

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **1 March 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,
with Confidential Annexes A-H**

**Public redacted version of “Prosecution application under rule 68(3) to admit
Witness P-0761’s prior recorded testimony and associated material”,
3 November 2016, ICC-01/04-02/06-1609-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. The Prosecution requests that Trial Chamber VI ("Chamber") admit into evidence the prior recorded testimony of Witness P-0761 under rule 68(3) of the Rules of Procedure and Evidence ("Rules").
2. Specifically, the Prosecution seeks to admit pursuant to rule 68(3), as part of Witness P-0761's testimony: (i) his screening note; (ii) his witness statement taken by the Prosecution and an investigation note that explains who was present when it was signed; (iii) the two birth certificates [REDACTED], referred to in P-0761's witness statement; and, (iv) P-0761's two prior statements given to a non-governmental organisation. Moreover, the Prosecution seeks to conduct a brief, focussed supplemental examination.
3. P-0761 is [REDACTED], [REDACTED], who is coming to testify. P-0761's prior recorded testimony and associated material primarily relates to [REDACTED] – in particular, P-0761's knowledge of [REDACTED], [REDACTED], [REDACTED]; [REDACTED]; and, [REDACTED].
4. All of the items that the Prosecution seeks to admit are relevant, probative and reliable. Witness P-0761 will be asked to confirm their accuracy and his knowledge about them at the beginning of his testimony,¹ and then to confirm his availability and willingness to be examined by the Parties, Legal Representatives (if applicable), and the Chamber.
5. Witness P-0761 will be the sixth witness to testify during the seventh block of evidence, which is scheduled to commence on 7 November 2016. The Prosecution estimates, based on past practice, that it will require in total one hour for the examination-in-chief of P-0761: namely, approximately thirty minutes for the

¹ ICC-01/04-02/06-619, para.43.

formalities associated with the admission of his prior recorded testimony and associated exhibits; and an additional thirty minutes to conduct a supplementary examination to elicit limited, focused *viva voce* evidence.

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-0761's examination-in-chief by one hour.
7. The Prosecution also seeks authorisation to submit this application under regulation 35 of the Regulations of the Court ("Regulations"), less than one month prior to P-0761's testimony as required, on the basis that the Prosecution has good cause in submitting this application late, and it would be in the interests of justice to allow the application.

Confidentiality

8. The filing and its annexes are classified as "Confidential" pursuant to regulation 23bis(1) of the Regulations of the Court because they contain confidential information about a Prosecution witness for whom the Prosecution is requesting in-court protective measures. The Prosecution will file a public redacted version of this filing.

Procedural History

9. Witness P-0761 provided a statement to the Prosecution [REDACTED], [REDACTED].

10. On 27 September 2016, the Prosecution identified P-0761 to the Defence as the ninth witness for the seventh evidentiary block and proposed that he testify *viva voce* for two hours.²
11. On 7 October 2016, the Prosecution submitted its formal witness list to the Chamber, Parties and participants, and proposed that P-0761 testify as the eighth witness.³
12. On 14 October 2016, the Prosecution provided a slightly amended version of the witness list, further to a Defence request for a change in the witness order.⁴ P-0761 remained as the eighth witness for the seventh evidentiary block.
13. On 17 October 2016, the Chamber recommended that the testimony of Witness P-0761, as well as P-0773, instead be admitted pursuant to rule 68(2)(b) of the Rules. The Chamber also indicated its guidance for reducing the hours of the testimony of witnesses during the seventh evidentiary block.⁵
14. Rather than submitting the testimony of P-0761 pursuant to rule 68(2)(b), the Prosecution identified Witness P-0761 as an appropriate witness for the procedure under rule 68(3) of the Rules.
15. P-0761 was originally meant to testify as the eighth witness during the seventh evidentiary block from on or around 30 November or 1 December 2016. Accordingly, any rule 68(3) application would have been due on 3 November 2016. However, for reasons outside the control of the Prosecution, P-0761 must now testify sooner than anticipated, as the sixth witness during the seventh evidentiary block from on or around 21 November 2016. Witnesses P-0875 and P-0908, who were due to testify before P-0761, are now testifying during the eighth

² Email of 27 September 2016 at 12:18pm.

³ Email of 7 October 2016, at 9:53am.

⁴ Email of 14 October 2016 at 13:56 pm.

⁵ Email of 17 October 2016 at 14:47pm.

evidentiary block. Moreover, it has been proposed that Witness P-0918, also appearing before P-0761, will testify *via* video-link in the evenings.

16. On 2 November 2016, the updated witness list confirming this change in order was communicated to the Chamber, Parties and participants.⁶
17. Accordingly, due to the changes in dates of witnesses' testimony because of the change in the order of witnesses and the reduction in hours of testimony, any rule 68(3) application would instead have been due on or about 24 October 2016, pursuant to the Chamber's Decision on the Conduct of Proceedings.⁷

Prosecution's Submissions

18. 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.
19. The prior recorded testimony and associated material that the Prosecution seeks to admit pursuant to rule 68(3) relates, *inter alia*, to: ((i) P-0761's [REDACTED]; (ii) [REDACTED], [REDACTED], and [REDACTED]; (iii) [REDACTED]; (iv) [REDACTED], [REDACTED]; (v) [REDACTED]; (vi) [REDACTED], and [REDACTED].
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

⁶ Email of 2 November 2016 at 19:00pm.

⁷ ICC-01/04-02/06-619, para.41.

referred to in these passages that are available to the calling party and, without which, the passages would not be understandable.⁸

21. As set out in Annex A, to this filing, the Prosecution seeks to admit under rule 68(3), in full Witness P-0761's [REDACTED], [REDACTED], his [REDACTED], a [REDACTED], as well as Witness P-0761's [REDACTED] , [REDACTED], [REDACTED].⁹

Witness P-0761's prior recorded testimony should be admitted pursuant to rule 68(3)

22. The prior recorded testimony and associated material set out in Annex A, are relevant to establishing a number of crimes for which the Accused has been charged, in particular the [REDACTED]and persecution of non-Hema.

23. Witness P-0761 provided his witness statement voluntarily and in accordance with the requisite formalities.¹⁰ His prior recorded testimony is relevant and reliable. Further, Witness P-0761 will be asked to confirm the accuracy of his testimony when he is called to provide *viva voce* testimony¹¹ 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 Witness P-0761's prior recorded testimony and associated material under rule 68(3) is not prejudicial to or inconsistent with the rights of the Accused.

⁸ ICC-01/04-02/06-619, para.42.

⁹ See Annex A.

¹⁰ 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); ICC-01/04-02/06-T-127-ENG ET, p.72, lns.10-18 (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.

¹¹ ICC-01/04-02/06-619, para.43.

Supplementary examination

24. Should Witness P-0761'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,¹² and of this Chamber.¹³
25. The Prosecution seeks to elicit, *viva voce*, further details. In particular, the Prosecution will seek further information, *inter alia*, from P-0761 regarding: (a) [REDACTED];¹⁴ (b) [REDACTED];¹⁵ (c) [REDACTED];¹⁶ and, (d) [REDACTED].¹⁷ Moreover, the Prosecution will seek to: (a) clarify P-0761's basis of knowledge, in particular, [REDACTED], [REDACTED],¹⁸ and [REDACTED];¹⁹ and (b) show P-0761 additional potential documents of relevance including: (i) [REDACTED];²⁰ and, (ii) information he provided [REDACTED], and [REDACTED].²¹ It is extremely important that these points are explored and clarified with P-0761 [REDACTED], and [REDACTED], [REDACTED], [REDACTED]; the issue of the [REDACTED]; and, the [REDACTED].

¹² 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)). 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.

¹³ 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).

¹⁴ DRC-OTP-2054-8283, para.10.

¹⁵ DRC-OTP-2054-8283, paras. 11-13.

¹⁶ DRC-OTP-2054-8283, para.22.

¹⁷ DRC-OTP-2054-8283, para.25.

¹⁸ DRC-OTP-2054-8283, para.12.

¹⁹ DRC-OTP-2054-8283, para.18.

²⁰ DRC-OTP-0225-0064.

²¹ DRC-OTP-0009-0146, at page 0154; DRC-OTP-0011-0476 at page 0476.

26. The Prosecution will 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.
27. As previously indicated to the Chamber,²² the Prosecution intends to complete the process of admission of Witness P-0761's material as well as its supplementary examination within one hour, if this application is accepted. Should the Chamber reject this Request in whole or in part, the Prosecution will require the two hours originally estimated for this witness's examination-in-chief.

Proposed procedure for the introduction of prior recorded testimony

28. Should this Request be granted, the Prosecution submits that there will be no need to read into evidence Witness P-0761's prior testimony.
29. During witness preparation, the Prosecution will ask Witness P-0761 to review his prior testimony, advise of any corrections or clarifications he wishes to make to it and then to confirm its accuracy.²³ 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 that the witness makes.²⁴
30. When Witness P-0761 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

²² Email of 24 October 2016 at 13:17pm to Defence. Email of 2 November 2016 at 19:00pm to the Chamber, Parties and participants.

²³ ICC-01/04-02/06-652-Anx, p. 4, paras.18-19.

²⁴ ICC-01/04-02/06-652-Anx, p. 4, paras.14-15 and p.6, paras.31-32.

any clarifications to that portion are required to be made.”²⁵ 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 its accuracy. Finally, the Prosecution will ask the witness to confirm his consent to be questioned by the Parties, Legal Representatives if applicable, and the Chamber.

31. 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 P-0761 as outlined above.

Application under regulation 35

32. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit “if good cause is shown”. 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”.²⁶

33. The Appeals Chamber has further decided to extend a time limit where it was in the “interest of justice”.²⁷

34. In this case there is good cause to vary the new time limit from 24 October 2016, to 3 November 2016.

²⁵ 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”.

²⁶ ICC-01/04-01/06-834, para.7.

²⁷ *See* ICC-01/04-01/10-505, para.11.

35. The Chamber made its recommendation to submit P-0761's testimony under rule 68(2)(b) on 17 October 2016. The Prosecution required some time to conduct its own in-depth analysis of the evidence of P-0761, [REDACTED], [REDACTED]. The Prosecution, mindful of the Chamber's recommendation and the interests of expeditious proceedings, concluded that P-0761 is an appropriate witness to submit prior testimony under rule 68(3). Admission of his testimony under rule 68(3) would shorten his testimony by an hour, thereby contributing to the expeditiousness of the proceedings, which is in the interests of justice.
36. At that stage, the application under rule 68(3) was only due on 3 November 2016. However, due to additional changes to the witness order outside the Prosecution's control, as described at paragraph 15 above, P-0761 will now testify sooner and the deadline has changed to 24 October 2016.
37. Accordingly, the Prosecution submits that there is good cause to vary the time limit of 24 October 2016 to 3 November 2016, slightly less than three weeks before P-0761 is due to testify.
38. There is no undue prejudice to the Accused. The application is made approximately one week less than it should have been submitted. Moreover, the use of rule 68(3), rather than rule 68(2)(b) as previously recommended, allows the Defence to cross-examine P-0761.
39. If the Chamber is not minded to grant the application under rule 68(3) and regulation 35, the Prosecution will call P-0761 to testify *viva voce* for the original two hours.

Conclusion

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



Fatou Bensouda
Prosecutor

Dated this 1st day of March 2017
At The Hague, The Netherlands