

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 May 2016**

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(2)(c) of the Rules for admission
of prior recorded testimony of Witness P-0039**

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 Christopher Gosnell

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2) and (9)(a), 67(1), 68 and 69(2) and (4) of the Rome Statute ('Statute'), and Rules 63(2) and 68(2)(c) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039'.

I. Background and submissions

1. On 28 October 2015, the Chamber granted, in part, a request¹ filed by the Office of the Prosecutor ('Prosecution') seeking in-court protective measures pursuant to Rule 87 of the Rules for the testimony of Witness P-0039 ('Witness').² Having found that it would 'sufficiently mitigate any risks to [the Witness's] security', the Chamber authorised the use of a pseudonym for the purposes of the trial but not voice and face distortion for the Witness's testimony ('First Decision').³
2. During the hearing held on 28 October 2015, the Witness appeared before the Chamber *via* video-link.⁴ After having been informed of the First Decision, and upon consultation with the Legal Representative of the victims of the attacks ('Legal Representative'), the Witness indicated that he did not wish to testify.⁵
3. During this hearing, the Prosecution sought reconsideration of the First Decision or, in the alternative, requested that the Witness be compelled to

¹ Prosecution's submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039, ICC-01/04-02/06-899-Conf-Exp. A confidential redacted version (ICC-01/04-02/06-899-Conf-Red) and public redacted version (ICC-01/04-02/06-899-Red2) were filed on the same day.

² Decision on Prosecution's request for in-court protective measures for Witness P-0039, ICC-01/04-02/06-956-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-956-Red).

³ ICC-01/04-02/06-956-Red, para. 8.

⁴ Transcript of hearing on 28 October 2015, ICC-01/04-02/06-T-40-CONF-ENG ET. *See also* Decision on Prosecution's request to hear P-0039's testimony by way of video-link, 12 October 2015, ICC-01/04-02/06-897-Red2.

⁵ ICC-01/04-02/06-T-40-CONF-ENG ET, page 69, line 16 to page 75, line 15.

testify pursuant to the Chamber's power under Article 64 of the Statute.⁶ The Chamber rejected both requests by way of an oral ruling on the same day.⁷

4. On 10 December 2015, the Chamber rejected a further Prosecution request⁸ seeking additional in-court protective and special measures for the Witness under Rules 87 and 88 of the Rules or, in the alternative, leave to appeal the First Decision.⁹
5. On 30 March 2016, the Prosecution requested that the Witness's prior recorded testimony be admitted pursuant to Rule 68(2)(c) of the Rules ('Request').¹⁰ The Prosecution notes that the Witness refused to testify under the Chamber's conditions and that the Chamber rejected the Prosecution's request to summons him. The Prosecution submits that 'the potential for oral testimony is foreclosed' and that, in the circumstances, the witness should be found 'unavailable to testify orally and in person'.¹¹ The Prosecution further submits that it has used reasonable diligence to pursue alternatives to Rule 68(2)(c) of the Rules.¹² In the alternative, the Prosecution seeks that the prior recorded testimony be admitted under Articles 69(2) and (4) and 64(9)(a) of the Statute and Rule 63(2) of the Rules ('Alternative Request') given that, in its view, the admissibility criteria are satisfied.¹³

⁶ ICC-01/04-02/06-T-40-CONF-ENG ET, page 75, line 25 to page 77, line 11.

⁷ ICC-01/04-02/06-T-40-CONF-ENG ET, page 81, line 2 to page 82, line 5 ('Second Decision').

⁸ Prosecution applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the "Decision on Prosecution's request for in-court protective measures for Witness P-0039", 3 November 2015, ICC-01/04-02/06-973-Conf with two confidential Annexes. On 4 November 2015, a public redacted version of the application was filed (ICC-01/04-02/06-973-Red).

⁹ Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039, ICC-01/04-02/06-1049-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-1049-Red).

¹⁰ Prosecution's application under Rule 68(2)(c) to admit the prior recorded testimony of Witness P-0039, ICC-01-04/02/06-1238 ('Prosecution Application') with one public and one confidential annexes.

¹¹ Prosecution Application, ICC-01/04-02/06-1238, paras 5 and 7-8.

¹² Prosecution Application, ICC-01/04-02/06-1238, para. 9.

¹³ Prosecution Application, ICC-01/04-02/06-1238, paras 4 and 21-28.

6. On 21 April 2016, the Legal Representative filed a response to the Request,¹⁴ whereby he submits that the requirements of Rule 68(2)(c) of the Rules are met and that the Chamber should consequently grant the Request.
7. On 22 April 2016, the defence team for Mr Ntaganda ('Defence') filed a response to the Request,¹⁵ in which it contends that the Witness's unwillingness does not render him unavailable to testify within the meaning of Rule 68(2)(c) of the Rules, and, consequently, requests that the Chamber reject the Request. In this regard, the Defence notes that the Witness's refusal to testify was solely grounded on his disagreement with the Chamber's decision not granting him the 'full set' of in-court protective measures.¹⁶ As for the Alternative Request, the Defence submits that, to the extent the Prosecution fails to meet the requirements under Rule 68(2)(c) of the Rules, the Alternative Request must be rejected.¹⁷

II. Analysis

8. Under Rule 68(2)(c) of the Rules, the Chamber may allow the introduction of previously recorded testimony coming from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally, provided that: i) the introduction is not prejudicial to or inconsistent with the rights of the accused; ii) the necessity of measures under Article 56 of the Statute could not be anticipated; and iii) the prior recorded testimony has sufficient indicia of

¹⁴ Response of the Common Legal Representative of the Victims of the Attacks to the "Prosecution's application under rule 68(2)(c) to admit the prior recorded testimony of Witness P-0039", ICC-01/04-02/06-1291.

¹⁵ Response on behalf of Mr Ntaganda to "Prosecution's application under rule 68(2)(c) to admit the prior recorded testimony of Witness P-0039", ICC-01/04-02/06-1295 ('Defence Response').

¹⁶ Defence Response, ICC-01/04-02/06-1295, paras 7-10.

¹⁷ Defence Response, ICC-01/04-02/06-1295, paras 16-17.

reliability.¹⁸ These requirements must be met in addition to the standard admissibility criteria.¹⁹

9. The Chamber notes that the Prosecution submits that Rule 68(2)(c) of the Rules is appropriate in the circumstances as the Witness is ‘unavailable to testify orally’. In this regard, the Chamber recalls that the Witness was available and ready to testify on 28 October 2015, before being informed of the First Decision, and subsequently elected not to do so.²⁰ As submitted by the Defence, the Chamber observes that the Witness simply stated that he did not want to testify under the conditions set by the Chamber.²¹ Moreover, the Chamber notes that the information currently before it does not suggest that the Witness’s condition or situation has changed in a way that would render him *inaccessible* or otherwise *incapable* of testifying orally.
10. Finally, the Chamber does not consider that its decision not to summon the Witness²² amounts to him being ‘unavailable’ within the meaning of Rule 68(2)(c) of the Rules. The Chamber therefore finds that the conditions required for a finding of unavailability under Rule 68(2)(c) of the Rules are not met and the Request is rejected.
11. Turning to the Alternative Request, the Chamber recalls that recourse to Article 69(2) or 69(4) of the Statute is not permissible if the requirements under Rule 68 are not observed – such a course of action would ‘render rule 68 of the Rules meaningless and would enable the party seeking introduction of the

¹⁸ Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, 20 November 2015, ICC-01/04-02/06-1029 (‘Decision of 20 November 2015’), paras 12-15; Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, 11 March 2016, ICC-01/04-02/06-1205, para. 7. See also, Rule 68(1) and 2(c) of the Rules.

¹⁹ Article 69(2) and (4). See also, Decision of 20 November 2015, ICC-01/04-02/06-1029, paras 14-15 referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, 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’, 3 May 2011, ICC-01/05-01/08-1386 OA5 OA6 (‘Bemba Appeal Judgment’), para. 78.

²⁰ ICC-01/04-02/06-T-40-CONF-ENG ET, pages 68-83. See particularly, page 73, lines 11-13.

²¹ See particularly, ICC-01/04-02/06-T-40-CONF-ENG ET, page 75, lines 2-3.

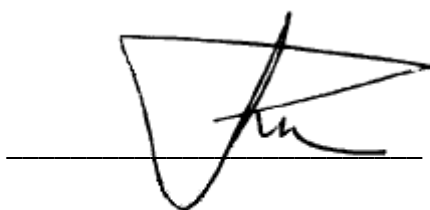
²² Second Decision, ICC-01/04-02/06-T-40-CONF-ENG ET, page 81, line 2 to page 82, line 5.

evidence to avoid the stringency of [Rule 68]'.²³ Accordingly, in the present circumstances, the Chamber finds it inappropriate to resort to its broader powers to admit into evidence the prior recorded testimony of the Witness.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request and the Alternative Request.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated 19 May 2016

At The Hague, The Netherlands

²³ Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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”, 12 February 2016, ICC-01/09-01/11-2024, OA 10, para. 86.