

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-02/06  
Date: 6 November 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-0010**

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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**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 'Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010'.

## **I. Procedural history and submissions**

1. On 7 October 2015, the Prosecution filed a request ('Request') seeking that the Chamber admit prior recorded testimony of Witness P-0010 ('Witness'), who previously testified in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case').<sup>1</sup>
2. The Prosecution submits that admission of the prior recorded testimony 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.<sup>2</sup> The Prosecution further submits that the testimony is 'relevant and reliable' and that the Witness will be asked to confirm its accuracy and lack of objection to its introduction.<sup>3</sup>
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 relevant to, or only briefly, addressed during the Witness's testimony in *Lubanga* case.<sup>4</sup> However, it undertakes to 'not ask extensive, if any,

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<sup>1</sup> Prosecution application under rule 68(3) to admit the prior recorded testimony of Witness P-0010, ICC-01/04-02/06-890-Conf; with confidential annexes A-E. A public redacted version was filed on 9 October 2015 (ICC-01/04-02/06-890-Red).

<sup>2</sup> Request, ICC-01/04-02/06-890-Red, paras 3, 13 and 18.

<sup>3</sup> Request, ICC-01/04-02/06-890-Red, paras 3 and 13.

<sup>4</sup> Request, ICC-01/04-02/06-890-Red, paras 2, 14-15.

questions’ on a specified number of topics.<sup>5</sup> The Prosecution estimates that this will reduce the examination-in-chief ‘by approximately 4-5 hours’.<sup>6</sup>

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 nor to Mr Ntaganda should not be permitted.<sup>7</sup>
5. On 23 October 2015, the Defence filed its response to the Request (‘Defence Response’),<sup>8</sup> opposing the admission of the Witness’s prior recorded testimony pursuant to Rule 68(3) of the Rules.<sup>9</sup>
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’.<sup>10</sup>
7. For the following reasons, the Defence avers that using Rule 68(3) of the Rules to admit the Witness’s prior recorded testimony is not appropriate: i) the ‘minimal overlap’ between the Witness’s prior recorded testimony and the expected testimony in the present case militates strongly against admission of the latter under of Rule 68(3) of the Rules, particularly given the Prosecution

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<sup>5</sup> Request, ICC-01/04-02/06-890-Red, para. 16.

<sup>6</sup> Request, ICC-01/04-02/06-890-Red, para. 17.

<sup>7</sup> Request, ICC-01/04-02/06-890-Red, para. 18.

<sup>8</sup> 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-0010”, ICC-01/04-02/06-935-Conf.

<sup>9</sup> Defence Response, ICC-01/04-02/06-935-Conf, para. 4 and page 11.

<sup>10</sup> Defence Response, ICC-01/04-02/06-935-Conf, para. 3. *See also* para. 2.

seeks leave to conduct supplementary examination on 11 of the 17 topics the Witness is anticipated to testify in relation to;<sup>11</sup> ii) Trial Chamber I found the Witness's testimony to be 'not reliable on many aspects';<sup>12</sup> (iii) 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;<sup>13</sup> iv) 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;<sup>14</sup> and v) all factors considered, admitting the prior recorded testimony would not result in time saved.<sup>15</sup>

8. On 26 October 2015, the Legal Representative of the former child soldiers ('LRV') filed her response ('LRV Response'),<sup>16</sup> supporting the Request. The LRV avers, *inter alia*, that admission of the Witness's prior recorded testimony will significantly enhance the efficiency of the proceedings by avoiding repetitive questions or duplication of the Witness's previous testimony in the *Lubanga* case.<sup>17</sup> The LRV submits further that reducing the length of the examination-in-chief of the Witness 'will limit the risk of re-traumatisation of the [W]itness who already testified at length in the *Lubanga* case'.<sup>18</sup>

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<sup>11</sup> Defence Response, ICC-01/04-02/06-935-Conf, paras 7 and 14-17.

<sup>12</sup> Defence Response, ICC-01/04-02/06-935-Conf, paras 8, 20 and 27.

<sup>13</sup> Defence Response, ICC-01/04-02/06-935-Conf, paras 17-20.

<sup>14</sup> Defence Response, ICC-01/04-02/06-935-Conf, paras 9 and 21-24.

<sup>15</sup> Defence Response, ICC-01/04-02/06-935-Conf, paras 25-27.

<sup>16</sup> Former Child Soldiers' Response to the "Public redacted version of 'Prosecution application under rule 68(3) to admit the prior recorded testimony of Witness P-0010', 7 October 2015, ICC-01/04-02/06-890-Conf", ICC-01/04-02/06-942.

<sup>17</sup> LRV Response, ICC-01/04-02/06-942, para. 2.

<sup>18</sup> LRV Response, ICC-01/04-02/06-942, para. 3.

## II. Analysis and conclusions

9. The Chamber recalls the applicable law as set out in its 'Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055' ('Rule 68(3) Decision regarding P-0055').<sup>19</sup>
10. The Chamber recalls that in its 'Decision on the conduct of proceedings' it had indicated 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 '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 the accuracy of the document to be tendered into evidence.'<sup>20</sup> In the present circumstances, consistent with the Rule 68(3) Decision regarding P-0055, in 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.
11. In making its case-by-case assessment of the Request, the Chamber notes the centrality of the Witness's prior recorded testimony to the case against the accused. The Chamber observes that the charges against the accused and his alleged actions are frequently discussed in the two transcripts that the Prosecution seeks to have admitted, particularly in relation to the Witness's alleged forced recruitment by the UPC/FPLC in 2002 and of the presence of children under the age of 15 at the training camps and in the ranks of the UPC/FPLC.<sup>21</sup> The Chamber notes further that, in respect of this prior recorded

<sup>19</sup> 29 October 2015, ICC-01/04-02/06-961, paras 8-9, *referring also to* 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.

<sup>20</sup> Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 43. *See also* Rule 68(3) Decision regarding P-0055', ICC-01/04-02/06-961, para. 9.

<sup>21</sup> *See* Request, ICC-01/04-02/06-890-Red, para. 7; ICC-01/04-02/06-890-Conf-AnxB and ICC-01/04-02/06-890-Conf-AnxC.

testimony, Trial Chamber I identified certain credibility issues.<sup>22</sup> The Chamber notes that the Defence has consequently foreshadowed that, accordingly, it would need a more extensive cross-examination should the Request be granted.<sup>23</sup>

12. In that light, the Chamber does not consider that the Prosecution's proposal to limit certain aspects of the cross-examination can be expected to save time. In this regard, consistent with the Rule 68(3) Decision regarding P-0055,<sup>24</sup> the Chamber also considers that the cross-examination conducted by the Lubanga Defence cannot replace cross-examination by the Defence for Mr Ntaganda, 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 will necessarily differ. This may particularly be the case in the light of the specific concerns raised by the Defence. The Chamber further notes that, on the basis of the Prosecution's estimates,<sup>25</sup> the Prosecution's 'supplementary questions' would, in fact, still amount to five to six hours of examination time.
13. In adjudicating the present Request, the Chamber has also considered the risk of re-traumatisation of the Witness, who may be particularly vulnerable.<sup>26</sup> Without prejudice to any requests pending before the Chamber in this regard,<sup>27</sup> or to the evaluation of prior or future testimony detailing these allegations, the Chamber considers that this issue ought to factor in its adjudication of the

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<sup>22</sup> See in particular *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, para. 268.

<sup>23</sup> Defence Response, ICC-01/04-02/06-935-Conf, paras 8, 18-20, and, in particular, para. 26 at (b) and (c).

<sup>24</sup> Rule 68(3) Decision regarding P-0055, ICC-01/04-02/06-961, para. 10.

<sup>25</sup> 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, page 26 and Forthcoming Witnesses List for the 2<sup>nd</sup> evidentiary block, submitted by the Prosecution by e-mail on 18 September 2015).

<sup>26</sup> See Prosecution application for rule 88 special measures in relation to Prosecution Witness P-0010, 4 November 2015, ICC-01/04-02/06-978-Conf, plus confidential Annex A ('Special Measures Request for P-0010'), para. 17. A public redacted version was filed on 5 November 2015 (ICC-01/04-02/06-978-Red). See also LRV Response, ICC-01/04-02/06-942, para. 3; see also, for example ICC-01/04-02/06-890-Conf-AnxB, pages 36-38; ICC-01/04-02/06-890-Conf-AnxC, pages 6-8; 30-31, 79-80.

<sup>27</sup> For example Special Measures Request for P-0010, ICC-01/04-02/06-978-Red.

present Request, to the extent that the potential for re-traumatisation ought to be minimised where possible.

14. In the present circumstances, the Chamber notes that the Defence has foreshadowed the need for extensive cross-examination of the Witness, and numerous objections, should the Request be granted. Further, the Prosecution has indicated that, in any event, it will be questioning the Witness on highly sensitive subject matter regardless of whether the prior recorded testimony is admitted.<sup>28</sup> Consequently, having regard to Article 68(1) of the Statute, the Chamber does not consider that granting the Request would effectively limit any re-traumatisation, or otherwise be in the best interests of the Witness.
15. 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. The Chamber wishes to emphasise, however, as noted in the Rule 68(3) Decision regarding P-0055,<sup>29</sup> 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.

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<sup>28</sup> See Request, ICC-01/04-02/06-890-Red, footnote 19, particularly with reference to paras 9-11 of Annex B to Prosecution's Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf-AnxB, pages 26-28.

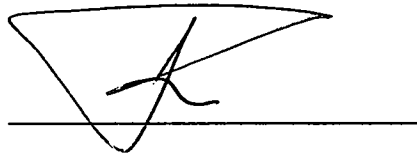
<sup>29</sup> Rule 68(3) Decision regarding P-0055, ICC-01/04-02/06-961, para. 13.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

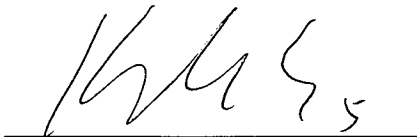
**REJECTS** the Request; and

**ORDERS** the Ntaganda Defence to file a public redacted version of its Response (ICC-01/04-02/06-935-Conf) within one week of the issuance of the present decision.

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



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Chang-ho Chung**

Dated 6 November 2015

At The Hague, The Netherlands