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No.: ICC-01/04-02/06

Date: 22 March 2017

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 and 2**

**Public redacted version of “Prosecution’s application under rule 68(2)(b) to admit
the prior recorded testimony of Witness P-0039” 14 October 2016,
ICC-01/04-02/06-1585-Conf**

Source: Office of the Prosecutor

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Introduction

1. The Prosecution requests that Trial Chamber VI ("Chamber") admit the prior recorded testimony of Witness P-0039 ("P-0039") under rule 68(2)(b) of the Rules of Procedure and Evidence ("Rules").
2. The prior recorded testimony comprises: (i) a 2005 statement provided by P-0039;¹ (ii) a 2013 statement and sketch provided by P-0039;² (iii) a 2013 victim's application related to the 2013 statement³.
3. The prior recorded testimony is relevant and *prima facie* probative to the charges and, in accordance with rule 68(2)(b), goes to proof of a matter other than the acts of conduct of the Accused. P-0039 has acknowledged its truthfulness and accuracy in an accompanying declaration meeting the conditions under rule 68(2)(b)(iii) of the Rules.⁴
4. The nature and content of P-0039's evidence is such that his appearance for cross-examination is unnecessary. Further, granting the Motion would not cause any unfair prejudice to the Accused. To the contrary, all Parties will benefit from an expedited presentation of the Prosecution's case-in-chief. Admitting P-0039's evidence would, therefore, best serve the interests of justice.

Confidentiality

5. This filing is classified as "Confidential", as it refers to information that could reveal P-0039's identity to the public. The Prosecution will file a public redacted version.

¹ DRC-OTP-0104-0015-R03.

² DRC-OTP-2062-0244-R02 and DRC-2062-0260-R02.

³ DRC-OTP-2078-2253-R01.

⁴ Annex 1.

Procedural Background

6. On 28 October 2015, the Chamber granted, in part, a Prosecution request⁵ seeking in-court protective measures for the testimony of P-0039.⁶ The Chamber authorised the use of a pseudonym for the purposes of the trial but not voice and face distortion for the Witness's testimony.⁷
7. On 28 October 2015, P-0039 appeared before the Chamber via video-link indicating that he did not wish to testify being concerned about security.⁸ During this hearing, the Prosecution sought reconsideration of the First Decision or, in the alternative, requested that the Witness be compelled to testify pursuant to the Chamber's power under article 64 of the Statute.⁹ The Chamber rejected both requests by way of an oral ruling on the same day.¹⁰
8. On 10 December 2015, the Chamber rejected a further Prosecution request¹¹ seeking additional in-court protective and special measures for P-0039 under rules 87 and 88 of the Rules or, in the alternative, leave to appeal the First Decision.¹²

⁵ 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, ICC-01/04-02/06-899-Conf-Exp. A confidential redacted version (ICC-01/04-02/06-899-Conf-Red) and public redacted version (ICC-01/04-02/06-899-Red2) were filed on the same day.

⁶ Decision on Prosecution's request for in-court protective measures for Witness P-0039, ICC-01/04-02/06-956-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-956-Red).

⁷ ICC-01/04-02/06-956-Red, para. 8.

⁸ ICC-01/04-02/06-T-40-CONF-ENG ET, page 69, line 16 to page 75, line 15.

⁹ ICC-01/04-02/06-T-40-CONF-ENG ET, page 75, line 25 to page 77, line 11.

¹⁰ ICC-01/04-02/06-T-40-CONF-ENG ET, page 81, line 2 to page 82, line 5 ('Second Decision').

¹¹ 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", 3 November 2015, ICC-01/04-02/06-973-Conf with two confidential Annexes. On 4 November 2015, a public redacted version of the application was filed (ICC-01/04-02/06-973-Red).

¹² Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039, ICC-01/04-02/06-1049-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-1049-Red).

9. On 30 March 2016, the Prosecution requested that P-0039's prior recorded testimony be admitted pursuant to rule 68(2)(c) of the Rules.¹³
10. On 19 May 2016, the Chamber rejected the Prosecution Request for admission of P-0039's prior recorded testimony under rule 68(2)(c).¹⁴
11. On 3 September 2016, P-0039 declared that the contents of the prior recorded testimony are true and correct to the best of his knowledge and belief. P-0039's declaration was witnessed by an officer of the Democratic Republic of the Congo Judicial Police in accordance with the requirements of rule 68(2)(b)(iii).

Prosecution's Submissions

(a) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused.

12. Rule 68(2)(b) provides for the introduction (admission) of a witness's prior recorded testimony that goes to proof of a matter other than the acts and conduct of the Accused. The "prior recorded testimony" includes statements taken pursuant to rule 111 of the Rules, together with associated exhibits.¹⁵
13. The plain reading of rule 68 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". This interpretation

¹³ Prosecution's application under rule 68(2)(c) of the Rules to admit the prior recorded testimony of Witness P-0039, ICC-01/04/02/06-1238 ('Prosecution Application') with one public and one confidential annexes.

¹⁴ Decision on Prosecution application under rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0039, ICC-01/04-02/06-1325.

¹⁵ 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-01/04-01/06-1603, para.18; ICC-01/04-01/07-2289-Corr-Red; ICC-01/04-01/07-2362.

was adopted by ICC Chambers including in *Prosecutor v Lubanga*,¹⁶ *Prosecutor v Katanga et al.*¹⁷, and, previously, by this Chamber.¹⁸ The Chambers allowed the admission of prior recorded witness statements.¹⁹ 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.²⁰ 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.

14. The acts and conduct of the Accused relates narrowly to the deeds and behaviour of the Accused. Other international tribunals have construed the legal expression “acts and conduct” to refer plainly to the “deeds and behaviour of the accused”,²¹ such that they seek to establish the accused’s responsibility under any applicable mode of liability.²² Importantly, acts and

¹⁶ ICC-01/04-01/06-1603, paras.18-19.

¹⁷ 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.”

¹⁸ ICC-01/04-02/06-1205, (referring throughout the Decision to the ‘prior recorded testimony’ of P-0103).

¹⁹ 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.

²⁰ 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.

²¹ “The phrase ‘acts and conduct of the accused’ in rule 92*bis* 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*”).

²² *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.*

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.²³ Proof of the latter is admissible under rule 68(2)(b).

(b) The interests of justice are served by the admission of the prior recorded testimony.

15. Admitting the rule 68(2)(b) prior recorded testimony advances the interests of justice and contributes to a fair and expeditious trial by enabling the Prosecution to present its evidence in a more concise and streamlined manner without causing any 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."²⁴ Their admission under rule 68 complies with article 51(4) of the Statute.
16. By its terms, rule 68(2)(b) does not *per se* unfairly prejudice the Defence by permitting the introduction of uncross-examined evidence 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.

(c) The prior recorded testimony has sufficient indicia of reliability

17. The prior recorded testimony bears sufficient indicia of reliability, as defined by the Chambers of this Court. The exhibits comprising the prior recorded testimony (i) are accompanied by a signed declaration confirming P-0039's

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").

²³ *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 92 bis Motion, 4 July 2006, para.6; *Lukić* Decision, para.17; *Milošević* Decision, para.22.

²⁴ 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.

identity; (ii) are given voluntarily; (iii) state that the contents are true and accurate to the best of P-0039's knowledge and belief; (iv) are given in the presence of a qualified interpreter; (v) are given under penalty of false testimony; (vi) are internally consistent and coherent; and (vii) P-0039 freely admitted when he did not know certain information.²⁵

18. The following factors also support the reliability of the evidence: (i) the prior recorded testimony mentions events that are consistent with accounts of other witnesses displaced and victimised in the *First and Second Attacks*,²⁶ including having gone to [REDACTED];²⁷ (ii) the witness freely admitted a lack of knowledge or a lack of memory of certain events within his prior testimony;²⁸ and (iii) there are no material inconsistencies in his account.²⁹ Additionally, P-0039 gives logical explanations without any apparent embellishments, stating, for example, [REDACTED].³⁰
19. 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.³¹ 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.³² It is only necessary to establish *prima facie* - not definitive - proof of reliability based on sufficient

²⁵ ICC-01/04-02/06-1205, para. 16.

²⁶ 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.

²⁷ DRC-OTP-2062-0244 at 0256, paras. 53-54; Testimony of **P-0301**, ICC-01/04-02/06-T-149-Conf-Eng RT, p. 69, ln. 15 – p.70, ln. 12; Testimony of **P-0792**, ICC-01/04-02/06-T-149-Conf-Eng ET, p. 79, lns.2-17.

²⁸ See e.g. DRC-OTP-0104-0015, paras. 20, 21, and 25.

²⁹ See e.g. *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Admission of Evidence of Radislav Krstic Pursuant to Rule 92quater, 26 November 2013, para.12.

³⁰ DRC-OTP-0104-0015, para. 22.

³¹ ICC-01/04-01/06-1399, para.29.

³² 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 rule92quater, 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.

indicia.³³ The Chamber's assessment of indicia of reliability requires an exercise of discretion, based on the circumstances of the case.³⁴

20. P-0039's prior recorded testimony bears *prima facie* indicia of reliability because it is truthful, authentic, consistent, and was 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/FPLC and P-0039 answered the questions of the Prosecution investigators only to the extent of his knowledge.
21. 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) The evidence is relevant and has *prima facie* probative value

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.³⁵ Evidence is deemed relevant if it tends to prove or disprove a material issue or fact in question, making it more or less probable.³⁶
23. P-0039's two prior statements are relevant, *inter alia*, to the *First Attack* Counts 12 and 13 and the *Second Attack* Counts 1, 3, 11, and 12.
24. As shown above at paragraphs 20-24, the prior recorded testimony has *prima facie* probative value because it bears sufficient indicia of reliability.

³³ 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."

³⁴ 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.

³⁵ ICC-01/04-01/06-1399, para.24; ICC-01/04-01/06-2360, para.23.

³⁶ ICC-01/09-01/11-1353, para.15; ICC-01/04-01/07-2635, para.34.

Additionally, the prior recorded testimony has *prima facie* probative value as it is generally consistent with several other witness testimonies with regard to events in the *First and Second Attacks*.

(e) Admission of the prior recorded testimony causes no undue prejudice to the Accused

25. The prior recorded testimony of P-0039 is not new evidence. It was 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 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 prior recorded testimony.

Request

26. For all the foregoing reasons, the Prosecution requests that the Chamber admit the prior recorded testimony of P-0039.



Fatou Bensouda
Prosecutor

Dated this 22nd day of March 2017
At The Hague, The Netherlands