



Original: English

No.: ICC-01/04-02/06
Date: 20 October 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
With Confidential Annexes A-F and H-I
and Public Annex J**

**Public redacted version of “Prosecution’s application under rule 68(2)(c) to admit
the statements and related documents of deceased Witness P-0027”,
4 October 2016, ICC-01/04-02/06-1559-Conf-Exp**

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 Christopher Gosnell

Legal Representatives of Victims

Mr Dmytro Suprun
Ms Sarah Pellet

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. The Prosecution requests that Trial Chamber VI (“Chamber”) admit the prior recorded testimony, including relevant associated documents, of Witness P-0027 under rule 68(2)(c) of the Rules of Procedure and Evidence (“Rules”) and articles 64(9)(a) and 69(2), (3) and (4) of the Rome Statute (“Statute”).
2. The prior recorded testimony and associated documents of Witness P-0027 are admissible under rule 68(2)(c) because: (i) the witness has died since providing his statement to the Prosecution; (ii) the Prosecution could not have anticipated the need for article 56; and (iii) the evidence is reliable.
3. As the Chamber held in its “Decision on Prosecution application under Rule 68(3)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103”, admitting these documents under rule 68(2)(c) does not give rise to retroactive application of this provision of the Statute to the detriment of the Accused within the meaning of article 51(4) of the Statute, nor does it offend the principles of legality.¹
4. The prior recorded testimony and associated documents are *prima facie* relevant and probative and, in weighing the probative value against the potential prejudice, there is no violation of the Accused’s right to a fair trial.

Confidentiality

5. This filing and Annex G are classified as “Confidential, *ex parte* – only available to the Prosecution and Victims and Witnesses Unit” pursuant to regulation 23bis (1) of the Regulations of the Court as it contains information

¹ ICC-01/04-02/06-1029, para. 11.

[REDACTED]. Annexes A to F and H to I are classified as “Confidential” because they contain information about [REDACTED]. The Prosecution will file a confidential and a public redacted version of the filing.

Prosecution’s Submissions

I. The materials are admissible under rule 68(3)(c) of the Rules

6. The prior recorded testimony of Witness P-0027 and associated documents that the Prosecution seeks to admit under rule 68(3)(c) fulfil the requirements under this provision of the Rules, namely: (i) the witness has subsequently died; (ii) the Prosecution could not have anticipated the need to apply article 56 to preserve his evidence; and (iii) his prior testimony bears sufficient indicia of reliability.
7. These documents are admissible under rule 68 as this provision applies equally to statements and transcripts of interviews made out-of-court, as it does to in-court testimony.² Further, applying amended rule 68 is not retroactive or detrimental to the Accused.³

(i) Witness P-0027 is unavailable to testify as he is deceased

8. Witness P-0027 provided a statement to the Prosecution in [REDACTED], to which he annexed four documents.⁴ The statement and these four annexed documents are attached to this filing as Annexes A to E.⁵

² ICC-01/04-02/06-1029, paras. 23, 34-35 and ICC-01/04-02/06-1205, paras. 15-16, 20.

³ ICC-01/04-02/06-1029, para. 11.

⁴ Witness P-0027 signed this statement in the presence of the investigator after attesting as follows: “*Je déclare en mon honneur et conscience que les informations figurant dans cette déclaration, que j’ai relue personnellement, reflètent correctement mon audition de [REDACTED]. J’ai fait cette déclaration de mon plein gré et j’ai été informé qu’elle pouvait être utilisée dans le cadre de poursuites judiciaires devant la Cour Pénale Internationale et que je peux être appelé à témoigner en public devant la Cour.*”

9. On [REDACTED] 2016, the Prosecution learned that Witness P-0027 had passed away. The Prosecution took measures to contact his next of kin and to collect a death certificate. Proof of his death is evidenced in Annexes F to H attached to this filing, which consist of [REDACTED]⁶ and an *Acte de Décès*, dated [REDACTED] 2016,⁷ the [REDACTED] in which Witness P-0027 resided prior to his death [REDACTED]. In the *Acte de Décès*, [REDACTED] attests to Witness P-0027's death in [REDACTED] on [REDACTED] 2016.

(ii) Article 56 measures were not taken as Witness P-0027's death was unforeseen

10. The Prosecution did not anticipate the need to take testimony or evidence under article 56 of the Statute as Witness P-0027's death was unexpected and sudden.
11. In [REDACTED] 2015, Witness P-0027 advised representatives of the Prosecution that he had been diagnosed with [REDACTED] and that he was being treated with medication. In [REDACTED] 2015, representatives of the Prosecution spoke with Witness P-0027 about his general condition. Following this conversation, the Prosecution [REDACTED]. Between [REDACTED] 2015 and [REDACTED] 2016, representatives of the Prosecution attempted to reach Witness P-0027 without success. On [REDACTED] 2016, the Prosecution learned [REDACTED] that Witness P-0027 had passed away on [REDACTED] 2016.⁸

⁵ **Annex A:** DRC-OTP-0096-0052 (witness statement); **Annex B:** DRC-OTP-0096-0068 (Annex 1 to witness statement, a statement provided to [REDACTED]); **Annex C:** DRC-OTP-0096-0070 (Annex 2 to witness statement, [REDACTED]); **Annex D:** DRC-OTP-0096-0071 (Annex 3 to witness statement, a sketch); and **Annex E:** DRC-OTP-0096-0072 (Annex 4 to witness statement, a sketch).

⁶ **Annex F:** DRC-OTP-2092-0129.

⁷ **Annex G:** DRC-OTP-2092-0133 (unredacted – *ex parte*) and **Annex H:** DRC-OTP-2092-0133 (with redactions applied). The Prosecution has formally disclosed the redacted version of this document.

⁸ **Annex I:** DRC-OTP-2091-0094.

12. On [REDACTED] 2016, representatives of the Prosecution met with Witness P-0027's [REDACTED], in which [REDACTED] confirmed that [REDACTED] became ill in [REDACTED] 2016 and was taken to hospital, where he died [REDACTED].⁹

(iii) The materials are relevant, reliable and have probative value

13. Witness P-0027's prior recorded testimony and the associated documents are *prima facie* relevant to and probative of issues in the proceedings including: UPC/FPLC attacks on several villages during the period of the charges; the "pacification" meeting in Sangi in 2003 and the massacre behind the Hôtel Paradiso in Kobu; UPC/FPLC forces capturing [REDACTED]; the presence of children under the age of 15 in the ranks of the UPC/FPLC forces; UPC/FPLC forces killing [REDACTED]; the burning of houses and the destruction of a church in Buli; and the burning of a church in Jitchu. His evidence corroborates the evidence of witnesses such as regarding the UPC/FPLC invitations to attend a so-called "pacification meeting", where UPC forces allegedly killed a number of Lendu in attendance. [REDACTED].¹⁰ The statement, however, also offers [REDACTED], on additional persons who were killed at the pacification meeting and on destruction of property and protected objects [REDACTED] in Buli.
14. It is only necessary to establish *prima facie* – not definitive – proof of reliability based on sufficient indicia.¹¹ Moreover, absence of certain indicia of reliability may be considered when assessing the weight of that evidence but should not

⁹ DRC-OTP-2092-0129 at 0130, para. 10 (Annex F).

¹⁰ ICC-01/04-02/06-T-140, p. 20, ln. 11 to p. 21, ln. 6.

¹¹ ICC-01/09-01/11-1353, para. 15. *See also* ICTY, *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."

be a reason for excluding the evidence.¹² The statements provided by Witness P-0027 to the Prosecution in [REDACTED] and to the non-governmental organisation [REDACTED]¹³ bear sufficient indicia of reliability, as defined by the Chambers of this Court and of the *ad hoc* tribunals. These statements are authentic,¹⁴ truthful and voluntarily provided.¹⁵

15. The two statements are also consistent, both internally and with each other.¹⁶ In Witness P-0027's witness statement, he acknowledges having been interviewed by representatives of [REDACTED], and explains the circumstances of this interview and the limitations on the information that was provided in the statement to [REDACTED].¹⁷ He provides the names of several individuals as part of his detailed narrative account.
16. These statements contain no obvious inconsistencies,¹⁸ and the detailed narrative of events and individuals mentioned therein are corroborated by other witness' evidence. [REDACTED].¹⁹ [REDACTED].²⁰ He also describes how bodies were found behind a hotel called Paradiso in Kobu, and [REDACTED].²¹

¹² See e.g. ICTY, *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 Milutinović et al*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92quater, 16 February 2007.

¹³ DRC-OTP-0096-0052 (Annex A) and DRC-OTP-0096-0068 (Annex B), respectively.

¹⁴ See 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."

¹⁵ See e.g. 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.

¹⁶ See ICC-01/04-01/06-1399, para. 40.

¹⁷ DRC-OTP-0096-0052 at 0054, para. 14 (Annex A): "Je considère le contenu de ce document comme partiellement, et pourtant non diligemment, reflétant au sujet des événements dont j'ai été témoin tels que je relaterais plus tard au cours de l'audition. Je précise pourtant que seulement les informations figurant dans la présente déclaration sont conformes aux événements dont j'ai été témoin et victime."

¹⁸ See e.g. ICTY, *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.

¹⁹ DRC-OTP-0096-0052 at 0057, para. 26 (Annex A).

²⁰ DRC-OTP-0096-0052 at 0061, para. 43 (Annex A).

²¹ DRC-OTP-0096-0052 at 0064-0065, paras. 56-58 (Annex A).

17. Witness P-0027 signed his witness statement to the Prosecution in the presence of the investigator after he attested to the truth and accuracy of its contents, by declaring on his honour and conscience that the information in his declaration was accurate.²² Further, in this statement, Witness P-0027 acknowledges areas in which his knowledge is limited.
18. Witness P-0027 annexed four documents to the statement he gave to the Prosecution. He describes each of these documents, provides his knowledge of them and explains the circumstances of their collection.²³
19. The first document annexed to his witness statement is the handwritten statement that Witness P-0027 provided to the non-governmental organisation [REDACTED] (attached as Annex B to this filing).²⁴ Witness P-0027 also annexed a map entitled [REDACTED] that sets out the positions of various villages referred to in his statement (attached as Annex E to this filing).²⁵ Finally, Witness P-0027 attests to [REDACTED]; [REDACTED] (attached as Annexes C and D to this filing). Witness P-0027 provides his understanding of the source and significance [REDACTED].²⁶
20. These four associated documents are all relevant and probative to the background of the conflict and the crimes charged in these proceedings and as such, are admissible through this witness pursuant to this application.
21. The Prosecution has disclosed the information in its possession with regard to the interactions between Witness P-0027 and [REDACTED].²⁷ There is no

²² DRC-OTP-0096-0052 at 0067 (Annex A).

²³ DRC-OTP-0096-0052 at 0054, para. 14 and at 0064, paras. 53, 54 and 55 (Annex A).

²⁴ Referred to in DRC-OTP-0096-0052 at 0054, para. 14 (Annex A).

²⁵ Referred to in DRC-OTP-0096-0052 at 0064, para. 55 (Annex A).

²⁶ Referred to in DRC-OTP-0096-0052 at 0064, paras. 53 and 54 (Annex A).

²⁷ See Investigation Notes [REDACTED], and documents [REDACTED].

indication of a motive for Witness P-0027 to fabricate or distort his account, or that there was any improper interference by [REDACTED].

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

22. As the Chamber has confirmed in its previous decisions regarding the statements of deceased witnesses P-0022, P-0041 and P-0103, rule 68(2)(c) applies both to statements and transcripts of interview made out-of-court (including to non-governmental organisations), as well as in-court testimony.²⁸ The plain reading of rule 68 (as amended) also makes it clear that “prior recorded testimony” includes written statements taken from the witness as it includes “other documented evidence of such testimony.”
23. This interpretation was also adopted by other Chambers of this Court including in *Prosecutor v Lubanga*²⁹ and *Prosecutor v Katanga et al.*³⁰ These Chambers allowed the admission of prior recorded witness statements.³¹ 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.³² 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 applies only to in-court testimony which is always given under oath.

²⁸ ICC-01/04-02/06-1029, paras. 23, 34-35 and ICC-01/04-02/06-1205, paras. 15-16, 20.

²⁹ ICC-01/04-01/06-1603, paras. 18-19.

³⁰ 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.”

³¹ 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.

³² 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 that confirm 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.

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

24. As this Chamber has previously found, admitting the prior recorded testimony and associated documents of a deceased witness under amended rule 68 of the Rules complies with article 51(4) of the Statute because its application is not retroactive or detrimental to the Accused.³³

II. Admitting the materials under rule 68(3)(c) is not prejudicial or inconsistent with the rights of the Accused

25. The documents sought to be admitted under rule 68(3)(c) of the Rules 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.
26. As the Chamber has previously decided, the inability to cross-examine the deceased witness on his evidence does not 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 and associated documents.
27. The Defence's inability to cross-examine the Witness P-0027 is simply 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 their being corroborative of other witness's testimony, which can be tested by the Defence in cross-examination.

³³ ICC-01/04-02/06-1029, para. 11. *See also*, ICC-01/09-01/11-1938-Red-Corr, paras. 23-26.

28. As set out above, the Prosecution has disclosed several investigation notes and other documents in its possession [REDACTED].³⁴ The Prosecution submits that the Accused is not prejudiced by the Defence's inability to cross-examine deceased Witness P-0027 about these interactions [REDACTED]. One of the investigation notes reflects that [REDACTED].³⁵ Moreover, the fact that witnesses [REDACTED] does not mean their evidence was contaminated or is unreliable.
29. The two other investigation notes relate to [REDACTED].³⁶ These claims were unsubstantiated and Witness P-0027 did not suggest that he received money [REDACTED]. Similarly, in respect of this information there is no basis to speculate that Witness P-0027 was subject to interference or that his evidence is not reliable.
30. As set out above at paragraphs 13-20, the prior recorded testimony and associated documents have *prima facie* probative value because they are relevant and bear sufficient indicia of reliability.
31. Finally, the prior recorded testimony and associated documents should be admitted because after weighing any prejudicial effect against the probative value – in particular the lack of an opportunity to cross-examine Witness P-0027 – admitting these documents would not violate the Accused's right to a fair trial.
32. Both Trial Chamber 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

³⁴ Investigation Notes [REDACTED], and documents [REDACTED].

³⁵ DRC-OTP-2090-0407.

³⁶ [REDACTED].

low.³⁷ This is a fact-specific enquiry.³⁸ 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.³⁹

33. The right of the Accused to cross-examine a witness is not an absolute right.⁴⁰ Chambers enjoy a significant discretion in admitting documents, even if the author of the document is not available to testify or to be cross-examined.⁴¹ The fairness of admitting evidence of a deceased witness, where there is no ability to cross-examine, will depend on factors such as whether it is corroborated by other evidence, has no obvious inconsistencies,⁴² and an assessment of the proceedings as a whole.⁴³ Corroboration is just one factor to be considered. Rule 63(4) explicitly provides that there is no legal requirement that corroboration is required in order to prove a crime within the jurisdiction of the Court. Similarly, at the ICTY, the equivalent rule 92*quater* evidence does not require corroboration, although uncorroborated evidence cannot form the sole basis for a conviction.⁴⁴

34. Admitting the prior recorded testimony and associated 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

³⁷ ICC-01/09-01/11-1353, para. 16; ICC-01/04-01/06-1399-Corr, para. 31.

³⁸ ICC-01/09-01/11-1353, para. 16.

³⁹ ICC-01/04-01/06-1399, para. 31.

⁴⁰ 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.).

⁴¹ ICC-01-04-01/06-1399, para. 24.

⁴² *See e.g.* ICTY *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.

⁴³ *See e.g.* ICTY, *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.

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

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

35. The Prosecution requests that the Chamber admit the prior recorded testimony and associated documents of deceased Witness P-0027 attached as Annexes A to I to this filing.



Fatou Bensouda
Prosecutor

Dated this 20th day of October 2016
At The Hague, The Netherlands