

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **11 March 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

**Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission
of prior recorded testimony of Witness P-0103**

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 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
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 51(4), 64(2) and (9)(a), 67, 68, and 69(2) and (4) of the Rome Statute ('Statute'), Rules 63(2) and 68(2)(c) of the Rules of Procedure and Evidence ('Rules'), and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103'.

I. Procedural history

1. On 28 June 2015, the Office of the Prosecutor ('Prosecution') filed a request under Rule 68(2)(c) of the Rules seeking the admission of the prior recorded testimony, and associated documents, of P-0103 ('Request').¹ Additionally, or alternatively, the Prosecution sought their admission on the basis of Articles 64(9)(a) and 69(2) and (4) of the Statute and Rule 63(2) of the Rules ('Alternative Request').
2. On 20 July 2015, having been granted an extension of time,² the defence team for Mr Ntaganda ('Defence') submitted its response, in which it opposed the Request.³
3. On 27 August 2015, having received the Chamber's authorisation,⁴ the Prosecution filed a reply on two identified issues.⁵

¹ 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-01/04-02/06-659, with confidential annexes 1-2, A1-A17, B1-B62, C1-C4 and D.

² E-mail from a Legal Officer of the Chamber to the parties on 10 July 2015 at 16:03.

³ 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, pages 16-20 ('Response'). On 13 January 2016 the Chamber reclassified the Response as public.

⁴ E-mail from a Legal Officer of the Chamber to the parties on 20 August 2015 at 13:43. *See also*, Prosecution request to file a 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, notified on 28 July 2015, ICC-01/04-02/06-751-Conf-Exp. This filing was reclassified 'public' on 16 November 2015.

4. On 20 November 2015, the Chamber issued its ‘Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103’ (‘Decision of 20 November 2015’),⁶ whereby, by majority, the Chamber deferred its ruling on the Request; invited the Prosecution to further substantiate its allegation that P-0103 is deceased; and rejected the Alternative Request.
5. On 9 February 2016, the Prosecution provided two documents in support of its Request, including a death certificate of P-0103 (‘Supplemental Filing’).⁷
6. The Defence did not file a response to the Supplemental Filing.

II. Analysis

7. In relation to the applicable law, the Chamber recalls that it may allow the introduction of previously recorded testimony coming from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally, provided that: i) the introduction is not prejudicial to or inconsistent with the rights of the accused; ii) the necessity of measures under Article 56 of the Statute could not be anticipated; and iii) the prior recorded testimony has sufficient indicia of reliability.⁸ These requirements must be met in addition to the standard admissibility criteria.⁹ Exhibits associated are also admissible so long as the witness uses or explains them in the prior recorded testimony.¹⁰

⁵ 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, ICC-01/04-02/06-796-Conf, with one confidential annex. A public redacted version was filed on 16 November 2015 (ICC-01/04-02/06-796-Red).

⁶ ICC-01/04-02/06-1029 and Partially dissenting opinion of Judge Chang-ho Chung, ICC-01/04-02/06-1029-Anx.

⁷ Prosecution submission of the death certificate of Witness P-0103, 9 February 2016, ICC-01/04-02/06-1162, with confidential annexes A and B.

⁸ Decision of 20 November 2015, ICC-01/04-02/06-1029, paras 12-15. *See also*, Rule 68(1) and 2(c) of the Rules and Article 69(2) and (4) of the Statute.

⁹ Decision of 20 November 2015, ICC-01/04-02/06-1029, paras 14-15 referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials

8. Turning to the Request, the Chamber notes that the Prosecution seeks the admission of the statement of P-0103, taken by the Prosecution in 2005,¹¹ as well as two associated documents. These consist of two signed sketches by P-0103, discussed in his statement.¹² In support of the Request, the Prosecution submits that: i) P-0103 has died since he provided his statement;¹³ ii) it could not have anticipated the need to rely on Article 56 of the Statute;¹⁴ and iii) the evidence P-0103 provided is reliable.¹⁵

i. Whether the witness is unavailable to testify orally

9. The Prosecution submits that P-0103 died subsequent to providing a witness statement. As proof of P-0103's death, the Prosecution initially provided a statement from someone said to have been P-0103's wife, wherein this person explains the causes and circumstances of P-0103's death in November 2010.¹⁶ Upon the Chamber's invitation to further substantiate its allegation, the Prosecution provided a death certificate, issued by the hospital where P-0103 is said to have died, stating that his death occurred on a certain date in November 2009,¹⁷ as well as an investigator's note detailing a conversation with P-0103's wife in which she confirms that the date stipulated on the death certificate is

contained in the prosecution's list of evidence', ICC-01/05-01/08-1386 OA5 OA6, para. 78; and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Red-Corr ('Ruto Rule 68 Decision'), paras 65 and 150.

¹⁰ Decision of 20 November 2015, ICC-01/04-02/06-1029, paras 23 and 35; Ruto Rule 68 Decision, ICC-01/09-01/11-1938-Corr-Red2, para. 33.

¹¹ Annex C.2. to Request, ICC-01/04-02/06-659-Conf-AnxC2.

¹² Annexes C.3. and C.4. to Request, ICC-01/04-02/06-659-Conf-C3; and ICC-01/04-02/06-659-Conf-AnxC4.

¹³ Request, ICC-01/04-02/06-659, para. 6; Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1; and Annexes to Supplemental Filing, ICC-01/04-02/06-1162-Conf-AnxA and ICC-01/04-02/06-1162-Conf-AnxB.

¹⁴ Request, ICC-01/04-02/06-659, paras 7-8; and Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, para. 13.

¹⁵ Request, ICC-01/04-02/06-659, paras 9 and 16.

¹⁶ Request, ICC-01/04-02/06-659, para. 6; and Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, paras 12-13. The Chamber notes in this regard that the name of P-0103's spouse is redacted in his witness statement (ICC-01/04-02/06-659-Conf-AnxC2, para. 10). The Chamber can therefore not verify whether the aforementioned statement refers to the person claiming to be P-0103's wife.

¹⁷ Annex A to Supplemental Filing, ICC-01/04-02/06-1162-Conf-AnxA.

correct¹⁸ and that the date of death she initially provided to the Prosecution was incorrect.¹⁹

10. It is noted that, prior to receiving notification of the Supplemental Filing, the Defence contested the unavailability of P-0103 as it was of the view that his death was not 'satisfactorily established'.²⁰ The Defence took issue with the fact that, instead of providing a death certificate, the Prosecution merely provided a statement 'not given under oath' and obtained four years and a half after the alleged death.²¹
11. The Chamber notes that the Prosecution addressed the Defence's objection by now providing a death certificate issued by the hospital where P-0103 died.²² In light of this newly provided information, and noting that the Defence has not expressed any further objections in response to the Supplemental Filing, the Chamber considers P-0103's death to be uncontested and that he is therefore unavailable to testify orally.

ii. Whether the necessity of measures under Article 56 of the Statute could have been anticipated

12. The Chamber notes that the Prosecution submits P-0103's death was unexpected and sudden²³ and observes that the Defence made no specific submissions in this regard. In its Request, the Prosecution stated P-0103, upon falling sick on account of his diabetes, spent only one day in hospital before he

¹⁸ Annex B to Supplemental Filing, ICC-01/04-02/06-1162-Conf-AnxB.

¹⁹ Annex B to Supplemental Filing, ICC-01/04-02/06-1162-Conf-AnxB referring to Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, para. 13.

²⁰ Response, ICC-01/04-02/06-736-Conf-Exp, paras 65-68.

²¹ Response, ICC-01/04-02/06-736-Conf-Exp, paras 66 and 68.

²² Annex A to Supplemental Filing, ICC-01/04-02/06-1162-Conf-AnxA; and Annex B to Supplemental Filing, ICC-01/04-02/06-1162-Conf-AnxB.

²³ Request, ICC-01/04-02/06-659, paras 7-8 referring to Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, paras 12-13.

died.²⁴ In these circumstances, the Chamber is satisfied that the necessity of measures under Article 56 could not reasonably have been anticipated.

iii. Whether the prior recorded testimony has sufficient indicia of reliability

13. The Prosecution, in its Request, submits that the statement of P-0103 and his two annexed sketches bear sufficient indicia of reliability as they are ‘truthful, authentic, consistent and provided voluntarily’.²⁵ In its view, the statement is ‘internally consistent, without implausible narratives and shows no motive to distort’.²⁶ In support of further establishing reliability, the Prosecution also submits that P-0103 frankly recognised areas on which he had no knowledge, and pointed to the witness’s admissions when he did not know exact dates or names of individuals.²⁷
14. The Defence submits that the prior recorded testimony does not bear sufficient indicia of reliability because it was not given under oath.²⁸ In its view, this negates ‘its truthfulness and trustworthiness’.²⁹
15. From the outset, the Chamber notes that the two associated documents are signed, dated, used and explained in P-0103’s statement.³⁰ For this reason, the Chamber finds it appropriate to consider them for introduction under Rule 68(2)(c) of the Rules, together with the prior recorded testimony.
16. In conducting its assessment of the reliability of P-0103’s prior recorded testimony under Rule 68(2)(c) of the Rules, the Chamber has taken into consideration, *inter alia*, the fact that: i) his statement to the Prosecution was signed, and stated to have been given voluntarily; ii) his testimony was given in

²⁴ Annex C.1. to Request, ICC-01/04-02/06-659-Conf-AnxC1, para. 13.

²⁵ Request, ICC-01/04-02/06-659, para. 16.

²⁶ Request, ICC-01/04-02/06-659, para. 16.

²⁷ Request, ICC-01/04-02/06-659, para. 16.

²⁸ Response, ICC-01/04-02/06-736-Conf-Exp, paras 69-71.

²⁹ Response, ICC-01/04-02/06-736-Conf-Exp, para. 70.

³⁰ Annexes C.3. and C.4. to Request, ICC-01/04-02/06-659-Conf-C3; and ICC-01/04-02/06-659-Conf-AnxC4.

the presence of a qualified interpreter; iii) he declared on his honour and conscience that the information contained in his statement is accurate; iv) his statement is internally coherent; and v) he admitted when he did know certain information.³¹

17. In light of the above, and as previously concluded by Judge Chung in his Partially dissenting opinion to the Decision of 20 November 2015,³² the Chamber finds that P-0103's prior recorded testimony bears sufficient indicia of reliability for the purposes of Rule 68(2)(c) of the Rules.

iv. Whether any prejudicial effect outweighs the probative value of the prior recorded testimony

18. Concerning the Defence's argument that the probative value of P-0103's prior recorded testimony is significantly outweighed by its prejudicial effect,³³ the Chamber notes that P-0103 mainly testifies on the attack on the Banyali-Kilo *collectivité* and alleged massacre at the *Hôtel Paradiso*. The Chamber does not find that his testimony is so proximate to the accused, as contended by the Defence, that it would be unfair to allow its admission under Rule 68(2)(c) of the Rules. Moreover, the Chamber notes that Rule 68(2)(c) does not prohibit the introduction of prior testimony which goes to the acts and conduct of an accused, but rather stipulates that it 'may be a factor' against its introduction.
19. Finally, in light of the Chamber's analysis related to the indicia of reliability of the prior recorded testimony of P-0103, the Chamber considers that its *prima facie* probative value outweighs any prejudicial effect to the accused caused by its introduction. In this regard, the Chamber recalls that introduction is without

³¹ Annex C.2. to Request, ICC-01/04-02/06-659-Conf-AnxC2, paras 15 and 32-33.

³² ICC-01/04-02/06-1029-Anx, para. 8.

³³ Response, ICC-01/04-02/06-736-Conf-Exp, paras 72-73.

prejudice to the weight, if any, which will be attached to the evidence admitted.³⁴

III. Conclusion

20. In light of the above, and having found all requirements of sub-rule (2)(c) of Rule 68 and Article 69(4) to be met, the Chamber decides to admit into evidence as Prosecution exhibits the prior recorded testimony of P-0103 and the two associated documents.
21. In light of the principle of publicity of the proceedings, and bearing in mind its duty to protect the safety of the witnesses and their family, the Chamber finds it appropriate to require that public redacted versions of the exhibits admitted be made available. The Prosecution is therefore instructed to apply further redactions to the statement of P-0103 and associated documents, if required, and to release them on Ringtail classified 'public', or, if applicable, to request reclassification as 'public'.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY,

GRANTS the Request;

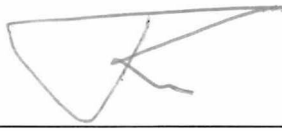
ADMITS INTO EVIDENCE the prior recorded testimony of P-0103 and the two associated documents as 'confidential' Prosecution exhibits;

DIRECTS the Registry to modify the metadata of all exhibits admitted pursuant to the present decision, including by indicating their status as evidence admitted, as well as noting that they have been admitted by way of the present decision; and

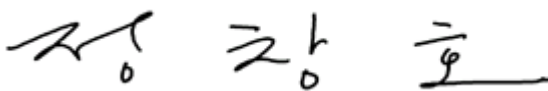
³⁴ Decision, ICC-01/04-02/06-1029, paras 27 and 38 referring to Ruto Rule 68 Decision, ICC-01/09-01/11-1938-Corr-Red2, paras 60, 81, 111 and 128.

ORDERS the Prosecution to apply further redactions to the exhibits, if required, and to release them on Ringtail as 'public', or to request their reclassification as 'public'.

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



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki

Judge Chang-ho Chung

Dated this 11 March 2016

At The Hague, The Netherlands