

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **16 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

**Public redacted version of 'Decision on Defence request for admission of
prior recorded testimony of Witness D-0251 under Rule 68(3)'**

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 Articles 64 and 67 of the Rome Statute and Rules 64(2) and 68(3) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence request for admission of prior recorded testimony of Witness D-0251 under Rule 68(3)'.

I. Procedural history

1. On 20 October 2017, the Chamber granted a request from the defence team for Mr Ntaganda ('Defence') for the addition of, *inter alia*, Witness D-0251 ('Witness') to its list of witnesses.¹
2. On 27 October 2017, the Defence requested the admission of the Witness's prior recorded testimony pursuant to Rule 68(3) of the Rules ('Request'),² 'subject to the formalities prescribed in Rule 68(3) and to be allocated one hour and fifteen minutes in total for supplementary direct examination and to conduct the necessary formalities associated with the admission of the Witness's prior recorded testimony'.³
3. On 9 November 2017, the Office of the Prosecutor ('Prosecution')⁴ and the Legal representative of the former child soldiers ('LRV')⁵ filed their respective responses ('Prosecution Response' and 'LRV Response', respectively), both opposing the Request.

¹ Decision on Defence Request to add Witnesses D-0251 and D-0257 to its List of Witnesses, ICC-01/04-02/06-2079 ('Decision 2079').

² Request on behalf of Mr Ntaganda to admit prior recorded testimony of Defence Witness D-0251 pursuant to Rule 68(3), ICC-01/04-02/06-2086-Conf and confidential Annex A.

³ Request, ICC-01/04-02/06-2086-Conf, para. 19.

⁴ Prosecution response to "Request on behalf of Mr Ntaganda to admit prior recorded testimony of Defence Witness D-0251 pursuant to Rule 68(3)", ICC-01/04-02/06-2106-Conf.

⁵ Response to the "Request on behalf of Mr Ntaganda to admit the prior recorded testimony of Defence Witness D-0251 pursuant to Rule 68(3)", ICC-01/04-02/06-2105-Conf.

II. Submissions and analysis

(i) *Applicable law and preliminary considerations*

4. The Chamber incorporates by reference the applicable law set out in previous decisions on applications for admission of evidence under Rule 68(3) of the Rules.⁶ The Chamber further recalls that in setting out the procedure to be adopted with regard to the introduction of prior recorded testimony under Rule 68(3), 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'.⁷ In the present circumstances, noting the Prosecution's and the LRV's objections to the introduction of the Witness's prior recorded testimony pursuant to Rule 68(3) of the Rules, the Chamber decides to render its decision on the Request at this time, as it will benefit the parties and participants in their preparation for the Witness's testimony.⁸

(ii) *Defence submissions*

5. The Defence submits that the Witness's prior recorded testimony, dated 1 October 2017 ('Statement'),⁹ primarily addresses: (i) the circumstances leading to her association with the UPC at the end of 2002; (ii) her presence at a UPC military camp; (iii) training with the UPC; (iv) [REDACTED] and after Mr Kisembo had re-taken the town in Bunia in 2003; (v) her knowledge of [REDACTED] and Mr Ntaganda's general attitude towards [REDACTED]; (vi)

⁶ 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.

⁷ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 43.

⁸ For a similar approach, *see* Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055, 29 October 2015, ICC-01/04-02/06-961, para. 9; and Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010, 6 November 2015, ICC-01/04-02/06-988 ('Decision 988'), para. 10.

⁹ DRC-D18-0001-6276, Annex A to the Request.

[REDACTED]; and (vii) [REDACTED] operations in [REDACTED] in June 2003 to regain control of the town, including orders by Mr Ntaganda regarding pillage and the treatment of prisoners.¹⁰

6. According to the Defence, admission of the Statement under Rule 68(3) is appropriate and neither prejudicial to the rights of the accused, nor unfair to the Prosecution,¹¹ on the basis that: (i) it was taken ‘in contemplation, and for the purpose, of litigation’, was given voluntarily, and is attested as truthful by the Witness who was informed, and attested that she understood, that any false statements could subject her to prosecution;¹² (ii) it mainly concerns [REDACTED] sometime after May 2003, and, accordingly, does not concern the First or Second Attacks as defined in the charges, or Mr Ntaganda’s conduct in relation to those two attacks;¹³ (iii) while the Statement is ‘relevant to some important issues that are materially disputed’, the Witness will be available for cross-examination on those topics;¹⁴ (iv) it mostly involves general attitudes and policies of Mr Ntaganda rather than a series of specific actions, and requiring the Witness to spontaneously relate those matters on direct examination will not substantially assist the Chamber in assessing her reliability;¹⁵ (v) the Statement is or will be corroborated ‘in important respects’ by other witnesses;¹⁶ (vi) the Prosecution will have ample opportunity to clarify, challenge or contradict the Witness during cross-examination;¹⁷ and (vii) it is in the interests of expeditiousness and efficiency of the proceedings and further in the interests of the Witness in light of her family situation.¹⁸

¹⁰ Request, ICC-01/04-02/06-2086-Conf, paras 10 and 12.

¹¹ Request, ICC-01/04-02/06-2086-Conf, page 6 and paras 11 and 13.

¹² Request, ICC-01/04-02/06-2086-Conf, para. 10.

¹³ Request, ICC-01/04-02/06-2086-Conf, para. 11.

¹⁴ Request, ICC-01/04-02/06-2086-Conf, para. 13.

¹⁵ Request, ICC-01/04-02/06-2086-Conf, para. 13.

¹⁶ Request, ICC-01/04-02/06-2086-Conf, para. 14.

¹⁷ Request, ICC-01/04-02/06-2086-Conf, para. 16.

¹⁸ Request, ICC-01/04-02/06-2086-Conf, para. 17.

(iii) *Prosecution submissions*

7. The Prosecution urges the Chamber to reject the Request and order the Witness to testify ‘entirely *viva voce*’, because her evidence is ‘materially in dispute and central to the [a]ccused’s case’.¹⁹ In this regard, the Prosecution notes that: (i) the Witness is the only [REDACTED] who are scheduled to testify on behalf of the accused, and is expected to testify in relation to 15 of the 18 charges against the accused;²⁰ (ii) the fact that the Statement does not concern the charged attacks does not detract from its centrality to the case, since the charges of enlistment, conscription, use of child soldiers and their rape and sexual slavery ‘span the entire period of the charges’;²¹ (iii) the Witness is expected to testify about the fact that [REDACTED] were raped by the accused or any other UPC/FPLC soldiers, which is potentially relevant to the charges against the accused;²² and (iv) the Witness is expected to give evidence about the accused’s whereabouts and behaviour.²³
8. Moreover, the Prosecution notes that the Witness is expected to contradict the testimony of other witnesses, notably Witness P-0010, which was elicited entirely *viva voce* and was highly incriminating.²⁴ With regard to the Defence’s submissions as to the alleged corroboration by Witness D-0211, the Prosecution notes that this only relates to specific issues, while Witness D-0251’s anticipated evidence contradicts other parts of Witness D-0211’s testimony, and further notes that Witness D-0211’s testimony, while arguably less important than that of Witness D-0251, was heard entirely *viva voce*.²⁵ The Prosecution further submits that *viva voce* testimony would assist the Chamber in assessing the

¹⁹ Prosecution Response, ICC-01/04-02/06-2106-Conf, paras 2 and 22.

²⁰ Prosecution Response, ICC-01/04-02/06-2106-Conf, paras 2 and 19.

²¹ Prosecution Response, ICC-01/04-02/06-2106-Conf, para. 21.

²² Prosecution Response, ICC-01/04-02/06-2106-Conf, para. 21.

²³ Prosecution Response, ICC-01/04-02/06-2106-Conf, para. 21.

²⁴ Prosecution Response, ICC-01/04-02/06-2106-Conf, paras 23-26.

²⁵ Prosecution Response, ICC-01/04-02/06-2106-Conf, paras 27-28.

Witness's reliability and credibility, which are challenged by the Prosecution, on the basis of, *inter alia*, the temporal proximity between the Statement and the accused's testimony.²⁶ Finally, the Prosecution argues that admission of the Statement under Rule 68(3) would not significantly contribute to the expeditiousness of the proceedings, arguing that the Defence's efforts to save two hours and 15 minutes with 'such a central witness' are inconsistent in view of the court time used by the Defence during the fourth evidentiary block.²⁷

(iv) *LRV submissions*

9. The LRV submits that admitting the Statement under Rule 68(3) is not appropriate since it would not serve the interests of justice,²⁸ arguing that 'the time saving consideration is clearly outweighed by the necessity to ensure a fair trial and the right to the truth'.²⁹ In this respect, the LRV submits, *inter alia*, that:
 - (i) expeditiousness is not sufficient in itself to grant the Request and saving two hours and 15 minutes does not represent a significant gain of time;³⁰
 - (ii) the Defence's concern to limit the Witness's absence from her home in light of her family situation can be addressed through video-link testimony;³¹
 - (iii) the Witness's evidence concerns issues of 'core importance that are covered *inter alia* by counts 6 and 9 of the charges'³² and undermines the credibility of dual status Witness P-0010,³³ an issue which is materially in dispute.³⁴

²⁶ Prosecution Response, ICC-01/04-02/06-2106-Conf, paras 29-32.

²⁷ Prosecution Response, ICC-01/04-02/06-2106-Conf, paras 34-37.

²⁸ LRV Response, ICC-01/04-02/06-2105-Conf, para. 24.

²⁹ LRV Response, ICC-01/04-02/06-2105-Conf, para. 28.

³⁰ LRV Response, ICC-01/04-02/06-2105-Conf, para. 18.

³¹ LRV Response, ICC-01/04-02/06-2105-Conf, para. 19.

³² LRV Response, ICC-01/04-02/06-2105-Conf, para. 23.

³³ LRV Response, ICC-01/04-02/06-2105-Conf, paras 23 and 27.

³⁴ LRV Response, ICC-01/04-02/06-2105-Conf, para. 27.

(v) Analysis

10. The Chamber recalls that, when granting the addition of the Witness to the Defence's list of witnesses, it noted that the Witness is 'expected to provide exculpatory evidence on a number of issues of significance to the case'.³⁵
11. The Chamber further observes that, in addition to the issues enumerated by the Defence,³⁶ the Statement also relates to the credibility of the account of Witness P-0010, whose evidence included frequent references to the charges against the accused and his alleged actions, particularly in relation to Witness P-0010's alleged forced recruitment by the UPC/FPLC in 2002, and the presence of children under the age of 15 at the training camps and in the ranks of the UPC/FPLC.³⁷
12. In these circumstances, the Chamber considers that the Statement addresses matters which are central to the case, which militates against its introduction under Rule 68(3).³⁸
13. In adjudicating the present Request, the Chamber has further considered the Defence's arguments pertaining to the personal circumstances of the Witness and the concern to minimise the absence from the Witness's family.³⁹ However, the Chamber is of the view that the potential gain of two hours and 15 minutes through the admission of the Statement pursuant to Rule 68(3) of the Rules, as estimated by the Defence, is limited, especially in light of the nature of the expected evidence and the time available in the fifth evidentiary block.

³⁵ Decision 2079, ICC-01/04-02/06-2079, para. 23.

³⁶ See Request, ICC-01/04-02/06-2086-Conf, paras 10 and 12.

³⁷ Decision 988, ICC-01/04-02/06-988, para. 11.

³⁸ See e.g., by contrast, the Chamber's ruling on the Prosecution request for admission of the prior recorded testimony of Witness P-0012 under Rule 68(3), Transcript of hearing on 21 November 2016, ICC-01/04-02/06-T-161-CONF-ENG ET, pages 25-29.

³⁹ Request, ICC-01/04-02/06-2086-Conf, para. 17.

14. The Chamber further finds that the Defence's submissions as to the potential impact of the possible end date of the testimony are speculative at this stage.⁴⁰ It also notes that there are alternative ways to address the Defence's concern, such as the use of video-link. In this respect, noting that it has previously considered that use of video-link testimony does not require exceptional justification,⁴¹ the Chamber indicates at this stage that it would see no obstacle, in the present circumstances, to hear the Witness's testimony by way of video-link, should the Defence opt to do so and provided that the necessary arrangements can be made to ensure the Witness's appearance during the fifth evidentiary block.
15. In light of the factors mentioned above, the Chamber considers that admission of Witness D-0251's testimony pursuant to Rule 68(3) of the Rules would not be appropriate.

⁴⁰ See Request, ICC-01/04-02/06-2086-Conf, para. 17, referring to a situation where a witness's return was delayed by four days because the testimony was completed on a Thursday rather than a Wednesday.

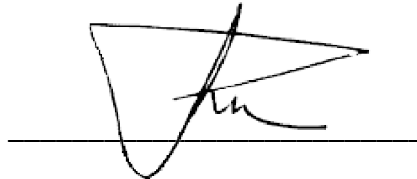
⁴¹ See, e.g., transcript of hearing on 29 May 2017, ICC-01/04-02/06-T-206-CONF-ENG ET, pages 36-37; Decision on Defence's request to hear Witness D-0054's testimony via video-link and advance notice concerning Witness D-0210, 23 May 2017, ICC-01/04-02/06-1919, para. 3; Decision on Prosecution's request to hear Witness P-0668's testimony via video-link, 9 September 2016, ICC-01/04-02/06-1499, para. 4; Public redacted version of 'Decision on Prosecution's request to hear Witness P-0918's testimony via video-link', 4 November 2016, ICC-01/04-02/06-1612-Conf, ICC-01/04-02/06-1612-Red, para. 5.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the Registry, if applicable, to make the necessary arrangements for the hearing of the testimony of Witness D-0251 by way of video-link during the fifth evidentiary block.

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

A handwritten signature in black ink, appearing to be 'RF', is written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K Ozaki', is written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, appearing to be 'Chang-ho Chung', is written over a horizontal line.

Judge Chang-ho Chung

Dated this 16 November 2017

At The Hague, The Netherlands