

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/04-02/06
Date: **2 November 2016**

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

Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness [REDACTED] and associated material, 2 November 2016

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 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**

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 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 [REDACTED] and associated material.'

I. Procedural history and submissions

Prosecution Request

1. On 10 October 2016, the Office of the Prosecutor ('Prosecution') filed a request seeking that the Chamber admit prior recorded testimony of Witness [REDACTED] ('Witness'), [REDACTED], consisting of [REDACTED] of the Witness's testimony [REDACTED] and one paragraph from a previous statement the Witness gave in 2005, as well as three photographs referred to in that paragraph ('Request').¹
2. The Prosecution submits that admission of the prior recorded testimony and associated documents is not prejudicial to the rights of the accused, because the Witness will be present before the Chamber, providing the parties, participants and the Chamber an opportunity to examine the Witness.² The Prosecution further submits that the testimony is 'relevant and reliable... and [the Witness] will be asked to attest to [its] accuracy'.³
3. In the event the Request is granted, the Prosecution seeks leave to conduct a supplemental examination of the Witness in order to elicit further evidence

¹ Prosecution application under rule 68(3) to admit Witness [REDACTED] prior recorded testimony and associated material, ICC-01/04-02/06-1575-Conf; with confidential annexes A-J. A public redacted version was filed on 14 October 2016 (ICC-01/04-02/06-1575-Red).

² Request, ICC-01/04-02/06-1575-Red, para. 16.

³ Request, ICC-01/04-02/06-1575-Red, para. 4. *See also* paras 15-16.

[REDACTED] that was not, or was only briefly, addressed [REDACTED].⁴ It undertakes to 'ensure that the witness is not merely asked to repeat the information which he already provided in his prior recorded testimony'.⁵ The Prosecution estimates that this will reduce the examination-in-chief by two hours.⁶

Defence Response

4. On 21 October 2016, the defence team for Mr Ntaganda ('Defence') filed its response to the Request ('Response').⁷ The Defence does not oppose the admission of [REDACTED] the Witness's prior testimony [REDACTED] pursuant to Rule 68(3), but does oppose the admission of the single paragraph from the Witness's 2005 statement and the three photographs referred to in that paragraph.⁸ The Defence also opposes the time sought by the Prosecution to conduct its supplemental examination.⁹
5. The Defence opposes the admission of the paragraph from the Witness's 2005 statement and associated photographs on the basis that: (i) the information, in a single paragraph and concerning a self-contained event, would not take long to elicit directly from the Witness and therefore the admission pursuant to Rule 68(3) of the Rules would not substantially expedite proceedings;¹⁰ (ii) the statement contains no record of questions and answers and thus provides no assurance that the information was not elicited by way of leading questioning;¹¹ and (iii) the subject of the paragraph is a matter on which spontaneous

⁴ Request, ICC-01/04-02/06-1575-Red, paras 5 and 18.

⁵ Request, ICC-01/04-02/06-1575-Red, para. 19.

⁶ Request, ICC-01/04-02/06-1575-Red, para. 6. The Prosecution estimates half an hour for the formalities associated with admitting the Witness's prior recorded testimony and related materials pursuant to Rule 68(3) and one and a half hours for supplemental examination.

⁷ Response on behalf of Mr Ntaganda to "Prosecution application under Rule 68(3) to admit Witness [REDACTED] prior recorded testimony and associated material," ICC-01/04-02/06-1589-Conf.

⁸ Response, ICC-01/04-02/06-1589-Conf, para. 1.

⁹ Response, ICC-01/04-02/06-1589-Conf, paras 2 and 10.

¹⁰ Response, ICC-01/04-02/06-1589-Conf, para. 4.

¹¹ Response, ICC-01/04-02/06-1589-Conf, para. 1.

recollection by the Witness, under the Trial Chamber's direct observation, could be helpful for assessing reliability and credibility.¹² The Defence also submits that admission of two of the three photographs referred to in the statement is otherwise objectionable on the basis that they contain annotations corresponding to information provided by a non-trial witness.¹³

6. The Defence opposes the time sought by the Prosecution for supplemental examination on the basis that the witness gave comprehensive testimony [REDACTED] and therefore, '[t]wo hours of direct examination, rather than being necessary to adduce the additional testimony of relevance to this case, will likely encourage repetitive, leading and suggestive questioning'.¹⁴ It submits that, having chosen to tender the prior recorded testimony of the Witness pursuant to Rule 68(3), which also confers certain benefits to the tendering party, the Prosecution should not at the same time be permitted to engage in a 'lengthy re-direct examination'.¹⁵ It requests that the time for supplemental examination be limited to one hour.¹⁶

II. Analysis

7. 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

¹² Response, ICC-01/04-02/06-1589-Conf, paras 1 and 4.

¹³ Response, ICC-01/04-02/06-1589-Conf, para. 6.

¹⁴ Response, ICC-01/04-02/06-1589-Conf, para. 2. It is noted that the Prosecution is seeking one and a half hours for supplemental examination in the Request (Request, ICC-01/04-02/06-1575-Red, para. 5).

¹⁵ Response, ICC-01/04-02/06-1589-Conf, para. 7.

¹⁶ Response, ICC-01/04-02/06-1589-Conf, para. 10.

that it will consider 'the impact of any such request on the rights of an accused and the fairness of the proceedings more generally'.¹⁷

8. 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 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.'¹⁸ In the present circumstances, noting the Defence objection to admission of certain of the materials, the Chamber decides to render a preliminary ruling on the Request.

[REDACTED] Witness's prior testimony [REDACTED]

9. The Chamber notes that the introduction of evidence under Rule 68(3) has the potential to significantly enhance the expeditiousness of the proceedings, and recalls that the Defence does not oppose the admission of [REDACTED] the Witness's prior testimony [REDACTED]. The Chamber has nonetheless proceeded to carefully consider the nature and content of the tendered material, and notes, *inter alia*, that it was [REDACTED], does not address the direct acts and conduct of Mr Ntaganda and is, in part, of a similar nature to, or corroborated by, other evidence which has previously been heard in the case or which is expected to be heard. The Chamber finds that, in 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 the Witness agreeing before the Chamber to the introduction of the prior recorded testimony and attesting to its accuracy.

¹⁷ 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).

¹⁸ Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 43.

Single paragraph of the Witness's 2005 statement and associated photographs

10. The Chamber now turns to the issue of admission of the single paragraph of the Witness's 2005 statement and three associated photographs. In making its case-by-case assessment whether to use Rule 68(3) of the Rules in this instance, the Chamber recalls that it has previously admitted extracts of statements, with documents referred to therein, pursuant to Rule 68(3).¹⁹ However, the Chamber observes that the extract sought to be admitted is a short paragraph only, regarding a self-contained issue. In these circumstances, the Chamber considers that application of the rule is of limited benefit and that it would be more appropriate for this evidence to be elicited directly from the Witness and for the photographs to be sought to be tendered during the Witness's in-court testimony.

11. Given its decision on this issue, it is not necessary for the Chamber to address the Defence's objection to the admission of two of the photographs referred to in the statement on the basis that they contain annotations corresponding to information provided by a non-trial witness. Nonetheless, by way of guidance, the Chamber recalls that it has previously indicated that, where annotations have not been made by the witness him- or herself, and there is no basis for the witness otherwise being able to testify in relation to them, such annotations should not be shown to the witness and the document, if admitted, would be admitted without annotations.²⁰ As a practical matter, the party using such materials should therefore either provide an unannotated or redacted version, or clearly indicate in advance to the Court Officer where a document contains such annotations, in order to avoid it being prematurely or inadvertently displayed on the witness's screen.

¹⁹ See e.g. Transcript of hearing dated 9 September 2016, ICC-01/04-02/06-T-127-ENG ET WT page 72, lines 10-18.

²⁰ See e.g. Transcript of Hearing dated 28 January 2016, ICC-01/04-02/06-T-58-Red-ENG CT WT, page 5, lines 3-7.

Time for supplemental examination

12. Although the Chamber notes the Prosecution's undertaking to limit its supplemental examination to charges not previously explored in detail in the Witness's testimony [REDACTED], the Chamber observes [REDACTED] was conducted [REDACTED]. Based on the available materials, it appears to the Chamber that the Witness would only be in a position to provide a limited amount of further relevant evidence.
13. In the circumstances, the Chamber permits the Prosecution, in principle, one hour to conduct the formalities associated with the admission of the [REDACTED] pursuant to Rule 68(3) as well as its supplemental examination of the Witness. The Chamber also recalls its commitment to 'actively ensure the efficiency and focus of the examination of witnesses'²¹ and notes that it will intervene if necessary, including to narrow the scope of the examination-in-chief so as to avoid any undue repetition with material already introduced.
14. The Chamber further indicates that the Defence will be strongly encouraged to complete its cross-examination of the Witness within four hours.²²

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that the use of Rule 68(3) of the Rules is, in principle, appropriate for admission of [REDACTED] the Witness's prior testimony [REDACTED] as identified in the Request;

DEFERS its final ruling in respect of the admission of [REDACTED] until the conditions set out in Rule 68(3) of the Rules and at paragraph 9 of the present decision have been satisfied;

²¹ Decision on the conduct of proceedings, 2 June 2015, ICC-01/04-02/06-619, para. 23.

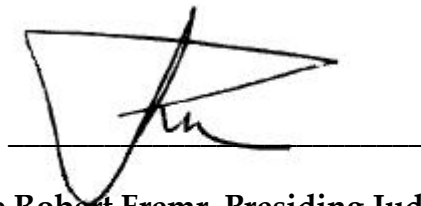
²² The Chamber notes that this time estimate reflects the time which the Prosecution estimated examination-in-chief would take without the application of Rule 68(3) of the Rules and considers it an appropriate guide for cross-examination in this instance.

REJECTS the admission, pursuant to Rule 68(3) of the Rules, of the single paragraph of the Witness's 2005 statement and, without prejudice, three associated photographs identified in the Request;

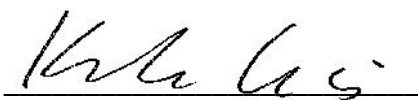
DECIDES that the Prosecution is, in principle, permitted one hour to conduct the formalities associated with the admission of the [REDACTED] pursuant to Rule 68(3) as well as its supplemental examination of the Witness, on the basis set out in paragraph 13 of the present decision; and

DIRECTS the Defence to file a public redacted version of the Response (ICC-01/04-02/06-1589-Conf) within two weeks from the date of this decision.

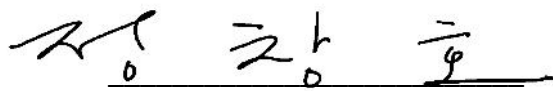
Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 2 November 2016

At The Hague, The Netherlands