

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 27 February 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

**Public redacted version of 'Decision on admission of prior recorded testimony of
Witness P-0773 under Rule 68', 2 December 2016, ICC-01/04-02/06-1667-Conf**

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**

Ms Paolina Massidda

**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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2) and (9)(a), 67, and 69(2) and (4) of the Rome Statute ('Statute') and Rules 63(2), 67 and 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68'.

I. Procedural history

1. On 14 October 2016,¹ the Office of the Prosecutor ('Prosecution') provided its Updated Forthcoming Witness List for the seventh evidentiary block, wherein Witnesses P-0773 and P-0761 (respectively, 'P-0773' and 'P-0761') were scheduled to testify before the Chamber.
2. By email of 17 October 2016,² the Chamber recommended 'that the Prosecution consider whether Rule 68(2)(b) could be used to facilitate submission of the evidence' of P-0773 or P-0761 who are [REDACTED] Witness P-0758 ('P-0758'), [REDACTED], also scheduled to testify during the seventh evidentiary block.³
3. On 3 November 2016, the Prosecution requested the Chamber to admit the prior recorded testimony of P-0761,⁴ as well as certain associated material, under Rule 68(3) of the Rules. Further to the Chamber's decision on that request,⁵ P-0761 appeared before the Chamber in person and his prior recorded testimony, together with part of the associated material, was formally admitted pursuant to Rule 68(3) of the Rules.⁶

¹ Email from the Prosecution to the Chamber and participants, at 13:56.

² Email from a Legal Officer of the Chamber to the parties and participants, at 14:47.

³ P-0758 testified before the Chamber on 17, 21 and 22 November 2016.

⁴ Prosecution application under rule 68(3) to admit Witness P-0761's prior recorded testimony and associated material, with confidential annexes A-H, ICC-01/04-02/06-1609-Conf.

⁵ Preliminary ruling on Prosecution request for admission under Rule 68(3) of the prior recorded testimony and associated material of Witness P-0761, 18 November 2016, ICC-01/04-02/06-1640-Conf.

⁶ Transcript of hearing on 22 November 2016, ICC-01/04-02/06-T-162-CONF-ENG ET, pp. 69-70.

4. On 4 November 2016, the Prosecution filed a request for conditional admission of the prior recorded testimony of P-0773 ('Statement'), pursuant to Rule 68(2)(b) of the Rules, pending submission of her certified declaration ('Request').⁷
5. On 21 November 2016, the defence team for Mr Ntaganda ('Defence') filed its response ('Response'),⁸ in which it opposes the Request.⁹

II. Submissions and Analysis

6. Under Rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the prior recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of 'a matter other than the acts and conduct of the accused'; and (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in Rule 68(2)(b)(ii) and (iii) of the Rules. Further, this introduction must not be prejudicial to or inconsistent with the rights of the accused, and, as with the use of other sub-rules of Rule 68, the Chamber considers that a cautious case-by-case assessment is required.
7. For the required accompanying declaration, the Chamber recalls its previous ruling that Rule 68(2)(b) applications 'may be made in advance of [such] declarations having been obtained, while noting that any favourable ruling on such applications could only be made on a conditional basis'.¹⁰

⁷ Prosecution's application under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0773, ICC-01/04-02/06-1611-Conf, with confidential Annex 1. The Statement is contained in confidential Annex 1.

⁸ Response on behalf of Mr Ntaganda to the "Prosecution's motion under rule 68(2)(b) to admit the prior recorded testimony of Witness P-0773", ICC-01/04-02/06-1642-Conf.

⁹ Response, ICC-01/04-02/06-1642-Conf, para. 21.

¹⁰ Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution, 19 October 2016, ICC-01/04-02/06-1588, para. 7.

8. As stated in prior jurisprudence of the Court, a chamber enjoys a certain degree of discretion in its decision of whether to introduce prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, when the relevant requirements are met.¹¹ Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall bear in mind in the exercise of its discretion.¹² These factors include whether the prior recorded testimony: (i) relates to issues that are not materially in dispute; (ii) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (iii) relates to background information; (iv) is such that the interests of justice are best served by its introduction; and (v) has sufficient indicia of reliability.
9. The Chamber has assessed the Statement in light of the aforementioned requirements and factors, and with regard to the parties' submissions which, to the extent they are relevant to contextualise the present decision, are referred to in the paragraphs below.

Whether P-0773's Statement goes to proof of a matter other than the acts and conduct of the accused

10. The Prosecution submits that P-0773's Statement concerns [REDACTED] by the UPC and the impact on her of those crimes, and therefore goes to proof of a matter other than the acts and conduct of the accused, which 'relate narrowly to his deeds and behaviour'.¹³ The Defence avers that the Statement *does* go to proof of the acts and conduct of the accused. Specifically, it is argued that since the Statement implies that P-0758 [REDACTED] at the time of [REDACTED], it is used to prove that Mr Ntaganda observed a person at the UPC training camp

¹¹ See, for example, Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red ('Ongwen Rule 68 Decision'), para. 6; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr ('Bemba et al. Rule 68 Decision'), para. 95.

¹² *Ongwen* Rule 68 Decision, para. 6; *Bemba et al.* Rule 68 Decision, para. 95.

¹³ Request, ICC-01/04-02/06-1611-Conf, paras 13-14.

under the age of 15,¹⁴ and, as such, goes to proof of Mr Ntaganda's 'requisite intent' in relation to a charged crime.¹⁵

11. The Chamber concurs with other trial chambers of this Court that the concept of 'acts and conduct' refers to the personal actions and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.¹⁶
12. The Chamber finds that the only direct reference to the accused in the Statement is of a purely peripheral nature¹⁷ and cannot be considered as going to the acts and conduct of the accused. Regarding the Defence's argument that the Statement goes to proof of Mr Ntaganda's 'requisite intent' in relation to a charged crime, the Chamber notes that the relevant Pre-Trial Brief paragraph referred to by the Defence refers to the testimony of P-0758 to prove Mr Ntaganda's observation of a person under the age of 15 at the UPC training camp, while P-0773's statement appears to serve as corroboration of P-0758's testimony and not to directly prove any acts or conduct of Mr Ntaganda. In these circumstances, the Chamber considers that the alleged connection between the Statement and the acts and conduct of the accused is too tenuous to preclude application of Rule 68(2)(b) on that basis.

¹⁴ The Defence refers to the Prosecution's Pre-Trial Brief, para. 482, citing Witness P-0758's statement to prove that Mr Ntaganda visited UPC/FPLC camps where children were trained and marked their transition from trainees to soldiers by providing uniforms and weapons.

¹⁵ Response, ICC-01/04-02/06-1642-Conf, para. 5.

¹⁶ See for example *Ongwen* Rule 68 Decision, paras 11-12.

¹⁷ See para. 15 of the Statement, when P-0773 refers to her daughters living in an area 'held by gangs of young men that would not allow people to leave' and who 'were from the group of Thomas, Bosco and Kahwa'.

Whether the introduction of the Statement under Rule 68(2)(b) is appropriate in light of the factors listed under Rule 68(2)(b)(i)

13. Noting that the reliability of the Statement is not contested,¹⁸ the Chamber has assessed the Statement in light of the remaining discretionary factors listed under Rule 68(2)(b)(i).
14. The Prosecution contends that the Statement: (i) 'is corroborative in nature' as it serves to corroborate the testimony of Witnesses P-0758 and P-0761 on the same events;¹⁹ and (ii) 'has *prima facie* probative value as it is generally consistent with [the] accounts of Witness P-0758 and P-0761'.²⁰ The Prosecution further argues that admission of the Statement under Rule 68(2)(b) 'advances the interests of justice and contributes to a fair and expeditious trial'²¹ and 'causes no undue prejudice to the Accused', since the Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of the information contained in the Statement, lead contradictory evidence during the Defence case or use the Statement in closing arguments.²²
15. According to the Defence, the discretionary factors listed under Rule 68(2)(b)(i) do not favour the admission of the Statement, given that: (i) the Statement is 'neither cumulative nor corroborative' and contains 'numerous' contradictions, notably when compared with the statements of P-0758 and P-0761;²³ (ii) the Statement refers to matters which are in dispute, in particular [REDACTED];²⁴ (iii) cross-examination of P-0773 is in the interests of justice and necessary to explore potential collusion between Witnesses P-0758 and P-0761, and the

¹⁸ Response, ICC-01/04-02/06-1642-Conf, para. 17.

¹⁹ Request, ICC-01/04-02/06-1611-Conf, para. 22.

²⁰ Request, ICC-01/04-02/06-1611-Conf, paras 16 and 21.

²¹ Request, ICC-01/04-02/06-1611-Conf, para. 23.

²² Request, ICC-01/04-02/06-1611-Conf, para. 25.

²³ Response, ICC-01/04-02/06-1642-Conf, page 5.

²⁴ Response, ICC-01/04-02/06-1642-Conf, paras 12-15.

reliability of the former's statement;²⁵ and (iv) the Prosecution's decision to call P-0761 rather than P-0773 'is not to primarily streamline the proceedings but rather diminish the contradictory information placed in front of the judges' and the Chamber should 'insist that [use of Rule 68(2)(b)] does not have the effect of minimizing the weight that can be accorded to exculpatory evidence'.²⁶

16. The Chamber notes that the Statement comprises a total of five pages, and primarily relates to the [REDACTED], the timing of [REDACTED] by the UPC, and the impact of P-0758's experiences on her mental and physical condition, and therefore appears to be - with respect to the matters addressed - of a cumulative or corroborative nature in relation to the testimony given by P-0758 and P-0761.
17. However, as put forward by the Defence, the Statement contains a number of apparent discrepancies when compared to the testimony of P-0758 and P-0761, including: (i) P-0758's place of residence at the time of [REDACTED]; (ii) [REDACTED]; (iii) the precise place where P-0758's [REDACTED] occurred; and (iv) P-0758's place of residence after she left the UPC.
18. Moreover, without taking any position at this time, the Chamber takes cognisance of the Defence's submission that the description given by P-0773 of the conditions prevailing at the time of P-0758's [REDACTED] may not be consistent with the allegation that P-0758's [REDACTED] occurred in [REDACTED] 2002.²⁷ In this regard, it is further noted that the timing of P-0758's [REDACTED] was challenged during the cross-examinations of P-0758 and P-0761, *inter alia*, on the basis of P-0758's victim application form.

²⁵ Response, ICC-01/04-02/06-1642-Conf, para. 17.

²⁶ Response, ICC-01/04-02/06-1642-Conf, para. 19.

²⁷ Response, ICC-01/04-02/06-1642-Conf, para. 10.

19. In view of the aforementioned issues, the Chamber considers that admitting the Statement without giving the Defence an opportunity to cross-examine P-0773 would cause prejudice to the rights of the accused.

Whether Rule 68(3) would be an appropriate basis for the admission of the Statement

20. Having found that recourse to Rule 68(2)(b) is not appropriate for the admission of the Statement, the Chamber has, although not requested by the Prosecution, proceeded to consider whether Rule 68(3) would provide an appropriate alternative. In this regard, it is recalled that under Rule 68(3) of the Rules, a chamber 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 his or her 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 that introduction of the prior recorded testimony must not be prejudicial to or inconsistent with the rights of the accused and ‘the fairness of the proceedings more generally’.²⁸
21. In this regard, the Chamber notes that the Statement is intended to be mainly corroborative in nature, in particular regarding [REDACTED] and the fact and consequences of her alleged [REDACTED]. It further notes that the Statement bears formal indicia of reliability, including being internally consistent, being signed by P-0773, and containing an acknowledgement that it was given voluntarily and is true to the best of her knowledge and recollection. In this regard, the Chamber also notes that the Defence accepts that the Statement is sufficiently reliable for admission. Finally, the Chamber notes that P-0773 will be available to be questioned by both parties and the Chamber. Accordingly,

²⁸ 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).

the Chamber considers it appropriate for the Statement to be introduced pursuant to Rule 68(3) of the Rules, and that admission in this context would not be prejudicial to or inconsistent with the rights of the accused.

22. For the purpose of the admission of the Statement, the Prosecution is permitted one hour to conduct the formalities associated with the procedure under Rule 68(3) and to ask any supplemental questions. The Chamber further indicates that the Defence will be strongly encouraged to complete its cross-examination of P-0773 within two hours.²⁹
23. Finally, the Chamber considers that the use of video-link may be appropriate for the testimony of P-0773, in view of the nature of the expected testimony, limited time expected to be required for the testimony, and potential logistical difficulties which the Victims and Witnesses Unit ('VWU') may encounter. The Chamber leaves this matter to the discretion of the Prosecution, in consultation with the VWU.

III. Conclusion

24. In light of the above, the Chamber considers that use of Rule 68(3) of the Rules, rather than Rule 68(2)(b) is, in principle, appropriate for admission of the Statement.

²⁹ The Chamber notes that this time estimate reflects the time which the Prosecution estimated examination-in-chief would take prior to its application for admission of the Statement under Rule 68(2)(b) of the Rules, and considers it an appropriate guide for cross-examination in this instance.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request;

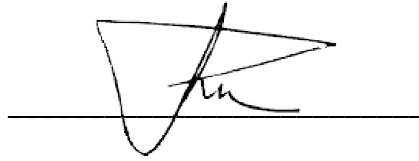
DECIDES that the use of Rule 68(3) of the Rules is, in principle, appropriate for admission of the Statement;

DEFERS its final ruling in respect of the admission of the Statement until the conditions set out in Rule 68(3) of the Rules have been satisfied;

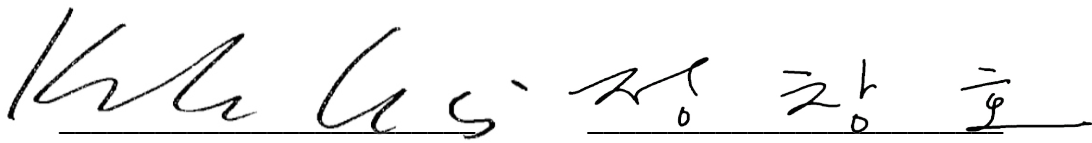
DECIDES that the Prosecution is, in principle, permitted one hour to conduct the formalities associated with the admission of the Statement and to ask any supplemental questions; and

DIRECTS the parties to file public redacted versions of their submissions within two weeks from the date of this decision.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by a smaller, cursive 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

Two handwritten signatures in black ink, written over a horizontal line. The first signature is 'Kuniko Ozaki' and the second is 'Chang-ho Chung'.

Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated this 27 February 2017

At The Hague, The Netherlands