

**Cour
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**International
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Court**

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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 reply to the "Response on behalf of Mr Ntaganda to the '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'", ICC-01/04-02/06-736-Conf-Exp", 27 August 2015, ICC-01/04-02/06-796-Conf

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Office of the Prosecutor (“Prosecution”), as authorised by Trial Chamber VI (“Chamber”),¹ replies to two matters raised in the Defence Response² to the Prosecution request to admit the prior testimony and related documents of deceased Prosecution witnesses P-22, P-41 and P-103:³
 - (i) First, the Prosecution will address how the materials referred to by the witnesses in their prior testimony can be admitted for the truth of their content and for the sake of completeness; and
 - (ii) Second, the Prosecution will address how P-22’s first witness statement⁴ is admissible under rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) even though it was not given directly to a party or authority, but to a non-governmental organisation (“NGO”).⁵
2. All of the documents related to the prior testimony of P-22, P-103, and P-41 can be admitted under rule 68 for the truth of their contents because they bear sufficient indicia of reliability: witnesses authenticated them and they are relevant and probative.
3. Witness P-22’s first statement can be admitted under rule 68 because it is part of P-22’s second statement given to the Prosecution. P-22 authenticated and commented upon the first statement in the statement she gave to the Prosecution, and it is necessary to admit the first statement to fully understand the second statement.

¹ Email of the Chamber on 20 August 2015, in which the Chamber granted the Prosecution leave to reply to the two matters addressed at paras.7 and 8 of the Prosecution’s request for leave to reply (ICC-01/04-02/06-751-Conf-Exp).

² ICC-01/04-02/06-736-Conf-Exp.

³ ICC-01/04-02/06-659.

⁴ Annex A2 to the Prosecution Request.

⁵ Response, paras.15-16.

Procedural Background

4. On 18 June 2015, the Prosecution applied to the Chamber to admit the prior recorded testimony and related documents of deceased witnesses P-22, P-103 and P-41 ("Prosecution Request").⁶
5. On 9 July 2015, the Defence sought a variation of the time limit to respond to the Prosecution Request.⁷ On 10 July 2015, the Chamber granted an extension until 20 July 2015.⁸
6. On 20 July 2015, the Defence responded to the Prosecution Request ("Defence Response").⁹
7. On 27 July 2015, the Prosecution sought leave to reply to the Defence Response.¹⁰
8. On 20 August 2015, *via* email, the Chamber granted the Prosecution leave to reply by 27 August 2015 to two of the points on which the Prosecution sought leave to reply.

Confidentiality

9. This filing is classified as Confidential under regulation 23*bis*(1) of the Regulations of the Court, because it refers to confidential information related to the deceased witnesses. The Prosecution will file a public redacted version of this filing.

⁶ ICC-01/04-02/06-659.

⁷ ICC-01/04-02/06-706-Conf-Exp.

⁸ Email from the Chamber to the Parties, 10 July 2015, 16:03pm.

⁹ ICC-01/04-02/06-736-Conf-Exp.

¹⁰ ICC-01.04-02/06-751-Conf-Exp.

Prosecution's Submissions

I. The documents of P-22, P-103 and P-41 can be admitted for the truth of their contents

10. On the first issue, the Defence argues that the 14 photographs of Witness P-22's injuries attached to her statement,¹¹ the two documents attached to P-103's statement,¹² and several documents referred to by Witness P-41 in his statement or during his court testimony¹³ are inadmissible because they are not an inseparable and indispensable part of the statement or testimony, or because the witnesses did not sufficiently elaborate upon them.

11. The Prosecution submits that this is incorrect.

12. First, all of the documents of P-22, P-103 and P-41 referred to in the original Prosecution Request, including those to which the Defence objects, can be admitted for the truth of their content, because they form part of the prior statements or testimony, the witnesses explained them in their prior recorded testimony, authenticated them, and they bear sufficient indicia of reliability.

13. Witness statements taken by the Prosecution under rule 111 and rule 112 of the Rules have been accepted as being "prior recorded testimony", for the purposes of rule 68.¹⁴ In *The Prosecutor v. Ruto and Sang*, Trial Chamber V(A) admitted the prior statements of witnesses, including exhibits, under rule 68(2)(c) and (d), for the truth of their contents.¹⁵ Trial Chamber V(A) decided that exhibits associated with transcripts of interviews conducted by the Prosecution under rule 112 of the Rules were admissible so long as the witness uses or explains them, and

¹¹ Annexes A4-A17 to the Prosecution Request; see Response, paras.33-36.

¹² Annexes C3 and C4 to the Prosecution Request; see Response, paras.74-75.

¹³ Annexes B25-B27, B29, B32-50, B52-55 and B60 to the Prosecution Request; see Response, para.62.

¹⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1938, paras.30-33.

¹⁵ ICC-01/09-01/11-1938-Red, p.55.

particularly when these are necessary to read and understand the prior recorded testimony introduced. The Chamber further considered whether the admission of the associated exhibits was not unduly prejudicial to the accused in accordance with article 69(4) of the Statute.¹⁶ The Chamber also admitted annexes to rule 111 written statements taken from witnesses by the Prosecution when they were signed and dated.¹⁷

14. Similarly, Chambers of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") have admitted prior testimony, including exhibits, of deceased witnesses under the equivalent of rule 68 (rule 92*quater*).¹⁸

15. Contrary to the Defence's assertion,¹⁹ in her statement at paragraph 49, P-22 authenticates and comments upon the 14 photographs taken of her: she confirms that she consented to photographs being taken of her and that the photographs are of the injuries she sustained during the events she described during her interview; she confirms that 14 digital photographs of her were taken; she confirms that she was given an opportunity to examine the photographs that were numbered [REDACTED]-01 to [REDACTED]-14; and, she confirms that these 14 digital photographs were transferred to a CDROM in an electronic folder entitled [REDACTED].²⁰

16. The photographs depict the injuries that P-22 described in her statement and they were authenticated by her. They are inherently reliable; the images speak for themselves, and constitute real, tangible evidence. Accordingly, the photographs should be admitted and relied upon for the truth of their content. The fact that P-22 could not date and sign the photographs at the time of the interview because

¹⁶ ICC-01/09-01/11-1938-Red, para.33

¹⁷ ICC-01/09-01/11-1938-Red, para.45.

¹⁸ See e.g. *Prosecutor v. Karadžić*, Decision on Accused's Motion to admit testimony of witness KW582 pursuant to rule 92 *quater*, 3 February 2014, paras.8-9, p.7.

¹⁹ Defence Response, paras.33-36.

²⁰ Prosecution Request, Annex A3, para.49.

they were available only as digital images does not detract from their authenticity or that they are an integral part of her statement.

17. The two documents attached to P-103's statement are sketches²¹ he drew during his interview. The sketches were annexed to the interview and the witness signed and dated them. The witness confirms in his statement that he drew the sketches - one sketch depicts certain places where the events he describes in his statement took place and the other sketch depicts the Motorola radio that he describes.²² Accordingly, P-103's sketches should be admitted and relied upon for the truth of their content.

18. All of P-41's exhibits, both those annexed to his witness statement and those upon which he commented during his prior in-court testimony can also be admitted and relied upon for the truth of their content. P-41 commented upon them and/or authenticated them.²³ Amongst the documents related to P-41's testimony to which the Defence specifically objects are P-41's personal documents drafted by him, such as his curriculum vitae and personal diary, and UPC documents that he recognised and/or authenticated in view of his [REDACTED],²⁴ and other documents that he elaborated upon during his prior testimony that the Chamber therefore requires in order to properly evaluate his testimony. P-41 referred to and explained the documents at issue in his witness statement and/or prior in-court testimony.²⁵ The exhibits authenticated by P-41 during his in-court testimony were accepted by Trial Chamber I as meeting the necessary tests for admissibility, when they were admitted as evidence in that case. Accordingly, these documents should be admitted.

²¹ Prosecution Request, Annexes C3 and C4.

²² See Prosecution Request, Annex C2, para.50

²³ P-41 did not authenticate one document which was shown to him by the Defence for Mr Lubanga. Refer to Annex B60 of the Prosecution Request.

²⁴ [REDACTED], see Prosecution Request, para.23, fn.64.

²⁵ See Prosecution Request, Annex B8 (DRC-OTP-2054-5384, p.5422, ln.19 – p.5424, ln.8) and Annex D.

19. Moreover, as all of this material is referred to by the witnesses in their prior recorded testimony, it should be admitted at minimum for the sake of completeness. These documents are necessary components of the prior recorded testimony of the witnesses, without which the Chamber would be unable to properly evaluate that testimony. In particular the Chamber would be unable to properly evaluate: (a) P-22's comments about her injuries, without seeing the photographs depicting those injuries; (b) P-103's description of the events with reference to the sketches that he drew to depict those events, without seeing them; and (c) P-41's comments on documents that he was shown during his prior statement or in-court testimony.

20. The Defence argues, relying on ICTY jurisprudence, that the exhibits are not an inseparable or indispensable part of the witnesses' prior recorded testimony.²⁶ However, the ICTY jurisprudence it relies upon does not assist its arguments. To the contrary, as explained below, those cases stand for the principle that exhibits used in prior recorded testimony should be admitted to enable Chambers to properly evaluate a witness's prior account.

21. Moreover, the Defence does not refer to other ICTY jurisprudence where Chambers have stressed the importance of identifying all associated exhibits to be admitted that were elaborated upon during a witness's prior testimony. For instance, in *Prosecutor v. Karadžić*, the ICTY Trial Chamber explained that the applicant was obliged to identify all associated exhibits used during a witness's testimony to be admitted to enable the Trial Chamber to properly evaluate the prior testimony.²⁷ The Chamber further decided - in the interests of justice - to

²⁶ Response, para.35, fn.15 citing *Prosecution v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution motion for admission of testimony of witness KDZ198 and associated exhibits pursuant to Rule 92 *quater*, 20 August 2009.

²⁷ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion to Admit Testimony of Witness KW582 Pursuant to Rule 92 *quater*, 3 February 2014, para.19 ("the Chamber reminds the Accused, yet again, of his responsibility to identify all relevant associated exhibits to be tendered with all proposed Rule 92 *quater* evidence. Despite the fact that the Accused failed to identify this document as inseparable from and indispensable to the Testimony, and in light of the Prosecution's submission in the Response, the Chamber has

admit an exhibit that the applicant had *not* sought to include in its application but that the Chamber considered it needed to properly evaluate the testimony.²⁸ In *Prosecutor v. Popović et al.*, an ICTY Trial Chamber described the fact that a party did not provide all exhibits relevant to prior testimony in a request to admit such testimony as “unfortunate”, stating that this may lead the Chamber to be able to conduct only a partial evaluation of the relevant material.²⁹

22. Moreover, in *Popović et al.*, an ICTY Trial Chamber stated that “transcripts read in the absence of the exhibits to which the witness referred cannot be fully evaluated for relevance and probative value. Ultimately, each exhibit that was shown to a witness during testimony in the earlier trial should be before the Trial Chamber as it evaluates the transcript. This includes exhibits shown to the witness, which were tendered and admitted with the testimony of other witnesses in the previous trial.”³⁰ The Trial Chamber went on to state that this principle also applies to “items such as photographs, maps or other documents referenced in and attached to written statements proposed for admission pursuant to Rule 92 *bis*(A)” and proceeded to admit any such item provided with the written statements proposed.³¹ The reasoning from this decision has continued to be applied by subsequent Chambers of the ICTY under the later-adopted rule 92*quater*.³²

reviewed the photograph and considers it to be intrinsic to the Testimony and therefore necessary to the Chamber’s understanding of a portion thereof. Consequently, the Chamber finds that it is in the interests of justice to exceptionally admit it as an associated exhibit of the Testimony despite the fact that it was not tendered by the Accused. Given that the photograph bears the Witness’s name, it shall also be admitted under seal.”).

²⁸ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion to Admit Testimony of Witness KW582 Pursuant to Rule 92 *quater*, 3 February 2014, para.19.

²⁹ *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2006, para.24.

³⁰ *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2006, para.24.

³¹ *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution’s Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2006, para.25.

³² See, e.g. *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 21 April 2008, para.65.

23. Further, the Defence's reference to the decision in *Katanga and Ngudjolo*³³ does not support its argument. The cited paragraph simply refers to the need for prior recorded testimony and accompanying material to be relevant, probative and for the probative value not to be outweighed by any prejudicial effect.³⁴

24. As stated above, Trial Chamber V(A) in *The Prosecutor v. Ruto and Sang* explained that exhibits associated with prior recorded testimony are admissible under rule 68 particularly when they are necessary to read and understand the prior recorded testimony being introduced.³⁵

25. Accordingly, the documents should be admitted.

II. Witness P-22's first statement is admissible because it is authenticated in P-22's second statement taken by Prosecution investigators

26. On the second issue, the Defence argues that Witness P-22's *first* witness statement³⁶ is inadmissible under rule 68(2)(c) because it was not given to a party or authority.³⁷ However, P-22's *second* statement³⁸ was given to a party (the Prosecution) and in this statement P-22 authenticates her first statement. She refers to, clarifies, and provides additional information concerning the incidents addressed in her first statement, which incidentally covers the same substantive matters: her capture by the UPC and the injuries she sustained.³⁹ P-22's first statement is admissible because it was authenticated by her in her second statement and because the Chamber would be unable to properly evaluate her second statement without considering her first statement.

³³ Response, para.35, fn.13 citing ICC-01/04-01/07-2289 (sic), para 13.

³⁴ See ICC-01/04-01/07-2289-Conf.

³⁵ ICC-01/09-01/11-1938-Red, para.33.

³⁶ Annex A2 to the Prosecution Request.

³⁷ Response, paras.15-16.

³⁸ Annex A3 to the Prosecution Request.

³⁹ See, e.g. Prosecution Request, Annex A3, para.14 where P-22 states: "*Je précise que à l'occasion de cet entretien avec le représentant [REDACTED] je me suis limitée à donner les informations concernant mon état-civil. A cet égard je précise le suivant...*".

Request

27. Based on the foregoing, the Prosecution asks that the Chamber grant the Prosecution Request.



Fatou Bensouda
Prosecutor

Dated this 13th day of November 2015
At The Hague, the Netherlands