be admitted pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence (the "Rules").⁹ This request was rejected on 19 March 2016.¹⁰

9. On 17 October 2016, the Prosecution moved for the admission of Witness P-0039's statement pursuant to rule 68(2)(b) of the Rules, stating that on 3 September 2016, P-0039 declared that the contents of his prior recorded testimony was true and accurate to the best of his knowledge and belief and that his declaration had been witnessed by an officer of the Congolese judicial police.¹¹

III. SUBMISSIONS

10. Witness P-0039 was ready to testify before the Chamber in October 2015 and only chose not to do so when the Prosecution's request for protective measures was only partially granted by the Chamber. The witness feared for his safety should his face and voice be broadcast and he thus declined to testify.¹² In these circumstances, Witness P-0039 has consented to his statement being admitted into evidence in lieu of his *viva voce* testimony.

⁷ See the Prosecution Application, *supra* note 1.

⁸ See the "Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039" (Trial Chamber VI), No. ICC-01/04-02/06-1049-Conf, 10 December 2015.

⁹ See the "Prosecution's application under rule 68(2)(c) of the Rules to admit the prior recorded testimony of Witness P-0039", No. ICC-01/04-02/06-1238-Conf, 30 March 2016.

¹⁰ See the "Decision on Prosecution application under rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, ICC-01/04-02/06-1325, 19 May 2016.

¹¹ See the Prosecution Request, *supra* note 1, para. 11.

¹² See the transcript of the hearing of 28 October 2015, No. ICC-01/04-02/06-T-40-Red-ENG ET, p. 75, lines 2-3.

11. The prior recorded statement is probative, relevant, and reliable and meets the requirements for admission under Rule 68(2)(b) of the Rules, including certification of a Congolese official within the meaning of Rule 68(2)(b)(iii).¹³ It does not relate to the acts and conduct of the accused and is therefore appropriate for admission under that Rule. In-court personal testimony is not the exclusive mode by which a Chamber may receive witness testimony.¹⁴

12. It is submitted that the prior statement is in large parts cumulative and corroborative in nature of other evidence already before the Chamber, which constitutes a factor militating in favour of admission.¹⁵ Particularly in the circumstances of Witness P-0039, this factor should carry significant weight and outweigh any potential prejudicial effect connected with the fact that he will not be available for cross-examination.¹⁶

¹³ The Appeals Chamber has held that the legal requirements under Rule 68 must be observed for the prior recorded testimony to be admissible. See the “Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’” (Appeals Chamber), No. ICC-01/09-01/11-2024, 12 February 2016 (the “*Ruto and Sang* Judgment of 12 February 2016”), para. 86.

¹⁴ See the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), No. ICC-02/11-01/15-744, 3 November 2016 (the “*Gbagbo and Blé Goudé* Judgment”), para. 65.

¹⁵ See Rule 68(2)(b)(i) of the Rules. See also the *Gbagbo and Blé Goudé* Judgment, *supra* note 14, para. 102. The Appeals Chamber stated that “[it] finds it useful to consider the relevant jurisprudence of that tribunal [of ICTY] given that the wording of rule 68(2)(b) of the Rules is based on the wording of rule 92 bis of the ICTY Rules.” Also, see the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. ICC-01/05-01/08-1386, 3 May 2011, para. 78. See ICTY, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, *Decision on Defence Motion to Admit the Evidence of Dragan Gajić Pursuant to Rule 92bis*, 17 December 2015, para. 8; *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, *Decision on Prosecution 39th Motion to Admit Evidence Pursuant to Rule 92bis – Witness RM-378*, 17 December 2013, paras. 10 and 12; *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, *Decision on Prosecution Motion to Admit GH-164’s Evidence pursuant to Rule 92 bis*, 22 April 2013, para. 8.

¹⁶ See the *Ruto and Sang* Judgment of 12 February 2016, *supra* note 13, paras. 93-94. See also the *Gbagbo and Blé Goudé* Judgment, *supra* note 14, para 104.

13. As underlined by the Prosecution, the witness has clearly indicated when he did not know certain information and his account is generally coherent and consistent,¹⁷ which illustrates the reliability of the prior recorded statement.

14. The Legal Representatives thus requests that the Chamber exercise its discretion and admit the prior recorded statement of dual-status witness P-0039 pursuant to Rule 68(3)(b) of the Rules which provides for an exception to the principle of orality.¹⁸

IV. CONFIDENTIALITY

15. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present submissions are classified as “confidential” as they refer to the sensitive information regarding a dual-status Prosecution witness.

¹⁷ See the Prosecution Request, *supra* note 1, paras. 17-18.

¹⁸ See the *Ruto and Sang* Judgment of 12 February 2016, *supra* note 13, paras. 84 and 94.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests
that the Chamber

GRANT the Prosecution Request.

A handwritten signature in black ink, appearing to read 'Dmytro Suprun', with a long vertical stroke extending downwards from the bottom of the signature.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 27th Day of January 2017

At The Hague, The Netherlands