

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06
Date: 22 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 under Rule 68(3) of the Rules for admission of prior
recorded testimony of Witness D-0017**

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

Mr Nigel Verrill

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(3) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence request under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness D-0017'.

I. Procedural history and submissions

Defence Request

1. On 31 October 2017, the defence team for Mr Ntaganda ('Defence') sought an extension of time to file a request pursuant to Rule 68(3) of the Rules ('Preliminary Request')¹ in relation to Witness D-0017 ('Witness'), which was granted by the Chamber ('Decision on Preliminary Request').²
2. On 7 November 2017, the Defence filed its request ('Request') seeking admission of the Witness's prior recorded testimony, consisting of a 51-page statement dated 7 November 2017 ('Statement').³ In addition, the Defence provides notice of its intention to put questions to the Witness on a number of audio-visual exhibits annexed to the Request covering events addressed in the Statement.⁴
3. The Defence submits that admission of the Statement pursuant to Rule 68(3) of the Rules is appropriate insofar as, *inter alia*: (i) the Statement bears the formal indicia of reliability;⁵ (ii) while the Statement 'touches upon certain events, which can be considered as central to core issues in the case' as well as issues

¹ Request for extension of time to file Rule 68(3) motion for Witness D-0017, ICC-01/04-02/06-2090. The Preliminary Request was notified on 1 November 2017.

² See email communication from the Chamber to the parties and participants on 1 November 2017 at 13:27.

³ Request on behalf of Mr Ntaganda to admit the prior recorded testimony of Defence Witness D-0017 pursuant to Rule 68(3), ICC-01/04-02/06-2101-Conf, with 28 confidential annexes.

⁴ See Request, ICC-01/04-02/06-2101-Conf, para. 30, Annexes A-AA (images) and Annex 1 (the Statement).

⁵ Request, ICC-01/04-02/06-2101-Conf, para. 15. See also para. 13.

materially in dispute, its admission will neither impact the fairness of the trial nor impede the right of the Prosecution to test the Witness's evidence, given that he will be available for cross-examination;⁶ (iii) the Witness's narrative is corroborated by other witnesses;⁷ (iv) it is in the interests of 'good trial management';⁸ and (v) it will reduce the time the Witness is in the courtroom, and thus any concomitant inconvenience to the Witness and his family.⁹ In the event that the Request is granted, the Defence seeks leave to conduct a supplemental examination of the Witness of two hours.¹⁰

Prosecution Response

4. On 15 November 2017, the Office of the Prosecutor ('Prosecution') filed its response to the Request ('Response'), opposing it.¹¹ The Prosecution avers that admission of the Statement under Rule 68(3) is inappropriate on the basis that, *inter alia*: (i) the majority of the issues addressed in the Statement are materially in dispute and central to the Defence case, and the Statement addresses Mr Ntaganda's acts, conduct, and behaviour during the temporal scope of the charges;¹² (ii) the timing and modalities related to the collection of the Statement militate in favour of the Witness testifying *viva voce*, given their bearing on the Statement's reliability;¹³ and (iii) granting the Request would impact on the fairness of the trial and would not significantly contribute to the expeditiousness of proceedings.¹⁴ The Prosecution also opposes the request for

⁶ Request, ICC-01/04-02/06-2101-Conf, paras 16-20 and 24.

⁷ Request, ICC-01/04-02/06-2101-Conf, para. 22.

⁸ Request, ICC-01/04-02/06-2101-Conf, para. 23. *See also* paras 9-10.

⁹ Request, ICC-01/04-02/06-2101-Conf, paras 26-27.

¹⁰ Request, ICC-01/04-02/06-2101-Conf, paras 1, 28-29 and 36.

¹¹ Prosecution response to "Request on behalf of Mr Ntaganda to admit the prior recorded testimony of Defence Witness D-0017 pursuant to Rule 68(3)", 7 November 2017, ICC-01/04-02/06-2101-Conf, ICC-01/04-02/06-2112-Conf, plus confidential Annex A. The Response was notified on 16 November 2017.

¹² Response, ICC-01/04-02/06-2112-Conf, paras 2 and 19-28.

¹³ Response, ICC-01/04-02/06-2112-Conf, paras 3 and 29-40.

¹⁴ Response, ICC-01/04-02/06-2112-Conf, paras 4 and 41-51.

supplementary examination of the Witness, on the basis that the Defence has not specified the topics upon which it seeks to examine the Witness.¹⁵

II. Analysis

Preliminary issue

5. The Chamber recalls that, in its Decision on Preliminary Request, it considered that good cause for the requested extension had been established pursuant to Regulation 35 of the Regulations.¹⁶ In so doing, the Chamber considered: (i) the issues as to timing regarding the Defence's meetings with the Witness; (ii) the broader scheduling variations in relation to the Witness appearing before the Chamber; and (iii) the relatively short duration of the extension requested,¹⁷ which the Chamber considered would allow the ensuing request to be adjudicated sufficiently in advance of the Witness testifying.

Analysis of the Request

6. 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 that it previously held that 'a cautious, case-by-case assessment is [...] required', and

¹⁵ Response, ICC-01/04-02/06-2112-Conf, paras 52-27.

¹⁶ See email communication from the Chamber to the parties and participants on 1 November 2017 at 13:27. The Chamber indicated therein that the ruling and the reasons therefor would be put on the record in due course.

¹⁷ See Preliminary Request, ICC-01/04-02/06-2090, paras 1-2. See also, for example, email communication from the Defence to the Chamber on 19 October 2017 at 10:09, outlining scheduling difficulties in meeting with the Witness and seeking to postpone his testimony to the fifth evidentiary block, which the Chamber granted.

that it will consider ‘the impact of any such request on the rights of an accused and the fairness of the proceedings more generally’.¹⁸

7. 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’.¹⁹ In the present circumstances, noting the Prosecution objection to the Request, the Chamber decides to render a ruling at this stage.
8. In making its case-by-case assessment as to whether to use Rule 68(3) in this instance, the Chamber notes the stated importance of hearing the Witness’s evidence *viva voce*, and of the centrality of his evidence to the accused’s case.²⁰ In this regard, the Chamber observes that Mr Ntaganda’s alleged actions are frequently referred to in the Statement, including in relation to his whereabouts at particular times, orders he allegedly gave, and his general conduct.²¹ The Chamber further notes that the Statement, which is dated 7 November 2017, was taken after the conclusion of the testimony of the accused and many years after the period of the charges. The Chamber is of the view that this timing may have an impact on the Statement’s reliability, and, coupled with its numerous references to the acts and conduct of the accused, and to related issues in dispute, militates against its admission under Rule 68(3) of the Rules.

¹⁸ 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.

¹⁹ Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 43.

²⁰ See in this regard, Response, ICC-01/04-02/06-2112-Conf, para. 26; Defence Final List of Witnesses and Evidence, 26 April 2017, ICC-01/04-02/06-1881-Conf-AnxB pages 14-15; Email communication from the Defence to the Chamber on 23 May 2017 at 15:18 stating, *inter alia*, that the Witness ‘is expected to testify on the acts and conduct of the Accused at times relevant to the UDCC’ and that it is ‘important as well as in the interest of justice to have him testify *viva voce* in person’.

²¹ See Request, ICC-01/04-02/06-2101-Conf-Anx1.

9. The Chamber also notes that the estimated time saved by the introduction of the Witness's Statement under Rule 68(3) is four hours, which, in light of the time available during the fifth evidentiary block, and the fact that the Witness's evidence can be expected to be completed within approximately three days, will not significantly enhance the expeditiousness of the proceedings. 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 six hours.²²
10. In the present case, in light of the factors mentioned above, the Chamber considers that admitting the Statement pursuant to Rule 68(3) of the Rules would not be appropriate, and rejects the Request.

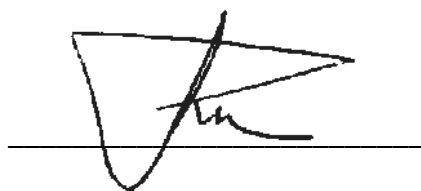
²² See email communication from the Defence to the Chamber, parties and participants on 16 November 2017 at 14:09 and Request, ICC-01/04-02/06-2101-Conf, paras 4 and 34.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

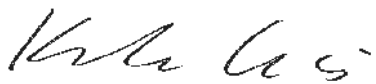
PLACES ON THE RECORD the Decision on Preliminary Request; and

REJECTS the Request.

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, consisting of a large, stylized 'K' followed by a cursive 'Ozaki'.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a cursive 'Chung'.

Judge Chang-ho Chung

Dated 22 November 2017

At The Hague, The Netherlands