

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **12 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
Witness P-0039 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 Witness P-0039 under Rule 68(2)(b)'.

I. Procedural history

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 for the testimony of Witness P-0039 ('Witness').² 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 testify pursuant to the Chamber's power under Article 64 of the Statute.⁶ The

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.

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

Chamber rejected both requests by way of an oral ruling on the same day ('Second Decision').⁷

4. On 10 December 2015, the Chamber rejected a 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 19 May 2016, the Chamber rejected a further Prosecution request¹⁰ for the Witness's prior recorded testimony to be admitted pursuant to Rule 68(2)(c) of the Rules.¹¹
6. On 14 October 2016, the Prosecution requested admission of the Witness's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules ('Request').¹² The prior recorded testimony sought to be admitted comprises a 2005 and a 2013 statement, together with a sketch and victim application form.¹³ The Request is accompanied by a declaration submitted in accordance with Rule 68(2)(b)(iii).¹⁴
7. On 8 November 2016, the Legal Representative filed a response supporting the Request,¹⁵ and the defence team for Mr Ntaganda ('Defence') filed a response opposing the Request ('Defence Response').¹⁶

⁷ ICC-01/04-02/06-T-40-CONF-ENG ET, page 81, line 2 to page 82, line 5.

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 Decision on the Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, ICC-01/04-02/06-1325.

¹² Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0039, notified on 17 October 2016, ICC-01/04-02/06-1585-Conf, with two confidential annexes.

¹³ Request, ICC-01/04-02/06-1585-Conf, para. 2.

¹⁴ Request, ICC-01/04-02/06-1585-Conf, para. 3; Annex 1 to the Request.

¹⁵ Response of the Common Legal Representative of the Victims of the Attacks to the Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0039, ICC-01/04-02/06-1619-Conf.

¹⁶ Response on behalf of Mr Ntaganda to 'Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0039', ICC-01/04-02/06-1620-Conf.

II. Submissions and Analysis

8. As a preliminary matter, the Chamber recalls that the Second Decision was expressly without prejudice to the Prosecution seeking to tender the Witness's testimony by other means.¹⁷
9. In relation to Rule 68(2)(b), the Chamber incorporates by reference the applicable law as previously set out by it.¹⁸

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

10. The Defence argues that because the Witness's statement is relied upon in the Prosecution's Pre-Trial Brief in a section falling under a heading stating that the accused and others 'shared a common plan to control Ituri and drive out the non-Hema population', it relates impermissibly to the 'acts and conduct of the accused' as a member of a joint criminal enterprise.¹⁹ The Chamber considers this to be misconceived. The phrase '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'.²⁰
11. The Chamber notes that the paragraphs of the Witness's statement cited to in the Prosecution's Pre-Trial Brief, as mentioned by the Defence, relate solely to the alleged targeting of Lendu by UPC soldiers; no reference is made to the accused. Indeed, the Chamber notes that neither of the Witness's statements

¹⁷ ICC-01/04-02/06-T-40-CONF-ENG ET, page 81, lines 17-21.

¹⁸ 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.

¹⁹ Defence Response, ICC-01/04-02/06-1620-Conf, paras 12-20.

²⁰ 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.

make any reference to the accused. The Chamber finds that they do not relate to Mr Ntaganda's acts and conduct within the meaning of Rule 68(2)(b).

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)

12. The Chamber finds that the prior recorded testimony is relevant, noting that it relates to allegations including the UPC attack on Mongbwalu in 2002, the attack on [REDACTED] in February 2003, Lendu people having been captured and imprisoned by the UPC in Kobu, and the Witness learning subsequently of some of those people having been killed.
13. The Defence submits that the testimony relates to matters which are materially in dispute.²¹ In respect, however, of the Defence submission that it disputes the accused's implication in the Second Attack,²² the Chamber notes that the Witness's statements do not relate to the acts and conduct of the accused, in connection with the Second Attack or otherwise. Nonetheless, the Chamber does consider that the statements address issues which are potentially materially in dispute, including the manner in which the Second Attack was conducted, encompassing the crimes alleged to have been committed and the discriminatory intent of the perpetrators.
14. The Chamber notes, however, that, in this respect, the statements are significantly cumulative with the oral testimony of other witnesses who have appeared before the Chamber. With reference to an alleged discrepancy between the Witness's statement of what he saw and other witnesses' accounts of what the Witness told them, the Defence submits that the statements are not corroborative.²³ The Chamber notes that the relevant consideration is whether

²¹ Defence Response, ICC-01/04-02/06-1620-Conf, para. 21.

²² Defence Response, ICC-01/04-02/06-1620-Conf, para. 21.

²³ Defence Response, ICC-01/04-02/06-1620-Conf, paras 22-24.

other testimony has been, or will be, provided on 'similar facts'. It is not required that the accounts accord in every detail. Indeed, the Chamber notes that other witnesses have testified not only in relation to similar facts in so far as they relate to the Prosecution's allegations, but have also specifically mentioned the Witness, in a manner potentially corroborative of his account of [REDACTED] and subsequently having recounted his experience to others.

15. Further, the Chamber notes that: (i) the Witness's first statement was given in 2005 and therefore bears relative temporal proximity to the events in question; (ii) the Witness's 2013 statement is largely confined to providing certain corrections, clarifications and supplementary information in relation to the 2005 statement; (iii) both statements are signed by the Witness; (iv) both statements are declared to have been given voluntarily, with an awareness they may be used in legal proceedings before the Court and to accurately reflect the content of the interview or to be true to the best of the Witness's recollection; (v) the 2005 statement was given in French, a language which the Witness indicates that he reads and writes, with the additional assistance of a French-Swahili interpreter; (vi) in the statements, the Witness identifies when he heard things through others, as opposed to having witnessed them directly, and indicates if he does not know something; (vii) although the Witness makes a small number of corrections to the 2005 statement, such as, for example, the timing of his stay in [REDACTED] and in [REDACTED], the accounts are largely consistent both internally and with each other; and (viii) as noted above, other witnesses have provided potentially corroborative testimony on these matters.
16. The Defence further submits that the Witness appears to have had contact with Intermediary P-0154 and other Prosecution witnesses in the case.²⁴ The Chamber notes that the meetings specifically referred to by the Defence

²⁴ Defence Response, ICC-01/04-02/06-1620-Conf, paras 35-36.

occurred in 2007, which is after the date of the Witness's first statement. Further, the Chamber considers that the Defence has ample opportunity to investigate and challenge the circumstances of the alleged meetings and contacts by means other than cross-examination of the Witness. The Defence has, for example, already cross-examined other witnesses alleged to have attended these meetings as to the contacts, as well as specifically on whether they know the Witness. The Chamber does not therefore consider that this issue would render admission of the statements under Rule 68(2)(b) prejudicial to the rights of the accused.

17. In light of the factors mentioned above, the Chamber finds the Witness's statements to be *prima facie* reliable, and that it is appropriate and in the interests of justice for it to be admitted under Rule 68(2)(b).
18. The Chamber also finds that the sketch²⁵ is adequately used and explained in the Witness's prior recorded testimony, and therefore considers it appropriate to admit it as an associated document. Conversely, the Witness's victim application form²⁶ is not mentioned in either statement and the Chamber therefore finds that it cannot be considered as an associated document to the Witness's prior recorded testimony.
19. Nonetheless, the Chamber considers that the Witness's victim application form may be considered for admission pursuant to Articles 64 and 69. The Chamber notes in this regard that it is relevant, and *prima facie* reliable and probative, being in standard format, in French, signed by the Witness, and having regard to its content. Additionally, noting the Defence submissions as to alleged discrepancies between the content of the form and the content of the Witness's

²⁵ DRC-OTP-2062-0260_R02.

²⁶ DRC-OTP-2078-2253_R01.

statements,²⁷ the Chamber finds it of potential relevance to an assessment of the Witness's testimony.

20. Finally, the Chamber notes the Defence submission that, in the event the Witness's prior recorded testimony is admitted, other documents associated with the Witness, including the witness preparation note ('Log')²⁸ and investigation notes mentioning contacts with Intermediary P-0154, should also be admitted.²⁹
21. In the circumstances, the Chamber does find it appropriate to admit, under Articles 64 and 69, the Log. The Chamber finds in this regard, that the Log is *prima facie* reliable, having been prepared by the Prosecution as an accurate record of the preparation sessions for disclosure purposes, and is relevant and probative, including potentially for the purpose of assessing credibility. As for the Defence request relating to 'all other investigation notes and other documents mentioning contacts between Intermediary P-0154 and [the Witness]', the Chamber considers that the Defence inadequately identifies the documents in question and insufficiently grounds its request, in a manner which makes it inappropriate to consider their admissibility at this time. The Chamber further recalls, as noted above, that other avenues remain open to the Defence to address the question of alleged contacts between the Witness, Intermediary P-0154 and other individuals.

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

22. As a preliminary matter, the Chamber recalls that it has previously held that Rule 68(2)(b) applications 'may be made in advance of [the required

²⁷ Defence Response, ICC-01/04-02/06-1620-Conf, para. 30. The Chamber additionally notes the explanation provided by the Witness in relation to the victim application form as recorded in the witness preparation note (DRC-OTP-2089-0053_R01).

²⁸ DRC-OTP-2089-0053_R01.

²⁹ Defence Response, ICC-01/04-02/06-1620-Conf, paras 41-42.

accompanying] declarations having been obtained, while noting that any favourable ruling on such applications could only be made on a conditional basis'.³⁰

23. In the present case, the Prosecution has provided an accompanying declaration at Annex 1 to the Request ('Declaration'), submitting that it meets the requirements under Rule 68(2)(b)(iii).³¹
24. The Defence submits that the requirement of Rule 68(2)(b)(ii) that accompanying declarations be made 'reasonably close in time' to when the prior recorded testimony is being submitted has not been satisfied, noting the dates of the Witness's statements. The Chamber notes that the relevant time period for the purposes of Rule 68(2)(b)(ii) is that between the date of the making of the declaration and *submission* of the prior recorded testimony, not the date of the prior recorded testimony itself. In this case, the time period in question is just over one month, which the Chamber considers to satisfy the requirement.
25. The Defence further submits that: (i) the Declaration is not in the form previously approved by the Chamber; (ii) the Declaration does not mention whether the Witness received a copy of Article 70 of the Statute and was informed that if the testimony is not true he may be subject to proceedings for having given false testimony; and (iii) the Prosecution has not demonstrated that an *Officier de Police Judiciaire* has the authority to attest to such a declaration in accordance with the law and procedure of the Democratic Republic of the Congo.³²

³⁰ Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution, 19 October 2016 ICC-01/04-02/06-1588, para. 7.

³¹ Request, ICC-01/04-02/06-1585-Conf, para. 3; Annex 1 to the Request.

³² Defence Response, ICC-01/04-02/06-1620-Conf, paras 43-46.

26. The Chamber considers 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. In this regard, the Chamber notes that, in conformity with the requirements of Rule 68(2)(b)(iii), the witnessing officer has confirmed, *inter alia*, that the Witness was informed that if the contents of the prior recorded testimony are not true he may be subject to proceedings for having given false testimony, as well as that the Witness stated that the prior recorded testimony is true and correct to the best of his knowledge and belief. However, the Declaration signed by the Witness which, in accordance with Rule 68(2)(b)(ii), is solely required to confirm that the contents of the prior recorded testimony are true and accurate to the best of his knowledge and belief, does not contain such a declaration. Rather, the Declaration merely states that the prior recorded testimony was read to the Witness in its entirety and then identifies two clarifications the Witness would like to make. The Prosecution provides no explanation in this regard.
27. In the circumstances, the Chamber does not consider that the Declaration meets the requirements of Rule 68(2)(b)(ii). The Chamber notes in this regard that it is unfortunate, especially in the particular circumstances of the Witness, that such steps would need to be repeated, and finds it somewhat inexplicable that a correct form was not utilised when obtaining the Declaration. In order for the prior recorded testimony to be admitted, the Prosecution is directed to submit a declaration fulfilling the requirements of Rule 68(2)(b)(ii) and (iii) not later than 3 February 2017.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

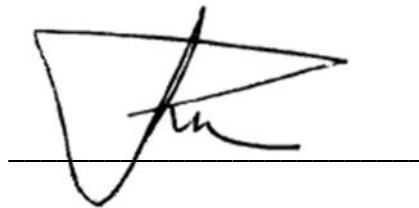
PROVISIONALLY GRANTS the Request;

ADMITS INTO EVIDENCE the following documents, only upon receipt of a satisfactory declaration conforming to the requirements of Rule 68(2)(b)(ii) and (iii) by 3 February 2017:

DRC-OTP-0104-0015_R03;
DRC-OTP-2062-0244_R02;
DRC-OTP-2062-0260_R02;
DRC-OTP-2078-2253_R01; and
DRC-OTP-2089-0053_R01; and

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

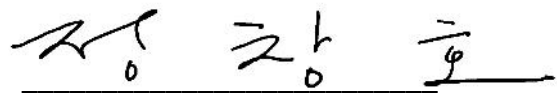
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of Korean characters '정창호' followed by a horizontal line.

Judge Chang-ho Chung

Dated this 12 January 2017

At The Hague, The Netherlands