

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: 18 January 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 redacted version of

**Decision on Prosecution application for admission of prior recorded testimony of
Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)**

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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 51(4), 64(2) and (9)(a), 67, and 69(2) and (4) of the Rome Statute ('Statute') and Rules 63(2) and 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b)'.

I. Procedural history

1. On 2 December 2016, the Office of the Prosecutor ('Prosecution') sought admission of the prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68(2)(b) ('Request').¹ This comprises: (i) a 2005 statement of Witness P-0020;² (ii) a 2006 statement of P-0057;³ and (iii) in respect of P-0932 (Professor Jean Kambayi Bwatshia), his expert testimony in the case of *The Prosecutor v Thomas Lubanga Dyilo* ('Lubanga case'), two reports and the witness's *curriculum vitae*.⁴
2. On 27 December 2016, the defence team for Mr Ntaganda ('Defence') responded opposing the Request ('Response').⁵
3. On 16 January 2017, the Prosecution filed an addendum to the Request ('Addendum').⁶

¹ Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witnesses P-0020, P-0057 and P-0932, and provision of certified declarations for Witnesses P-0551 and P-0773, ICC-01/04-02/06-1668-Conf.

² Annex 2 to the Request.

³ Annex 3 to the Request.

⁴ Annex 1 to the Request (the testimony is at DRC-OTP-2098-0271, pages 0327 - 0363; DRC-OTP-2098-0365 pages 0366 – 0386; DRC-OTP-2083-0402, pages 0449-0477; DRC-OTP-2083-0479, pages 0480 – 0494; the reports are DRC-OTP-2083-0385 and DRC-OTP-2083-0517; and the *curriculum vitae* is DRC-OTP-2083-0513.

⁵ Response on behalf of Mr Ntaganda to "Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0020, P-0057 and P-0932, and provision of certified declarations for Witnesses P-0551 and P-0773", ICC-01/04-02/06-1702-Conf.

⁶ Addendum to the Prosecution's applications under rule 68(2)(b) to admit the prior testimony of Witnesses P-0551, P-0020, P-0057 and P-0932, ICC-01/04-02/06-1719-Conf.

II. Submissions and Analysis

4. In relation to Rule 68(2)(b), the Chamber incorporates by reference the applicable law as previously set out by it.⁷

Whether the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused

5. The Chamber notes that the ‘acts and conduct of the accused’ should be given its ordinary meaning and, as previously held, refers to the ‘personal acts and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged’.⁸

Witness P-0020

6. In respect of Witness P-0020, the Prosecution submits that a reference to the accused in the prior recorded testimony of Witness P-0020 is ‘discrete’ and ‘peripheral’, cannot be relied upon to establish his criminal responsibility for the crimes charged and therefore does not mean that the statement relates to the ‘acts and conduct of the accused’ within the meaning of Rule 68(2)(b).⁹ In the alternative, the Prosecution submits that it will not seek to rely on this reference.¹⁰ While noting the Prosecution’s submissions, the Defence argues that the statement ‘manifestly trespasses’ on the Rule 68(2)(b) prohibition.¹¹
7. The Chamber notes that although the reference to the accused is discrete in nature, it does address acts and conduct of the accused which could potentially

⁷ Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf, paras 6-8.

⁸ Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf, para. 11.

⁹ Request, ICC-01/04-02/06-1668-Conf, para. 24.

¹⁰ Request, ICC-01/04-02/06-1668-Conf, para. 24.

¹¹ Response, ICC-01/04-02/06-1702-Conf, para. 16.

be relied upon to demonstrate, for example, knowledge of the commission of crimes. The Chamber, however, considers that, in the circumstances, a reference of this nature need not render the statement inadmissible pursuant to Rule 68(2)(b), given: (i) its discrete nature; and (ii) the fact the Prosecution has indicated it will not rely on it.¹² The Chamber notes that it would not itself be bound by the Prosecution's undertaking. Therefore, with the limitation that the Chamber will not rely on paragraph 27 of the statement for the purposes of establishing Mr Ntaganda's acts and conduct, the Chamber considers that the statement is not, in principle, excluded from admission pursuant to Rule 68(2)(b).

Witness P-0057

8. Similarly, in respect of Witness P-0057, the Prosecution submits that references to the accused are 'general', do not relate to charged conduct or fall outside the temporal scope and as such do not constitute 'acts and conduct' within the meaning of Rule 68(2)(b).¹³ Alternatively, the Prosecution submits that it will not seek to rely on these references to the accused.¹⁴ The Defence submits that the request to admit Witness P-0057's statement should be rejected *in limine* for failing to adequately identify the portions being tendered which do not go to the 'acts and conduct of the accused'.¹⁵
9. The Chamber notes that references to the accused are made in 13 of the 157 paragraphs of the statement. While a certain number of these are what might be considered to be incidental references,¹⁶ the Chamber finds that others do address the acts and conduct of the accused in a manner which could go to

¹² See similarly Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 13.

¹³ Request, ICC-01/04-02/06-1668-Conf, para. 26.

¹⁴ Request, ICC-01/04-02/06-1668-Conf, para. 26.

¹⁵ Response, ICC-01/04-02/06-1702-Conf, paras 30-31.

¹⁶ ICC-01/04-02/06-1668-Conf-Anx3; DRC-OTP-0150-0354, paras 35, 37, 99 and 140.

proof of the charges, including the accused's role and his relationship with other alleged co-perpetrators.¹⁷ The Chamber notes, however, that this does not constitute the core of Witness P-0057's testimony upon which the Prosecution seeks to rely, and, relatedly, the Prosecution's undertaking not to rely on the references in question, although again not binding on the Chamber itself. Therefore, with the limitation that the Chamber will not rely on the references to Mr Ntaganda contained in the paragraphs identified in footnote 17 for the purposes of establishing Mr Ntaganda's acts and conduct, the Chamber considers that the statement is not, in principle, excluded from admission pursuant to Rule 68(2)(b).

Witness P-0932

10. In respect of Witness P-0932, the Prosecution submits that the prior recorded testimony does not go to the acts and conduct of the accused,¹⁸ and the Defence makes no specific submissions on this point. Noting the nature and content of the testimony, the Chamber finds that it does not relate to the acts and conduct of the accused.

Whether the introduction of the prior recorded testimony under Rule 68(2)(b) is appropriate in light of the factors listed under Rule 68(2)(b)(i)

Witness P-0020

11. The Prosecution submits that Witness P-0020's statement is reliable, relevant, probative and 'consistent with' the testimony of other witnesses.¹⁹ The Defence submits that the statement is 'rife with ambiguities and contradictions',²⁰ was

¹⁷ ICC-01/04-02/06-1668-Conf-Anx3; DRC-OTP-0150-0354, paras 72-74, 91, 100-102, 144 and 146.

¹⁸ Request, ICC-01/04-02/06-1668-Conf, para. 27.

¹⁹ Request, ICC-01/04-02/06-1668-Conf, paras 29-32, 34, 38-39 and 41.

²⁰ Response, ICC-01/04-02/06-1702-Conf, para. 14.

only translated orally into a language which the witness understands,²¹ and that it contains disputed content, including in relation to the allegation of conscription of child soldiers and that [REDACTED] had been taken by UPC troops and brought to Mandro.²² The Defence argues that the statement is not corroborative 'in any meaningful sense', as the testimonies cited to by the Prosecution do not relate to allegations of killing, rape and pillage prior to 19 September 2002.²³ Further, the Defence submits that, [REDACTED], Witness P-0020 denied having had contact with Intermediary P-0316, contrary to indications in a disclosed investigation note.²⁴ The Defence submits that if the statement is admitted, then the investigation notes, [REDACTED] and the witness's victim application form should also be admitted for impeachment purposes.²⁵

12. The Chamber notes that, with the exception of the allegation of the presence of child soldiers in the UPC, Witness P-0020's statement does not address underlying acts charged, but rather mentions general allegations of rape and loss of civilian life occurring in September 2002, as well as the specific incident of the alleged [REDACTED].²⁶ Without prejudice to the Chamber's assessment of the evidence provided by these witnesses and of their credibility, the Chamber finds that certain of the aforementioned content is corroborative of the evidence of other witnesses who have already testified in the case, including in relation to the presence of child soldiers in the UPC in Bunia in August and

²¹ Response, ICC-01/04-02/06-1702-Conf, para. 15.

²² Response, ICC-01/04-02/06-1702-Conf, paras 18-19.

²³ Response, ICC-01/04-02/06-1702-Conf, paras 20-24.

²⁴ Response, ICC-01/04-02/06-1702-Conf, para. 27.

²⁵ Response, ICC-01/04-02/06-1702-Conf, para. 25.

²⁶ The Chamber notes that the evidence of Witness P-0020 is in fact only expressly relied upon three times in the Prosecution's Pre-Trial Brief, in each instance for relatively general assertions regarding UPC recruitment and accompanied by multiple other sources (ICC-01/04-02/06-503-Conf-Exp-AnxA, paras 1035, 1037 and 1038).

September 2002,²⁷ and allegations of the killing of non-Hema civilians, of rape and theft by the UPC in or around September 2002.²⁸

13. The Chamber notes that the statement: (i) is signed by the witness; (ii) was given in 2005 and therefore has relative temporal proximity to the events described therein; (iii) is stated to be true to the best of the witness's recollection, to have been given voluntarily and with an awareness that it may be used in legal proceedings before the Court; (iv) contains an interpreter certification; (v) is internally consistent; and (vi) as noted above is potentially corroborative of the testimony of other witnesses.
14. The Chamber does not consider that the alleged ambiguities and inconsistencies identified by the Defence in Witness P-0020's statement are such as would impact its *prima facie* reliability. The Chamber finds them to be of a nature to be more appropriately considered when assessing the weight, if any, to be attached to the statement.
15. In light, however, of the specific issues raised by the Defence relating to the witness's potential contacts with Intermediary P-0316, the Chamber does not consider that it would be in the interests of justice for the statement to be introduced without the opportunity for cross-examination. If the Prosecution still wishes to tender Witness P-0020's statement, the Chamber finds that, in light of the factors discussed above, the use of Rule 68(3) would, subject to the fulfilment of the other requirements of that rule, be appropriate and would not be prejudicial to the rights of the accused.²⁹ The Chamber, however, encourages

²⁷ See, for example, **P-0046**, ICC-01/04-02/06-T-100 to ICC-01/04-02/06-T-103. See also **P-0014**, ICC-01/04-02/06-T-136, ICC-01/04-02/06-T-137; **P-0888**, ICC-01/04-02/06-T-105 to ICC-01/04-02/06-T-107; **P-0190**, ICC-01/04-02/06-T-96 to ICC-01/04-02/06-T-99.

²⁸ See, for example, **P-0014**, ICC-01/04-02/06-T-136 to ICC-01/04-02/06-T-138; **P-0888**, ICC-01/04-02/06-T-105 to ICC-01/04-02/06-T-107; **P-0190**, ICC-01/04-02/06-T-96 to ICC-01/04-02/06-T-99.

²⁹ See similarly Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf, para. 20. See also Preliminary ruling on Prosecution application

the Prosecution to consider whether or not this material is actually necessary to its case.

Witness P-0057

16. The Prosecution submits that Witness P-0057's statement is reliable, relevant, probative and that a number of other witnesses have testified in relation to Witness P-0057's [REDACTED].³⁰ The Defence submits that the substance of 'much of' Witness P-0057's statement is in dispute, and that the Prosecution has not shown that the statement is corroborated, arguing that the details of [REDACTED] are of 'utmost importance' for testing the credibility of other witnesses.³¹ The Defence further submits that Witness P-0057's screening note suggests that the statement is not reliable 'in various respects' and that the Defence should have the opportunity to cross-examine the witness concerning certain documents and videos he provided to the Prosecution.³² The Defence contends that if the statement is admitted then the witness's screening note should also be admitted for impeachment purposes.³³
17. While Witness P-0057's statement does mention matters including the alleged use of child soldiers by the UPC, the Chamber notes that the statement primarily addresses contextual background matters, including, in particular, pacification efforts in Ituri. Without prejudice to the Chamber's assessment of the evidence provided by these witnesses and of their credibility, the Chamber finds in this regard that the testimony is corroborative of the testimony of other witnesses who have already testified, or are expected to testify, addressing, for

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; and Rule 68(3) of the Rules.

³⁰ Request, ICC-01/04-02/06-1668-Conf, paras 29-31, 33-34, 38-39 and 41.

³¹ Response, ICC-01/04-02/06-1702-Conf, paras 32-33.

³² Response, ICC-01/04-02/06-1702-Conf, paras 34-35.

³³ Response, ICC-01/04-02/06-1702-Conf, para. 36.

example, the conference on peace in Ituri in Kinshasa in 2002,³⁴ Witness P-0057's [REDACTED],³⁵ and the pacification commission in 2003.³⁶ The participation of Mr Lubanga and the UPC in efforts to demobilise child soldiers, while in dispute,³⁷ is also a matter on which the Chamber has heard testimony on similar facts from other witnesses.³⁸

18. The Chamber further notes that Witness P-0057's prior recorded testimony: (i) is signed by the witness; (ii) is attested to have been given voluntarily, to accurately reflect the content of the interview and to have been given in the knowledge it could be used in legal proceedings before Court; (iii) is in French, a language which the witness fully understands, and was therefore given without the need for interpretation; (iv) was given in 2006, in relative temporal proximity to the events described therein; (v) is internally consistent; and (vi) as noted above, is potentially corroborative in many respects of the testimony of other witnesses.
19. The Chamber does not consider that the alleged discrepancies identified by the Defence as between Witness P-0057's screening note and statement, [REDACTED],³⁹ are such as would prevent the Defence from exploring the circumstances of that event with other witnesses to the extent necessary for the purposes of testing credibility, or would cast doubt on the *prima facie* reliability of the statement.

³⁴ See, for example, **P-0245**, ICC-01/04-02/06-T-142.

³⁵ See, for example, **P-0030**, ICC-01/04-02/06-T-145; **P-0067**, ICC-01/04-02/06-491-Conf-Exp-AnxB, p. 47; **P-0012**, ICC-01/04-02/06-T-165; **P-0055**, ICC-01/04-02/06-T-70; **P-0190**, ICC-01/04-02/06-T-99.

³⁶ See, for example, **P-0046**, ICC-01/04-02/05-T-100 to ICC-01/04-02/06-T-103; **P-0365**, ICC-01/04-02/06-T-147, T-148; **P-0002**, ICC-01/04-02/06-T-171; **P-0030**, ICC-01/04-02/06-T-144; **P-0012**, ICC-01/04-02/06-T-165; **P-0245**, ICC-01/04-02/06-T-142.

³⁷ Response, ICC-01/04-02/06-1702-Conf, para. 32.

³⁸ See, for example, **P-0046**, ICC-01/04-02/05-T-100 to ICC-01/04-02/06-T-103; **P-0365**, ICC-01/04-02/06-T-147, T-148; **P-0976**, ICC-01/04-02/06-T-152; **P-0031**, ICC-01/04-02/06-T-174 to ICC-01/04-02/-T-T-176.

³⁹ In respect of one of the identified discrepancies, the Chamber notes that Witness's P-0057's statement does in fact mention both [REDACTED] as having attended the meetings, Annex 3 to the Request, paras 72, 74-76.

20. In light of the factors discussed above, the Chamber finds that the admission of Witness P-0057's statement pursuant to Rule 68(2)(b) is appropriate and in the interests of justice.
21. Finally, while taking note of the fact that the witness has not had the opportunity of being confronted by the content of the screening note, the Chamber finds it appropriate in this instance to also admit, as requested by the Defence, the screening note for impeachment purposes.

Witness P-0932

22. The Prosecution submits that Witness P-0932's prior recorded testimony is reliable, relevant and probative.⁴⁰ The Defence submits that Witness P-0932 was not relied upon by the Prosecution or Trial Chamber I in the *Lubanga* case,⁴¹ that his credibility was 'seriously damaged' during his appearance before Trial Chamber VII,⁴² that the 'need for cross-examination' has already been 'expressly acknowledged', and that the Prosecution has made no submissions demonstrating that the witness's testimony is corroborated by other testimony.⁴³
23. The Chamber notes that the prior recorded testimony of Witness P-0932 relates primarily to background matters of culture and convention in the Democratic Republic of the Congo ('DRC'). Although the Chamber recalls its finding that Witness P-0932's report 'appear[ed] *prima facie* relevant',⁴⁴ the Chamber finds the prior recorded testimony to have limited additional probative value, whether incriminatory or exculpatory, in respect of material issues which are apparent at this time. Further, the Chamber considers there to be apparent

⁴⁰ Request, ICC-01/04-02/06-1668-Conf, paras 29-30, 35-36 and 38.

⁴¹ Response, ICC-01/04-02/06-1702-Conf, para. 10.

⁴² Response, ICC-01/04-02/06-1702-Conf, paras 9-10.

⁴³ Response, ICC-01/04-02/06-1702-Conf, paras 11-12.

⁴⁴ Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, ICC-01/04-02/06-1159 ('Preliminary Decision'), para. 16.

deficiencies in the reports, including in respect of methodology and identification of sources, which significantly impacts their probative value.⁴⁵ The Chamber does not consider these issues to be remedied by the limited examination conducted by parties and participants in the *Lubanga* case. In the circumstances, the Chamber does not consider the prior recorded testimony suitable for admission under Rule 68(2)(b), and encourages the Prosecution to consider whether or not the material is necessary to its case.

Whether the requirements of Rule 68(2)(b)(ii) and (iii) are satisfied

24. The Defence argues that the declarations submitted with the prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 do not correspond to the form previously approved by the Chamber, and that no information has been provided to establish that the person witnessing the declaration has the authority to do so.⁴⁶ In the Addendum, the Prosecution provides confirmation that the certifying officers are duly authorised in accordance with the law and procedure of the DRC, indicating their role, official function and delegated authority.⁴⁷
25. Noting the findings above, the Chamber will address only the declaration relating to Witness P-0057. The Chamber recalls its finding that the question is whether the declaration fulfils the requirements of Rule 68(2)(b)(ii) and (iii), rather than necessarily whether it is in the precise form previously approved by the Chamber.⁴⁸
26. The Chamber notes that, as required by Rule 68(2)(b)(ii), Witness P-0057 confirms in the declaration that the contents of the prior recorded testimony are

⁴⁵ See also Preliminary Decision, ICC-01/04-02/06-1159, para. 16.

⁴⁶ Response, ICC-01/04-02/06-1702-Conf, paras 13, 26 and 37.

⁴⁷ Addendum, ICC-01/04-02/06-1719-Conf, paras 3-6.

⁴⁸ See Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), 12 January 2017, ICC-01/04-02/06-1715-Red, para. 26.

true and accurate to the best of his knowledge and belief. Equally, the witnessing officer has made the relevant confirmations as required by Rule 68(2)(b)(iii). In respect of the Defence submission that the authority of the witnessing officer has not been established, the Chamber notes that specification of the role of the witnessing officer and basis of his authority was provided by way of the Addendum, and the certification itself incorporates a confirmation that he is authorised pursuant to Rule 68. The Chamber observes that the provision of such information is preferable in order to enable the Chamber to appropriately assess declarations submitted pursuant to Rule 68(2)(b) and, to avoid further difficulties in relation to the procedure for declarations under Rule 68(2)(ii) and (iii), the Chamber urges use of the previously-approved forms. In the circumstances, however, the Chamber is satisfied that the declaration submitted fulfils the necessary requirements.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADMITS INTO EVIDENCE the following documents:

DRC-OTP-0150-0354; and
DRC-OTP-2058-0025 for impeachment purposes;

DECIDES that the use of Rule 68(3) is, in principle, appropriate for admission of the statement of Witness P-0020, should the Prosecution wish to pursue its admission;

DIRECTS the Registry to modify the metadata of all exhibits admitted pursuant to the present decision, including by indicating their status as evidence admitted, as well as noting that they have been admitted by way of the present decision;

ORDERS the parties to file public redacted versions of their filings within three weeks of the date of this decision; and

REJECTS all other requests.

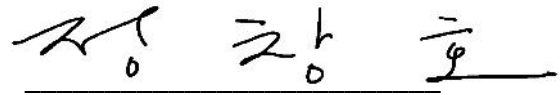
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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Chang-ho Chung

Dated this 18 January 2017

At The Hague, The Netherlands