

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06
Date: 30 November 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

**Decision on Defence request to admit the prior recorded testimony of Witness
D-0243 pursuant to Rule 68(3) and Regulation 35**

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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Article 67 of the Rome Statute ('Statute'), Rules 64(2) and 68(3) of the Rules of Procedure and Evidence ('Rules'), and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Defence Request to admit the prior recorded testimony of Witness D-0243 pursuant to Rule 68(3) and Regulation 35'.

I. Procedural history

1. On 10 November 2017, the defence team for Mr Ntaganda ('Defence') submitted a request ('Request') to admit the prior recorded testimony of Witness D-0243 ('Witness') in the form of a statement dated 8-9 November 2017, ('Statement') pursuant to Rule 68(3) of the Rules, and sought a variation of the applicable time limit pursuant to Regulation 35 of the Regulations for that purpose ('Request for Extension').¹ Should the Request be granted, the Defence also requests one and a half hours in total for the formalities associated with the admission of the Statement, and to conduct a limited supplementary direct examination.²
2. On 23 November 2017, the Office of the Prosecutor ('Prosecution') submitted its response opposing the Request ('Prosecution Response').³

¹ Request on behalf of Mr Ntaganda to admit prior recorded testimony of Defence Witness D-0243 pursuant to Rule 68(3) and Regulation 35, ICC-01/04-02/06-2107-Conf-Exp. A confidential redacted version was filed on the same day, ICC-01/04-02/06-2107-Conf-Red.

² Request, ICC-01/04-02/06-2107-Conf-Red, para. 1.

³ Prosecution's response to the "Confidential redacted version of 'Request on behalf of Mr Ntaganda to admit prior recorded testimony of Defence Witness D-0243 pursuant to Rule 68(3) and Regulation 35'" ICC-01/04-02/06-2107-Conf-Red', ICC-01/04-02/06-2127-Conf. A corrected version was filed on 24 November 2017, ICC-01/04-02/06-2127-Conf-Corr.

II. Submissions and Analysis

Request for Extension

3. The Defence states that Witness D-0243 is likely to begin his testimony on 4 December 2017, which implies a deadline of 6 November 2017 for a Rule 68(3) submission. The Defence argues that there is good cause justifying a variation of the applicable time limit, submitting, *inter alia*, that: (i) the Witness was only added to the Defence list of witnesses on 6 November 2017; (ii) the Defence was unable to submit the Statement prior to 9 November 2017 due to the Witness's illness; (iii) the summary of the Witness's intended evidence was disclosed on 16 October 2017; and (iv) the delay of four days will not impede the Prosecution's ability to prepare for the Witness's testimony.⁴ The Defence further argues that it is in the interest of justice to grant a variation of the time limit since Witness D-0243 'is able to provide relevant contextual and background information in relation to communication issues'.⁵
4. The Prosecution argues that the Defence has not met the necessary criteria for an extension of time. In particular, the Prosecution states that the Defence does not establish that it was unable to file its request before the four week deadline for reasons outside of its control, and failed to establish good cause as required by Regulation 35(2).⁶ In this regard, the Prosecution submits that (i) there is a 'marked difference between a two page summary disclosed [...] on 16 October 2017 and [a] detailed 30 page witness statement';⁷ (ii) the Defence has not explained why it waited six months from the date of first contact with the Witness in May 2017 to obtain D-0243's prior recorded testimony;⁸ (iii) the Defence fails to satisfy the non-exhaustive list of factors that the Chamber may

⁴ Request, ICC-01/04-02/06-2107-Conf-Red, paras 9-10.

⁵ Request, ICC-01/04-02/06-2107-Conf-Red, para. 10.

⁶ Prosecution Response, ICC-01/04-02/06-2127-Conf, paras 2, 17-18.

⁷ Prosecution Response, ICC-01/04-02/06-2127-Conf, para. 20.

⁸ Prosecution Response, ICC-01/04-02/06-2127-Conf, para. 21.

consider in instances where the terms of Regulation 35 are not met;⁹ and (iv) granting the Request ‘would not be in the interests of justice and would be inconsistent with the Chamber’s obligation to ensure the fairness of the proceedings’.¹⁰

5. The Chamber notes that pursuant to Regulation 35 of the Regulations, after the lapse of a time limit, the requesting party or participant must demonstrate that it was ‘unable to file the application within the time limit for reasons outside [its] control’.¹¹ The Chamber further notes that if the criteria of Regulation 35 are not met, the Chamber may nevertheless grant an extension of time if it is in the interests of justice to do so.¹²
6. The Chamber considers that the Defence has not satisfied the Regulation 35 criteria as set out above. In considering whether it may nevertheless be in the interests of justice to grant the Request, the Chamber notes the circumstances surrounding the late nature of the Request. It also notes the limited nature of the extension requested, which allows the ensuing request to be ruled on sufficiently in advance of the Witness’s testimony. In light of the foregoing, the Chamber considers that it is in the interests of justice to grant the Request for Extension.

Request for admission of the prior recorded testimony of Witness D-0243 under Rule 68(3)

7. The Defence submits that admission of the Statement pursuant to Rule 68(3) of the Rules is appropriate as, *inter alia*: (i) the Statement bears the formal indicia

⁹ Prosecution Response, ICC-01/04-02/06-2127-Conf, para. 22.

¹⁰ Prosecution Response, ICC-01/04-02/06-2127-Conf, para. 23.

¹¹ Regulation 35(2) of the Regulations. The Chamber recalls that the Appeals Chamber considered this to involve the existence of ‘exceptional circumstances.’ Appeals chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for the ‘Decision of the Appeals chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the court of 7 February 20017’, ICC-01/04-01/06-834 OA8, paras 9-10.

¹² See, for example, Decision on Prosecution application under Rule 68(2)(b) and Regulation 35 for admission of prior recorded testimony of Witness P-0551, ICC-01/04-02/06-1733.

of reliability;¹³ (ii) Witness D-0243's anticipated evidence is not directed at issues in dispute, is not central to core issues in the case, constitutes background information, and is corroborative of other evidence in the case;¹⁴ (iii) the admission of the Statement favours efficiency and the expeditious conduct of proceedings, and will make it possible to save, at a minimum, two hours of court time;¹⁵ (iv) admitting the Statement would not impact on the fairness of the proceedings or cause prejudice to the Prosecution, as the issues addressed are known to the Prosecution, and it will be able to cross-examine the Witness;¹⁶ and (v) the personal circumstances of Witness D-0243 favour admission pursuant to Rule 68(3).¹⁷

8. The Defence also seeks leave to conduct a supplementary examination-in-chief of Witness D-0243 in order to clarify certain issues raised in the Statement, as well as to put questions to the Witness in relation to limited additional topics in the Statement.¹⁸
9. The Prosecution submits that the Statement is not appropriate for admission under Rule 68(3) of the Rules, arguing, *inter alia*, that: (i) Article 69(4) of the Statute requires the Chamber to take into account, *inter alia*, any prejudice that evidence may cause to a fair trial or a fair evaluation of the testimony of a Witness;¹⁹ (ii) the Witness has provided opinions rather than personal knowledge, and admitting the Statement pursuant to Rule 68(3) would prevent the Prosecution from objecting to the admission of opinion evidence;²⁰ (iii) the Statement is not temporally proximate to the events to which it relates, and was obtained after Mr Ntaganda's testimony, and as such, the reliability of the

¹³ Request, ICC-01/04-02/06-2107-Conf-Red, para. 17.

¹⁴ Request, ICC-01/04-02/06-2107-Conf-Red, paras 18-23.

¹⁵ Request, ICC-01/04-02/06-2107-Conf-Red, paras 25-26.

¹⁶ Request, ICC-01/04-02/06-2107-Conf-Red paras 28-29.

¹⁷ Request, ICC-01/04-02/06-2107-Conf-Red, paras 30-32.

¹⁸ Request, ICC-01/04-02/06-2107-Conf-Red, paras 33-36.

¹⁹ Prosecution Response, ICC-01/04-02/06-2127-Conf, para. 25.

²⁰ Prosecution Response, ICC-01/04-02/06-2127-Conf, paras 3, and 29-30.

Statement requires ‘full testing’;²¹ and (iv) the time that, according to the Defence, would be saved if the Request is granted, would not result in a considerable shortening of the proceedings.²² The Prosecution further argues that the Defence has provided insufficient grounds justifying its request for supplementary examination.²³

10. Should the Request be granted, the Prosecution estimates that it would require four hours for Witness D-0243’s cross-examination in order to address the Statement.²⁴
11. 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 their prior recorded testimony; and (ii) if both parties and the Chamber have an opportunity to examine the witness. The Chamber further recalls its previous statement that ‘a cautious, case-by-case assessment is [...] required’, and that it will consider ‘the impact of any such request on the rights of the accused and the fairness of the proceedings more generally’.²⁵
12. 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 previously 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.’²⁶ In the present

²¹ Prosecution Response, ICC-01/04-02/06-2127-Conf, paras 31-34.

²² Prosecution Response, ICC-01/04-02/06-2127-Conf, para. 36.

²³ Prosecution Response, ICC-01/04-02/06-2127-Conf, paras 38-40.

²⁴ Prosecution Response, ICC-01/04-02/06-2127-Conf, paras 42-44.

²⁵ *See, for example*, 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. *See also* Rule 68(1) of the Rules.

²⁶ Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 43.

circumstances, noting that the Prosecution has objected to the Request, the Chamber shall render a decision at this stage.

13. In making its assessment, the Chamber notes that the Statement refers to issues of communications in Ituri during the period from September 2002 to March 2003, and also includes some references to the conduct of Mr Ntaganda. The Chamber considers it appropriate to allow a full examination to be conducted on this content, and in regard to the Witness's reported expertise in the area of communications. The Chamber further considers the timing of the Statement, which was taken on 8-9 November 2017, and falls many years after the period of the charges, and following the conclusion of the testimony of Mr Ntaganda. The Chamber finds that the timing of the Statement may impact on its reliability. Furthermore, the Chamber observes that the time estimated to be saved by the introduction of the Statement under Rule 68(3) would not significantly enhance the expeditiousness of proceedings. In light of the above, the Chamber is of the view that it would not be appropriate to admit the Statement pursuant to Rule 68(3) of the Rules.
14. As regards the personal circumstances of the Witness, the Chamber is of the view that the Victims and Witnesses Unit can adequately address any issues the Witness may face in terms of the impact of the duration of his testimony. In terms of timing, the Chamber notes that the most recent Defence estimate as to the duration of the examination-in-chief of the Witness, if Rule 68(3) is not applied, is three hours.²⁷
15. In light of the factors outlined above, the Chamber rejects the Request for admission of the prior recorded testimony of Witness D-0243 pursuant to Rule 68(3).

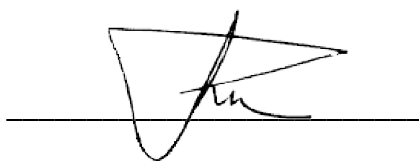
²⁷ See email communication sent by the Defence to the Chamber, parties, and participants on 16 November 2017 at 14:09.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request for Extension; and

REJECTS the Request for admission of the prior recorded testimony of Witness D-0243 pursuant to Rule 68(3).

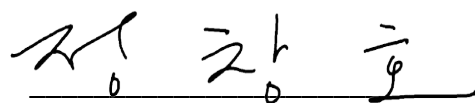
Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a smaller, cursive signature, positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

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

Judge Chang-ho Chung

Dated this 30 November 2017

At The Hague, The Netherlands