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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
With Confidential Annex 1 and Public Annex 2**

**Prosecution's application under rule 68(2)(c) to admit the prior recorded testimony
of Witness P-0039**

Source: Office of the Prosecutor

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Introduction

1. The Prosecution requests that Trial Chamber VI ("Chamber") admit the prior recorded testimony, including related documents, of Witness P-0039 ("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) P-0039 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence; (ii) the Prosecution could not anticipate the need for article 56 to obtain his evidence; and, (iii) his evidence is reliable.
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.
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.
5. P-0039 is unavailable under rule 68(2)(c) as he has refused to testify without face and voice distortion as part of in-court protective measures, the Chamber has declined to grant such measures, and the Chamber has declined to compel his testimony.¹ Under these circumstances, the potential for oral testimony is foreclosed and the Witness is unavailable to testify orally and in person. The

¹ ICC-01/04-02/06-T-40-CONF-ENG, ET, at pages 68-83; ICC-01/04-02/06-956-Conf.

only reasonable avenue for the introduction for P-0039's testimony is now through rule 68(2)(c).

Prosecution's Submissions

I. The Chamber can admit the Documents under rule 68

6. The Chamber can admit the Documents² under rule 68(2)(c) because its three key requirements are fulfilled: P-0039 is unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence; the Prosecution could not anticipate the need to use article 56 to preserve his evidence; and, his 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.

(a) P-0039 is unavailable to testify as he refused to testify and the Chamber declined to compel his testimony

7. On 28 October 2015, P-0039 appeared before the Chamber. On the same day, the Chamber issued its *Decision on in-court protective measures for P-39*.³ The Chamber granted the use of a pseudonym but declined to grant voice and face distortion.⁴ Upon learning of the Chamber's decision, P-0039 refused to testify under the Chamber's conditions.⁵ The Prosecution and the Legal Representative for victims of the attacks requested that the Chamber reconsider its decision on protective measures.⁶ The Chamber declined to alter the decision.⁷ Additionally, and in the alternative to reconsideration, the Prosecution requested that the Chamber

² See Annex 1, listing the Documents which the Prosecution seeks to admit.

³ ICC-01/04-02/06-956-Conf.

⁴ ICC-01/04-02/06-956-Conf.

⁵ ICC-01/04-02/06-T-40-CONF-ENG, ET, at pages 68-83.

⁶ ICC-01/04-02/06-T-40-CONF-ENG, ET, at pages 68-83.

⁷ ICC-01/04-02/06-T-40-CONF-ENG, ET, at pages 68-83.

compel P-0039's testimony.⁸ The Chamber declined to compel P-0039's testimony.⁹ The Prosecution also filed a request for reconsideration and an additional application for protective or special measures in order to allow P-0039 to testify.¹⁰ The Chamber declined to grant the Prosecution's request.¹¹

8. In order to meet the requirements of rule 68(2)(c) the Prosecution must show i) the unavailability of the witness; ii) due to obstacles that cannot be outcome with reasonable diligence; iii) that the necessity of measures under article 56 could not be anticipated; and iv) that the prior recorded testimony has sufficient indicia of reliability.
9. The conditions required for a finding of unavailability under rule 68(2)(c) are met. P-0039 refuses to testify without full protective measures, the Chamber has declined to provide those protective measures, and the Chamber has declined to compel the Witness to testify. The Prosecution has used reasonable diligence to pursue alternatives to rule 68(2)(c).¹²

(b) Article 56 measures could not be anticipated as the situation was unforeseeable

10. The Prosecution could not anticipate the need to take testimony or evidence under article 56 because it reasonably expected P-0039 to testify orally and was unable to predict that the Witness would refuse to testify, that the Chamber would decline to order full in-court protective measures, and that the Chamber would decline to compel his testimony.

⁸ ICC-01/04-02/06-T-40-CONF-ENG, ET, at pages 68-83.

⁹ ICC-01/04-02/06-T-40-CONF-ENG, ET, at pages 68-83.

¹⁰ ICC-01/04-02/06-973-Conf.

¹¹ ICC-01/04-02/06-1049-Conf.

¹² ICC-01/04-02/06-1049-Conf.

(c) The Documents are reliable

11. The Documents bear sufficient indicia of reliability, as defined by the Chambers of this Court and of the *ad hoc* tribunals. The Documents are i) signed, and given voluntarily; ii) were given in the presence of a qualified interpreter; iii) were given under declaration of honour and conscience that the statements are accurate; iv) are internally consistent and coherent; and v) he admitted when he did not know certain information.¹³
12. P-0039 signed his statements before Court investigators. P-0039 attested to the truth and accuracy of the content of his statements, by declaring on his honour and conscience that the information in his declarations was accurate.¹⁴ The following factors also support the reliability of the evidence: first, the Documents mention events that are consistent with accounts of other witnesses displaced and victimized in the *First and Second Attacks*;¹⁵ second, the witness freely admitted a lack of knowledge or a lack of memory of certain events within his prior testimony;¹⁶ and third, there are no obvious inconsistencies.¹⁷ Additionally, P-0039 gives logical explanations without any apparent embellishments, stating, for example, that he wasn't able to see any attackers and could not describe their weapons, but he knew the attackers had weapons because he could hear them.¹⁸
13. 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.¹⁹ Absence of certain indicia of reliability may be

¹³ ICC-01/04-02/06-1205, para. 16.

¹⁴ DRC-OTP-0104-0015, pg. 9.

¹⁵ See e.g. Testimony of **P-0805**, ICC-01/04-02/06-T-25-Conf-Eng and ICC-01/04-02/06-T-26-Conf-Eng.

¹⁶ See e.g. DRC-OTP-0104-0015, paras. 20, 21, and 25.

¹⁷ See e.g. *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Admission of Evidence of Radislav Krstić Pursuant to Rule 92quater, 26 November 2013, para.12.

¹⁸ DRC-OTP-0104-0015, para. 22.

¹⁹ ICC-01/04-01/06-1399, para.29.

considered when assessing the weight of that evidence but should not be a reason for excluding the evidence.²⁰ It is only necessary to establish *prima facie* - not definitive - proof of reliability based on sufficient indicia.²¹ The Chamber's assessment of indicia of reliability requires an exercise of discretion, based on the circumstances of the case.²²

14. P-0039's prior recorded testimony bears *prima facie* indicia of reliability because it is truthful, authentic, consistent and were provided voluntarily. There is no indication of a motive for P-0039 to fabricate or distort his account. P-0039 describes his experience as a victim of UPC and P-0039 answered the questions of the Prosecution investigator only to the extent of his knowledge.
15. During his second statement, P-0039 provided clarifications and additional information to his first statement. P-0039 stated in his second statement that his first statement was read back to him. He maintained consistency throughout his first and second statements.

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

16. Rule 68(2)(c) applies equally to statements and transcripts of interview made out-of-court, as it does to in-court testimony.
17. 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".

²⁰ 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 Miluntinović et al*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92quater, 16 February 2007.

²¹ 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."

²² 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.

This interpretation was adopted by ICC Chambers including in *Prosecutor v Lubanga*²³, *Prosecutor v Katanga et al.*²⁴, and, previously, by this Chamber.²⁵ The Chambers allowed the admission of prior recorded witness statements.²⁶ 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.²⁷ This 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 applied only to in-court testimony, which is always given under oath.

(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

18. 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 P-0039 on his 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.

²³ ICC-01/04-01/06-1603, paras.18-19.

²⁴ 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.”

²⁵ ICC-01/04-02/06-1205, (referring throughout the Decision to the ‘prior recorded testimony’ of P-0103).

²⁶ 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.

²⁷ 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 or exceed the scope of ICTY Rules 92*quater* and 92*quinqies* that explicitly allow for introduction of written statements or transcripts of evidence.

19. The Defence's inability to cross-examine the witness 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.
20. 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.²⁸ Trial Chamber I observed that although article 69(2) usually requires the testimony of a witness at trial to be given in person, it allows "a wide range of other evidential possibilities".²⁹ 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.³⁰ 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.³¹ Accordingly, as the Documents could have been admitted under article 69(2), no prejudice arises in admitting them under rule 68(2)(c).

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

21. 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-

²⁸ ICC-01/04-01/06-1399, paras.36-42.

²⁹ ICC-01/04-01/06-1399, para.22.

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

³¹ ICC-01/04-01/06-1399, para.24.

stage test for admitting “evidence other than direct oral testimony”:³² (i) determine that the Documents are *prima facie* relevant to the trial,³³ (ii) determine that have *prima facie* probative value³⁴ (including indicia of reliability);³⁵ and (iii) determine that their probative value outweighs any prejudicial effect.³⁶ It is not unfair to admit the evidence.

(a) Prima Facie Relevant

22. 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.³⁷ Evidence is deemed relevant if it tends to prove or disprove a material issue or fact in question, making it more or less probable.³⁸

23. P-0039’s two prior statements are *prima facie* relevant, *inter alia*, to the *First Attack* Counts 12 and 13 and the *Second Attack* Counts 1, 3, 11, and 12.

(b) Prima Facie Probative—sufficient indicia of reliability

24. As shown above at paragraphs 11-15, the Documents have *prima facie* probative value because they bear sufficient indicia of reliability.

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

25. The Documents should be admitted because after weighing any prejudicial effect against the probative value – in particular the lack of an opportunity to cross-

³²See *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.

³³Article 69(3); See also, ICC-01/04-01/06-1399, para.27.

³⁴Article 69(4).

³⁵Rule 68(2)(c)(i).

³⁶ICC-01/04-01/06-1399, paras.31-32.

³⁷ICC-01/04-01/06-1399, para.24; ICC-01/04-01/06-2360, para.23.

³⁸ICC-01/09-01/11-1353, para.15; ICC-01/04-01/07-2635, para.34.

examine the witnesses – admitting the documents would not violate the Accused’s right to a fair trial.

26. Both TC V(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.³⁹ This is a fact-specific enquiry.⁴⁰ 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.⁴¹

27. Evidence of unavailable 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.⁴² 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.⁴³ 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,⁴⁴ and an assessment of the proceedings as a whole.⁴⁵ Corroboration is just one factor to be considered. The general rule at the ICTY is that the equivalent rule

³⁹ ICC-01/09-01/11-1353, para.16; ICC-01/04-01/06-1399-Corr, para.31.

⁴⁰ ICC-01/09-01/11-1353, para.16.

⁴¹ ICC-01/04-01/06-1399, para.31.

⁴² 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);

⁴³ ICC-01-04-01/06-1399, para.24.

⁴⁴ *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.

⁴⁵ *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.

92^{quater} evidence does not require corroboration, although uncorroborated evidence cannot form the sole basis for a conviction.⁴⁶

28. Admitting the Documents is not unfair to the Accused, as it becomes clear 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

29. For all the foregoing reasons, the Prosecution requests that the Chamber admit the Documents of P-0039 as listed in Annex 1 to this filing.



Fatou Bensouda
Prosecutor

Dated this 30th day of March 2016
At The Hague, The Netherlands

⁴⁶ See e.g. *Prosecutor v Perišić*, IT-04-81-T, 6 September 2011, para.44.