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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 Annexes 1-5 and Public Annex A

**Public redacted version of “Prosecution’s application under rule 68(2)(b) and regulation 35 to admit the prior recorded testimony of Witness P-0045”,
9 January 2017, ICC-01/04-02/06-1709-Conf**

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Introduction

1. The Prosecution seeks the conditional admission of the prior recorded testimony of Witness P-0045 under rule 68(2)(b) of the Rules¹ and regulation 35 of the Regulations² ("Request"). The prior recorded testimony of this Witness consists of the entirety of his written statement and four annexes thereto, which are discussed in the statement.
2. The prior recorded testimony of Witness P-0045 is relevant to the charges of persecution and destruction of property, bears sufficient probative value and goes to proof of matters other than the acts and conduct of the Accused, as required by rule 68(2)(b). His prior testimony is corroborative in nature of witnesses who have given and will give oral evidence on similar facts.
3. All Parties will benefit from an expedited presentation of the Prosecution's case. Admitting the prior recorded testimony of this witness under rule 68(2)(b) best serves the interests of justice and the determination of the truth. There is good cause to vary the time limit of 2 March 2015 for submission of the Prosecution's list of witnesses and related evidence to allow admission of Witness P-0045's prior testimony. The Chamber may also admit this witness's testimony under rule 68(2)(b), pursuant to its powers, *inter alia*, under articles 64(6)(b) and (d), 69(3) and (4), and 64(9)(a) of the Statute³ and rule 63(2) of the Rules, either as a Prosecution witness or as a witness of the Chamber.
4. The cumulative nature and limited purpose of the evidence of this witness is such that his appearance for cross-examination is unnecessary. Granting the Request would not cause any unfair prejudice to the Accused, who remains in a

¹ Rules of Procedure and Evidence ("Rules").

² Regulations of the Court ("Regulations").

³ Rome Statute ("Statute").

position to challenge the witness's evidence through means other than cross-examination.

5. The Prosecution intends to obtain and submit the necessary accompanying declaration certified by a duly authorised certifying officer, pursuant to rule 68(2)(b).

Confidentiality

6. This filing and its Annexes are classified as "Confidential" pursuant to regulation 23bis(1) of the Regulations, since they refer to information not available to the public. The Prosecution will file a public redacted version of this filing.

Background

7. On 10 January 2014, the Prosecution disclosed Witness P-0045's witness statement to the Defence.⁴ The annexes to this statement that the Prosecution seeks to admit were disclosed to the Defence between May 2013 and November 2014.⁵
8. On 9 October 2014, the Chamber ordered the Prosecution to file its final list of witnesses and disclose remaining incriminatory material by 2 March 2015.⁶
9. On 22 April 2015, the Chamber decided that the Prosecution could submit an amended List of Evidence with any additional items that it seeks to admit, and the Defence could at any time challenge the use of items subsequently added to

⁴ See para. 20, below.

⁵ See fns. 18-19, below. The Prosecution does not seek to admit the third annex to this statement, consisting of three photographs, disclosed to the Defence in January 2017.

⁶ ICC-01/04-02/06-382, pp. 7-8.

the List "on the basis that it received unduly late notice of them or had inadequate time to prepare."⁷

10. On 2 June 2015, in its Decision on the conduct of proceedings, the Chamber held that Parties that intend to request admission of prior recorded testimony pursuant to rule 68(2) "shall file the application together with copies of the previously recorded testimony and any supporting material, and [...] shall identify precisely which passages it wishes to tender into evidence".⁸
11. On 29 July 2016, the Prosecution submitted an updated list of witnesses in which it indicated that it intended to make requests for the admission of witness evidence under rule 68(2)(b) of the Rules in relation to certain witnesses.⁹ On 19 October 2016, the Chamber set 2 December 2016 as the deadline for the submission of requests in relation to the latter witness,¹⁰ and 3 February 2017 as the deadline for any further applications under rule 68(2), noting that rule 68(2)(b) applications "may be made in advance of the required accompanying declarations having been obtained, while noting that any favourable ruling on such applications could only be made on a conditional basis".¹¹
12. Between 8 and 13 December 2016, Witness P-0031 testified, including in relation to [REDACTED] by the UPC, which was strongly contested by the Defence in cross-examination. Following P-0031's testimony, it became apparent that it would be in the interests of justice and the determination of the truth that the Chamber have detailed evidence regarding the circumstances of [REDACTED] departure from the Democratic Republic of the Congo ("DRC").

⁷ ICC-01/04-02/06-T-19-ENG, p. 11, ln. 7 – p. 12, ln. 7 (open session).

⁸ ICC-01/04-02/06-619, para. 55.

⁹ ICC-01/04-02/06-1471-AnxA.

¹⁰ ICC-01/04-02/06-1588, para. 6.

¹¹ ICC-01/04-02/06-1588, para. 7.

13. On 15 December 2016, the Prosecution provided the Chamber, Defence and participants with its forthcoming witness list for the eighth evidentiary block, indicating that it would make a rule 68(2)(b) application for Witness P-0045.¹²

Prosecution's Submissions

I. The prior recorded testimony of Witness P-0045 should be admitted

14. Pursuant to rule 68(2)(b) of the Rules and regulation 35, the Prosecution seeks the admission of Witness P-0045's witness statement¹³ and four annexes thereto.¹⁴
15. Witness P-0045 is [REDACTED]. His statement and associated material relate to: (i) [REDACTED]; (ii) the conflict between the Lendu and the Hema in Ituri; (iii) his knowledge of the creation of the UPC and of UPC members, including Thomas Lubanga and Adèle Lotsove; (iv) the UPC/Hema takeover of Bunia in 2002; (v) the burning of Lendu houses and his provision of accommodation for 110 Lendu persons; (vi) the UPC accusing [REDACTED] of being pro-Lendu; and (vii) [REDACTED] expulsion by Thomas Lubanga in February 2003.
16. This Chamber has held that "exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced."¹⁵
17. The Prosecution seeks to admit the following material associated with Witness P-0045's statement and similarly relevant to the charge of persecution: (i) a report written by Witness P-0045 dated 21 February 2003 about [REDACTED].

¹² Email from the Prosecution to the Chamber, Defence and Participants dated 15 December 2016 at 17:49.

¹³ See Annex 1.

¹⁴ See Annexes 2-5.

¹⁵ ICC-01/04-02/06-T-105-CONF-ENG ET, p. 93, ln. 24 - p. 94, ln. 7 (open session); See also ICC-01/04-02/06-1205, para. 7; ICC-01/04-02/06-1029, paras. 23, 35; ICC-01/09-01/11-1938-Corr-Red2, para. 33.

The witness explains this report in paragraph 3 of his statement;¹⁶ (ii) the UPC's [REDACTED]. The witness explains this document in paragraph 19 of his statement;¹⁷ (iii) a memorandum by the Hema community stating, *inter alia*, that certain [REDACTED], incited the Lendu to kill the Hema. The witness stated that he has knowledge of this document and explains it in paragraph 30 of his statement;¹⁸ and (iv) an article dated 21 February 2003, the first paragraph of which states that [REDACTED] denounced the UPC's commission of crimes on numerous occasions. At paragraph 31 of his statement, the witness states that he knows this document and disagrees with this affirmation.¹⁹

There is good cause to extend the time limit

18. In 2013, Witness P-0045 informed the Prosecution that he did not wish to testify in the proceedings against the Accused given [REDACTED].
 19. In December 2016, Witness P-0031 testified that [REDACTED].²⁰ [REDACTED]. [REDACTED].²¹ Witness P-0031 was cross-examined extensively about this subject and challenged about the veracity of his account. He was shown a video which the Defence will undoubtedly seek to use to argue that P-0031's account is untrue, despite not asking him any questions specifically about the video.²²
- The issue has become relevant to the case and to the credibility of Witness P-

¹⁶ See Annex 2, DRC-OTP-0113-0012.

¹⁷ See Annex 3, DRC-OTP-0113-0014.

¹⁸ See Annex 4, DRC-OTP-0037-0527 and DRC-OTP-0113-0019. At paragraph 30 of P-0045's witness statement, reference is made to "DRC.00037.527 (Annexe 4)". The Prosecution had not disclosed DRC-OTP-0037-0527 since another document, DRC-OTP-0113-0019, with identical content and containing a reference to "Annexe 4" was disclosed on 27 May 2013 and is on the Prosecution's list of evidence. The Prosecution has now formally disclosed DRC-OTP-0037-0527 and seeks to admit both documents for ease of reference.

¹⁹ See Annex 5, DRC-OTP-0074-0146 and DRC-OTP-0113-0026. At paragraph 31 of P-0045's witness statement, reference is made to "DRC.00074.146 (Annexe 5)". DRC-OTP-0074-0146 was disclosed on 11 July 2013 and is on the Prosecution's list of evidence. However, the latter document does not contain a reference to "Annexe 5"- this is found in the otherwise identical undisclosed DRC-OTP-0113-0026. The Prosecution has now formally disclosed DRC-OTP-0113-0026 and seeks to admit both documents for ease of reference.

²⁰ [REDACTED].

²¹ [REDACTED].

²² ICC-01/04-02/06-T-176-CONF-ENG ET, p.88, ln.12 – p.97, ln.23 (private session); ICC-01/04-02/06-T-177-CONF-ENG ET, p.3, ln.14 – p.4, ln.1 (open session), *see also* p.39, ln.15 – p.42, ln.9 (private session) concerning the admission of the video excerpts used in relation to Witness P-0031's testimony concerning [REDACTED].

0031 in the face of the Defence's questioning on his account of events and on the plausibility of Thomas Lubanga having [REDACTED] from Ituri. P-0045's [REDACTED] statement to the Prosecution confirms Witness P-0031's account of events.

20. The Prosecution contacted Witness P-0045 again immediately after Witness P-0031 was questioned about the incident regarding [REDACTED] from Bunia. Witness P-0045 agreed to meet the Prosecution in order to undergo the necessary procedure pursuant to rule 68(2)(b). For this reason, while Witness P-0045's 7 July 2005 statement was disclosed as material relevant to the Defence's preparation on 10 January 2014, it will be added to the Prosecution's list of evidence forthwith.
21. The admission of Witness P-0045's statement and associated material is important to the determination of the truth, in particular in light of Witness P-0031's testimony [REDACTED].
22. Under regulation 35(2) of the Regulations, a Chamber may extend a time limit "if good cause is shown". The Appeals Chamber has held that "[s]uch reasons as may found a good cause are necessarily associated with a party's duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations".²³
23. The Appeals Chamber has further decided to extend a time limit where it was in the "interest of justice".²⁴

²³ ICC-01/04-01/06-834, para. 7.

²⁴ See ICC-01/04-01/10-505, para. 11.

24. In *Katanga and Ngudjolo*, Trial Chamber II held that even where the conditions of regulation 35(2) are not met the Chamber may authorise the late addition of incriminating evidence pursuant to its powers under articles 64(6)(d) and 69(3) of the Statute to order the production of evidence that it deems necessary for the determination of the truth, provided it can be shown that:

(i) the new material is either significantly more compelling than other items of evidence already disclosed to the Defence, or brings to light a previously unknown fact which has a significant bearing upon the case, and (ii) the late addition will not cause undue prejudice to the Defence in relation to the latter's right to have adequate time and facilities to prepare in accordance with article 67(l)(b) of the Statute.²⁵

25. In this case, there is good cause to vary the time limit because the importance of P-0045's evidence only became entirely clear after P-0031 testified. The Chamber will be assisted by his evidence [REDACTED].

26. Additionally, the requested variation of the time limit will not "derail the proceedings from their ordained course"²⁶ and is not unduly prejudicial. It is in the interests of justice and the determination of the truth that the Chamber admit P-0045's evidence under articles 64(6)(b) and (d), and 69(3) of the Statute.

27. Witness P-0045 may be treated as a Prosecution witness, alternatively as a witness of the Chamber. If the Chamber decides to admit P-0045's testimony as that of a Chamber witness, then regulation 35 is not relevant to its consideration. Like other Chambers, the Chamber may decide to include witnesses it considers appropriate. For example, Trial Chamber I in *Prosecutor v Thomas Lubanga* decided to call four Chamber witnesses,²⁷ whilst Trial Chamber III in *Prosecutor v Jean Pierre Bemba Gombo* called one Chamber

²⁵ ICC-01/04-01/07-2325, para. 15.

²⁶ ICC-01/04-01/07-653, para. 6.

²⁷ CHM-0001: ICC-01/04-01/06-T-89-ENG, p. 41, l. 24 to p. 42, l. 2; ICC-01/04-01/06-1559-Conf, para. 3; CHM-0003: ICC-01/04-01/06-T-176-CONF-ENG, p. 27, ll. 2-10; ICC-01/04-01/06-2030-Anx1; CHM-0002: ICC-01/04-01/06-T-88-ENG, p. 8, l. 16 to p. 9, l. 2; ICC-01/04-01/06-T-99-ENG, p. 17, l. 18 to p. 18, l. 22; ICC-01/04-01/06-1558; CHM-0004: ICC-01/04-01/06-1934, para. 12.

witness.²⁸ The Chamber may admit P-0045's prior testimony pursuant to rule 68(2)(b) whether as a Prosecution or Chamber witness, provided – as in this instance – the requirements of that provision are met.

28. In this instance, it is in the interests of justice and determination of the truth if the Chamber and Parties have detailed evidence regarding [REDACTED] departure from the DRC.

a. Witness P-0045's witness statement constitutes "prior recorded testimony" in the sense of rule 68

29. The statement of Witness P-0045 was produced during an interview conducted by [REDACTED] in [REDACTED], in the presence of Prosecution staff members in execution of a request for assistance. The statement complies with rule 111 of the Rules and constitutes "prior recorded testimony".²⁹ The four annexes are discussed in this statement and meet the Chamber's requirements for admission in this regard.³⁰

b. The prior recorded testimony of Witness P-0045 goes to proof of matters other than the acts and conduct of the Accused

30. The acts and conduct of the Accused relate narrowly to his deeds and behaviour. In *Ongwen*, Trial Chamber IX stated that "[t]he expression 'acts and conduct of the accused' – which is not further qualified in Rule 68(2)(b) of the

²⁸ See ICC-01/05-01/08-2863-Conf, para. 4.

²⁹ See ICC-01/05-01/08-1386, OA5 OA6, paras. 79-81, confirming that written witness statements can be introduced as "prior recorded testimony" (stating that "[w]itness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met."); See also ICC-01/09-01/11-1938-Red-Corr, paras. 30-33, analysing the term "prior recorded testimony" in light of the Rules' *travaux préparatoires*, the Court's prior case-law and the need to ensure language consistency within the rule in interpreting it; ICC-01/05-01/08-2012-Red, para. 136; ICC-01/05-01/08-886, para. 6; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362; ICC-01/04-01/07-2635, paras. 44-49; ICC-01/04-01/06-1603, paras. 18-19; ICC-01/04-01/06-1399, paras. 40-42; ICC-01/04-01/07-412; ICC-02/11-01/15-744 OA8, paras. 6, 30-31, 63-65, 95-105; ICC-01/04-02/06-1205.

³⁰ See ICC-01/04-02/06-T-105-CONF-ENG ET, p. 93, ln. 24 - p. 94, ln. 7 (open session); See also ICC-01/04-02/06-1205, para. 7; ICC-01/04-02/06-1029, paras. 23, 35; ICC-01/09-01/11-1938-Corr-Red2, para. 33.

Rules – must be interpreted in its plain natural meaning, referring to the personal actions and omissions of the accused, rather than a broader normative meaning, extended to the actions and omissions of others which are attributable to the accused under the modes of liability charged by the Prosecution.”³¹

31. Trial Chamber IX also noted that the ICTY adopted the same interpretation of the expression “acts and conduct of the accused” for essentially the same purpose.³² Indeed, other international tribunals have construed the legal expression “acts and conduct” to refer plainly to the “deeds and behaviour of the accused”,³³ such that they seek to establish the accused’s responsibility under any applicable mode of liability.³⁴ Importantly, acts and conduct of the accused must be distinguished from acts and conduct of others who commit crimes for which the accused is alleged to be responsible- proof of the acts and conduct of others is admissible under rule 68(2)(b).³⁵

32. Trial Chamber IX went on to note that it:

“... will not exclude the application of Rule 68(2)(b) of the Rules when the prior recorded testimony contains evidence with

³¹ ICC-02/04-01/15-596-Red, para. 11.

³² ICC-02/04-01/15-596-Red, para. 24.

³³ “The phrase ‘acts and conduct of the accused’ in rule 92bis is a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so”, see *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted under Rule 92 bis, 21 March 2002, para. 22 (“*Milošević Decision*”); *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on the Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Witnesses for Sarajevo Municipality), 15 October 2009, para.5 (“*Karadžić Decision*”); *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 bis and Prosecution Motion to Admit GH-139’s Evidence Pursuant to Rule 92 bis, 24 January 2013, para. 15 (“*Hadžić Decision*”).

³⁴ *Karadžić Decision*, para. 5; *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, para. 10 (“*Galić Decision*”); *Hadžić Decision*, para. 15; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis, 22 August 2008, para.17 (“*Lukić Decision*”).

³⁵ *Karadžić Decision*, para.5; *Galić Decision*, para.9; *Hadžić Decision*, para.15; *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Prosecution Rule 92bis Motion, 4 July 2006, para.6; *Lukić Decision*, para.17; *Milošević Decision*, para.22.

respect to the acts and conduct of other persons, whether alleged co-perpetrators, subordinates or otherwise, which are attributed to the accused in the charges by reason of the mode of liability alleged. Furthermore, the Chamber considers that the expression ‘acts and conduct of the accused’ within the meaning of Rule 68(2)(b) of the Rules must be understood as referring exclusively to those actions of the accused which are described in the charges brought against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.”³⁶

33. Finally, Trial Chamber IX found that:

“... in certain circumstances, the party’s intended purpose in relying on a prior recorded testimony may be of relevance to the determination of whether such testimony goes to proof of the accused’s acts and conduct or not. In particular, the Chamber considers that the presence of a limited reference to the accused in a prior recorded testimony does not entail, in and of itself, that the testimony cannot be introduced under Rule 68(2)(b) of the Rules when (i) the calling party indicates that it does not intend to rely on that reference and (ii) this reference is not of significance to the case or is, in any event, of limited importance and does not constitute the core of the testimony. Any such reference would in any case not be considered by the Chamber to establish the acts and conduct of the accused for the purposes of its final judgment.”³⁷

34. This Chamber has held that:

“As stated in prior jurisprudence of the Court, a chamber enjoys a certain degree of discretion in its decision of whether to introduce prior recorded testimony pursuant to Rule 68(2)(b) of the Rules, when the relevant requirements are met. Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall bear in mind in the exercise of its discretion.

³⁶ ICC-02/04-01/15-596-Red, para.12.

³⁷ The Chamber went on to state that “With this limited exception concerning peripheral discrete references to the accused – which must be evaluated on a case-by-case basis – the Chamber otherwise agrees with the Defence that ‘statements cannot be submitted piecemeal’ as this approach ‘would lead to an artificial exercise’ and possibly ‘absurdity and re-litigation of the Rule 68 admission’. In other words, as submitted by the Defence, the Chamber must conduct its determination of whether a prior recorded testimony can be introduced under Rule 68(2)(b) of the Rules upon consideration of the whole testimony and, in turn, the whole testimony would be introduced under that provision”, ICC-02/04-01/15-596-Red, para.13.

These factors include whether the prior recorded testimony: (i) relates to issues that are not materially in dispute; (ii) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (iii) relates to background information; (iv) is such that the interests of justice are best served by its introduction; and (v) has sufficient indicia of reliability.”³⁸

35. The Chamber has stated that it “concur[s] with other trial chambers of this Court that the concept of ‘acts and conduct’ refers to the personal actions and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.”³⁹
36. The prior recorded testimony of Witness P-0045 does not relate to the acts and conduct of the Accused as defined in the jurisprudence of this and other courts. The only mention that Witness P-0045 makes of the Accused is in paragraphs 12 and 13 of his statement.
37. At paragraph 12 of his statement, the witness states that [REDACTED]. [REDACTED]. The witness states that [REDACTED]. Witness P-0045 does not elaborate further on the identity of the person he refers to as “BOSCO”, whom the Prosecution submits is the Accused.
38. This peripheral, discrete reference to the Accused, which cannot be relied upon to establish his criminal responsibility for the crimes charged, does not mean that the witness’s statement relates to the acts and conduct of Bosco Ntaganda. However, should the Chamber find that this reference does refer to the Accused’s acts and conduct, the Prosecution would not rely on this reference.

³⁸ ICC-01/04-02/06-1667-Conf, para.8 (footnotes omitted).

³⁹ ICC-01/04-02/06-1667-Conf, para.11, citing to ICC-02/04-01/15-596-Red.

39. The witness also refers, at paragraph 13, to a “Bosco” whom he believes was present during a meeting with Thomas Lubanga around 15 February 2003. This mention of a person whom the Prosecution submits is the Accused, does not relate to the Accused’s acts and conduct. Similarly, however, should the Chamber find that this reference does refer to the Accused’s acts and conduct, the Prosecution would not rely on this reference.

c. The prior recorded testimony is reliable

40. There is no finite list of possible criteria to determine whether an exhibit or prior recorded testimony should be admitted as evidence or the factors that inform a review of the reliability of the document.⁴⁰ Absence of certain indicia of reliability may be considered when assessing the weight of that evidence, but should not be a reason for excluding the evidence.⁴¹ It is only necessary to establish *prima facie* - not definitive - proof of reliability based on sufficient indicia.⁴² The Chamber’s assessment of indicia of reliability requires an exercise of discretion, based on the circumstances of the case.⁴³ The Appeals Chamber has stated that “in their assessment of indicia of reliability under rule 68 (2) (b) (i) of the Rules, Trial Chambers are not obliged to consider factors beyond formal requirements.”⁴⁴

41. The prior recorded testimony of Witness P-0045 bears sufficient *prima facie* indicia of reliability because it is truthful, authentic, consistent, and was

⁴⁰ ICC-01/04-01/06-1399, para. 29.

⁴¹ 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 Miluntinovic et al*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92quater, 16 February 2007.

⁴² 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.”

⁴³ 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.

⁴⁴ ICC-02/11-01/15-744, para.104.

provided voluntarily. There is no indication of a motive for the witness to fabricate or distort his account.

42. The witness has indicated his willingness to acknowledge the truthfulness and accuracy of his prior recorded testimony before certifying officers. The Prosecution will shortly meet with the witness and relevant authorities for this purpose and submit the certified declaration forthwith.
43. The statement of Witness P-0045 was given voluntarily and was signed by the witness, along with an acknowledgment that he had no modification, addition or correction to make thereto.
44. Witness P-0045 is well-placed to provide evidence in relation to [REDACTED] expulsion. His prior recorded testimony relates events that are consistent⁴⁵ with the account [REDACTED] provided by Witness P-0031.⁴⁶ Witness P-0041, whose statement was admitted pursuant to rule 68(2)(c),⁴⁷ also referred to [REDACTED].⁴⁸
45. There are no inconsistencies sufficient to cast doubt as to the reliability of Witness P-0045's overall evidence.

d. The evidence is relevant and has *prima facie* probative value

46. The Chamber is empowered to admit evidence it considers relevant to the determination of the truth under articles 69(3) and (4) and 64(9)(a) of the

⁴⁵ 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.

⁴⁶ See para. 19, above.

⁴⁷ ICC-01/04-02/06-1029.

⁴⁸ DRC-OTP-0147-0002, p. 0037, para. 234.

Statute and rule 63(2).⁴⁹ Evidence is deemed relevant if it tends to prove or disprove a material issue or fact in question, making it more or less probable.⁵⁰

47. The prior recorded testimony of Witness P-0045 is relevant to the charges of persecution and destruction of property.
48. As shown above, the prior recorded testimony has *prima facie* probative value because it bears sufficient indicia of reliability. Additionally, the prior recorded testimony has *prima facie* probative value as it is generally consistent with and corroborates the account of a *viva voce* witness and a witness whose prior recorded testimony was admitted pursuant to rule 68(2)(c).⁵¹

e. The prior recorded testimony is corroborative in nature

49. One of the factors that the Chamber must consider in determining whether the introduction of prior recorded testimony that goes to proof of a matter other than the acts of conduct of the accused may be allowed is whether other witnesses will give, or have given oral testimony of similar facts.
50. Witness P-0031 testified on similar facts to those referred to in Witness P-0045's prior recorded testimony and Witness P-0041's statement, admitted pursuant to rule 68(2)(c), also refers to such facts. Further, the Prosecution expects to elicit information concerning these facts from Witness P-0005 during the upcoming eighth evidentiary block.⁵²

⁴⁹ ICC-01/04-01/06-1399, para. 24; ICC-01/04-01/06-2360, para. 23.

⁵⁰ ICC-01/09-01/11-1353, para. 15; ICC-01/04-01/07-2635, para. 34.

⁵¹ See paras. 19, 44 above.

⁵² The Prosecution notes that [REDACTED].

f. The interests of justice are best served by the admission of the prior recorded testimony

51. By its terms, rule 68(2)(b) does not unfairly prejudice the Defence by permitting the introduction of evidence that has not been cross-examined when this evidence is unrelated to the acts and conduct of an accused. That both Parties can avail themselves of this provision further underscores its inherent neutrality and advances the interests of justice.
52. Admitting the prior recorded testimony of Witness P-0045 under rule 68(2)(b) would advance the interests of justice and contribute to a fair and expeditious trial by enabling the presentation of evidence in a more concise and streamlined manner without causing undue prejudice to the fair trial rights of the Accused. This aligns with the stated goal behind the rule's adoption which was to "reduce the length of ICC proceedings and streamline evidence presentation."⁵³ The admission of the prior recorded testimony of this witness under rule 68 complies with article 51(4) of the Statute.

g. Admission of the prior recorded testimony causes no undue prejudice to the Accused

53. The inability to cross-examine the witness on his evidence, and the admission of the evidence at this stage of the proceedings, does not deprive the Accused of his right and opportunity to challenge the evidence. The Defence retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the prior recorded testimony this witness, lead contradictory evidence during the Defence case, or - to the extent that discrepancies exist with any other evidence - address the prior testimony

⁵³ Assembly of State Parties, Study Group on Governance, Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, para. 11.

during closing submissions and advance arguments on the weight to be attributed to the prior recorded testimony.

Conclusion

54. For all the foregoing reasons, the Prosecution asks that the Chamber grant its Request.



Fatou Bensouda
Prosecutor

Dated this 15th day of February 2017
At The Hague, The Netherlands