

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 20 December 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**

**Public redacted version of "Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0773", 4 November 2016, ICC-01/04-02/04-1611-Conf**

**Source:** Office of the Prosecutor

**Document 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 the Defence**

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**

Ms Paolina Massidda

**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**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations Section Other**

## Introduction

1. The Prosecution seeks the conditional admission of the prior recorded testimony of Witness P-0773, comprising the entirety of her written statement,<sup>1</sup> under rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”).
2. The prior recorded testimony of Witness P-0773 is relevant to the charges of conscription and use of child soldiers and bears sufficient probative value. It goes to proof of a matter other than the acts and conduct of the Accused as required by the Rule.
3. Witness P-0773’s prior testimony is corroborative in nature of witnesses who will give oral evidence on similar facts. Witness P-0773’s prior testimony is confined to corroborating the expected evidence of *viva voce* Witness P-0758, and Witness P-0761’s,<sup>2</sup> in addition to documentary evidence.
4. All parties will benefit from an expedited presentation of the Prosecution’s case. Admitting P-0773’s prior recorded testimony under rule 68(2)(b) therefore best serves the interests of justice and the determination of the truth.
5. The cumulative nature and limited purpose of Witness P-0773’s evidence is such that her appearance for cross-examination is unnecessary. Granting the Request would not cause any unfair prejudice to the Accused, who remains in a position to challenge the witness’s evidence through means other than her cross-examination.

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<sup>1</sup> Annex 1: DRC-OTP-2057-0127.

<sup>2</sup> For whom an application to admit his prior recorded testimony under rule 68(3) is pending before the Chamber, ICC-01/04-02/06-1609.

6. The Prosecution seeks the introduction of this material on a condition basis, subject to the subsequent submission of Witness P-0773's certified declaration, pursuant to rule 68(2)(b)(ii) and (iii).

### **Confidentiality**

7. This filing is classified as "Confidential", as it refers to information that could reveal P-0773's identity to the public. The Prosecution will file a public redacted version.

### **Procedural Background**

8. On 2 June 2015, in its Decision on the conduct of proceedings, the Chamber held that Parties that intend to request admission of prior recorded testimony pursuant to Rule 68(2) "shall file the application together with copies of the previously recorded testimony and any supporting material, and [...] shall identify precisely which passages it wishes to tender into evidence".<sup>3</sup>
9. On 7 October 2016, the Prosecution submitted its list of witnesses for the 7<sup>th</sup> block of evidence.<sup>4</sup> It further submitted an amended list on 14 October 2016.<sup>5</sup>
10. On 17 October 2016, the Chamber recommended that the Prosecution consider whether rule 68(2)(b) could be used to facilitate submission of the evidence of, *inter alia*, Witness P-0773.<sup>6</sup>
11. On 19 October 2016, the Chamber indicated that rule 68(2) applications "may be made in advance of the required accompanying declarations having been

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<sup>3</sup> ICC-01/04-02/06-619, para.55.

<sup>4</sup> Email from the Prosecution to the Chamber, 7 October 2016, 9h53.

<sup>5</sup> Email from the Prosecution to the Chamber, 14 October 2016, 13h56.

<sup>6</sup> Email from the Chamber to the Parties and participants, 17 October 2016, 14h47.

obtained, while noting that any favourable ruling on such applications could only be made on a conditional basis”.<sup>7</sup>

### **Prosecution’s Submissions**

**(a) P-0773’s statement to the Prosecution constitutes a “prior recorded testimony” in the sense of Rule 68(2)**

12. P-0773’s written statement to the Prosecution, recorded in compliance with rule 111 of the rule constitutes a “prior recorded testimony”.<sup>8</sup>

**(b) P-0773’s prior recorded testimony goes to proof of a matter other than the acts and conduct of the Accused**

13. P-0773’s prior recorded testimony concerns [REDACTED], conscription and use to participate actively in hostilities, as well as [REDACTED], by the UPC and the impact of those crimes on Witness P-0758. It does not relate to the acts and conduct of Bosco Ntaganda.
14. The acts and conduct of the Accused relate narrowly to his deeds and behaviour. Other international tribunals have construed the legal expression “acts and conduct” to refer plainly to the “deeds and behaviour of the

<sup>7</sup> ICC-01/04-02/06-1588, para.7.

<sup>8</sup> See ICC-01/05-01/08-1386, OA5 OA6, paras.79-81, confirming that written witness statements can be introduced as “prior recorded testimony” (stating that “[w]itness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met.”). See also ICC-01/09-01/11-1938-Red-Corr, paras.30-33, analysing the term “prior recorded testimony” in light of the Rules’ *travaux préparatoires*, the Court’s prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para.136; ICC-01/05-01/08-886, para.6; ICC-01/04-01/06-1603, para.18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362. See for example: ICC-01/04-01/06-1603, paras.18-19; ICC-01/04-01/07-2635. ICC-01/04-01/06-1603, paras.18, 25-26; ICC-01/04-01/06-1399, paras.40-42; ICC-01/04-01/07-412. ICC-02/11-01/15-744 OA8, paras. 6, 30-31, 48, 63-65, 68-76, 85, 87-88, 95-103. ICC-01/04-01/06-1603, paras.18-19. ICC-01/04-01/07-2635, para.44. ICC-01/04-02/06-1205, (referring throughout the Decision to the ‘prior recorded testimony’ of P-0103). ICC-01/04-01/06-1603, paras.18, 25-26; ICC-01/04-01/06-1399, paras.40-42; ICC-01/04-01/07-412. ICC-02/11-01/15-744 OA8, paras. 6, 30-31, 48, 63-65, 68-76, 85, 87-88, 95-103.

accused”,<sup>9</sup> such that they seek to establish the accused’s responsibility under any applicable mode of liability.<sup>10</sup> Importantly, acts and conduct of the accused must be distinguished from acts and conduct of others who commit crimes for which the accused is alleged to be responsible.<sup>11</sup> Proof of the latter is admissible under rule 68(2)(b).

**(c) The prior recorded testimony is reliable**

15. The prior recorded testimony bears sufficient indicia of reliability. Witness P-0773’s written statement (i) is signed by the witness, along with an acknowledgment that the content is true and accurate to the best of P-0773’s knowledge and recollection; (ii) was given voluntarily; (iii) was taken by Prosecution investigators in compliance with the requirements of rule 111, and with the assistance of an interpreter who certified the witness’s comprehension; (iv) is internally consistent and coherent; and (v) the Prosecution intends to submit a certified declaration from P-0773, in accordance with rule 68(2)(b) (ii) and (iii).
  
16. The following factors also support the reliability of the evidence:

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<sup>9</sup> “The phrase ‘acts and conduct of the accused’ in rule 92*bis* is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so”, see *Prosecutor v. Miloševi*, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92 *bis*, 21 March 2002, para.22 (“*Miloševi* Decision”); *Prosecutor v. Karadži*, IT-95-5/18-PT, Decision on the Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009, para.5 (“*Karadži* Decision”); *Prosecutor v. Hadzi*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *bis* and Prosecution Motion to Admit GH-139’s Evidence Pursuant to Rule 92 *bis*, 24 January 2013, para.15 (“*Hadzi* Decision”).

<sup>10</sup> *Karadži* Decision, para.5; *Prosecutor v. Gali*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para.10 (“*Gali* Decision”); *Hadzi* Decision, para.15; *Prosecutor v. Luki and Luki*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008, para.17 (“*Luki* Decision”).

<sup>11</sup> *Karadži* Decision, para.5; *Gali* Decision, para.9; *Hadzi* Decision, para.15; *Prosecutor v. Milutinovi et al.*, IT-05-87-PT, Decision on Prosecution Rule 92*bis* Motion, 4 July 2006, para.6; *Luki* Decision, para.17; *Miloševi* Decision, para.22.

(i) P-0773 is well-placed to provide evidence on the year of birth of [REDACTED], Witness P-0758, [REDACTED] after Witness P-0758 [REDACTED] the UPC, and the impact of the events on Witness P-0758.

(ii) P-0773's prior recorded testimony relates events that are consistent<sup>12</sup> with accounts of Witnesses P-0758 and P-0761. To the extent that there is some degree of inconsistency between the accounts, they may be explored by the Defence in the cross-examinations of P-0758 and P-0761, used in closing submissions or explained by the distance of witness P-0773 to certain events, or her basis of knowledge; but do not cast doubt as to the reliability of her overall evidence.

17. There is no finite list of possible criteria to determine whether an exhibit or prior recorded testimony should be admitted as evidence or the factors that inform a review of the reliability of the document.<sup>13</sup> Absence of certain indicia of reliability may be considered when assessing the weight of that evidence but should not be a reason for excluding the evidence.<sup>14</sup> It is only necessary to establish *prima facie* - not definitive - proof of reliability based on sufficient indicia.<sup>15</sup> The Chamber's assessment of indicia of reliability requires an exercise of discretion, based on the circumstances of the case.<sup>16</sup>

<sup>12</sup> See e.g. *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Admission of Evidence of Radislav Krstić Pursuant to Rule 92quater, 26 November 2013, para.12.

<sup>13</sup> ICC-01/04-01/06-1399, para.29.

<sup>14</sup> See e.g. *Prosecutor v Popović et al*, IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence pursuant to rule 92quater, 21 April 2008, para.41, citing *Prosecutor v Rasim Deli*, IT-04-83-PT, Decision on Prosecution Motion for Admission of evidence pursuant to rule 92quater, 9 July 2007 and *Prosecutor v Miluntinović et al*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92quater, 16 February 2007.

<sup>15</sup> ICC-01/09-01/11-1353, para.15. See also e.g. *Prosecutor v Popović et al*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para.22: "[p]rima facie proof of reliability on the basis of sufficient indicia is enough at the admissibility stage."

<sup>16</sup> See e.g. *Prosecutor v Prlić et al*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para.27.

18. P-0773's prior recorded testimony bears *prima facie* indicia of reliability because it is truthful, authentic, consistent, and was provided voluntarily. There is no indication of a motive for P-0773 to fabricate or distort her account.

**(d) The evidence is relevant and has *prima facie* probative value**

19. The Chamber is empowered to admit evidence it considers relevant to the determination of the truth under articles 69(3) and (4) and 64(9)(a) of the Statute and rule 63(2).<sup>17</sup> Evidence is deemed relevant if it tends to prove or disprove a material issue or fact in question, making it more or less probable.<sup>18</sup>
20. P-0773's prior statement is relevant to the charges of conscription and use of child soldiers,<sup>19</sup> and to corroborate the account of the crime base *viva voce* witness and direct victim, P-0758.
21. As shown above, the prior recorded testimony has *prima facie* probative value because it bears sufficient indicia of reliability. Additionally, the prior recorded testimony has *prima facie* probative value as it is generally consistent with accounts of Witnesses P-0758 and P-0761.

**(e) The prior recorded testimony is corroborative in nature**

22. As envisaged by rule 68(2)(b), the purpose of the prior testimony of Witness P-0773 is to corroborate evidence of other witnesses who will provide oral testimony on the same events, namely Witness P-0758's [REDACTED], conscription and use to participate actively in hostilities by the UPC. Witnesses P-0758 and P-0761, [REDACTED], will testify on those events during the upcoming evidentiary block, and documentary evidence will be presented to support the account of Witness P-0758.

<sup>17</sup> ICC-01/04-01/06-1399, para.24; ICC-01/04-01/06-2360, para.23.

<sup>18</sup> ICC-01/09-01/11-1353, para.15; ICC-01/04-01/07-2635, para.34.

<sup>19</sup> ICC-01/04-02/06-458-AnxA, counts 14 and 16.



**(f) The interests of justice are best served by the admission of the prior recorded testimony**

23. Admitting the rule 68(2)(b) prior recorded testimony advances the interests of justice and contributes to a fair and expeditious trial by enabling the presentation of evidence in a more concise and streamlined manner without causing undue prejudice to the fair trial rights of the Accused. This aligns with the stated goal behind the rule's adoption which was to "reduce the length of ICC proceedings and streamline evidence presentation."<sup>20</sup> Their admission under rule 68 complies with article 51(4) of the Statute.
24. By its terms, rule 68(2)(b) does not *per se* unfairly prejudice the Defence by permitting the introduction of uncross-examined evidence unrelated to the acts and conduct of an accused. That both parties can avail themselves of this provision further underscores its inherent neutrality and advances the interests of justice.

**(g) Admission of the prior recorded testimony causes no undue prejudice to the Accused**

25. The inability to cross-examine P-0773 on her evidence, and the admission of the evidence at this stage of the proceedings, does not deprive the Accused of his right and opportunity to challenge the evidence. The Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the prior recorded testimony, lead contradictory evidence during the Defence case, or - to the extent that discrepancies exist with other evidence - use her prior testimony in closing argument.

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<sup>20</sup> Assembly of State Parties, Study Group on Governance, Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, para. 11.

## Request

26. For all the foregoing reasons, the Prosecution requests that the Chamber conditionally admit the prior recorded testimony of P-0773, pending submission of her certified declaration.



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**Fatou Bensouda**  
**Prosecutor**

Dated this 20<sup>th</sup> day of December 2016  
At The Hague, The Netherlands