

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-02/06
Date: **25 November 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-0027**

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 Christopher Gosnell

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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64(2) and (9)(a), 67, and 69(2) and (4) of the Rome Statute ('Statute') and Rules 63(2) and 68 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0027'.

I. Procedural history

1. On 4 October 2016, the Office of the Prosecutor ('Prosecution') filed a request for admission of the prior recorded testimony, and associated documents, of Witness P-0027, pursuant to Rule 68(2)(c) of the Rules ('Request').¹
2. On 26 October 2016, the defence team for Mr Ntaganda ('Defence') filed its response ('Response'),² in which it opposes the Request and seeks that it be 'denied in its entirety with prejudice'.³

II. Submissions and Analysis

3. The Chamber incorporates by reference the applicable law set out in previous decisions on applications for admission of evidence under Rule 68(2)(c) of the Rules.⁴
4. The Prosecution seeks the admission, under Rule 68(2)(c) of the Rules, of the prior recorded testimony of P-0027, consisting of a statement taken by the

¹ Prosecution's application under rule 68(2)(c) to admit the statements and related documents of deceased Witness P-0027, ICC-01/04-02/06-1559-Conf-Exp, with confidential annexes A-F and H-I, confidential, *ex parte*, only available to the Prosecution and Victims and Witnesses Unit Annex G and public Annex J. A confidential redacted version was filed on the same day (ICC-01/04-02/06-1559-Conf-Red), and a public redacted version was filed on 20 October 2016, ICC-01/04-02/06-1559-Red2.

² 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 Witness P-0027", ICC-01/04-02/06-1594-Conf.

³ Response, ICC-01/04-02/06-1594-Conf, para. 38.

⁴ See, for example, 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, 20 November 2015 ('Decision of 20 November 2015'), ICC-01/04-02/06-1029, paras 12-15.

Prosecution in 2005 ('Statement'),⁵ as well as four associated documents, including: (i) a statement P-0027 provided in 2005 to a non-governmental organisation ('NGO') ('NGO Statement');⁶ (ii) a type-written document;⁷ and (iii) two sketches, including a map prepared by the witness, which it is stated is based on a map he had previously received from another person,⁸ and another map, created by the witness and showing the locations referred to in his Statement⁹ ('Associated Documents', and together with the Statement, 'Material'). According to the Prosecution, the Material is admissible under Rule 68(2)(c) of the Rules,¹⁰ on the basis that: (i) P-0027 has died since he provided his Statement;¹¹ (ii) it could not have anticipated the need to rely on Article 56 of the Statute;¹² and (iii) the Material is relevant, reliable and has probative value.¹³

5. The Prosecution submits that admitting the Material is not prejudicial or inconsistent with the rights of the accused,¹⁴ and, in this respect, argues that: (i) the Material has been available to the Defence since 2013;¹⁵ (ii) the inability to cross-examine P-0027 on his evidence does not deprive the accused of his right to challenge the evidence,¹⁶ but is a factor to be considered in the final determination of the weight to be given to that testimony;¹⁷ (iii) the accused is not prejudiced by the Defence's inability to cross-examine P-0027 about his interactions with Intermediary P-0154, as there is no indication of improper

⁵ Annex A to Request, ICC-01/04-02/06-1559-Conf-AnxA.

⁶ Annex B to Request, ICC-01/04-02/06-1559-Conf-AnxB.

⁷ Annex C to Request, ICC-01/04-02/06-1559-Conf-AnxC.

⁸ Annex D to Request, ICC-01/04-02/06-1559-Conf-AnxD.

⁹ Annex E to Request, ICC-01/04-02/06-1559-Conf-AnxE.

¹⁰ Request, ICC-01/04-02/06-1559-Conf-Red, page 4. With respect to the reference to Rule 68(3)(c) in the Request, the Chamber considers this to be a typographical error and that this in fact refers to Rule 68(2)(c).

¹¹ Request, ICC-01/04-02/06-1559-Conf-Red, paras 6, 8-9.

¹² Request, ICC-01/04-02/06-1559-Conf-Red, paras 6, 10-12.

¹³ Request, ICC-01/04-02/06-1559-Conf-Red, paras 6, 13-21.

¹⁴ Request, ICC-01/04-02/06-1559-Conf-Red, para. 24.

¹⁵ Request, ICC-01/04-02/06-1559-Conf-Red, para. 25.

¹⁶ Request, ICC-01/04-02/06-1559-Conf-Red, para. 26.

¹⁷ Request, ICC-01/04-02/06-1559-Conf-Red, para. 27.

interference;¹⁸ and (iv) any prejudicial effect resulting from admission of the Material will be weighed against its probative value.¹⁹

6. The Defence opposes the Request, on the basis that, as set out in more detail below, the requirements under Rule 68(2)(c) of the Rules are not met.

Whether the witness is unavailable to testify orally

7. The Prosecution submits that in January 2016, it was informed that P-0027 had passed away, whereupon it contacted his next of kin to collect a death certificate. To establish P-0027's death, the Prosecution appends a statement from P-0027's wife, indicating that her husband has died,²⁰ as well as an *acte de décès* signed by the *Chef de groupement* of the locality where P-0027 resided, and which indicates the location and date of P-0027's death, as a result of long illness, and of his burial.²¹
8. The Defence argues that these documents do not 'satisfactorily' establish P-0027's death, noting that: (i) the Prosecution did not explain its failure to provide a death certificate or certificate from the hospital where P-0027 died;²² (ii) the name of the *Chef de groupement* is redacted in the *acte de décès* provided to the Defence, depriving it 'without justification of the opportunity to check with the alleged attestant concerning the circumstances of Witness P-0027's death';²³ (iii) P-0027's wife's statement, which was not given under oath,²⁴ indicates that she does not remember the dates of her husband's death and burial;²⁵ and (iv) the *acte de décès* was established on the basis of information provided by P-0027's brother-in-law, thus raising doubt as to whether it constitutes an

¹⁸ Request, ICC-01/04-02/06-1559-Conf-Red, paras 28-29.

¹⁹ Request, ICC-01/04-02/06-1559-Conf-Red, paras 31-34.

²⁰ Annex F to Request, ICC-01/04-02/06-1559-Conf-AnxF.

²¹ Annex G to Request, ICC-01/04-02/06-1559-Conf-Exp-AnxG and ICC-01/04-02/06-1559-Conf-AnxH.

²² Response, ICC-01/04-02/06-1594-Conf, para. 5.

²³ Response, ICC-01/04-02/06-1594-Conf, para. 5.

²⁴ Response, ICC-01/04-02/06-1594-Conf, para. 7.

²⁵ Response, ICC-01/04-02/06-1594-Conf, paras 6-7.

independent attestation of P-0027's death, or is 'merely an attestation of what [the brother-in-law] told the Chef de groupement'.²⁶

9. In respect of the present Request, the Chamber notes P-0027's wife's statement that she 'did not get any death certificate from the hospital',²⁷ and that following the ICC investigators' enquiry about a death certificate, she tried to find her husband's electoral card, which she could not find, and did not ask the hospital for a death certificate.²⁸ While the Investigation Note attached to the Request refers to the Prosecution's enquiry about a death certificate and the intention to follow up on this matter,²⁹ no further information to that effect is provided in the Request.³⁰
10. In addition to the aforementioned statement, the Prosecution provides an *acte de décès* signed by the *Chef de groupement* - whose identity is redacted in the document provided to the Defence on the basis that it could reveal the current location of P-0027's family members³¹ - and attesting to P-0027's death. In this regard, the Chamber recalls that it previously accepted a similar document as sufficient proof of death, accompanied by a statement indicating that the individual in question had seen that witness's body and assisted at the burial.³²
11. On the basis of the combined effect of the information submitted in the Request, including P-0027's reported medical history, and noting the limited amount of time passed between P-0027's alleged death and the filing of the Request, the

²⁶ Response, ICC-01/04-02/06-1594-Conf, para. 6.

²⁷ Annex F to Request, ICC-01/04-02/06-1559-Conf-AnxF, para. 10.

²⁸ Annex F to Request, ICC-01/04-02/06-1559-Conf-AnxF, para. 12.

²⁹ Annex I to the Request, ICC-01/04-02/06-1559-Conf-AnxI, paras 14–16.

³⁰ See, in this respect, Decision of 20 November 2015, ICC-01/04-02/06-1029, para. 43 and page 19, in relation to another request under Rule 68(2)(c), where the Chamber, when provided with a statement from a witness's alleged wife as the sole proof for a witness's death, deferred, by majority, its decision on the admission of the witness's prior statement and invited the Prosecution to further substantiate its allegation that the witness was deceased.

³¹ Request, ICC-01/04-02/06-1559-Conf-Red, para. 5.

³² Decision of 20 November 2015, ICC-01/04-02/06-1029, paras 17-19.

Chamber considers that there is sufficient indication that P-0027 has died and is therefore satisfied that he is unavailable to testify orally.

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

12. The Prosecution submits that P-0027's death was unexpected and sudden which is why it did not anticipate the need to take testimony or evidence under Article 56 of the Statute.³³ The Defence contends that having been informed of P-0027's diagnosis, considering his environment and the difficulty of access to medical care there, the Prosecution 'should have known [...] that his life was in peril' and taken measures to secure his testimony or allow the Defence to question him in the context of a deposition'.³⁴
13. The Chamber notes that while the Prosecution was informed of P-0027's diagnosis in 2015, it follows from his wife's statement that his health subsequently deteriorated seriously, and that the doctors confirmed that his death was a result of this deterioration.³⁵ Under these circumstances, and noting in particular the apparently unforeseen and rapid deterioration of P-0027's physical condition, the Chamber finds that the necessity of measures under Article 56 could not reasonably have been anticipated by the Prosecution in 2015 when it was informed of P-0027's illness.

³³ Request, ICC-01/04-02/06-1559-Conf-Red, para. 10.

³⁴ Response, ICC-01/04-02/06-1594-Conf, paras 8-10.

³⁵ Annex F to Request, ICC-01/04-02/06-1559-Conf-AnxF, para. 10.

Whether the prior recorded testimony has sufficient indicia of reliability and whether any prejudicial effect outweighs the probative value of the prior recorded testimony

14. The Prosecution avers that P-0027's Statement 'bear[s] sufficient indicia of reliability' because it is 'authentic, truthful and voluntarily provided.'³⁶ In this regard, it submits that: (i) it is consistent, internally and with regard to the NGO Statement,³⁷ and is corroborated by other witnesses' evidence;³⁸ (ii) P-0027 'signed his 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';³⁹ and (iii) P-0027 acknowledges in his Statement areas in which his knowledge is limited.⁴⁰
15. Regarding the Associated Documents, the Prosecution submits that the witness describes each of them, provides his knowledge of them and explains the circumstances of their collection.⁴¹ Finally, the Prosecution submits that it has disclosed 'the information in its possession with regard to the interactions between Witness P-0027 and Intermediary P-0154' and that there is 'no indication of a motive for Witness P-0027 to fabricate or distort his account, or that there was any improper interference by Intermediary P-0154.'⁴²
16. The Defence argues that the Material 'lacks the required criteria of reliability',⁴³ noting, *inter alia*, that (i) the Statement was not given under oath, contains no record of questions and no *verbatim* record of responses, and was not subject to

³⁶ Request, ICC-01/04-02/06-1559-Conf-Red, para. 14 (internal citations omitted).

³⁷ Request, ICC-01/04-02/06-1559-Conf-Red, para. 15 (internal citations omitted).

³⁸ Request, ICC-01/04-02/06-1559-Conf-Red, para. 16.

³⁹ Request, ICC-01/04-02/06-1559-Conf-Red, para. 17 (internal citations omitted).

⁴⁰ Request, ICC-01/04-02/06-1559-Conf-Red, para. 17.

⁴¹ Request, ICC-01/04-02/06-1559-Conf-Red, para. 18.

⁴² Request, ICC-01/04-02/06-1559-Conf-Red, para. 21 (internal citations omitted).

⁴³ Response, ICC-01/04-02/06-1594-Conf, page 7.

cross-examination;⁴⁴ (ii) the Material demonstrates P-0027's 'willingness to lie and to present false evidence to the ICC';⁴⁵ (iii) P-0027's evidence does not corroborate the evidence brought by other Prosecution witnesses,⁴⁶ and, as such, could not serve as a basis for a conviction against Mr Ntaganda;⁴⁷ (iv) P-0027 was in contact with other Prosecution witnesses through Intermediary P-0154;⁴⁸ (v) 'serious inconsistencies' between the Statement and the NGO Statement render the Material unreliable and its admission 'highly prejudicial' to the accused;⁴⁹ and (vi) the Associated Documents do not meet the minimum requirements for admission.⁵⁰

17. The Chamber notes that the relevance of the Material has not been contested. In conducting its assessment of the reliability and *prima facie* probative value of P-0027's prior recorded testimony under Rule 68(2)(c) of the Rules, the Chamber has taken into consideration, *inter alia*, the fact that: (i) the Statement was given in the presence of a qualified interpreter; (ii) P-0027 signed and put his initials on the Statement, which was also signed by the interpreters present; (iii) P-0027 signed an acknowledgement annexed to the Statement, which states that the latter was given voluntarily, that it correctly reflects his deposition and that it may be used in legal proceedings before the Court; (iv) the Statement was given in 2005, and therefore has relative temporal proximity to the events described therein; and (v) the Statement is internally coherent. The Chamber, however, equally notes that there are a number of potentially relevant discrepancies between the Statement and the NGO Statement, which P-0027 explains by stating that the NGO Statement only partially reflects the events he had

⁴⁴ Response, ICC-01/04-02/06-1594-Conf, paras 12-15

⁴⁵ Response, ICC-01/04-02/06-1594-Conf, paras 16-19.

⁴⁶ Response, ICC-01/04-02/06-1594-Conf, paras 20-21.

⁴⁷ Response, ICC-01/04-02/06-1594-Conf, para. 31.

⁴⁸ Response, ICC-01/04-02/06-1594-Conf, paras 22 to 25.

⁴⁹ Response, ICC-01/04-02/06-1594-Conf, paras 26-30.

⁵⁰ Response, ICC-01/04-02/06-1594-Conf, paras 32-34.

witnessed and that only the information provided in the Statement corresponds to the events he experienced.⁵¹

18. The Defence has further identified certain alleged discrepancies between the account provided by the Witness in the Statement, and the evidence of other witnesses in the case.⁵² The Chamber considers that variations of the nature identified would most appropriately fall to be considered when weighing the full evidence in the case, and do not necessarily give rise to an inference of unreliability.
19. With regard to the Associated Documents, the Chamber observes, at the outset, that the NGO Statement has been tendered as an associated document, rather than as prior recorded testimony in itself, and considers this appropriate in the particular circumstances.⁵³ The Chamber notes that the Associated Documents are referred to and explained to varying degrees in the Statement. For the NGO Statement, P-0027 provided information as to the time and circumstances of its creation as well as to its accuracy.⁵⁴ For the map included in Annex E, P-0027 explained that it provides an approximate illustration of the location of the events referred to in his Statement. In relation to Annexes C and D of the Request, however, the Chamber notes that the information provided is of limited assistance in assessing their authenticity and reliability. In that regard, the Chamber notes that: (i) Annex D appears to be a reproduction of an original document created by the witness from memory; (ii) Annex C and the document at Annex D are described as having been found seemingly on the ground in Buli; (iii) in the case of Annex C, the alleged author of the document is

⁵¹ Annex A to Request, ICC-01/04-02/06-1559-Conf-AnxA, para. 14.

⁵² See, for example, Response, ICC-01/04-02/06-1594-Conf, paras 16 (the burning of churches in Lipri), 20 (the role of a particular individual) and 21 (the sequence of events leading to the pacification meeting).

⁵³ See *similarly*, Decision of 20 November 2015, ICC-01/04-02/06-1029, para. 23.

⁵⁴ Annex A to Request, ICC-01/04-02/06-1559-Conf-AnxA, para. 14.

unknown; and (iv) for both Annexes C and D, the identity of the person alleged to have found them is unknown.

20. Turning to potential prejudice, at the outset, in the Chamber's view, it does not appear that P-0027's prior recorded testimony goes to the acts and conduct of the accused or otherwise addresses matters so proximate to the accused as to necessitate its exclusion on that basis.
21. P-0027 mainly testifies to the background of the conflict in Ituri, the invitation to, circumstances and aftermath of the 'pacification meeting' in Sangi, the UPC attack on Buli, Sangi and Kobu, and the commission of crimes by UPC soldiers in that context. On the basis of the information provided in the Prosecution's Pre-Trial Brief⁵⁵ and Summary of evidence,⁵⁶ and noting the evidence presented so far, the Chamber finds that these are matters which have been or can be expected to be addressed by a number of other witnesses who appeared or are to appear before this Chamber. The Chamber further recalls that the fact that certain portions of the prior recorded testimony are uncorroborated would not necessarily render use of Rule 68 inappropriate, the degree of corroboration is one factor which a chamber may consider.⁵⁷
22. The Chamber has further taken into account the disclosed material indicating that P-0027 may have had interactions both with Intermediary P-0154 and other witnesses in the case, and the fact that the Defence will not have the opportunity to cross-examine him in this regard. However, the Chamber notes that cross-examination is not the only potential source of information available

⁵⁵ Prosecution's Pre-Trial Brief, 9 March 2015, ICC-01/04-02/06-503 and confidential Annex A ('Pre-Trial Brief').

⁵⁶ Prosecution's Lists of Witnesses, Summaries and Evidence, 2 March 2015, ICC-01/04-02/06-491-Conf, with confidential annexes A, B and C.

⁵⁷ See similarly in the context of Rule 68(3): Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744, para. 2.

to the Defence, and not the only means by which the Defence could challenge P-0027's account or explore his interactions with other individuals.

23. Having balanced all these factors, the Chamber finds that the Statement is sufficiently relevant, and that its *prima facie* probative value outweighs any prejudicial effect that might be caused to the accused by its introduction. However, the Chamber recalls its approach that the introduction of material pursuant to Rule 68(2)(c) is without prejudice to the weight, if any, which will ultimately be attached to the evidence admitted,⁵⁸ which will be assessed in light of the entirety of the evidence presented in this case. With reference to its observations on the Associated Documents in paragraph 19 above, the Chamber further considers that the NGO Statement and Annex E are sufficiently explained by P-0027 in his Statement and necessary to understand his testimony, and are therefore to be considered for introduction under Rule 68(2)(c) of the Rules, as accompanying documents to the Statement. With regard to Annexes C and D, and noting the lack of information regarding their reliability and authenticity and the Defence's inability to cross-examine P-0027 in this regard, the Chamber finds that their probative value is outweighed by the prejudicial effect their introduction might cause.

III. Conclusion

24. In light of the above, and having found all requirements of Rule 68(2)(c) and Article 69(4) to be met, the Chamber decides to admit into evidence the Statement, as well as the NGO Statement and Annex E. For the reasons outlined in the present decision, the Chamber rejects the admission of Annexes C and D.

⁵⁸ See Decision of 20 November 2015, ICC-01/04-02/06-1029, para. 27, referring to *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- Corr-Red2, paras 60, 81, 111 and 128.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

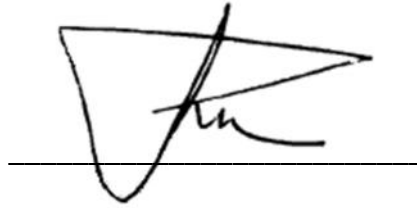
PARTIALLY GRANTS the Request;

ADMITS INTO EVIDENCE the prior recorded testimony of P-0027 (Statement, Annex A), together with the NGO Statement (Annex B) and the map created by P-0027 (Annex E);

REJECTS all other requests; and

ORDERS the Defence to file a public redacted version of its Response (ICC-01/04-02/06-1594-Conf) within four weeks of notification of the present decision.

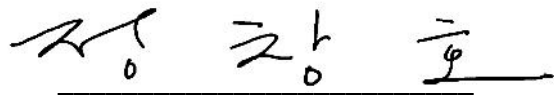
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of stylized Korean characters, written over a horizontal line.

Judge Chang-ho Chung

Dated this 25 November 2016

At The Hague, The Netherlands