

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/04-02/06  
Date: 20 February 2018

**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 for admission of additional paragraphs of  
Witness D-0148's Prosecution Statement**

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**

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**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, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2) and (9)(a), and 69(2) and (4) of the Rome Statute, and Rules 63(2) and 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on Defence request for admission of additional paragraphs of Witness D-0148's Prosecution Statement'.

## **I. Background and Submissions**

1. On 4 December 2017, the Chamber issued its decision ('Rule 68(2) Decision')<sup>1</sup> on the request by the Defence team for Mr Ntaganda ('Defence') for the admission of the prior recorded testimony of certain witnesses pursuant to Rule 68(2) of the Rules ('Rule 68(2) Request').<sup>2</sup> In this context, the majority of the Chamber, Judge Ozaki dissenting,<sup>3</sup> admitted into evidence, pursuant to Rule 68(2)(b) of the Rules, the prior recorded testimony of Witness D-0148 ('Witness'),<sup>4</sup> given to the Defence in 2017 ('Defence Statement'), as well as, further to a request by the Office of the Prosecutor ('Prosecution') to that effect,<sup>5</sup> certain excerpts of her

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<sup>1</sup> Decision on Defence request for admission of prior recorded testimony of Witnesses D-0001, D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, and D-0179 pursuant to Rule 68(2)(b), ICC-01/04-02/06-2141-Conf. A public redacted version was filed on the same day as ICC-01/04-02/06-2141-Red.

<sup>2</sup> Request to admit prior recorded testimony of eleven witnesses under Rule 68(2), 16 October 2017, ICC-01/04-02/06-2066-Conf, with confidential Annexes. A Corrigendum was filed on 27 October 2017, ICC-01/04-02/06-2066-Conf-Corr and Conf-Anx respectively.

<sup>3</sup> Partly dissenting opinion of Judge Kuniko Ozaki, ICC-01/04-02/06-2141-Conf-Anx, para.6. A redacted version was filed on the same day as ICC-01/04-02/06-2141-Anx-Red. Judge Ozaki considered, *inter alia*, that 'it would have been more appropriate to provide the Prosecution with an opportunity to cross-examine the witness, either by having her appear before the Chamber or by having her testify by way of deposition, so as to provide an opportunity for further clarification of the aforementioned matters, as well as more generally with respect to the witness's knowledge of and involvement in the procedure for the retroactive issuance of birth certificates', and 'would therefore have rejected the admission of D-0148's prior recorded testimony under Rule 68(2)(b) of the Rules'. Judge Ozaki further noted that, under these circumstances, 'it would have not been necessary to adjudicate upon the Prosecution's request for admission of three paragraphs of a statement previously given by D-0148 to the Prosecution, tendered for the purposes of impeachment'. Without prejudice to the aforementioned considerations, for the purpose of the present decision, the Request is considered in the circumstances resulting from the majority's decision to admit the Witness's prior recorded testimony together with the Admitted Paragraphs.

<sup>4</sup> DRC-D18-0001-6141.

<sup>5</sup> Prosecution response to the Defence "Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)", ICC-01/04-02/06-2066-Conf, 27 October 2017, ICC-01/04-02/06-2087-Conf, para. 73, and

statement given to the Prosecution in 2016<sup>6</sup> (respectively, ‘Admitted Paragraphs’ and ‘Prosecution Statement’).<sup>7</sup>

2. On 7 February 2018, the Defence requested the admission of additional paragraphs<sup>8</sup> of the Prosecution Statement (respectively, ‘Additional Paragraphs’ and ‘Request’).<sup>9</sup> The Defence urges the Chamber to admit the Additional Paragraphs either ‘*de novo*’ or ‘as a matter of reconsideration’, arguing that the admission of the Admitted Paragraphs constitutes a new circumstance the Defence was not aware of at the time of its Rule 68(2) Request.<sup>10</sup> The Defence posits that the Additional Paragraphs are necessary to ‘properly evaluate’ the Prosecution’s argument that the Prosecution Statement is inconsistent with, and undermines the reliability of, the Defence Statement. Specifically, the Defence argues that, in relation to various aspects, the Additional Paragraphs are ‘vital’ to understanding the content of the Admitted Paragraphs, and show that the Prosecution Statement and the Defence Statement are ‘mutually corroborative and consistent’.<sup>11</sup>
3. On 13 February 2018, within the time limit set by the Chamber,<sup>12</sup> the Prosecution responded to the Request, opposing it (‘Response’).<sup>13</sup> The Prosecution posits that: (i) the Request is ‘out of time’ because it was filed nearly four months after the 16 October 2017 deadline for applications under Rule 68(2)(b) without good cause or any ‘acceptable explanation for failing to

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confidential annexes. A public redacted version was filed on 12 December 2017 and notified on 13 December 2017 as ICC-01/04-02/06-2087-Red.

<sup>6</sup> DRC-OTP-2097-0455, paras 14-16.

<sup>7</sup> Rule 68(2) Decision, ICC-01/04-02/06-2141-Red, paras 51-52.

<sup>8</sup> DRC-OTP-2097-0455, paras 10-13 and 17-19, also provided in ICC-01/04-02/06-2214-Conf-Anx.

<sup>9</sup> Defence request for admission of additional paragraphs of Witness D-0148’s Prosecution Statement pursuant to Rule 68(2)(b), ICC-01/04-02/06-2214-Conf and confidential Annex.

<sup>10</sup> Request, ICC-01/04-02/06-2214-Conf, para. 4.

<sup>11</sup> Request, ICC-01/04-02/06-2214-Conf, paras 11-19.

<sup>12</sup> Email communication from the Chamber to the parties and participants on 8 February 2018, at 10:55, directing that any responses to the request be filed by 14 February 2018.

<sup>13</sup> Prosecution response to the “Defence request for admission of additional paragraphs of witness D-0148’s Prosecution Statement pursuant to Rule 68(2)(b)”, ICC-01/04-02/06-2214-Conf, ICC-01/04-02/06-2224-Conf.

seek a variation of the deadline prior to its expiration’;<sup>14</sup> (ii) the Admitted Paragraphs do not constitute a new circumstance meriting an opportunity to make a *de novo* request since their admission was sought in the Prosecution’s response to the Defence’s Rule 68(2)(b) Request,<sup>15</sup> and could have been addressed by the Defence in its request for leave to reply;<sup>16</sup> (iii) there is no decision available for reconsideration since the Chamber never ruled, either at the request of the parties or *proprio motu*, on the admission of the Additional Paragraphs;<sup>17</sup> and (iv) should the Chamber consider that the decision to admit the Admitted Paragraphs is a decision implicitly rejecting the admission of the Additional Paragraphs, the standard for reconsideration is nevertheless not met.<sup>18</sup>

4. Separately, the Prosecution argues, *inter alia*, that admitting the Witness’s evidence pursuant to Rule 68(2)(b) does not serve the interests of justice, and that even by admitting the Additional Paragraphs, which were not shown to the Witness for her Defence Statement, ‘the doubts arising from [her] evidence will remain’.<sup>19</sup>
5. On 16 February 2018, the Defence sought leave to reply to the Response (‘Request for Leave to Reply’).<sup>20</sup>

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<sup>14</sup> Response, ICC-01/04-02/06-2224-Conf, paras 17-19, referring to an email from the Chamber to the parties and participants on 3 October 2017, at 10:17, in which the Chamber directed that any Defence requests pursuant to Regulation 35(2) and/or Rule 68(2) were to be submitted by Monday, 16 October 2017.

<sup>15</sup> Prosecution response to the Defence “Request to admit prior recorded testimony of eleven witnesses under Rule 68 (2)”, 16 October 2017, ICC-01/04-02/06-2066-Conf, 27 October 2017, ICC-01/04-02/06-2087-Conf. A public redacted version was filed on 12 December 2017 as ICC-01/04-02/06-2087-Red.

<sup>16</sup> Response, ICC-01/04-02/06-2224-Conf, paras 20-22, referring to Request for leave to reply to the “Prosecution response to the Defence ‘Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)’”, ICC-01/04-02/06-2066-Conf, 2 November 2017, ICC-01/04-02/06-2095-Conf.

<sup>17</sup> Response, ICC-01/04-02/06-2224-Conf, para. 23.

<sup>18</sup> Response, ICC-01/04-02/06-2224-Conf, paras 24-25.

<sup>19</sup> Response, ICC-01/04-02/06-2224-Conf, para. 27.

<sup>20</sup> Request for leave to reply to the “Prosecution response to the ‘Defence request for admission of additional paragraphs of Witness D-0148’s Prosecution Statement pursuant to Rule 68(2)’”, ICC-01/04-02/06-2214-Conf, ICC-01/04-02/06-2232-Conf.

## II. Analysis

6. As a preliminary matter, with reference to the Request for Leave to Reply, the Chamber considers that it would not be assisted by further submissions on any of the issues identified by the Defence, and therefore rejects the Request for Leave to Reply.
7. As a further preliminary issue, the Chamber notes that the Request is related to the Rule 68(2) Decision which was issued on 4 December 2017 upon determination of the Defence's Rule 68(2) Request filed in line with the 16 October 2017 time limit for the filing of such requests set by the Chamber. Accordingly, although it would have been preferable for the Request to be filed closer in time to the issuance of the Rule 68(2) Decision to which it relates,<sup>21</sup> the Chamber considers the present Request not to constitute an independent Rule 68(2)(b) request, and therefore, the Prosecution's submission that the Request is 'nearly four months late' and should be rejected for failure to comply with the 16 October 2017 deadline for the submission of applications pursuant to Rule 68(2)(b) is inapposite.
8. Further, concerning the Prosecution's submission that the Defence was aware of the Prosecution's request for admission of the Admitted Paragraphs by virtue of the Prosecution's response to the Rule 68(2)(b) Request, the Chamber concurs that the Defence could have sought admission of the Additional Paragraphs at that time. However, noting that a Defence request for leave to reply was rejected in relation to issues pertaining to the Witness,<sup>22</sup> as well as the limited

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<sup>21</sup> The Request was filed two months after the issuance of the Rule 68(2)(b) Decision.

<sup>22</sup> Email communication from the Chamber to the parties and the participants on 6 November 2017, at 12:16. Therein, the Chamber stated, 'Pursuant to Regulation 24(5) of the Regulations of the Court, the Chamber hereby grants the Request [for Leave to Reply] in part. The Defence is granted leave to reply to issues (d) and (e) in paragraph 9, and issue (a) in paragraph 21 of the Request [for Leave to Reply]. The Chamber does not consider that it would be assisted by further submissions on the other issues identified.'

scope of the Request, the Chamber finds it appropriate and in the interest of justice to consider the Request on its merits.

9. In this regard, the Chamber agrees with the Prosecution's submission that, absent any prior decision on the admissibility of the Additional Paragraphs, the Request should not be treated as a request for reconsideration.
10. Accordingly, and having already determined that the admission of the Witness's prior recorded testimony under Rule 68(2)(b) is appropriate, with the Admitted Paragraphs being admitted to 'better assess' the Witness's evidence,<sup>23</sup> the Chamber has considered the Additional Paragraphs with a view to determining whether their admission would further assist the Chamber in its assessment of the Witness's evidence.
11. In this respect, the Chamber notes that the Additional Paragraphs include information on the Witness's identity and professional background,<sup>24</sup> general information on the provision of birth certificates by the medical institution at which the Witness works,<sup>25</sup> the context of her interview with the Prosecution,<sup>26</sup> and her comments on the format of the birth certificate pertaining to Witness P-0883, which contains the Witness's handwriting and signature, but was filled out by another person,<sup>27</sup> as well as the Witness's comments on the date of issuance of the document and her general conclusion as to the authenticity of the document.<sup>28</sup> As such, the Chamber finds that the Additional Paragraphs directly relate to issues addressed in the Admitted Paragraphs as well as in the Defence Statement, and that their admission would therefore further assist the Chamber in its evaluation of the Witness's evidence. In addition, the Chamber

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<sup>23</sup> Rule 68(2)(b) Decision, ICC-01/04-02/06-2141-Red, para. 52.

<sup>24</sup> DRC-OTP-2097-0455, para. 10.

<sup>25</sup> DRC-OTP-2097-0455, para. 11.

<sup>26</sup> DRC-OTP-2097-0455, para. 12.

<sup>27</sup> DRC-OTP-2097-0455, paras 13 and 17.

<sup>28</sup> DRC-OTP-2097-0455, paras 18-19.

notes the limited scope of the information included in the Additional Paragraphs, and emphasises that this admission is without prejudice to the weight to be attached to the Witness's prior recorded testimony in its overall assessment of the evidence presented in this case. For these reasons, the Chamber considers it appropriate to admit the Additional Paragraphs.

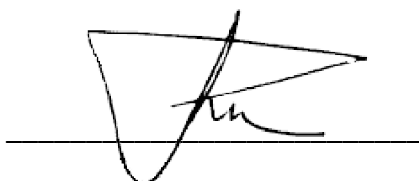
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request for Leave to Reply;

**GRANTS** the Request; and

**DIRECTS** the Registry to update the eCourt metadata of item DRC-OTP-2097-0455 so as to reflect the admission status of the Additional Paragraphs and the fact that they were admitted pursuant to the present decision.

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



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Chang-ho Chung**

Dated this 20 February 2018

At The Hague, The Netherlands