

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 27 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 'Preliminary ruling on Prosecution request for admission under Rule 68(3) of the prior recorded testimony and associated material of Witness P-0761', 18 November 2016, ICC-01/04-02/06-1640-Conf

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
Me Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

**Unrepresented Applicants for
Participation/Reparation**

Unrepresented Victims

**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 of the Rules of Procedure and Evidence ('Rules'), and Regulation 35 of the Regulations of the Court ('Regulations') issues the following 'Preliminary ruling on Prosecution request for admission under Rule 68(3) of the prior recorded testimony and associated material of Witness P-0761.'

I. Procedural history and submissions

1. On 3 November 2016, the Office of the Prosecutor ('Prosecution') filed a request seeking that the Chamber admit the prior recorded testimony of Witness P-0761 ('Witness'), as well as certain associated material ('Request').¹ In particular, the Prosecution seeks admission of: (i) the Witness's screening note;² (ii) the Witness's statement ('Statement');³ (iii) an investigator's note explaining the circumstances of the interview with the Witness;⁴ (iv) two birth certificates;⁵ and (v) two interviews the Witness gave to a non-governmental organisation ('NGO'),⁶ (collectively items (i) to (v) are referred to herein as the 'Material').⁷
2. The Prosecution submits that the Material is 'relevant, probative and reliable',⁸ and that granting the Request would not be prejudicial to the accused's rights.⁹ The Prosecution seeks one hour to conduct both the formalities associated with Rule 68(3) and a supplementary examination of the Witness.¹⁰

¹ Prosecution application under rule 68(3) to admit Witness P-0761's prior recorded testimony and associated material, with confidential annexes A-H, ICC-01/04-02/06-1609-Conf.

² DRC-OTP-2053-0010; ICC-01/04-02/06-1609-Conf-AnxB.

³ DRC-OTP-2054-8283; ICC-01/04-02/06-1609-Conf-AnxC.

⁴ DRC-OTP-2054-8290; ICC-01/04-02/06-1609-Conf-AnxD.

⁵ DRC-OTP-2051-2066; ICC-01/04-02/06-1609-Conf-AnxE; and DRC-OTP-2054-8289; ICC-01/04-02/06-1609-Conf-AnxF.

⁶ DRC-OTP-2062-0374, pages 0392-0393; ICC-01/04-02/06-1609-Conf-AnxG; and DRC-OTP-2066-1054, page 0176 and 0179; ICC-01/04-02/06-1609-Conf-AnxH.

⁷ Request, ICC-01/04-02/06-1609-Conf, paras 2 and 21. *See also* ICC-01/04-02/06-1609-Conf-AnxA.

⁸ Request, ICC-01/04-02/06-1609-Conf, paras 4, 19, 22-23.

⁹ Request, ICC-01/04-02/06-1609-Conf, paras 6 and 23.

¹⁰ Request, ICC-01/04-02/06-1609-Conf, paras 5, 24-26.

3. Further, the Prosecution makes a simultaneous request pursuant to Regulation 35 of the Regulations of the Court for submission of the Request less than one month prior to the Witness's scheduled testimony ('Regulation 35 Request').¹¹ The Prosecution submits that, due to scheduling changes outside its control, it did not submit the Request within the applicable time limit,¹² and that there is good cause to vary the time limit in this case.¹³
4. On 14 November 2016, the defence team for Mr Ntaganda ('Defence') opposed the Request in part ('Response').¹⁴ The Defence takes no position in relation to the Regulation 35 Request.¹⁵ Further, it does not oppose admission of the Statement under Rule 68(3), but opposes admission of the remainder of the Material.¹⁶ In particular, the Defence submits that: (i) the screening note and investigator's note 'cannot properly' be deemed prior recorded testimony, including because they contain information likely to be beyond the Witness's knowledge;¹⁷ (ii) the statements to the NGOs are not 'associated documents' as they are neither mentioned in the Statement nor necessary to understand it, and that the circumstances in which they were given are unknown;¹⁸ and (iii) the birth certificates are 'of dubious provenance and reliability', and the Statement does not enhance their reliability or admissibility.¹⁹
5. Finally, the Defence states that it opposes supplemental questioning on areas outside the scope of the Witness's statements.²⁰

¹¹ Request, ICC-01/04-02/06-1609-Conf, para. 7.

¹² The Prosecution notes that as the Witness is currently scheduled to commence his testimony on or around 21 November 2016, a request under Rule 68(3) would have had to be filed by 24 October 2016 (Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 41).

¹³ Request, ICC-01/04-02/06-1609-Conf, paras 15-17 and 32-38.

¹⁴ Response on behalf of Mr Ntaganda to "Motion under rule 68(3) to admit Witness P-0761's prior recorded testimony and associated material", ICC-01/04-02/06-1632-Conf.

¹⁵ Response, ICC-01/04-02/06-1632-Conf, para. 12.

¹⁶ Response, ICC-01/04-02/06-1632-Conf, paras 1, 3-9 and 14.

¹⁷ Response, ICC-01/04-02/06-1632-Conf, paras 1 and 4.

¹⁸ Response, ICC-01/04-02/06-1632-Conf, paras 1 and 5-7.

¹⁹ Response, ICC-01/04-02/06-1632-Conf, paras 1, 8-9.

²⁰ Response, ICC-01/04-02/06-1632-Conf, paras 2, 10-11 and 14.

II. Analysis

6. In respect of the Regulation 35 Request, the Chamber accepts that the Prosecution has demonstrated good cause for extension of the time limit and that it was not in a position to request the extension prior to the deadline for filing of the Rule 68(3) request for the Witness, namely 'no later than four weeks before the relevant witness is scheduled to testify',²¹ for reasons outside its control. It is noted in this regard that following adjustments to the schedule for the seventh evidentiary block, the expected start of the Witness's testimony moved forward in time. As a result, the date by which the Rule 68(3) request should have been filed also moved forward in time, and had in fact already passed by the time the adjustments to schedule were made. Consequently, at the time of expiry of the deadline (on or about 24 October 2016), the outcome of the changes to the schedule and the need to make a request for extension of deadline would not have been foreseeable to the Prosecution. The Chamber further notes that the late filing has not impacted the time period permitted for the Defence to respond to the Request.

7. Turning to the Material, 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 his or her 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 introduction of the prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused and 'the fairness of the proceedings more generally'.²²

²¹ See Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 41.

²² Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded

8. 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 the accuracy of the document to be tendered into evidence.'²³ In the present circumstances, noting the Defence objection to admission of certain parts of the Material, the Chamber decides to render a preliminary ruling on the Request.

9. The Chamber considers it appropriate for the Statement to be introduced pursuant to Rule 68(3), and that admission in this context would not be prejudicial to or inconsistent with the rights of the accused. The Chamber has considered in this regard the fact that: (i) the Statement is intended to be mainly corroborative in nature, in particular regarding [REDACTED] and the fact and consequences of her alleged [REDACTED];²⁴ (ii) the Statement bears formal indicia of reliability, including being signed by the Witness and containing an acknowledgement that it was given voluntarily and is true to the best of the Witness's knowledge and recollection; (iii) the Statement is internally consistent and accompanied by supporting documents in relation to certain aspects; (iv) the Witness will be available to be questioned; and (v) the Defence does not oppose this aspect of the Request.

10. The Chamber notes that the two birth certificates are used and explained in the Statement, and that the Witness provides information, including based on his direct knowledge, regarding the circumstances in which they were obtained. Furthermore, the Chamber finds them to be *prima facie* relevant and probative. Noting, however, that the birth certificates have now already been admitted

testimony of Witness P-0931, 21 September 2015, ICC-01/04-02/06-845, para. 6. *See also* Rule 68(1).

²³ Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 43.

²⁴ The Witness is one of four witnesses on the Prosecution's witness list (P-0758, P-0761, P-0773 and P-0806) expected to provide evidence on related matters.

into evidence,²⁵ the Chamber finds it unnecessary to address this aspect of the request further.

11. With respect to the screening note, the Chamber observes that it is not used or explained in the Statement and also does not consider that it constitutes prior recorded testimony. Noting that it is unsigned and there is no indication that the Witness had the opportunity to review the information at the time it was recorded, the Chamber does not consider that it would be appropriate to admit the screening note by way of Rule 68(3).
12. With respect to the investigator's note, the Chamber considers that this document does not constitute either prior recorded testimony or an associated document to the Witness's prior recorded testimony, and may not be introduced pursuant to Rule 68(3). The Chamber notes in this regard that neither the investigator's note nor the circumstances described therein are mentioned in the Statement, and that the latter may well be outside the Witness's knowledge.
13. In relation to the two statements given to NGOs, the Chamber has previously noted that the mere fact that a statement is given to an entity other than one of the parties to the proceedings does not mean that it necessarily cannot be considered to be prior recorded testimony.²⁶ However, as has been found by other chambers of the Court,²⁷ in order for a statement to constitute prior recorded testimony the person providing it must have been questioned in their capacity as a witness, and must have understood that the information may be relied on in the context of legal proceedings.

²⁵ Transcript of hearing dated 17 November 2016, ICC-01/04-02/06-T-160-ENG RT.

²⁶ 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, ICC-01/04-02/06-1029, para. 23.

²⁷ Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, para. 49; Trial Chamber VII, Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Red-Corr, para. 32.

14. In respect of the declaration in DRC-OTP-2066-0154 at page 0176, the Chamber considers that it can qualify as prior recorded testimony on the basis of the criteria outlined above. The Chamber is satisfied that the statement was provided in circumstances in which its potential use in the context of legal proceedings was apparent. Further, the statement is signed, dated, stated to have been given voluntarily and is, in pertinent details, both internally consistent and consistent with the account provided in the Statement. The Chamber will therefore permit its introduction pursuant to Rule 68(3). The accompanying explanation at page 0179 does not, however, fall to be considered either as prior recorded testimony of the Witness or an associated document.
15. In respect of the interview contained at DRC-OTP-2062-0374, pages 0392 – 0393, although the content indicates a desire on the part of the Witness for a legal process, it is not apparent that the statement was provided in the knowledge that it may actually be used in the context of legal proceedings. In such circumstances, the Chamber does not find it appropriate to consider it as prior recorded testimony within the meaning of Rule 68. Neither is the statement used or explained in the Witness's prior recorded testimony. The Chamber will therefore not permit its introduction under Rule 68(3).
16. The Chamber's ruling rejecting the introduction of certain of the items tendered under Rule 68(3) is without prejudice to the potential use of such items by the Prosecution during the Witness's testimony where a satisfactory basis is established, or the eliciting of such information directly during the supplemental examination.
17. With regard to the scope of permitted supplemental examination, the Chamber notes that the Prosecution has identified specific points to be addressed: elaborating certain matters mentioned in the Statement; clarifying the basis of

the Witness's knowledge on certain matters; and providing the Witness with the opportunity to comment on certain additional documents. The Chamber notes that where a witness is in a position to comment on relevant matters or materials other than those addressed in a witness statement, there is no prohibition *per se* on a party seeking to elicit such testimony, provided the materials in question have been disclosed in sufficient time.

18. In the present case, the Chamber has reservations regarding the degree of relevance of the substance of the information dating from 2004, but takes no position at this time on whether or not the materials may be used with the Witness. In the circumstances, the Chamber will grant the Prosecution 45 minutes to conduct the formalities associated with the admission of the prior recorded testimony pursuant to Rule 68(3) as well as its supplemental examination of the Witness. The Chamber will strongly encourage the Defence to complete its cross-examination of the Witness within two hours.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that the use of Rule 68(3) of the Rules is, in principle, appropriate for admission of the materials identified at Annexes C and H (page 0176 only) of the Request;

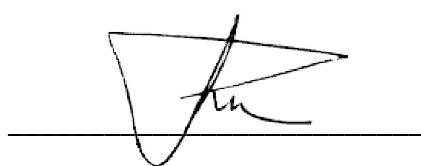
DEFERS its final ruling in respect of the admission of those items until the conditions set out in Rule 68(3) of the Rules and at paragraph 8 of the present decision have been satisfied;

DECIDES that the Prosecution is, in principle, permitted 45 minutes to conduct the formalities associated with the admission of the specified items pursuant to Rule 68(3) as well as its supplemental examination of the Witness;

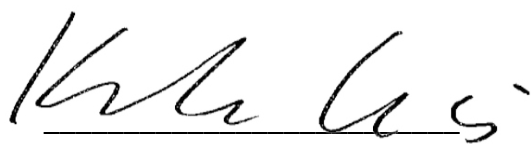
DIRECTS the parties to file public redacted versions of their submissions within two weeks from the date of this decision; and

REJECTS all other requests.

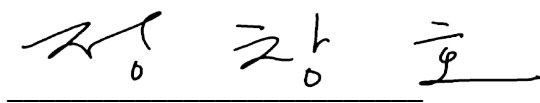
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, featuring a large, stylized 'K' followed by 'u', 'n', 'i', 'k', 'o', and 'O', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct, stylized characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated 27 February 2017

At The Hague, The Netherlands