

**Cour
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**International
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Date: 21 April 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

**Response of the Common Legal Representative of the Victims of the Attacks to the
“Prosecution’s application under rule 68(2)(c) to admit prior recorded testimony of
Witness P-0039”**

Source: Office of Public Counsel for Victims

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 Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Mohamed Abdou

Legal Representatives of the Applicants

Mr Dmytro Suprun
Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**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

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”), representing Witness P-0039 in the latter’s capacity as a participating victim in the present proceedings, hereby submits his response to the “Prosecution’s application under Rule 68(2)(c) to admit the prior recorded testimony of Witness P-0039” filed on 31 March 2016 (the “Prosecution Request” or “Request”).¹

2. The Legal Representative supports the Prosecution’s Request. It is respectfully submitted that Trial Chamber VI (the “Chamber”) should admit P-0039’s prior statements into evidence *in lieu* of oral testimony pursuant to article 69(2) of the Rome Statute and Rule 68(2)(c) of the Rules of Procedure and Evidence (the “Rules”).

II. PROCEDURAL BACKGROUND

3. On 18 September 2015, the Prosecution submitted its list of forthcoming witnesses for the second evidentiary block commencing on 19 October 2015, according to which P-0039 was the third witness to be called in that block.²

4. On 14 October 2015, the Prosecution filed a request for the in-court protective measures of face and voice distortion as well as the use of pseudonym for the testimony of P-0039.³

5. On 28 October 2015, Witness P-0039 appeared before the Chamber. He, however, declined to testify under the regime of protective measures ordered by the

¹ See the “Prosecution’s application under Rule 68(2)(c) to admit the prior recorded testimony of Witness P-0039”, No. ICC-01/04-02/06-1238, 31 March 2016 with confidential Annexes A and B.

² See email sent by the Prosecution to the Chamber, Defence, and Participants at 18:47 on 18 September 2015 transmitting the Prosecution’s Forthcoming Witness List for the Second Evidentiary Block.

³ See the “Confidential redacted version of ‘Prosecution’s submission pursuant to regulation 35 to vary the time limit for the sixth request for in-court protective measures concerning Prosecution Witness P-0039’, 14 October 2015”, No. ICC-01/04-02/06-899-Conf-Red, 14 October 2015.

Chamber.⁴ At the time, the Chamber declined to reconsider its decision in respect of protective in-court measures and also declined to compel the witness to testify.⁵ The Chamber, however, indicated that it was open to the Prosecution to “*think about other legal measures how to get this testimony into evidence*”.⁶

6. On 3 November 2015, the Prosecution requested reconsideration of the Chamber’s oral decision and further requested that the Chamber order special measures pursuant to rule 87 of the Rules.⁷

7. On 10 December 2015, the Chamber rejected the Prosecution requests for reconsideration and special measures.⁸

8. On 31 March 2016, the Prosecution filed the Request.

III. SUBMISSIONS

9. Rule 68 of the Rules foresees the possibility of the prior recorded statements of a witness being introduced into evidence *in lieu* of oral testimony, by setting forth that a Chamber may “*allow the introduction of [...] other documented evidence of [...] testimony*”⁹ provided that this would not be prejudicial to or inconsistent with the rights of the Accused, and where the requirements of “*one or more of the [...] sub-rules*”¹⁰ of rule 68 of the Rules are met.

⁴ See the transcript of the hearing held on 28 October 2016, No. ICC-01/04-02/06-T-40-Red-ENG-WT, p. 81, lines 2-12, 22-25; p. 82, lines 2-5.

⁵ *Idem*, p. 81, lines 7-21.

⁶ *Ibid.*, lines 17-18.

⁷ See the “Prosecution applications for protective/special measures under rule 87 or rule 88, and for leave to appeal the “Decision on Prosecution’s request for in-court protective measures for Witness P-0039”, No. ICC-01/04-02/06-973-Conf, 3 November 2015, with two confidential Annexes. On 4 November 2015, a public redacted version of the application was filed (ICC-01/04-02/06-973-Red).

⁸ See the “Decision on Prosecution’s requests relating to in-court protective and special measures for Witness P-0039”, No. ICC-01/04-02/06-1049-Red.

⁹ See rule 68(1) of the Rules of Procedure and Evidence.

¹⁰ *Idem*.

10. Indeed, this Chamber has previously allowed the introduction into evidence of prior recorded statements pursuant to rule 68(2)(c) of the Rules where the persons giving the statements were deceased, finding that the documents were *prima facie* relevant, reliable, and their probative value was not outweighed by their prejudicial effect.¹¹ The Chamber further recalled that rule 68 of the Rules conferred upon it the discretionary power to admit into evidence the statements of persons who are, “*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.*”¹²

(i) *The unavailability of the witness*

11. Witness P-0039 is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify before this Chamber, as the Chamber has declined the Prosecution’s request to compel him to testify and subsequently declined to reconsider its decision in this regard.

12. Reasons giving rise to obstacles that cannot be overcome with reasonable diligence can be manifold and do not necessarily imply death or presumption of death. In the *Šešelj* case for instance, the Trial Chamber of the ICTY held that a person was unavailable for the purposes of Rule 94*quater* of the ICTY Rules of Procedure and Evidence,¹³ where he was neither deceased nor presumed dead.¹⁴ In this case the

¹¹ See the “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” (Trial Chamber VI), No, ICC-01/04-02/06-1029, 20 November 2015.

¹² *Idem*, para. 12.

¹³ See ICTY rule 92*quater* of the Rules of Procedure and Evidence is a similar provision to rule 68(2)(c) of the ICC Rules of Procedure and Evidence. See also ICTY, *The Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-A, Appeals Judgment, 4 December 2012, para. 565: “Rule 92 quater of the Rules allows for the admission of written evidence when the person giving the statement is objectively unable to attend a court hearing - either because the person is deceased or because of a physical or mental impairment - even if the evidence goes directly to the accused’s acts and conduct”. See also ICTY, *The Prosecutor v. Jandranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jandranko Prlić’s Questioning into Evidence, 13 November 2007, para. 48: “It is true that Rule 92quater

Trial Chamber found that it was in the interests of justice and necessary in order to ascertain the truth, and after having tried to obtain Ljubiša Petković's *viva voce* testimony – including by subpoena, that his statements be admitted into evidence in that case.¹⁵ In the *Karadžić* case, the ICTY Trial Chamber held that 'the accused's assertion that a witness is only to be considered unavailable if he or she is objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment' and that 'only a death certificate or substantial medical documentation can establish the unavailability of a witness' did not accurately describe rule 92 *quarter* of the ICTY Rules.¹⁶ Although this case concerned a person who could no longer be traced, the Trial Chamber importantly went on to state that "[t]he only requirement under Rule 92quarter [...] concerning a witness's unavailability is that the Trial Chamber must be 'satisfied of the person's unavailability.'"¹⁷

13. Although Witness P-0039 in the present case is neither deceased, nor presumed dead, nor incapacitated for medical reasons, the Legal Representative shares the Prosecution's view in so far as the witness's refusal to testify should, in the circumstances of this particular witness, be regarded as unavailability and his statement should be admitted on the basis that he is 'unavailable' within the meaning of rule 68(2)(c) of the Rules.

provides for a mechanism to allow for the admission of written evidence when the person giving the statement is unavailable – but this is so because the individual in question is objectively unable to attend a court hearing, either because he is deceased or because of physical or mental impairment."

¹⁴ See ICTY, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision Admitting the Prior Statements of Ljubiša Petković Pursuant to Rule 94 *quarter* of the Rules, 6 November 2008 (English version dated 12 January 2009) (the "*Šešelj* Decision"), p. 2. In this case, the Trial Chamber had (i) twice unsuccessfully ordered Ljubiša Petković to testify *viva voce*, which resulted in contempt proceedings against witness; (ii) denied the Prosecution's motion to hear him pursuant to Rule 92 *ter* of the ICTY Rules; (iv) heard the witness during his contempt proceedings, where stated that it would, under normal circumstances, be a pleasure for him to testify; and (iii) received a psychological assessment of the witness which concluded that he was incapable of testifying owing to a mental health issue. As the witness had been interviewed as a suspect, the Chamber in particular noted the importance that he had counsel present when his interview with the Office of the Prosecutor was conducted and recorded.

¹⁵ See the *Šešelj* Decision, *supra* note 14, p. 3.

¹⁶ See ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution's Motion for Admission of Evidence of KDZ290 (Mirsad Kučanin) Pursuant to Rule 92 Quarter, 25 September 2009, para. 7.

¹⁷ *Idem*, para 8.

(ii) The prima facie probative value of the statement outweighs any prejudicial effect to the accused

14. It is submitted that P-0039's statement bears sufficient indicia of reliability. It is signed by P-0039 who declared that he has given it voluntarily and that the information provided therein is accurate and true to the best of his knowledge. The statement is internally coherent and P-0039 indicated when not knowing certain information. Furthermore, his evidence does not directly pertain to the acts and conduct of the accused and is in large part corroborative of the evidence of other witnesses who appeared before the Chamber. The probative value therefore outweighs the prejudice to the Accused.

FOR THE FOREGOING REASONS the Legal Representative respectfully requests the Chamber to grant the Prosecution Request.



Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 21st Day of April 2016
At The Hague, The Netherlands