



Original: **English**

No.: ICC-01/04-02/06
Date: 13 February 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 Decision on Prosecution's request for admission of
prior recorded testimony of P-0045**

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 64(2) and (9)(a), 67, and 69(2), (3) and (4) of the Rome Statute ('Statute'), Rule 68 of the Rules of Procedure and Evidence ('Rules'), and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Prosecution's request for admission of prior recorded testimony of P-0045'.

I. Procedural history

1. On 9 October 2014, the Chamber ordered the Office of the Prosecutor ('Prosecution') to file its final list of witnesses, and disclose remaining incriminatory material by 2 March 2015.¹
2. On 9 January 2017, the Prosecution sought the conditional admission under Rule 68(2)(b) and Regulation 35 of the prior recorded testimony of P-0045 ('Request'),² pending submission of the required accompanying declarations.³ The prior recorded testimony of P-0045, who was not previously included in the Prosecution's list of witnesses,⁴ comprises a statement from July 2005 ('Statement')⁵ and four annexes⁶ sought to be admitted as associated material.⁷

¹ Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382. A corrigendum was filed on 28 November 2014 (ICC-01/04-02/06-382-Corr).

² Prosecution's application under rule 68(2)(b) and regulation 35 to admit the prior recorded testimony of Witness P-0045, ICC-01/04-02/06-1709-Conf with confidential Annexes 1 to 5 and Public Annex A. The Request was notified on 10 January 2017.

³ Request, ICC-01/04-02/06-1709-Conf, paras 1, 5 and 54.

⁴ Confidential redacted Annex A to Prosecution's Lists of Witnesses, Summaries, and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf-AnxA-Red.

⁵ Annex 1 to the Request.

⁶ Annexes 2 to 5 to the Request.

⁷ Request, ICC-01/04-02/06-1709-Conf, para. 17.

3. On 23 January 2017, the defence team for Mr Ntaganda ('Defence') filed its response ('Response'),⁸ in which it opposes the Request.
4. On 30 January and 3 February 2017, the Prosecution provided the required accompanying declarations,⁹ and requests that the Chamber admit P-0045's prior recorded testimony pursuant to Rule 68(2)(b).¹⁰

II. Submissions and Analysis

5. As a preliminary matter, while noting the Prosecution's commitment to file a public redacted version of the Request,¹¹ the Chamber observes that, at the time of issuance of this decision, the underlying documents are classified as confidential. In the interest of publicity of the proceedings, the Chamber hereby directs the parties to prepare public redacted versions of their underlying documents. In this respect, the Chamber also notes the Prosecution's submission that document ICC-01/04-02/06-1768-Conf can be reclassified as public without redactions,¹² and accordingly orders its reclassification.

⁸ Response on behalf of Mr Ntaganda to "Prosecution's application under Rule 68(2)(b) and Regulation 35 to admit the prior recorded testimony of Witness P-0045", ICC-01/04-02/06-1741-Conf.

⁹ Prosecution's provision of a document related to its application to admit Witness P-0045's prior recorded testimony pursuant to rule 68(2)(b), 27 January 2017, ICC-01/04-02/06-1755-Conf and confidential *ex parte* and confidential redacted Annex 1 and Prosecution's provision of further documents related to its application to admit Witness P-0045's prior recorded testimony pursuant to rule 68(2)(b), 3 February 2017, ICC-01/04-02/06-1768-Conf and confidential Annexes 1 and 2. The two documents included in the second filing were initially filed by the Registry on an *ex parte* basis, only available to the Registry, and then, pursuant to the Chamber's instruction, reclassified as confidential *ex parte* only available to the Registry and the Prosecution, whereupon the Prosecution applied redactions to P-0045's recent contact information in accordance with the Protocol Establishing a Redaction Regime, 12 December 2014, ICC-01/04-02/06-411-AnxA.

¹⁰ ICC-01/04-02/06-1768-Conf, para. 8.

¹¹ Request, ICC-01/04-02/06-1709-Conf, para. 6.

¹² ICC-01/04-02/06-1768-Conf, para. 7.

Applicable law

6. The Chamber incorporates by reference the applicable law for additions to a list of witnesses after the relevant deadline¹³ and Rule 68(2)(b)¹⁴ as previously set out by it.

Whether the terms of Regulation 35(2) are met

7. The Prosecution submits that there is 'good cause' to vary the 2 March 2015 time limit for the submission of the Prosecution's list of witnesses and related evidence to allow admission of P-0045's testimony, on the basis that: (i) in 2013, P-0045 informed the Prosecution that he 'did not wish to testify [...] given his [REDACTED]';¹⁵ (ii) the importance of P-0045's evidence 'only became entirely clear' after having heard the testimony of P-0031, who testified, *inter alia*, about the circumstances of the expulsion from the DRC of a person referred to as 'white father',¹⁶ [REDACTED];¹⁷ and (iii) when contacted anew by the Prosecution after P-0031's testimony, P-0045 agreed to undergo the necessary procedure under Rule 68(2)(b).¹⁸
8. The Defence argues that the terms of Regulation 35(2) are not met,¹⁹ noting that: (i) the Prosecution failed to justify its inability to add P-0045 to its list of witnesses before 2 March 2015; (ii) the fact that P-0045 informed the Prosecution in 2013 that he did not wish to testify 'given his [REDACTED]' does not amount to exceptional circumstances;²⁰ and (iii) the argument that the importance of

¹³ Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, 19 January 2017, ICC-01/04-02/06-1733 ('Decision 1733'), paras 6-8.

¹⁴ 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.

¹⁵ Request, ICC-01/04-02/06-1709-Conf, para. 18.

¹⁶ 'Père blanc' in the French transcript. See transcript of hearing on 8 December 2016, ICC-01/04-02/06-T-174-CONF-FRA ET, p. 44.

¹⁷ Request, ICC-01/04-02/06-1709-Conf, paras 19 and 21. [REDACTED].

¹⁸ Request, ICC-01/04-02/06-1709-Conf, para. 20.

¹⁹ Response, ICC-01/04-02/06-1741-Conf, paras 2 and 16.

²⁰ Response, ICC-01/04-02/06-1741-Conf, para. 14.

P-0045's evidence 'only became entirely clear' after the testimony of Witness P-0031 was previously rejected by the Chamber in respect of a similar request.²¹

9. The Chamber recalls its previous finding that the conditions under Regulation 35(2) will 'generally not be satisfied' when a party or participant requests to add evidence 'many months after the expiration of a deadline set in accordance with Rule 84 of the Rules'.²² In the present case, the Chamber considers that the Prosecution's arguments - that the proposed witness did not wish to testify due to his [REDACTED] and that the importance of P-0045's evidence only became entirely clear after the testimony of P-0031 - do not meet the required standard.

Whether admission of P-0045's prior recorded testimony is warranted in the interests of justice or for the determination of the truth

10. The Prosecution claims that it is in the interests of justice and the determination of the truth that the Chamber admit P-0045's evidence under Articles 64(6)(b) and (d), and 69(3) of the Statute,²³ and that P-0045 may be treated as either a Prosecution or a Chamber witness.²⁴ It submits that the significance of P-0045's evidence in this regard became apparent after the testimony of Witness P-0031, and in particular his account of the expulsion of the so-called 'white father' from Ituri by the UPC for having given shelter to Lendu civilians, the veracity of which was challenged by the Defence in its cross-examination, notably on the basis of a video shown to P-0031.²⁵ Against this background, the Prosecution argues that the issue has become relevant to the case and the credibility of Witness P-0031, and that it would be in the interests of justice and the determination of the truth that the Chamber have 'detailed evidence

²¹ Response, ICC-01/04-02/06-1741-Conf, para. 15.

²² Decision 1733, para. 7, agreeing with Trial Chamber V(B) in *The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber V(B), Decision on Prosecution Request to add P-548 and P-66 to its witness list, 23 October 2013, ICC-01/09-02/11-832, para. 10.

²³ Request, ICC-01/04-02/06-1709-Conf, para. 26.

²⁴ Request, ICC-01/04-02/06-1709-Conf, para. 27.

²⁵ Request, ICC-01/04-02/06-1709-Conf, para. 12. The video shown in this regard bears the ERN DRC-D18-0001-2488.

regarding the circumstances of [the 'white father']'s departure from the Democratic Republic of the Congo'.²⁶

11. For the Defence, the addition of P-0045 'is neither warranted in the interests of justice nor for the determination of the truth'.²⁷ In support of its position, the Defence argues that: (i) the time elapsed since the initial deadline for the submission of the Prosecution's list of witnesses and the fact that the addition is requested 'at a very late stage of the Prosecution's case, both militate in favour of denying the application', which, if granted, would be contrary to the right of the accused to have adequate time and facilities for the preparation of his defence;²⁸ (ii) the reasons provided for the late addition are unconvincing,²⁹ noting, in particular, that the aim of its cross-examination of Witness P-0031 was not to challenge the expulsion of the 'white father', but rather to establish the circumstances of Thomas Lubanga's visit at the 'residence of the 'white father' and the absence of discriminatory intent on the part of Thomas Lubanga;³⁰ (iii) the relevance and significance of P-0045's evidence is 'very limited in relation to the Prosecution's aim' which appears to have been fulfilled through the evidence from Witness P-0005;³¹ (iv) the proposed additional evidence does not meet the threshold for being in the interests of justice or the determination of the truth since it does not bring to light a previously unknown fact, goes beyond the evidence necessary to accomplish the Prosecution's aim in relation to Witness P-0031, and relates to issues in respect of which ample evidence has already been led by the parties and which

²⁶ Request, ICC-01/04-02/06-1709-Conf, para. 12.

²⁷ Response, ICC-01/04-02/06-1741-Conf, para 31.

²⁸ Response, ICC-01/04-02/06-1741-Conf, para. 18.

²⁹ Response, ICC-01/04-02/06-1741-Conf, para. 19.

³⁰ Response, ICC-01/04-02/06-1741-Conf, para. 20.

³¹ Response, ICC-01/04-02/06-1741-Conf, para. 21.

are materially in dispute;³² and (v) the addition of P-0045 at this stage impacts the rights of the accused and the expeditiousness of the trial.³³

12. The Chamber notes that the Statement was in the Prosecution's possession since 2005 and that the addition of P-0045 was requested more than 20 months after the original deadline and only one week before the commencement of the last evidentiary block of the Prosecution case. As already observed, the Chamber is unpersuaded by the Prosecution's justification for the late request for addition of this witness. In this regard, the Chamber also emphasises that, given that the option of using Rule 68(2)(b) was available at the time of the 2 March 2015 deadline, the Prosecution could have anticipated its request for admission of P-0045's evidence under Rule 68(2)(b) and made the necessary arrangements at an earlier stage.
13. Concerning the nature of P-0045's evidence and its potential relevance and significance to the matters for the Chamber's determination, the Chamber notes that it relates mainly to the background of the 'white father's arrival in Ituri as part of his congregation,³⁴ the UPC accusing the congregation of being pro-Lendu, and the circumstances of the expulsion of the 'white father' by the UPC in February 2003.³⁵ In addition, the Statement contains information on the proposed witness's knowledge of the background of the conflict between the Lendu and the Hema,³⁶ the creation of the UPC and some of its members,³⁷ and crimes committed in Ituri.³⁸ Regarding the issues pertaining to the 'white father', the Chamber notes that it has heard evidence on this issue by other

³² Response, ICC-01/04-02/06-1741-Conf, paras 22-24.

³³ Response, ICC-01/04-02/06-1741-Conf, paras 25-28.

³⁴ Statement, paras 6-9.

³⁵ Statement, paras 10-21, Annex 2, Annex 3.

³⁶ Statement, para. 8 and Annex 4.

³⁷ Statement, paras 25-26.

³⁸ Statement, paras 22-24.

witnesses, notably P-0031³⁹ and P-0005,⁴⁰ and has admitted P-0041's statement, addressing this issue, pursuant to Rule 68(2)(c).⁴¹ In this regard, the Chamber also notes the Defence's submission that its cross-examination of P-0031 was not aimed at challenging his account on the expulsion of the 'white father', but rather the alleged discriminatory intent of Thomas Lubanga.

14. For the remaining issues addressed in the proposed additional evidence, the Chamber notes the Defence submission that this has been largely addressed during the testimony of other witnesses. In these circumstances, the Chamber considers that the new evidence would not bring to light a previously unknown fact which has a significant bearing upon the case, and is therefore of limited relevance to matters for determination by the Chamber.
15. Turning to potential prejudice, the Chamber notes that the Statement was disclosed to the Defence on 10 January 2014, and added to the list of evidence on 12 January 2017.⁴² Accordingly, for the major part of the Prosecution case, the Defence was not aware of the Prosecution's intention to rely on the Statement. Further, if P-0045 was added to the list of witnesses at this stage, the Chamber acknowledges that the Defence might need to conduct additional investigations in relation to P-0045. In these circumstances, the Chamber considers that the Defence would be prejudiced by the late addition of P-0045.
16. Having balanced all these factors, the Chamber considers that adding P-0045 to the Prosecution's list of witnesses at this stage of the proceedings would not be in the interests of justice.

³⁹ Transcript of hearing on 8 December 2016, ICC-01/04-02/06-T-174-CONF-ENG ET, pp 47-48; Transcript of hearing on 12 December 2016, ICC-01/04-02/06-T-176-CONF-ENG ET, pp 88-95; Transcript of hearing on 13 December 2016, ICC-01/04-02/06-T-177-CONF-ENG ET, pp 3, 33, 44, 48.

⁴⁰ Transcript of hearing on 23 January 2017, ICC-01/04-02/06-T-185-CONF-ENG ET, pp 35-36; Transcript of hearing on 26 January 2017, ICC-01/04-02/06-T-188-CONF-ENG ET, pp 9-16.

⁴¹ DRC-OTP-0147-0002, para. 234. 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.

⁴² ICC-01/04-02/06-1713-AnxA.

17. Accordingly, an examination of the conditions and factors for admission under Rule 68(2)(b) of the Rules is not required.

III. Conclusion

18. In light of the above, the Chamber rejects the Prosecution's request for admission of P-0045's prior recorded testimony.

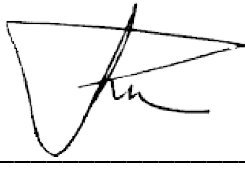
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

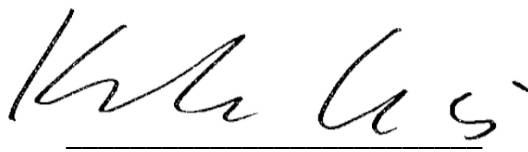
DIRECTS the parties to file public redacted versions of the Request (ICC-01/04-02/06-1709-Conf) and the Response (ICC-01/04-02/06-1741-Conf) within two weeks from the date of this decision; and

ORDERS that document ICC-01/04-02/06-1768 be reclassified as public.

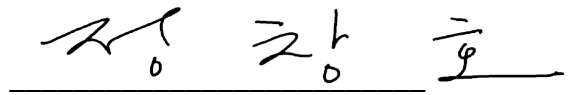
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated this 13 February 2017

At The Hague, The Netherlands