

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 21 December 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 "Corrected version of 'Prosecution's response to the 'Confidential redacted version of 'Request on behalf of Mr Ntaganda to admit prior recorded testimony of Defence Witness D-0243 pursuant to Rule 68(3) and Regulation 35' ICC-01/04-02/06-2107-Conf-Red", 22 November 2017, ICC-01/04-02/06-2127-Conf", 24 November 2017, ICC-01/04-02/06-2127-Conf-Corr

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 Defence Request for the admission of Witness D-0243's prior recorded testimony pursuant to rule 68(3) of the Rules¹ should be rejected.
2. First, under regulation 35(2) of the Regulations of the Court ("Regulations"), the Defence has failed to show good cause for a variation of the time limit and demonstrate that it was unable to file its Request for reasons outside its control. Nor has the Defence provided grounds to grant its Request in the interests of justice and the determination of the truth.
3. Second, even if the Defence Request were valid under regulation 35, it should be rejected. Witness D-0243 is a fact witness and not an expert, yet his prior recorded testimony contains sections of inadmissible opinion evidence woven throughout the statement. The Defence Request does not indicate that D-0243 has the qualifications expected of an expert in the fields of radio communications or radio-wave propagation. Indeed, by D-0243's own admission, he does not have any technical training in radio communications.² Admitting his prior recorded testimony would prevent the Prosecution from objecting to the admission of opinion evidence. Rather, ordering D-0243's *viva voce* testimony would permit the Prosecution to object question by question, should the Defence seek to elicit opinion evidence.
4. Third, it is necessary for the Chamber to test the veracity and spontaneity of Witness D-0243's prior recorded testimony by assessing his evidence in full and live. Witness D-0243's statement was obtained [REDACTED], after the completion of the Accused's testimony. The irregular timing of collection of the statement, the pervasive allegations of witness coaching present in this case, and the content of

¹ ICC-01/04-02/06-2107-Conf-Red; Rules of Procedure and Evidence.

² ICC-01/04-02/06-2107-Conf-Red-Anx1, para. 57.

his statement, militate in favour of a full delivery of the witness's testimony. Cross-examination alone is insufficient for the Chamber to evaluate the spontaneity and credibility of the witness's account.

5. Fourth, admitting Witness D-0243's statement pursuant to rule 68(3) would not significantly contribute to the expeditiousness of proceedings. Granting the Defence Request would save just one hour and thirty minutes, or one court session, of court time.³ While saving any amount of court time is generally favourable, it would not be in the interests of justice to grant the Defence Request in the present circumstances.

Confidentiality

6. In accordance with regulation 23bis(2) of the Regulations, this response is classified as Confidential since it responds to a Confidential Defence Request.

Background

7. On 30 January 2017, the Chamber ordered the Defence, *inter alia*, to provide a further provisional list of witnesses as well as a summary of the anticipated testimony of the witnesses by 31 March 2017⁴ and provide the final version of its list of witnesses and summaries of anticipated testimony, as well as its final list of evidence by 26 April 2017.⁵ The Chamber also set 26 April 2017 as the final deadline for all disclosure by the Defence.⁶

³ ICC-01/04-02/06-2107-Conf-Red, para. 33. Though the Defence claims in paragraph 26 that its request would save 2 hours of court time, the Prosecution calculates that given the Defence's initial estimate of 3 hours of examination time, and its request for 1.5 hours of supplemental examination, the savings is actually 1.5 hours.

⁴ ICC-01/04-02/06-1757, para. 10.

⁵ ICC-01/04-02/06-1757, para. 11.

⁶ ICC-01/04-02/06-1757, para. 14.

8. On 28 August 2017, the Chamber ordered the Defence to file an updated list of witnesses within two weeks of the completion of the Accused's testimony.⁷
9. On 27 September 2017, the Defence provided an updated list of witnesses and indicated that it would be filing requests to add new witnesses to its list.⁸
10. On 3 October 2017, the Chamber set 16 October 2017 as the deadline by which the Defence must file any requests pursuant to regulation 35(2) of the Regulations and/or rule 68(2) of the Rules.⁹
11. On 16 October 2017, the Defence filed a Request to add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses and annexed his witness summary.¹⁰
12. On 27 October 2017 the Prosecution filed a Response opposing the Defence Request.¹¹
13. The Defence sought leave to reply on 2 November 2017.¹²
14. On 6 November 2017 the Prosecution filed a Response to the Defence Request for leave to reply.¹³
15. On 6 November 2017 the Chamber filed a Decision rejecting the Defence Request for leave to reply and granted the addition of Witnesses D-0207 and D-0243 to the Defence List of Witnesses, directing that D-0243's testimony be scheduled in the fifth evidentiary block.¹⁴

⁷ ICC-01/04-02/06-T-231-CONF-ENG ET, p. 4, ln. 24 – p. 5, ln. 5 (open session).

⁸ ICC-01/04-02/06-2045-Conf, para. 16 (c) and (e).

⁹ Email from the Chamber to the Parties and participants dated 3 October 2017 at 10:17.

¹⁰ ICC-01/04-02/06-2065, Annex C.

¹¹ ICC-01/04-02/06-2084-Conf.

¹² ICC-01/04-02/06-2094-Conf.

¹³ ICC-01/04-02/06-2098-Conf.

¹⁴ ICC-01/04-02/06-2099-Conf.

16. On 10 November 2017, the Defence filed a Request to admit the prior recorded testimony of Witness D-0243 pursuant to rule 68(3) and regulation 35.¹⁵

Submissions

I. The Defence Request fails to meet the requirements of regulation 35(2)

17. In order to obtain an extension of time pursuant to regulation 35(2) of the Regulations after the applicable deadline has expired, this Chamber has held that “in addition to showing ‘good cause’ for a variation of the time limit, the [calling party] is required to demonstrate that it was ‘unable to file the application within the time limit for reasons outside [its] control’”.¹⁶ Absent such grounds, the applying party must show that granting its request is in the interests of justice and the determination of the truth and is consistent with the Chamber’s obligations to ensure the fairness of the proceedings.¹⁷ The Defence Request does not meet these criteria.

18. First, the Defence Request does not establish that the Defence was *unable* to file its request before the four week deadline¹⁸ for reasons outside its control and fails to establish “good cause”, as required by regulation 35(2).¹⁹

19. Witness D-0243 was added to the Defence witness list on 6 November 2017. The Prosecution did not object to him appearing as the second witness in the fifth block, which would fall around 30 November 2017,²⁰ and as such, the deadline for the Defence to seek the admission of the prior recorded testimony of Witness D-0243 was 6 November 2017.

¹⁵ ICC-01/04-02/06-2107-Conf-AnxI.

¹⁶ ICC-01/04-02/06-1733, para. 7.

¹⁷ See ICC-01/04-02/06-1733, para. 6; See also ICC-01/04-02/06-1785-Conf, para. 6.

¹⁸ ICC-01/04-02/06-619, para. 41.

¹⁹ See ICC-01/04-02/06-1733, para. 7; See also ICC-01/04-02/06-1785-Conf, paras. 6, 9.

²⁰ Email from N. Samson to S. Bourgon, 8 November 2017 at 11:27.

20. The Defence argues that the Prosecution's ability to prepare for his testimony is not impeded, because a summary was disclosed on 16 October 2017.²¹ There is a marked difference between the two page summary disclosed to the Prosecution on 16 October 2017 and the detailed 30 page witness statement disclosed on 10 November 2017. One does not simply replace the other.
21. Furthermore, the Defence has never explained why it waited six months from the date of first contact with the witness in [REDACTED] to obtain D-0243's prior recorded testimony. The Chamber set clear deadlines for the Defence and provided ample time for the Defence to supplement its disclosure. The Defence Request fails to show that it was 'unable to file the application within the time limit for reasons outside [its] control'.²² There is nothing exceptional about the circumstances that led the Defence to file this late Request and as such, it should be rejected.
22. The Chamber has held that "[w]hen the terms of Regulation 35 are not met, a case-by-case assessment which balances the justification for the addition of new evidence against the potential prejudice which may be caused to the other party is required."²³ The Chamber then referred to a non-exhaustive list of factors that it may consider in such cases.²⁴ The Defence Request fails to satisfy these requirements.
23. Granting the Defence Request would not be in the interests of justice and would be inconsistent with the Chamber's obligation to ensure the fairness of the proceedings.

²¹ ICC-01/04-02/06-2107, para. 10.

²² ICC-01/04-02/06-1733, para. 7.

²³ See ICC-01/04-02/06-1733, para. 8; See also ICC-01/04-02/06-1785-Conf, para. 6.

²⁴ See ICC-01/04-02/06-1733, para. 8; See also ICC-01/04-02/06-1785-Conf, para. 6.

II. D-0243's prior recorded testimony is inadmissible under rule 68(3)

24. Article 69(2) provides that the "testimony of a witness shall be given in person".

The Chamber has noted that admission pursuant to rule 68(3) "constitutes an exception to the principle of the primacy of orality before the Court" and that "a cautious, case-by-case assessment is therefore required, and the impact of any such request on the rights of an accused and the fairness of the proceedings more generally should be considered".²⁵

25. The Defence states that the Chamber's power to admit prior recorded testimony pursuant to rule 68(3) "is not subject to express conditions or criteria."²⁶ However, the Chamber's determination in relation to rule 68(3) must be "in accordance with article 69, paragraphs 2 and 4".²⁷ Article 69(4) of the Statute requires the Chamber to take into account, *inter alia*, "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness" when ruling on the relevance or admissibility of any evidence.

26. Rule 68(3) 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.

²⁵ ICC-01/04-02/06-845, para. 6; *See also* ICC-01/04-02/06-961, para. 8; ICC-01/05-01/08-1386 OA5 OA6, para. 76; ICC-01/09-01/11-2024 OA10, para. 84.

²⁶ Defence Request, para. 12.

²⁷ Rule 68(1).

a. D-0243's evidence contains inadmissible opinion evidence

27. Under article 69(4) the Chamber may find inadmissible any evidence with little to no probative value. Opinion evidence provided by an unqualified fact witness would generally have little to no probative value. This is because a fact witness does not possess the expertise sufficient to form opinions that carry probative value. Rather the opinions of fact witnesses may serve to confuse the issues and litter the record of trial with non-probative information.
28. The Defence will call Witness D-0243 as a fact witness and not as an expert. It does not appear that D-0243 possesses the requisite expertise to qualify as an expert or to form an expert opinion about radio communications or radio wave propagation. He has not obtained a technical or university level education, specialised training, licenses, teaching experiences, or publications that would all factor into his qualification as an expert witness. By D-0243's own admission in his prior recorded testimony, he does not have any technical training in radio communications.²⁸
29. Despite the lack of expertise and apparently prompted by Defence questioning, D-0243 provided many opinions rather than facts based on personal knowledge in his prior recorded testimony. For instance in paragraphs 58-62 he opined on factors affecting radio wave propagation and in paragraphs 67-75 he opined on the ability to communicate over distance. It is not apparent that D-0243 provided the prior recorded testimony from personal knowledge having conducted attempts to communicate to and from the places listed in 2002-2003 [REDACTED]. Rather, it appears he estimated the information based on his own non-expert assessments of distance and terrain. Additionally, it is unclear whether his estimates are based on his own memory, which considering the

²⁸ ICC-01/04-02/06-2107-Conf-Red-Anx1, para. 57.

information on distances and descriptions seems unlikely, or whether he relied on unrecorded extrinsic information.

30. The opinion testimony is interwoven into the prior recorded testimony in such a way that it would be impractical and illogical to admit the portions of his potentially admissible testimony through rule 68(3). Admitting the prior recorded testimony would prevent the Prosecution from objecting to the admission of opinion evidence. Rather, ordering D-0243's *viva voce* testimony would permit the Prosecution to object question by question, should the Defence seek to elicit opinion evidence.

b. The reliability of D-0243's prior recorded testimony needs full testing

31. In determining whether to admit prior recorded testimony pursuant to rule 68(3), the Chamber has considered its reliability²⁹ as well as its relative temporal proximity to the events described therein.³⁰

32. Witness D-0243's statement was obtained [REDACTED]. This means that it is not at all temporally proximate to the events to which it relates, which took place between 14 and 15 years ago. This also means that the statement was obtained after the completion of the Accused's testimony, which was mainly conducted in open session. The irregular timing of the statement militates in favour of hearing Witness D-0243's *viva voce* testimony rather than in a written statement, which was completed a short time ago.

33. Requiring Witness D-0243 to spontaneously give his evidence during examination-in-chief will substantially assist the Chamber in assessing his reliability and credibility. As stated by Judge Ozaki in a Dissenting Opinion,

²⁹ See ICC-01/04-02/06-1733, para. 25.

³⁰ See ICC-01/04-02/06-T-161-CONF-ENG ET, p. 28, lns. 7-8 (open session); ICC-01/04-02/06-T-188-CONF-ENG ET, p. 3, lns. 23-24 (private session).

“[t]he primacy of the principle of orality is founded on the importance which should be attached to direct observation and oversight on the part of a chamber of the giving of a witness’s evidence, including from the perspective of evaluating the credibility of the account.”³¹

34. While there are numerous instances when admission of prior recorded testimony pursuant to rule 68(3) can be the most appropriate form of admission, the circumstances referred to above indicate that Witness D-0243 should testify entirely *viva voce* in order for the Chamber to be best placed to assess the witness’s credibility.

c. Admitting D-0243’s statement pursuant to rule 68(3) would not significantly contribute to the expeditiousness of proceedings

35. This Court’s jurisprudence makes it clear that while expeditiousness is a relevant factor in relation to the admission of prior recorded testimony pursuant to rule 68(3) it “cannot justify a deviation from statutory requirements.”³² Therefore, the fact that a witness consents to the admission of his or her prior recorded testimony and is available for examination does not automatically mean that such requests should be granted if the testimony can be considerably shortened.

36. The time that the Defence posits would be saved should the Chamber grant the Defence Request - one hour and thirty minutes -, is not a considerable shortening of the proceedings. While saving any amount of court time is generally favourable, it would not be in the interests of justice to grant the Defence Request in the present circumstances. As stated by Judge Ozaki in a Dissenting Opinion, “[e]xpeditiousness must be achieved *in a manner consistent with the statutory*

³¹ ICC-02/11-01/15-744-Anx, para. 8.

³² ICC-02/11-01/15-744, para. 62; ICC-01/05-01/08-1386, para. 55.

framework including, in particular, with the fairness and integrity of the proceedings.”³³

d. The Defence provides insufficient grounds justifying one hour and thirty minutes for supplementary examination

37. The Defence requests one hour and thirty minutes in order to conduct a supplementary direct examination as well as to conduct the necessary formalities associated with the admission of Witness D-0243’s prior recorded testimony.

38. Since the only prior recorded testimony that the Defence seeks to admit is one 30-page statement, no longer than 15 minutes should be required for its admission pursuant to rule 68(3) especially since the statement was obtained [REDACTED], which indicates that the witness is unlikely to have much to change or add to it.

39. Parties must adequately establish the reasons for requiring a certain amount of time to conduct a supplementary examination of a witness whose testimony is admitted pursuant to rule 68(3) of the Rules.³⁴ The Chamber would only be in a position to appropriately determine the length of any requested supplementary examination if it receives notice, as the Prosecution provided,³⁵ of the topics that the Party proposes to address during such examination.

40. However, other than a very general statement, the Defence fails to identify a single topic it intends to cover during the supplementary examination that it requests. In rejecting a Prosecution application for the admission of prior recorded testimony pursuant to rule 68(3), the Chamber noted, *inter alia*, that the Prosecution’s submissions did not make it clear how the Prosecution proposed to limit the scope of its supplementary examination if the prior recorded testimony

³³ ICC-02/11-01/15-744-Anx, para. 6 (footnote omitted, emphasis in original).

³⁴ See ICC-01/04-02/06-T-188-CONF-ENG ET, p. 5, ln. 23 – p. 6, ln. 3 (open session).

³⁵ See, e.g. ICC-01/04-02/06-1600-Conf, paras. 6, 36; ICC-01/04-02/06-1479-Conf, paras. 5, 25; ICC-01/04-02/06-1488-Conf, paras. 5, 44.

were to be admitted.³⁶ The Chamber should reject the Defence Request for the same reason.

41. Finally, should the Defence Request be granted, the Defence should be required to follow the established procedure in relation to the admission of the prior recorded testimony, including that any clarifications to it should be elicited in a non-leading manner.³⁷

III. Time required for cross-examination

42. The Chamber has held that “Rule 68(3) procedures necessarily constitute exceptions to its general principle that cross-examination shall not last longer than examination-in-chief”.³⁸ Therefore, should the Defence Request be granted, the Prosecution would not be limited to the abbreviated time allotted for examination in chief to conduct its cross-examination.

43. The Chamber also stated that although the initial time estimate provided by a Party for examination-in-chief without the use of rule 68(3) may be of guidance, the Chamber will consider on a case-by-case basis how much time it considers appropriate to grant for cross-examination.³⁹ The Defence estimated that it would require 3 hours to elicit Witness D-0243’s entirely *viva voce*.⁴⁰

44. Should the Chamber grant the Defence Request, the Prosecution estimates that it would require 4 hours for D-0243’s cross-examination in order to address the witness’s prior recorded testimony in addition to the one hour and thirty minutes of supplemental Defence examination.

³⁶ ICC-01/04-02/06-961, para. 11.

³⁷ 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, p. 63, lns. 10-12 (open session).

³⁸ ICC-01/04-02/06-T-127-ENG ET, p. 72, ln. 22 – p. 73, ln. 3 (open session).

³⁹ ICC-01/04-02/06-T-127-ENG ET, p. 72, ln. 22 – p. 73, ln. 3 (open session).

⁴⁰ *See* the forthcoming witness list for the fifth evidentiary block attached to the email from the Defence to the Chamber, Prosecution and participants dated 27 October 2017 at 16:25.

Conclusion

45. For the foregoing reasons, the Chamber should reject the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 21st day of December 2017

At The Hague, The Netherlands