

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 29 October 2015

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

**Decision on Prosecution application under Rule 68(3) of the Rules for admission
of prior recorded testimony of Witness P-0055**

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of 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

Trial Chamber VI ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Article 67 of the Rome Statute and Rules 64(2) and 68(3) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055'.

I. Procedural history and submissions

1. On 2 October 2015, the Prosecution filed a request seeking that the Chamber admit prior recorded testimony of Witness P-0055 ('Witness'), who previously testified in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case'), as well as four associated documents.¹
2. The Prosecution submits that admission of the prior recorded testimony and four documents is not prejudicial to the rights of the accused, because the Witness will be present before the Chamber, providing the parties, participants and the Chamber an opportunity to examine the Witness.² The Prosecution further submits that the testimony is 'relevant and reliable, and [the Witness] will be asked to confirm its accuracy'.³
3. In the event the Request is granted, the Prosecution wishes to ask 'supplementary questions' in order to elicit evidence specific to the present case that was not, or only briefly, addressed during the Witness's testimony in *Lubanga* case.⁴ However, it undertakes to 'not ask extensive or any questions' on

¹ Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0055, ICC-01/04-02/06-884-Conf; with 17 annexes. A public redacted version was filed on 5 October 2015 (ICC-01/04-02/06-884-Red).

² Request, ICC-01/04-02/06-884-Red, para. 13, and 18.

³ Request, ICC-01/04-02/06-884-Red, para. 13.

⁴ Request, ICC-01/04-02/06-884-Red, paras 14-15.

a specified number of topics.⁵ The Prosecution estimates that this will reduce the examination-in-chief 'by 4 or 5 hours'.⁶

4. According to the Prosecution, 'in the interest of the expeditiousness of the proceedings', the defence team of Mr Ntaganda ('Defence') should be limited in cross-examining the Witness on 'virtually identical lines of questioning' as explored by the defence team for Mr Lubanga ('Lubanga Defence') in the *Lubanga* case and that repetitive cross-examination on 'issues appropriately tested' by the Lubanga Defence that are not specific to the present case should not be permitted.⁷
5. On 19 October 2015, the Defence filed its response to the Request ('Response'),⁸ opposing the admission of the Witness's prior recorded testimony or the associated documents pursuant to Rule 68 of the Rules.⁹
6. The Defence acknowledges that admitting prior recorded testimony pursuant to Rule 68(3) of the Rules can contribute to the expeditiousness of the proceedings, but it submits that in the case of the Request, it is unlikely that the advantage expected by the Prosecution, namely to save four to five hours of hearing time, will materialise and that it 'is far outweighed by the potential prejudice to and the disadvantages for the Accused'.¹⁰
7. For the following reasons, the Defence avers that using Rule 68(3) of the Rules to admit 'six days of testimony representing no less than 328 pages of transcript' is not appropriate and that it is in interests of justice to hear the Witness's evidence in full, by way of *viva voce* testimony:¹¹ i) the 'absence of a

⁵ Request, ICC-01/04-02/06-884-Red, para. 16.

⁶ Request, ICC-01/04-02/06-884-Red, para. 17.

⁷ Request, ICC-01/04-02/06-884-Red, para. 18.

⁸ Response on behalf of Mr Ntaganda to "Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0055", ICC-01/04-02/06-908-Conf. A public redacted version was filed that same day (ICC-01/04-02/06-908-Red).

⁹ Response, ICC-01/04-02/06-908-Red, para. 3 and page 12.

¹⁰ Response, ICC-01/04-02/06-908-Red, para. 2.

¹¹ Response, ICC-01/04-02/06-908-Red, para. 5.

significant overlap' between the Witness's prior recorded testimony and the expected testimony in the present case defeats the purposes of Rule 68(3) of the Rules;¹² ii) admitting the prior recorded testimony would impose a heavier burden on the Defence in preparing for and conducting the cross-examination of the Witness, and will increase the cross-examination time;¹³ iii) due to the central importance of the Witness's prior recorded testimony to issues in dispute in the present case, it is in the interests of justice to hear the Witness's testimony *viva voce* in its entirety;¹⁴ iv) admitting the prior recorded testimony would not result in time saved.¹⁵

II. Analysis and conclusions

8. The Chamber recalls that, pursuant to Rule 68(3) of the Rules, it may allow the introduction of the prior recorded testimony of a witness who is present before the Chamber: i) where the individual does not object to the introduction of its prior recorded testimony; and ii) if both parties and the Chamber have an opportunity to examine the witness. The Chamber further recalls that it previously held that 'a cautious, case-by-case assessment is [...] required', and that it will consider 'the impact of any such request on the rights of an accused and the fairness of the proceedings more generally'.¹⁶
9. Furthermore, the Chamber recalls that in setting out the procedure to be adopted with regard to the introduction of prior recorded testimony under Rule 68(3) of the Rules, it had indicated that it 'may rule on any preliminary objections in advance but will not issue a decision on a Rule 68(3) [a]pplication until the relevant witness has appeared before [the] Chamber and attested to

¹² Response, ICC-01/04-02/06-908-Red, paras 13-15.

¹³ Response, ICC-01/04-02/06-908-Red, paras 16-18.

¹⁴ Response, ICC-01/04-02/06-908-Red, paras 19-22.

¹⁵ Response, ICC-01/04-02/06-908-Red, paras 23-25.

¹⁶ Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931, 21 September 2015, ICC-01/04-02/06-845, para. 6.

the accuracy of the document to be tendered into evidence.’¹⁷ In the present circumstances, noting the Defence’s objection to the introduction of the prior recorded testimony pursuant to Rule 68(3), the Chamber decides to render its decision on the Request at this time, as it will benefit the parties in their preparation for the Witness’s testimony.

10. In making its case-by-case assessment on the present request to use Rule 68(3) of the Rules, the Chamber notes the centrality of the prior recorded testimony to the case against the accused. The Chamber observes that the charges against the accused and his alleged actions are discussed at length in the extensive number of pages that the Prosecution seeks to have admitted. It is further evident that in the event of admission pursuant to Rule 68(3) of the Rules, the Defence would need to be granted a significant amount of time to cross-examine the Witness on the prior recorded testimony. In this regard, the Chamber does not consider that the Prosecution’s proposal to limit certain aspects of the cross-examination can be expected to save time. Whilst the cross-examination by the Lubanga Defence may assist in assessing the Witness’s evidence and credibility, it cannot replace cross-examination by the Defence, as the former was conducted with Mr Lubanga’s interests in mind, whilst Mr Ntaganda’s interests and/or the Defence’s strategy in the present case may not necessarily be the same. In addition, and contrary to the Prosecution’s submission,¹⁸ the situation cannot be compared with a division of tasks between defence teams in a multi-accused trial, as no coordination can take place between a current defence team and one that cross-examined in the past.

¹⁷ Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 43.

¹⁸ Request, ICC-01/04-02/06-884-Red, para. 19.

11. The Chamber further notes that, on the basis of the Prosecution's estimates,¹⁹ the Prosecution's 'supplementary questions' would, in fact, amount to five to six hours of examination time. In addition, the Chamber notes that it is not clear from the Prosecution's submissions how the Prosecution proposes to limit the scope of its examination-in-chief if the prior recorded testimony is admitted pursuant to Rule 68(3) of the Rules. In this regard, the Chamber specifically notes the Prosecution's intention to develop what is mentioned in the 'second paragraph of page 29' of the summary of evidence as provided by the Prosecution on 2 March 2015,²⁰ as this paragraph comprises all the charges that the Witness's expected testimony relates to. Moreover, the Chamber notes that although for some of the points mentioned in the summary, such as point 7, the Prosecution elicited several transcript pages of evidence in the *Lubanga* case, the Prosecution nonetheless includes these areas in the list of topics it intends to further develop during its examination of the Witness in the present case.²¹
12. In the present case, in light of the factors mentioned above, the Chamber considers that admitting the testimony pursuant to Rule 68(3) of the Rules would not be in the interests of justice.
13. The Chamber wishes to emphasize, however, that the introduction of evidence under Rule 68(3), in principle, has the potential to significantly enhance the expeditiousness of the proceedings and encourages the parties to continue exploring whether the use of this Rule is appropriate for future witnesses.

¹⁹ The Prosecution had estimated that it would require 10 hours for the examination-in-chief of the Witness (see, e.g., ICC-01/04-02/06-491-Conf-AnxB, p.29 and Forthcoming Witnesses List for the 2nd evidentiary block, submitted by the Prosecution by e-mail on 18 September 2015).

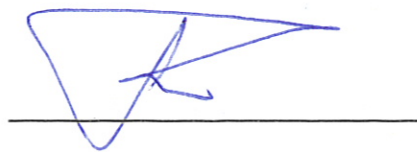
²⁰ Annex B to Prosecution's Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf-AnxB.

²¹ Request, ICC-01/04-02/06-884-Red, para. 15 and accompanying footnote 12.

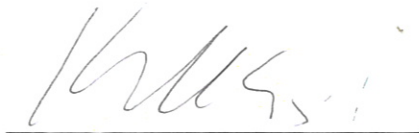
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A black ink signature, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A black ink signature, appearing to be 'Chang-ho Chung', written over a horizontal line.

Judge Chang-ho Chung

Dated 29 October 2015

At The Hague, The Netherlands