

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 21 September 2015

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

**Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for
admission of prior recorded testimony of Witness P-0931**

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 Luc Boutin

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**

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 'Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931'.

I. Procedural history

1. On 24 August 2015, the Prosecution filed a request seeking that the Chamber admit prior recorded testimony of Witness P-0931, Mr Garretón, as well as other associated documents.¹ The Prosecution seeks to rely on Mr Garretón, who previously testified in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga case'), as an expert on context in the present proceedings.²
2. On 8 September 2015, the Defence filed its response to the Request ('Response').³ It does not oppose the introduction of Witness P-0931's prior recorded testimony or the associated documents sought to be admitted,⁴ but i) opposes the exclusion of one specific excerpt of transcript from the material admitted;⁵ ii) 'insists on the necessity for the Prosecution to ask only general and short questions to Witness P-0931';⁶ and iii) submits that the Chamber's decision should be subject to Mr Garretón not objecting to the introduction of his prior recorded testimony and associated documents at the beginning of his in-court testimony.⁷

¹ Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Expert Witness P-0931, ICC-01/04-02/06-793 with nine public Annexes.

² Request, ICC-01/04-02/06-793, para. 1.

³ Response on behalf of Mr Ntaganda to "Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Expert Witness P-0931", ICC-01/04-02/06-809.

⁴ Response, ICC-01/04-02/06-809, para. 10 and page 6.

⁵ Response, ICC-01/04-02/06-809, paras 11 and 12.

⁶ Response, ICC-01/04-02/06-809, para. 9.

⁷ Response, ICC-01/04-02/06-809, para. 8 and page 6.

3. On 14 September 2015, the Chamber granted a Prosecution request seeking leave to reply to the Response in relation to: i) the Defence's submissions that one specific excerpt of the relevant transcript should not be excluded from the material admitted in the present case; and ii) the scope of the calling party's supplemental examination.⁸ As ordered, the Prosecution's reply was filed on 17 September 2015.⁹
4. On 15 September 2015, having been invited to do so by the Chamber in its 'Decision on the conduct of proceedings',¹⁰ the Defence filed its 'Notice on behalf of Mr Ntaganda setting out the position of the Defence on proposed Prosecution expert witnesses',¹¹ in which it, *inter alia*, indicated that it does not challenge Mr Garretón's qualification as an expert.¹²

II. Analysis and conclusions

5. From the outset, the Chamber takes note that the Defence does not challenge Mr Garretón's qualification as an expert.¹³ Having further considered his qualification, as well as his field of expertise,¹⁴ the Chamber finds that Mr Garretón's testimony is likely to be relevant to the present case and decides that he may appear before it as an expert witness.
6. As to the Request, 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

⁸ Prosecution request for leave to reply to the Defence's "Response on behalf of Mr Ntaganda to 'Prosecution application under Rule 68(3) to admit the prior recorded testimony and associated documents of Expert Witness P-0931'", ICC-01/04-02/06-809, 11 September 2015, ICC-01/04-02/06-819; and Email from Legal Officer of the Chamber to the parties on 14 September 2015 at 16:39.

⁹ Prosecution reply to the "Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Expert Witness P-0931'", ICC-01/04-02/06-809, 17 September 2015, ICC-01/04-02/06-833 ('Reply').

¹⁰ 2 June 2015, ICC-01/04-02/06-619, para. 38. *See also*, Email from Chamber to parties on 13 August 2015 at 8:52.

¹¹ 15 September 2015, ICC-01/04-02/06-826-Conf ('Defence Notice'). A public redacted version was filed on the same day (ICC-01/04-02/06-826-Red).

¹² Defence Notice, ICC-01/04-02/06-826-Red, para. 6.

¹³ Defence Notice, ICC-01/04-02/06-826-Red, para. 6.

¹⁴ DRC-OTP-2083-0189: Curriculum Vitae of Roberto Garretón M.

is present before the Chamber: i) where the individual does not object to the introduction of its prior recorded testimony; and ii) if both parties and the Chamber have an opportunity to examine the witness. The Chamber notes that Rule 68(3) of the Rules constitutes an exception to the principle of the primacy of orality before the Court.¹⁵ The Chamber considers that a cautious, case-by-case assessment is therefore required, and the impact of any such request on the rights of an accused and the fairness of the proceedings more generally should be considered.¹⁶

7. The Chamber further recalls that, in its 'Decision on the conduct of proceedings', 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 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.'¹⁷ In the present circumstances, noting that it will benefit both parties to the procedure, and especially since the Defence i) does not challenge Mr Garretón's qualification as an expert;¹⁸ ii) does not oppose the Request;¹⁹ and iii) acknowledges the relevance of his report to the present proceedings,²⁰ the Chamber decides to render a preliminary ruling relating to the Request at this time.

8. Noting that the introduction of the evidence under Rule 68(3) has the potential of significantly enhancing the expeditiousness of the proceedings, and recalling that the Defence does not oppose the Request, the Chamber finds that, in

¹⁵ Article 69(2) of the Statute. See also *The Prosecutor v Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', ICC-01/05-01/08-1386 OA5 OA6 ('Bemba Appeals Judgment'), paras -77.

¹⁶ Bemba Appeals Judgment, ICC-01/05-01/08-1386 OA5 OA6, para. 78.

¹⁷ Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 43.

¹⁸ Defence Notice, ICC-01/04-02/06-826-Red, para. 6.

¹⁹ Response, ICC-01/04-02/06-809, para. 10 and page 6; and Defence Notice, ICC-01/04-02/06-826-Red, para. 5.

²⁰ Defence Notice, ICC-01/04-02/06-826-Red, para. 6.

principle, the application of Rule 68(3) would be appropriate and consistent with the rights of the accused and the fairness of the proceedings in this instance. This is subject to Witness P-0931, who is scheduled to testify in-court during the first evidentiary block, agreeing before the Chamber to the introduction of the prior recorded testimony and attesting to its accuracy.

9. The Chamber now turns to the Defence's submissions that an excerpt of the relevant transcript from the *Lubanga* case (Annex C to the Request) should not be excluded from the material admitted in the present case as it is 'essential to understanding the overall context of Witness P-0931's prior testimony'.²¹ Having considered the contested excerpt, the Chamber agrees with the Defence in that it *relates* to Mr Garretón's testimony, but finds that it is not a part thereof. The Chamber is therefore of the view that the contested excerpt, which consists of submissions from a legal representative from the *Lubanga* case, should not be introduced pursuant to Rule 68(3) of the Rules.

10. With regard to any supplemental examination by the Prosecution, the Chamber recalls its commitment to 'actively ensure the efficiency and focus of the examination of witnesses'.²² Accordingly, and mindful of the Defence's concern that lengthy examination by the calling party runs the risks of eliminating the benefit of reliance on Rule 68(3) of the Rules, the Chamber recalls that it will intervene if necessary, including to narrow the scope of the examination-in-chief so as to avoid undue repetition with material already introduced. In case the Defence objects to a given line of questioning or the overall time spent by the Prosecution for its supplemental examination, a decision as to the appropriateness of the questioning will be rendered by the Chamber on a case-by-case basis. The Chamber therefore finds that the Prosecution may conduct a brief supplementary examination of Mr Garretón.

²¹ Response, ICC-01/04-02/06-809, para. 12 referring to Annex C, page 11, line 25 to page 14, line 4.

²² Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 23.

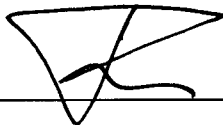
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that Mr Garretón may testify as an expert witness in the present case;

DECIDES that the use of Rule 68(3) of the Rules is, in principle, appropriate in the this instance for the admission of the prior recorded testimony and associated exhibits identified in the Request; and

DEFERS its final ruling on the Request until the conditions set out at paragraph 8 of the present decision have been satisfied.

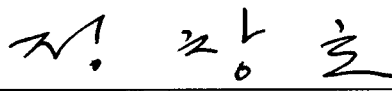
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 21 September 2015

At The Hague, The Netherlands