

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06

Date: 18 June 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

**With Confidential Annexes 1-2 and
Confidential Annexes A1-A17, B1-B62, C1-C4 and D**

**Prosecution's application under rule 68(2)(c) to admit the statements and related
documents of deceased witnesses – P-22, P-41 and P-103**

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 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

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 Other
Section**

INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") requests that Trial Chamber VI ("Chamber") admit the prior recorded testimony, including related documents, of deceased witnesses P-22, P-41 and P-103 ("Documents") under rule 68(2)(c) of the Rules of Procedure and Evidence ("Rules") as well as articles 69(2), 64(9)(a) and 69(4) of the Rome Statute ("Statute") and rule 63(2) of the Rules. These provisions are an exception to the rule that witnesses should testify orally and be cross-examined.
2. The Documents are admissible under rule 68(2)(c) because: (i) the witnesses died since they provided statements or testified under oath; (ii) the Prosecution could not anticipate the need for article 56 to obtain their evidence; and, (iii) their evidence is reliable. The parts of P-41's prior recorded testimony that address the acts and conduct of the Accused are also admissible because rule 68(2)(c) does not impose an absolute prohibition on such testimony. Rather, this is only one factor to be considered under rule 68(2)(c)(ii).
3. 'Prior recorded testimony' in rule 68(2)(c) includes out-of-court testimony such as witness statements and interview transcripts, as well as in-court testimony. Admitting the Documents under rule 68 complies with article 51(4), as the rule is not being applied retroactively.
4. Additionally, or alternatively, the Chamber can admit the Documents under articles 69(2), 69(4), 64(9)(a) and rule 63(2) because the Documents are *prima facie* relevant and probative, and in weighing the probative value against the potential prejudice, there is no violation of the right to a fair trial.

PROSECUTION'S SUBMISSIONS

I. The Chamber can admit the Documents under rule 68

5. The Chamber can admit the Documents¹ under rule 68(2)(c) because its three key requirements are fulfilled: the witnesses have subsequently died; the Prosecution could not anticipate the need to use article 56 to preserve their evidence; and, their prior testimony bears sufficient indicia of reliability. Moreover, the Documents are admissible under rule 68 as the rule covers out-of-court, not just in-court testimony, and applying amended rule 68 is not retroactive or detrimental to the Accused. The parts of P-41's prior testimony related to the acts and conduct of the Accused are also admissible.

(a) P-22, P-41 and P-103 are unavailable to testify as they are deceased

6. P-22,² P-41³ and P-103⁴ died subsequent to providing witness statements and under oath testimony. Proof of death is evidenced in Annexes A1, B1-2, and C1.

(b) Article 56 measures could not be anticipated as the witnesses' deaths were unforeseeable

7. The Prosecution could not anticipate the need to take testimony or evidence under article 56 because the witnesses' deaths were unexpected and sudden.
8. The Chief of P-22's locality reports that P-22 died in November 2005 and seemed more nervous and irritable the month preceding her suicide; the motive for P-22 committing suicide was not known.⁵ On 28 April 2015, P-41 died suddenly from a stroke due to hypertension.⁶ The Prosecution had no

¹ See Annexes, listing all of the Documents which the Prosecution seeks to admit: P-22 (Annexes A1-A17); P-41 (Annexes B1-B62); and P-103 (Annexes C1-C4).

² **P-22-Annex-A1**: DRC-OTP-2078-2526.

³ **P-41-Annex-B2**: DRC-OTP-2085-0348 (P-41's death certificate); **P-41-Annex-B1**: DRC-OTP-2085-0350 (Medical report on P-41's death).

⁴ **P-103-Annex-C1**: DRC-OTP-2085-0038, at 0038 to 0042.

⁵ **P-22-Annex-A1**: DRC-OTP-2078-2526.

⁶ **P-41-Annex-B1**: DRC-OTP-2085-0350.

information that P-41, who was in the Court's protection programme, had any pre-existing medical condition. P-103 was ill due to diabetes and was medically treated in 2009; around 26 November 2010, P-103 became sick due to his diabetes and spent only one day in hospital before he died.⁷

(c) The Documents are reliable

9. The Documents bear sufficient indicia of reliability, as defined by the Chambers of this Court and of the *ad hoc* tribunals. The Documents are coherent, internally consistent,⁸ authentic,⁹ truthful, trustworthy, and voluntarily provided.¹⁰ P-41 and P-103 signed their statements, and P-22 affixed her thumb-print to hers, before Court investigators.¹¹ They attested to the truth and accuracy of the content of their statements, by declaring on their honour and conscience that the information in their declarations were accurate.¹² Moreover, the Documents mention events that are corroborated by other evidence, and there are no obvious inconsistencies.¹³ P-41's in-court testimony has additional indicia of reliability as he testified consistently, under oath and was cross-examined in court.
10. There is no finite list of possible criteria to determine whether a document should be admitted as evidence or the factors that inform a review of the reliability of the document.¹⁴ Absence of certain indicia of reliability may be considered when assessing the weight of that evidence but should not be a

⁷ **P-103-Annex-C1:** DRC-OTP-2085-0038, at 0040, paras.12-13.

⁸ See ICC-01/04-01/06-1399, para.40.

⁹ ICC-01/09-01/11-1353, para.15: "in order to have such probative value, the item must also be seen to have the indicia of reliability, including of authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles."

¹⁰ ICTY, *Prosecutor v Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para.15; ICC-01/04-01/06-1399, paras.28-29.

¹¹ **P-22-Annex-A3:** DRC-OTP-0104-0026, at 0026- 0037; **P-41-Annex-B3:** DRC-OTP-0147-0002, at 0002-0039; **P-103-Annex-C2:** DRC-OTP-0104-0170, 0170 to 0181.

¹² **P-22-Annex-A3:** DRC-OTP-0104-0026, at 0037; **P-41-Annex-B3:** DRC-OTP-0147-0002, at 0039; **P-103-Annex-C2:** DRC-OTP-0104-0170, at 0181.

¹³ See e.g. *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Admission of Evidence of Radislav Krstic Pursuant to Rule 92quater, 26 November 2013, para.12.

¹⁴ ICC-01/04-01/06-1399, para.29.

reason for excluding the evidence.¹⁵ It is only necessary to establish *prima facie* - not definitive - proof of reliability based on sufficient indicia.¹⁶ The Chamber's assessment of indicia of reliability requires an exercise of discretion, based on the circumstances of the case.¹⁷

11. P-22's two prior statements¹⁸ and her fourteen photographs,¹⁹ provided to the non-governmental organisation ("NGO") Lipadho and to the Prosecution, bear *prima facie* indicia of reliability because they are truthful, authentic, consistent and were provided voluntarily. There is no indication of a motive for P-22 to fabricate or distort her account. P-22 describes her experience as a victim of UPC.²⁰ P-22 answered to the extent of her knowledge. For example, she states: *"[i]ls étaient tous armés de fusils. Je me souviens que certaines de leurs armes étaient longues et installées sur le sol... Je ne peux pas mieux les décrire, je ne connais pas grand-chose aux armes."*²¹
12. P-22's two statements are consistent—internally and, with each other. P-22's statements were voluntarily made²² and both statements state that UPC soldiers detained her, put her in a prison, cut her neck and threw her bleeding into a pit where she lost consciousness.²³ P-22 agreed that photographs be taken of her injuries; in viewing these images, she confirmed the accuracy of the

¹⁵ 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 Delić*, IT-04-83-PT, Decision on Prosecution Motion for Admission of evidence pursuant to rule 92quater, 9 July 2007 and *Prosecutor v Miluntinovic et al*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92quater, 16 February 2007.

¹⁶ 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."

¹⁷ 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-22-Annex-A2**: DRC-OTP-0077-0012; **P-22-Annex-A3**: DRC-OTP-0104-0026.

¹⁹ **P-22-Annexes-A4-A17**: DRC-OTP-0104-0039-DRC-OTP-0104-0052.

²⁰ **P-22-Annex-A2**: DRC-OTP-0077-0012; **P-22-Annex-A3**: DRC-OTP-0104-0026.

²¹ **P-22-Annex-A3**: DRC-OTP-0104-0026, para.25; **P-41-Annex-B4**: DRC-OTP-2054-5030; **P-41-Annex-B6**: DRC-OTP-2054-5199; **P-41-Annex-B8**: DRC-OTP-2054-5384.

²² **P-22-Annex-A3**: DRC-OTP-0104-0026, at 0028-0029, para.14, at 0037-0038.

²³ **P-22-Annex-A3**: DRC-OTP-0104-0026, at 0031-0032, paras.29-30, at 0034, paras.41-42; **P-22-Annex-A2**: DRC-OTP-0077-0012.

photographs²⁴ depicting her significant scars which corroborate her being hit on the head and that her neck was slashed.²⁵

13. During her second statement, P-22 endorsed the accuracy of the first statement, taken by a third party. P-22 stated in her second statement that she read over the first statement with a French-Swahili interpreter and confirmed its accuracy with minor corrections.²⁶
14. P-41's prior statement authenticated multiple exhibits²⁷ and was truthful, voluntary, internally consistent and consistent with his subsequent in-court testimony. For instance, P-41 discussed in both his written statement and in-court testimony similar details regarding: meetings attended by UPC leaders in Uganda in 2002;²⁸ the creation of the UPC;²⁹ and the abduction and release of Ntumba Luaba.³⁰ P-41 also demonstrated the reliability of his written statement by acknowledging when he did not know something. For example, he was candid in saying that he did not know what was said at certain Executive meetings,³¹ how many people were at the UPC/FPLC military training in Rwanda in 2002,³² or how Lendu combatants were organised.³³
15. P-41 testified under oath.³⁴ Again, he admitted when he was unsure and that he could not "accurately answer" because he did not know.³⁵ The strength of P-41's prior in-court testimony and his credibility were tested in cross-

²⁴ **P-22-Annex-A3**: DRC-OTP-0104-0026, at 0035, para.49.

²⁵ **P-22-Annex-A4-A17**: DRC-OTP-0104-0039 to DRC-OTP-0104-0052; **P-22-Annex-A3**: DRC-OTP-0104-0026, at 0032, para.32; at 0034, paras.41-44.

²⁶ **P-22-Annex-A2**: DRC-OTP-0077-0012; **P-22-Annex-A3**: DRC-OTP-0104-0026, at 0028-0029, para.14.

²⁷ **P-44-Annex-B10-B57-- see Annex D.**

²⁸ **P-41-Annex-B4**: DRC-OTP-2054-5030, at 5109-5111, ln.2 to ln.13; **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0008-0009, para.38-43; **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5202, lns.18-25, at 5203, lns.1-25, and at 5204; **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0010, paras.50-53.

²⁹ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0009, para.45; **P-41-Annex-B4**: DRC-OTP-2054-5030, at 5104, lns.3-15.

³⁰ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0013-0014, para.70; **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5214, lns.13-25, at 5215, lns.1-8.

³¹ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0017, para.86.

³² **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0019, para.105.

³³ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0032, para.190.

³⁴ **P-41-Annex-B4**: DRC-OTP-2054-5030, at 5088, lns.9-12.

³⁵ **P-41-Annex-B8**: DRC-OTP-2054-5384, at 5388, lns.9-10.

examination by the Defence for Mr Lubanga.³⁶ Legal Representative of Victims³⁷ and Judge Odio-Benito also asked P-41 questions.³⁸ The documents that P-41 authenticated or referred to in-court are reliable because P-41 authenticated them in his written statement and then also testified about them and/or provided additional information or insight about items in-court, including *via* the Defence.

16. P-103's statement and his two annexed sketches also bear sufficient indicia of reliability as they are truthful, authentic, consistent and provided voluntarily. P-103's voluntary statement³⁹ is internally consistent, without implausible narratives and shows no motive to distort. P-103's frank acknowledgement of areas on which he had no knowledge bolsters his reliability. For instance, P-103 admitted that he did not know exact dates,⁴⁰ the names of the two young men who were running the Mabanga UPC Camp⁴¹ or what happened to the camera film after he gave it to a *notable*.⁴²

(d) P-41's testimony that relates to the acts or conduct of the Accused can be admitted

17. P-41's prior statement and in-court testimony are admissible, including parts that relate to the acts or conduct of the Accused. Under rule 68(2)(c), prior recorded testimony that relates to the acts and conduct of the Accused is not automatically excluded. Instead, the Chamber has discretion to admit such prior recorded testimony and this is only a factor that the Chamber may consider when deciding whether to admit the evidence.⁴³ Trial Chamber V(A) ("TCV(A)") rejected a Defence argument that documents pertaining to the acts

³⁶ **P-41-Annex-B6:** DRC-OTP-2054-5199, at 5272 to 5288; **P-41-Annex-B8:** DRC-OTP-2054-5384, at 5386-5448.

³⁷ **P-41-Annex-B6:** DRC-OTP-2054-5199, at 5271-5272.

³⁸ **P-41-Annex-B8:** DRC-OTP-2054-5384, at 5448-5449.

³⁹ **P-103-Annex-C2:** DRC-OTP-0104-0170, at 0171, para.4

⁴⁰ **P-103-Annex-C2:** DRC-OTP-0104-0170, at 0172, para.15.

⁴¹ **P-103-Annex-C2:** DRC-OTP-0104-0170, at 0175, para.29.

⁴² **P-103-Annex-C2:** DRC-OTP-0104-0170, at 0180, para.48.

⁴³ ICC-01/09-01/11-1353, para.24.

and conduct of the accused are not admissible, stating that a case-by-case approach must be adopted.⁴⁴ TCV(A) further referred to the “distinct regime” set out by article 69(2) and rule 68.⁴⁵

18. Although jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) is not binding on Chambers of this Court, prior recorded statements going to the acts and conduct of the accused have been admitted at the ICTY, provided the statements were reliable. The ICTY Chambers assessed whether the statements were corroborated by other evidence and were internally consistent.⁴⁶ ICTY Chambers will not base a conviction solely on evidence that has not been subject to examination by both parties.⁴⁷
19. The acts and conduct of persons other than the Accused, including acts of subordinates, co-perpetrators and others acting with a common purpose, do not constitute the acts and conduct of the Accused.⁴⁸
20. P-22 and P-103’s statements do not address the direct acts or conduct of the Accused. Although P-41 references the Accused, his evidence is admissible because it is relevant, reliable and probative; it is corroborated by - and corroborates the evidence of other witnesses, who are available for cross-examination. The Chamber need not rely solely on P-41’s evidence to convict the Accused on any charge.
21. In his prior written statement, P-41 identifies the Accused in a photo with a UPC delegation⁴⁹ and discusses background information including *inter alia*,

⁴⁴ ICC-01/09-01/11-1353, paras.25-26.

⁴⁵ ICC-01/09-01/11-1353, paras.25-26.

⁴⁶ *Prosecutor Haradinaj et al.*, IT-04-84-T, Decision on Prosecution’s Motion to Admit Five Statements of Witness 1 into Evidence pursuant to Rule 92quater with Confidential Annex, 28 November 2007, paras.10-11.

⁴⁷ *Prosecutor v Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement pursuant to rule 92quater of the Rules (Hasan Rizvic), 14 January 2008, para.22, citing *Prosecutor v Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, 14 September 2006, para.20.

⁴⁸ See e.g. *Prosecutor v Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C), 7 June 2002, paras.8-10.

the Accused's whereabouts in June 2002,⁵⁰ his association with UPC militia,⁵¹ that he was responsible for the recruitment of UPC soldiers⁵², that P-41 saw young bodyguards at the Accused's home,⁵³ and his history with the UPC/FPLC (including his ethnicity and military training).⁵⁴ Other witnesses will corroborate these parts of P-41's written statement that relate to the acts or conduct of the Accused.⁵⁵ Most of P-41's references to the Accused – other than references to his responsibility for recruitment of UPC soldiers – is background information. Moreover, as indicated above, P-41's written statement is sufficiently reliable and probative because it is consistent, authentic and P-41 affirmed its accuracy.

22. Aspects of P-41's testimony transcript may also go to prove the acts and conduct of the Accused including, *inter alia*: the Accused's association with top UPC/FPLC members;⁵⁶ being the Chief of Staff around September 2002;⁵⁷ his position within the Ministry of Defence⁵⁸ and as Kisembo's assistant;⁵⁹ his training of soldiers;⁶⁰ and, that P-41 saw Kisembo and the Accused with bodyguards (mostly 13-22 years old) around Bunia.⁶¹
23. As stated above, P-41's testimony⁶² is reliable as he testified voluntarily and under oath and his testimony was consistent. P-41 was subject to questioning and cross-examination. Any prejudice arising from his unavailability for cross-

⁴⁹ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0005-0006, paras.24-25.

⁵⁰ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0011, para.51.

⁵¹ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0007, para.32, at 0009, para.39, at 0011, para.51, at 0014, para.71, at 0018-0019, paras.98-99.

⁵² **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0028, para.166.

⁵³ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0029, para.173.

⁵⁴ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0020, paras.109-110.

⁵⁵ Other witnesses expected to testify on aspects include P-768, P-55, P-290, P-190, P-901, P-16, P-17, P-38.

⁵⁶ **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5200, ln.22.

⁵⁷ **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5201, lns.18-22.

⁵⁸ **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5201, lns.7-10.

⁵⁹ **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5225, lns.3-9.

⁶⁰ **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5250, lns.4-13.

⁶¹ **P-41-Annex-B6**: DRC-OTP-2054-5199, at 5261, lns.18-25, at 5262, lns.1-24.

⁶² **P-41-Annex-B4-B5**: DRC-OTP-2054-5030 ENG/DRC-OTP-2054-5114 FRE; **P-41-Annex-B6-B7**: DRC-OTP-2054-5199 ENG/DRC-OTP-2054-5290 FRE; **P-41-Annex-B8-B9**: DRC-OTP-2054-5384 ENG/DRC-OTP-2054-5465 FRE.

examination does not outweigh the probative value of his testimony. P-41's testimony corroborates, and is corroborated by, the evidence of witnesses who are testifying and will be cross-examined. Moreover, P-41's evidence is reliable because he was well-placed within the UPC to know the information he provided about the Accused.⁶³ Thomas Lubanga appointed P-41 as the *Vice-Gouverneur* of Ituri in September 2003; in June 2003 Thomas Lubanga appointed him as *Secrétaire National*.⁶⁴ The Chamber is able to admit all of P-41's evidence, including those parts related to the Accused, and to assess it against the totality of evidence at the end of the case.

(e) Rule 68(2)(c) applies to out-of-court as well as in-court testimony

24. Rule 68(2)(c) applies equally to statements and transcripts of interview made out-of-court, as it does to in-court testimony.
25. The plain reading of rule 68 as amended makes it clear that "prior recorded testimony" also covers written statements taken from the witness, because it includes, among others "any other documented evidence of such testimony". This interpretation was adopted by ICC Chambers including in *Prosecutor v Lubanga*,⁶⁵ and *Prosecutor v Katanga et al.*⁶⁶ The Chambers allowed the admission of prior recorded witness statements.⁶⁷ The *travaux préparatoires* also confirms that "prior recorded testimony" was understood to include prior transcripts and written witness statements, taken by the parties or authorities.⁶⁸ This

⁶³ See e.g. *R v Kharsekin* (1994, 30 C.R (4th) 252, 88 C.C.C. (3d) 193 (Nfld. C.A.).

⁶⁴ **P-41-Annex-B3**: DRC-OTP-0147-0002, at 0008, paras.22-23.

⁶⁵ ICC-01/04-01/06-1603, paras.18-19.

⁶⁶ ICC-01/04-01/07-2635, para.44: "Clearly, statements made out of court can equally qualify as testimony. This is apparent from the wording of article 56(1)(a), which refers to a 'unique opportunity to take testimony', and of article 93(1)(b), which expressly mentions the taking of evidence, 'including testimony under oath' in the context of assistance provided by States Parties 'in relation to investigations or prosecutions'. Moreover, a narrow interpretation of the word 'testimony' in article 67(1)(a) would entirely undermine the very right protected by this article and deprive rule 68 of any meaning."

⁶⁷ 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.

⁶⁸ ICC-ASP/12/37/Add.1, Annex II, A, Study Group on Governance Cluster I: Expediting the Criminal Process Working Group on Lessons Learnt Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para.13. See also paras.3, 35: confirming that the intent was to match

interpretation is further affirmed by the express requirements of rule 68(2)(b)(ii), which require an accompanying declaration to admit “testimony”. This would be unnecessary if rule 68 applies only to in-court testimony, which is always given under oath.

(f) Applying rule 68 is not retroactive or detrimental to the Accused

26. Admitting the Documents under amended rule 68 complies with article 51(4), because its application is not retroactive or detrimental to the Accused.
27. First, rule 68 is not being applied retroactively as the Prosecution is asking that it is applied now, namely after the rule came into force. “Retroactive” is defined as the “process of acting with reference to *past occurrences*”.⁶⁹ “Retroactive laws” have been defined as “all laws that make present rights and duties depend on past events”.⁷⁰ Accordingly, there is no retroactive application of the law merely because a new legal provision is applied in a pre-existing, but still on-going case. Here, the application to admit the Documents of witnesses P-22, P-41 and P-106 is being made after amended rule 68 came into effect. By way of analogy, a change in the statutory page-limit for ordinary submissions would apply to all submissions filed by the parties as soon as the new provision entered into force, regardless of whether the case was already in course once the provision was adopted.
28. In any event, applying rule 68 to admit the evidence of P-22, P-41 and P-106 is not detrimental to the Accused. The Accused has had the Documents since 2013⁷¹ and has had ample notice that the Documents were being relied upon as

or exceed the scope of ICTY Rules 92*quater* and 92*quinquies* that explicitly allow for introduction of written statements or transcripts of evidence.

⁶⁹ Black’s Law Dictionary (1990), p.1317. *Emphasis added*.

⁷⁰ W.D.Slawson, Constitutional and Legislative Considerations in Retroactive Law-making, 48 Cal.L.Rev.216 (1960), p.217.

⁷¹ **P-22-Annex-A1:** disclosed 30 January 2015 (exact copy (DRC-OTP-0152-0111) disclosed 7 October 2013); **P-22-Annexes-A2-A17:** disclosed in 2013; **P-41-Annex-B1-B2:** (undisclosed) Medical report and death certificate of P-41 (dated April 2015); **P-41-Annexes-B3-B62:** disclosed in 2013; **P-103-Annex-C1:** undisclosed (dated 26 April 2015); **P-103-Annexes-C2-C4:** disclosed in 2013.

incriminatory evidence. The Accused can still test the Documents, including by bringing evidence in rebuttal. The Prosecution did not previously try to admit them under the old rule 68. Both Prosecution and Defence may equally use rule 68. Moreover, the Documents are admissible under articles 69(2), 69(4) and 64(9)(a) and rule 63(2).

(i) The Accused has had ample notice that the Prosecution was relying on the Documents and can still test that evidence even if not by cross-examination

29. First, the Documents sought to be admitted under rule 68 are not new evidence. They were properly disclosed to the Accused in 2013 as material upon which the Prosecution is relying. There is no surprise or detriment simply because the Prosecutor seeks admission of the testimony in a different form. Documentary evidence is routinely admitted into evidence once its relevance is established. Nor does the inability to cross-examine the deceased witnesses on their evidence completely deprive the Accused of his right to challenge the evidence. He retains the right to lead evidence during the Defence case or to question other witnesses generally on the basis of information contained in the statements.

30. The Defence's inability to cross-examine the witnesses whose prior recorded testimony is sought to be admitted is only a factor to be considered in the final determination of the weight to be given to that testimony. The Documents should be accorded weight, bearing in mind their probative value and indicia of reliability, as well as the fact that the Documents are corroborative of other witness testimony, which can be tested by the Defence in cross-examination.

(ii) The Prosecution did not try to admit the Documents previously

31. Article 51(4) provides that amendments to the Rules shall not be applied retroactively to the detriment of a person who is being investigated or prosecuted. Retroactivity may arise if prior to the rule amendment, the

Prosecutor had already unsuccessfully taken a procedural step to have the material admitted, failing which, she now seeks introduction of the same material pursuant to the rule 68 amendments. The Prosecutor never previously sought to admit the Documents of P-22 or P-103 under the old rule 68, and P-41 died only recently after the introduction of the amended rule 68. Yet, even if the Prosecution had sought to admit the Documents under the former rule, this would not automatically preclude the Chamber from using the amended rule to include them. For instance, at the ICTY – even where the Prosecution previously applied unsuccessfully to submit a deceased witness’s statement – the Court later admitted it using a procedural amendment. This was not viewed as prohibitively retroactive.⁷²

(iii) The Prosecution and the Defence may equally use rule 68

32. Furthermore, no detriment arises since rule 68 introduces a procedure to admit prior recorded statements that is available to both the Prosecution and the Defence. Like article 51(4), the ICTY Rules require a Chamber to verify that applying an amended rule does not prejudice the Accused.⁷³ ICTY Chambers have determined that there is no prejudice where there is equality of arms because each party can use the amended rule to present their case.⁷⁴ The rule against non-retroactivity under article 51(4) relating to evidentiary or procedural matters is not absolute.⁷⁵ Instead, it is subject to the requirements of fairness;⁷⁶ so it is relevant that both parties can use the new rule 68.

⁷² See *Prosecutor v. Milutinović et al.*, IT-95-87-T, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92Quater, 5 March 2007, para.8; *contra Prosecutor v. Milutinović et al.*, IT-05-87-PT, T. Decision on Prosecution’s Rule 92bis Motion, 4 July 2006, para.21.

⁷³ See ICTY rule 6(D).

⁷⁴ See *Prosecutor v. Šešelj*, IT-03-67-T, Redacted Version of the “Decision on the Prosecution’s Consolidated Motion Pursuant to Rules 89(f), 92bis, 92ter and 92quater of the Rules of Procedure and Evidence” Filed Confidentially on 7 January 2008, 21 February 2008, paras.35-37.

⁷⁵ See e.g. article 24(2), which allows the Court to apply a retroactive rule amendment before a final judgment if it is to the advantage of the Accused.

⁷⁶ For instance, under article 24(2) the Court may apply a retroactive rule amendment before a final judgment if it is to the advantage of the Accused.

(iv) There is no prejudice to the Accused because the statements were previously admissible under the Statute and Rules

33. Finally, there is no detriment to the Accused because even prior to the rule 68 amendment, neither the Statute nor the Rules prohibited the introduction of material covered under the rule 68 amendments. Indeed, the Documents are admissible under the Statute under other provisions.
34. Various ICC Chambers both prior to and after the rule 68 amendments have confirmed that there is no automatic ground for exclusion of evidence in the Statute or Rules. Instead, under articles 64(9)(a), 69(4) and rule 63(2), Chambers have discretion to freely assess the relevance or admissibility of any, and all, items of evidence.⁷⁷ A Chamber has broad discretion to weigh the probative value of each item of evidence against the potentially prejudicial effect of its admission. This is a balancing test carried out on a case-by-case basis.⁷⁸
35. Apart from rule 68, article 69(2) also provides an exception to the general rule that testimony shall be in person,⁷⁹ which potentially includes the prior testimony of deceased persons.
36. For instance, in *Lubanga*, Trial Chamber I admitted under article 69(2) notebooks and logbooks, although the authors were unavailable to give evidence or to be cross-examined by the Defence.⁸⁰ Trial Chamber I observed that although article 69(2) usually requires the testimony of a witness at trial to

⁷⁷ See e.g. ICC-01-04-01/06-1399, para.24; ICC-01/04-01/07-717, para.78; ICC-01/04-01/07-956, para.35; ICC-01/09-01/11-1353, para.13; D.K. Piragoff, in Chapter 4 “Evidence”, in *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, R.S. Lee (ed.), Transnational Publishers, p.351.

⁷⁸ ICC-01/04-01/07-2635, para.15; See also ICC-01/04-01/06-1399, para.29; ICC-01/04-01/07-956, para.35; ICC-01/09-01/11-1353, para.16.

⁷⁹ See e.g. ICC-01/09-01/11-1353, para.13, footnote 24, stating, “See also Article 69(3) of the Statute (which authorises the Chamber to request the submission of all evidence that it ‘considers necessary for the determination of the truth’) and Article 69(2) of the Statute (which while it explicitly requires that the ‘testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68’ or in the Rules, also clearly envisages that a variety of other means of introducing evidence may be appropriate, provided that such means are not prejudicial to or inconsistent with the rights of the accused).”; ICC-01/04-01/06-2595-Conf-Corr, para.42.

⁸⁰ ICC-01/04-01/06-1399, paras.36-42.

be given in person, it allows “a wide range of other evidential possibilities”.⁸¹ The Trial Chamber, noting its broad discretion to rule on admissibility or relevance, emphasised that Chambers must be careful not to impose artificial limits on their ability to consider a piece of evidence freely, subject to requirements of fairness.⁸² It stressed that the Chamber’s broad discretion is particularly necessary given the nature of cases coming before the ICC, including where individuals are killed or survivors cannot be traced.⁸³ Accordingly, as the Documents could have been admitted under article 69(2), no prejudice arises in admitting them under rule 68(2)(c).

(v) *Any alleged detriment must be strictly construed*

37. As the rule 68 amendments deal with procedure and not substantive criminal law, any alleged detriment must be strictly construed. Amendments to rules of procedure for procedural matters are not usually restricted by the rule of retroactivity – and, if at all - not in the same manner as the rule against retroactivity for prosecution of substantive crimes.⁸⁴ Article 51(4) provides an exception to this general rule, so it must be strictly interpreted, including in relation to allegations of detriment. Amended rule 68 contains vital safeguards to ensure there is not unrestrained or unregulated introduction of any prior recorded testimony,⁸⁵ which minimises risk of any detriment.

⁸¹ ICC-01/04-01/06-1399, para.22.

⁸² ICC-01/04-01/06-1399, paras.24, 29-30.

⁸³ ICC-01/04-01/06-1399, para.24.

⁸⁴ See e.g. articles 22 and 23 of the Statute; Kress, C, ‘Nulla poena nullum crimen sine lege’ in Max Planck Encyclopaedia of Public International Law (OUP: article updated February 2010): “[t]he legality principle does not apply to rules of criminal procedure”; Trechsel, S, Human Rights in Criminal Proceedings (OUP: 20050, p.111. See also e.g. *Scoppola v Italy* (No.2), 10249/03, 17 September 2009, para.110: The Grand Chamber of the European Court of Human Rights considering article 7(1) of the Convention (analogous to articles 22 and 23) reiterated that the rules on retrospectiveness of article 7 only apply to provisions defining offences and held that it is reasonable for national courts to apply the *tempus regit actum* principle with regard to procedural laws. See also eg. *Prosecutor v Nyiramasuhuko et al.*, ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15bis(D), 24 September 2003, para.13, fn.15 citing *Rex v Chandra* [1905], 2 K.B.335, *Paul v Paul*, Va. 651, 203 S.E.2D.123 (1974); *R v Clarke*, 2014, SCC 28.

⁸⁵ *Prosecutor v Nyiramasuhuko et al.*, ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15bis(D), 24 September 2003, para.19.

II. Additionally, or alternatively, the Documents can be admitted under articles 69(2), 69(4), 64(9)(a) and rule 63(2)

38. The Chamber can admit the Documents additionally, or alternatively, under articles 69(2), 69(4), 64(9)(a) and rule 63(2). The Chamber can apply the three-stage test for admitting “evidence other than direct oral testimony”: ⁸⁶ (i) determine that the Documents are *prima facie* relevant to the trial,⁸⁷ (ii) determine that have *prima facie* probative value⁸⁸ (including indicia of reliability);⁸⁹ and (iii) determine that their probative value outweighs any prejudicial effect.⁹⁰ It is not unfair to admit the evidence.

(a) Prima Facie Relevant

39. The Chamber is empowered to admit evidence it considers relevant. It can admit any evidence it considers necessary to determine the truth under articles 69(3) and (4) and 64(9)(a) of the Statute.⁹¹ Evidence is deemed relevant if it tends to prove or disprove a material issue or fact in question, making it more or less probable.⁹²
40. P-22’s two prior statements are *prima facie* relevant to issues involving: UPC/FPLC child soldiers; ethnic tension between Hema and non-Hema; prior UPC/FPLC attacks on non-Hema civilians in 2002; forcible civilian displacement; the UPC/FPLC attack on Kilo in 2002; UPC/FPLC detention of civilians; and the UPC/FPLC murder and attempted murder of civilians, including the attempted murder of P-22.⁹³

⁸⁶ See *e.g.*, ICC-01/04-01/06-1399, para.26-32; ICC-01/04-01/06-2589-Corr, para.28; ICC-01/04-01/06-2135, para.21; ICC-01/09-01/11-1353, para.17.

⁸⁷ Article 69(3); See also, ICC-01/04-01/06-1399, para.27.

⁸⁸ Article 69(4).

⁸⁹ Rule 68(2)(c)(i).

⁹⁰ ICC-01/04-01/06-1399, paras.31-32.

⁹¹ ICC-01/04-01/06-1399, para.24; ICC-01/04-01/06-2360, para.23.

⁹² ICC-01/09-01/11-1353, para.15; ICC-01/04-01/07-2635, para.34.

⁹³ **P-22-Annex-A3:** DRC-OTP-0104-0026; **P-22-Annex-A2:** DRC-OTP-0077-0012.

41. P-41's previously recorded testimony is *prima facie* relevant to matters including: the UPC/FPLC history and establishment of its executive body; UPC/FPLC finances and weapons procurement; the UPC/FPLC recruitment campaign, including children below 15; UPC/FPLC training camps; UPC/FPLC use of child soldiers; the UPC/FPLC killing of Lendu; a "pacification" meeting in Walendu Djatsi; and the role of the Accused within the UPC/FPLC (including his military association and responsibility for recruitment).⁹⁴ P-41's sworn testimony is consistent with his written statement and is *prima facie* relevant to additional matters including: Lubanga's role within the UPC/FPLC;⁹⁵ NTAGANDA's role within the⁹⁶ delegation to Uganda;⁹⁷ the UPC/FPLC use of Radio Candip;⁹⁸ the UPC/FPLC demobilisation decrees;⁹⁹ and the background to the armed conflict.¹⁰⁰
42. P-103's statement is *prima facie* relevant including to: UPC/FPLC militia being composed of mostly Hema; forcible displacement due to the UPC/FPLC attack on Mongbwalu; a UPC/FPLC letter inviting Lendu notables to the Kobu "pacification" meeting; and Motorola radio conversations where UPC/FPLC militia discussed exterminating Lendu leaders.¹⁰¹

(b) Prima Facie Probative—sufficient indicia of reliability

43. As shown above at paragraphs 9-16, the Documents have *prima facie* probative value because they bear sufficient indicia of reliability.

⁹⁴ **P-41-Annex-B3:** DRC-OTP-0147-0002.

⁹⁵ **P-41-Annex-B4:** DRC-OTP-2054-5030.

⁹⁶ FRP meaning "Front for Reconciliation and Peace" (**P-41-Annex-B6:** DRC-OTP-2054-5199, at 5203, ln.20-22).

⁹⁷ **P-41-Annex-B6:** DRC-OTP-2054-5199.

⁹⁸ **P-41-Annex-B6:** DRC-OTP-2054-5199.

⁹⁹ **P-41-Annex-B8:** DRC-OTP-2054-5384.

¹⁰⁰ **P-41-Annex-B4:** DRC-OTP-2054-5030; **P-41-Annex-B6:** DRC-OTP-2054-5199; **P-41-Annex-B8:** DRC-OTP-2054-5384.

¹⁰¹ **P-103-Annex-C2:** DRC-OTP-0104-0170; **P-103-Annex-C3:** DRC-OTP-0104-0183; **P-103-Annex-C4:** DRC-OTP-0104-0184.

(c) Any prejudicial effect does not outweigh the probative value

44. The Documents should be admitted because after weighing any prejudicial effect against the probative value – in particular the lack of an opportunity to cross-examine the witnesses – admitting the documents would not violate the Accused’s right to a fair trial.
45. Both TCV(A) and Trial Chamber I have held that any prejudicial effect must be weighed against the probative value. Evidence may be excluded where its prejudicial effect is high and its probative value is comparatively low.¹⁰² This is a fact-specific enquiry.¹⁰³ Trial Chamber I further stated that it is trite to observe that all evidence that tends to incriminate the accused is also “prejudicial” to him; but, the Chamber must be careful to ensure that it is not unfair to admit disputed material.¹⁰⁴
46. Evidence of deceased witnesses, even absent cross-examination, can still be admitted if it has probative value. The right of the Accused to cross-examine a witness is not an absolute right.¹⁰⁵ Chambers enjoy a significant discretion in admitting documents, even if the authors of the documents are not available to testify or to be cross-examined by the Defence.¹⁰⁶ The fairness of admitting evidence of witnesses, without cross-examination, will depend on factors such as whether it is corroborated by other evidence, has no obvious inconsistencies,¹⁰⁷ and an assessment of the proceedings as a whole.¹⁰⁸ Corroboration is just one

¹⁰² ICC-01/09-01/11-1353, para.16; ICC-01/04-01/06-1399-Corr, para.31.

¹⁰³ ICC-01/09-01/11-1353, para.16.

¹⁰⁴ ICC-01/04-01/06-1399, para.31.

¹⁰⁵ Article 67(1)(3); ICC-01-04-01/06-1399, para.36. *See also e.g. ICTY, Prosecutor v Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, paras.15-16, 20-21; **ECHR: Ferrantelli and Santangelo v Italy**, Application No.48/1995/554/640; *Doorson v The Netherlands*, Application No.54/1994/501/583. **National systems:** *see e.g.* sections 116 and 117 (UK) Criminal Justice Act 2003; *R v Finta* (1992), 14 C.R. (4th) 1, 73 C.C.C (3d) 65 (Ont. C.A);

¹⁰⁶ ICC-01-04-01/06-1399, para.24.

¹⁰⁷ *See e.g. Prosecutor v Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Evidence of Witness Milan Babić pursuant to rule 92*quater*, 16 December 2010, para.36.

¹⁰⁸ *See e.g. Kostovski v The Netherlands*, Application No.11454/85, para.39; *Prosecutor v Milan Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Milan Babić, 14 September 2006, para.13.

factor to be considered. The general rule at the ICTY is that the equivalent rule 92*quater* evidence does not require corroboration, although uncorroborated evidence cannot form the sole basis for a conviction.¹⁰⁹

47. Admitting the Documents is not unfair to the Accused – when balancing their probative value against their prejudicial effect. The Documents are reliable, internally consistent, legible, authentic, and can be tested by rebuttal evidence. The Documents corroborate evidence of witnesses who will testify and will be tested by cross-examination. None of the Documents are submitted as the sole evidence upon which to convict the Accused.

REQUEST

48. For all the foregoing reasons, the Prosecution requests that the Chamber admit the Documents of P-22, P-41 and P-103 as listed in Annex 1 to this filing.



Fatou Bensouda,
Prosecutor

Dated this 18th day of June 2015
At The Hague, The Netherlands

¹⁰⁹ See e.g. *Prosecutor v Perišić*, IT-04-81-T, 6 September 2011, para.44.