

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-02/06**
Date: **12 December 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 1-2**

Public redacted version of "Prosecution response to the Defence 'Request to admit prior recorded testimony of eleven witnesses under Rule 68 (2)', ICC-01/04-02/06-2066-Conf", 27 October 2017, ICC-01/04-02/06-2087-Conf

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court to:*

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Introduction

1. The Defence Request to admit the prior recorded testimony of ten witnesses¹ pursuant to rule 68(2)(b) of the Rules² and of D-0080 pursuant to rule 68(2)(c)³ should be rejected.
2. First, the Prosecution opposes admission of the prior recorded testimony of D-0123, D-0179, D-0185 and D-0207 pursuant to rule 68(2)(b), or any other rule, because it is irrelevant to known issues in the case. Additionally, the statements of D-0179 and D-0185 do not contain sufficient indicia of reliability.
3. Second, the Prosecution opposes admission of the prior recorded testimony of D-0001, D-0013, D-0134, D-0148, D-0150 and D-0163 because it relates to issues that are materially in dispute, including the credibility of specific Prosecution witnesses, and is not cumulative or corroborative of other evidence; indeed, this evidence is unique in this case and highly contentious. Additionally, D-0001's prior recorded testimony relates to the acts and conduct of the Accused. Cross-examination is required to address D-0001's expected evidence [REDACTED].
4. Admitting the prior recorded testimony of these ten witnesses pursuant to rule 68(2)(b) is not be in the interests of justice and is unduly prejudicial to the Prosecution since it would be deprived of any opportunity to test its veracity.
5. Third, the Prosecution opposes admission of Witness D-0080's statement under rule 68(2)(c) because the Defence fails to establish that D-0080 is unavailable within the meaning of this rule. The email from the Victims and Witnesses Section ("VWS") upon which the Defence relies does not support the argument that D-0080 is unavailable. Indeed, the VWS' advice is that it is possible to arrange travel

¹ D-0001, D-0013, D-0123, D-0134, D-0148, D-0150, D-0163, D-0179, D-0185 and D-0207.

² Rules of Procedure and Evidence.

³ ICC-01/04-02/06-2066-Conf ("Defence Request").

under certain conditions. The Defence appears not to have provided complete information to the VWS about D-0080's status in [REDACTED], the content of his anticipated evidence or the fact that the Defence has been investigating on [REDACTED] territory, presumably with the consent of the State, without difficulty. These factors will impact the VWS' assessment of the possibility of travel to testify or to testify *via* video-link.

6. Even if D-0080 were considered unavailable, the Prosecution opposes admission of his prior recorded testimony under rule 68(2)(c) since his statement is not reliable, is of low probative value and refers to highly contentious issues.
7. For no justifiable reason, six⁴ of the statements that the Defence seeks to admit pursuant to rule 68(2)(b) or (c) were taken *after* the conclusion of the Accused's testimony; a further two⁵ statements were taken while the Accused's testimony was still ongoing. This factor weighs against the admission of any of these statements pursuant to rule 68(2)(b) or (c) since it undermines their probative value given that they may well have been influenced by the Accused's testimony.
8. Further, since all ten of the new statements that the Defence seeks to admit were only provided on 16 October 2017, nearly six months after the applicable deadline,⁶ their admission pursuant to rule 68(2)(b) or (c) is prejudicial and hinders the Chamber's ability to determine the truth. The Prosecution has been deprived of adequate time to investigate and to cross-examine the Accused and other Defence witnesses on the specific content of these statements.

⁴ These are the statements of D-0001, D-0123, D-0148, D-0150, D-0163, and D-0080.

⁵ These are the statements of D-0207 and D-0134.

⁶ ICC-01/04-02/06-1757, para. 14.

9. The Prosecution proposes that the prior recorded testimony of D-0013, D-0134, D-0148, D-0150 and D-0163 be admitted pursuant to rule 68(3), rather than rule 68(2)(b).⁷ The testimony of D-0001 and D-0080 should be elicited entirely *viva voce*.
10. The Defence has not filed any declarations as required under rule 68(2)(b). Should the Chamber approve any part of the Defence Request, the Prosecution reserves the right to make submissions on the form and substance of such declarations. The Prosecution also provides advance notice that it may request authorisation to admit rebuttal evidence and/or to recall the Accused and other witnesses should the Chamber admit the prior recorded testimony.

Confidentiality

11. In accordance with regulation 23*bis*(1) and (2) of the Regulations, this response and its Annexes are classified as “Confidential” as they refer to material not yet available to the public and respond to a request bearing the same classification. The Prosecution will file a public redacted version of this response.

Background

12. On 16 October 2017, the Defence filed the Defence Request. [REDACTED].⁸
13. On 24 October 2017, the Chamber granted the Prosecution’s request⁹ for an extension of the page limit for this response to 40 pages.¹⁰
14. On 27 November 2017, the Defence filed an Addendum to the Defence Request.¹¹

⁷ Should the Chamber wish to receive the evidence of D-0123 and D-0207, the Prosecution would similarly propose admission *via* rule 68(3). The Prosecution would not cross-examine D-0179 and D-0185.

⁸ Email from the Chamber to the Registry, Parties and participants dated 24 October 2017 at 12:05 p.m.

⁹ Email from Nicole Samson to the Chamber, Defence and participants dated 24 October 2017 at 14:28 p.m.

¹⁰ Email from the Chamber to the Parties and participants dated 24 October 2017 at 17:31 p.m.

¹¹ ICC-01/04-02/06-2083-Conf (“Addendum”).

Prosecution Submissions

A. The Chamber should reject the rule 68(2)(b) applications

15. Pursuant to rule 68(2)(b), the Chamber may admit the prior recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony goes to proof of “a matter other than the acts and conduct of the accused” and is accompanied by the appropriate declaration.¹² Rule 68(2)(b)(i) sets out a list of non-exhaustive factors that the Chamber is bound to consider in determining whether to permit the introduction of the prior recorded testimony.

I. Witness D-0001

16. D-0001’s prior recorded testimony is not suitable for admission pursuant to rule 68(2)(b). It does not relate to background information, but rather to the acts and conduct of the Accused and to issues that are materially in dispute. Nor is D-0001’s prior recorded testimony either cumulative or corroborative of other evidence [REDACTED]. Further, D-0001’s [REDACTED] statement¹³ lacks probative value and requires examination: [REDACTED].

D-0001’s prior recorded testimony relates to the Accused’s acts and conduct

17. D-0001’s [REDACTED]¹⁴ and [REDACTED]¹⁵ [REDACTED] statements make extensive direct reference to the Accused’s acts and conduct. [REDACTED]. [REDACTED]: (i) [REDACTED];¹⁶ (ii) [REDACTED]¹⁷ [REDACTED].¹⁸ [REDACTED];¹⁹ (iii) [REDACTED];²⁰ and (iv) [REDACTED].²¹

¹² In view of the fact that the Defence has not submitted any of the relevant declarations required pursuant to rule 68(2)(b)(ii), any favourable ruling in relation to the Defence Request can only be made on a conditional basis, *see* ICC-01/04-02/06-1667-Conf, para. 7.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

18. These matters squarely relate to the Accused's acts and conduct. [REDACTED].
[REDACTED].²²
19. [REDACTED].²³ This effort to limit the Chamber's use of the statements or minimise their content is incorrect. [REDACTED].
20. The Chamber decided that it was appropriate to consider a statement that Witness P-0027 provided *to an NGO* as an associated document, rather than as prior recorded testimony itself.²⁴ However, the items that the Defence seeks to tender as documents associated with D-0001's [REDACTED] Statement are [REDACTED].²⁵ It is more appropriate to consider these items themselves as D-0001's prior recorded testimony, not as associated documents. Further, D-0001's [REDACTED] Statement, which is four pages long, does not sufficiently "explain"²⁶ the 240 pages annexed to it - a condition that the Chamber has previously held to be necessary for admission as associated documents, rather than as part of the prior recorded testimony itself. Indeed, as set out below, the new four-page statement raises further questions that must be addressed in cross-examination.

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ See Defence Request, para. 11.

²⁴ ICC-01/04-02/06-1653, para. 19.

²⁵ [REDACTED].

²⁶ See ICC-01/04-02/06-1205, para. 7; ICC-01/04-02/06-1029, para. 35.

D-0001's prior recorded testimony relates to issues that are materially in dispute

21. [REDACTED] is not a "background and contextual issue."²⁷ On the contrary, D-0001's prior recorded testimony relates to issues that are materially in dispute. [REDACTED].

22. [REDACTED].²⁸ [REDACTED]²⁹

D-0001's prior recorded testimony is not of a cumulative or corroborative nature

23. D-0001's prior recorded testimony is not of a cumulative or corroborative nature.³⁰ Although it is not required that the accounts of other witnesses who have given or will give oral testimony on similar facts accord in every detail,³¹ such other accounts must at least touch upon key aspects of the proposed prior recorded testimony. [REDACTED].³² [REDACTED].

24. [REDACTED].

25. [REDACTED]³³ [REDACTED].³⁴ [REDACTED].

Introducing D-0001's prior recorded testimony is not in the interests of justice

26. The Defence also misrepresents the probative value and potential scope of D-0001's prior recorded statement. [REDACTED].³⁵ [REDACTED].³⁶ [REDACTED].³⁷

²⁷ *Contra* Defence Request, para. 12.

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ *Contra* Defence Request, paras. 14, 17.

³¹ ICC-01/04-02/06-1715-Conf, para. 14.

³² Defence Request, para. 14, *see also* para. 17.

³³ Defence Request, para. 17, fn. 22.

³⁴ [REDACTED].

³⁵ Defence Request, para. 17.

³⁶ [REDACTED].

³⁷ [REDACTED].

27. Further, there are several aspects of D-0001's [REDACTED] Statement that require clarification through *viva voce* testimony. [REDACTED] .³⁸ [REDACTED]³⁹ [REDACTED].⁴⁰ [REDACTED].

28. [REDACTED]⁴¹ [REDACTED].

29. [REDACTED].⁴² [REDACTED].

30. The Prosecution also has a number of concerns in relation to the manner in which D-0001's [REDACTED] Statement was taken.

31. [REDACTED]⁴³ [REDACTED].⁴⁴ [REDACTED].

32. [REDACTED]⁴⁵ [REDACTED]⁴⁶ [REDACTED]. [REDACTED].⁴⁷ This approach is inappropriately leading and serves the Accused's own interests, not the interests of justice.

33. Further, in the Prosecution's experience, 5 hours and 40 minutes, the amount of time that the Defence needed to obtain D-0001's statement,⁴⁸ is not sufficient for a witness to carefully review most or all⁴⁹ of the 240 pages⁵⁰ annexed to the statement, go through the necessary initial and closing formalities of taking a statement, read-back and answering questions.

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ Defence Request, para. 10.

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ See para. 31, above.

⁵⁰ See Defence Request, Annex I, pp. 6-245.

34. [REDACTED].⁵¹ [REDACTED]⁵² [REDACTED].

35. [REDACTED]. [REDACTED].⁵³ [REDACTED].

36. [REDACTED].

D-0001 is able to testify in person

37. The MICT Appeals Chamber in *Ngirabatware*⁵⁴ also noted that the Accused “failed to demonstrate that he made any effort to call these witnesses to testify or that he had good reason for not doing so.”⁵⁵ Similarly, the Defence provides no good reason as to why D-0001 should not testify in person.

38. D-0001’s expression of unwillingness to provide testimony in person, without any detail whatsoever as to the reason,⁵⁶ is not a relevant consideration.⁵⁷ [REDACTED]⁵⁸ [REDACTED].

39. The Defence has not requested the admission of this Witness’s prior recorded testimony pursuant to rule 68(2)(c). His unwillingness⁵⁹ does not amount to unavailability within the meaning of that rule.⁶⁰ Further, the Defence contention that the Court has “limited powers of compulsion”⁶¹ is neither true⁶² nor relevant for the purposes of determining the application pursuant to rule 68(2)(b).

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ See para. 22 and fns. 28-29, above.

⁵⁵ *Prosecutor v. Ngirabatware*, MICT-12-29A, Judgement, 18 December 2014, para. 104.

⁵⁶ [REDACTED].

⁵⁷ See Defence Request, para. 15.

⁵⁸ [REDACTED].

⁵⁹ See Defence Request, para. 15;

⁶⁰ See ICC-01/04-02/06-1325, para. 9 where the Chamber found that a witness’s unwillingness to testify under the conditions set by the Chamber did not mean that the witness was inaccessible or otherwise incapable of testifying orally.

⁶¹ Defence Request, para. 15.

⁶² See ICC-01/09-01/11-1598.

40. In these circumstances, admission pursuant to rule 68(2)(b), or even rule 68(3), would be inappropriate. This Witness's testimony should be heard entirely *viva voce*, in particular because of the unique nature of this witness's evidence and the concerns outlined above.

II. Witness D-0013

41. D-0013's prior recorded testimony fails to satisfy the requirements set out in rule 68(2)(b): it relates to issues that are materially in dispute, is not of a cumulative or corroborative nature and its admission would prejudice the Prosecution by depriving it of the possibility to test the evidence of a witness uniquely placed to provide information about numerous relevant issues.

42. The Defence Request is silent on the key role played by D-0013 [REDACTED]. [REDACTED]⁶³ [REDACTED].⁶⁴ D-0013's prior recorded testimony is in no way comparable to Witness P-0057's.⁶⁵ Neither is the description of D-0013's prior recorded testimony as relating to "contextual matters or what is sometimes referred to as 'crime base'"⁶⁶ accurate.

43. D-0013's prior recorded testimony addresses several issues that are materially in dispute, primarily the UPC/FPLC's approach to the demobilisation of child soldiers. D-0013 discusses numerous UPC/FPLC documents on this subject, [REDACTED].⁶⁷

⁶³ [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ See Defence Request, para. 21, fn. 24.

⁶⁶ Defence Request, para. 21; *see also* para. 22.

⁶⁷ [REDACTED].

44. The Defence states that D-0013's prior recorded testimony is cumulative and corroborative of the testimony of other witnesses, citing to the testimony of Witnesses P-0901, P-0365, P-0031 and the Accused.⁶⁸ [REDACTED].⁶⁹
45. [REDACTED].⁷⁰ However, should the Chamber admit D-0013's prior recorded testimony, it would be on the record in its entirety and the Chamber must consider all parts of it.
46. [REDACTED]⁷¹ [REDACTED].⁷² Admitting the statement via rule 68(2)(b) would deprive the Chamber of the ability to assess D-0013's credibility during his testimony.⁷³
47. Depriving the Prosecution of the opportunity to cross-examine D-0013 would be prejudicial to the Prosecution's rights to test this witness's evidence. [REDACTED].⁷⁴
48. [REDACTED]⁷⁵ [REDACTED].⁷⁶ The Prosecution is also in possession of several other disclosed items related to D-0013 that it would use to test this Witness's credibility.

III. Witness D-0123

49. D-0123's prior recorded testimony should not be admitted pursuant to rule 68 (2)(b), or any other rule, since it is irrelevant.⁷⁷

⁶⁸ Defence Request, para. 23, fn. 26.

⁶⁹ [REDACTED].

⁷⁰ Defence Request, para. 22.

⁷¹ [REDACTED]

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ See para. 53, above.

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

50. [REDACTED].⁷⁸

51. [REDACTED]⁷⁹ [REDACTED].⁸⁰ [REDACTED]⁸¹ [REDACTED].⁸² [REDACTED].

52. [REDACTED],⁸³ [REDACTED],⁸⁴ [REDACTED]. As such, the Defence is precluded from adducing evidence to prove its suggestion. As noted by an ICTR Trial Chamber in *Nahimana*, “when an attack is made upon the veracity of a witness by reference to particular facts, ‘the matter is collateral, and a denial cannot be rebutted’”.⁸⁵

53. [REDACTED]⁸⁶

54. Neither does D-0123’s prior recorded testimony relate to any other matter that is relevant to the proceedings. [REDACTED]⁸⁷ [REDACTED]. [REDACTED].

IV. Witness D-0134

55. D-0134’s prior recorded testimony does not satisfy the requirements of rule 68(2)(b) since it directly relates to an issue that is materially in dispute,

⁷⁷ In determining previous requests for the admission of prior recorded testimony pursuant to rule 68(2)(b), the Chamber has considered whether such testimony is relevant, for example, by assessing whether it relates to the charges against the Accused, *see* ICC-01/04-02/06-1715-Conf, para. 12.

⁷⁸ [REDACTED].

⁷⁹ [REDACTED]

⁸⁰ [REDACTED].

⁸¹ [REDACTED].

⁸² [REDACTED].

⁸³ [REDACTED].

⁸⁴ [REDACTED].

⁸⁵ *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Decision of 9 May 2003 on the Prosecutor’s Application for Rebuttal Witnesses as Corrected According to the Order of 13 May 2003, 13 May 2003, para.51, fn.21 citing *R v Hamilton* (1998) Times, 25 July, reaffirming *R v Wood* [1951] 2 All ER 112n, 35 Cr App Rep 61, *R v Redgrave* (1981) 74 Cr App Rep 10, *Cross and Tapper*, p.332. Similarly, in *Ntagerura*, an ICTR Trial Chamber described evidence challenging the credibility of a witness as a collateral matter, *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Decision on the Prosecutor’s Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54, 73, and 85 (A) (iii) of the Rules Of Procedure and Evidence, 21 May 2003, para.33.

⁸⁶ [REDACTED].

⁸⁷ [REDACTED].

[REDACTED]. Further, no other witness has given or will give oral testimony that relates to [REDACTED],⁸⁸ which is the subject of D-0134's Statement.

56. Introducing D-0134's prior recorded testimony pursuant to rule 68(2)(b) is prejudicial to the Prosecution's duty to establish the truth by depriving it of the opportunity to test evidence that relates to the testimony of a Prosecution Witness. [REDACTED] cannot reasonably be considered as "background" to his testimony since [REDACTED].⁸⁹ The Prosecution bears the burden of proof and principles of fairness dictate that it should be provided with every reasonable opportunity to test information that seeks to undermine the evidence that it has submitted.

57. Admission of D-0134's prior recorded testimony pursuant to rule 68(3) would be more appropriate in the circumstances. This would afford the Prosecution the opportunity to explore [REDACTED] and to test D-0134's credibility.

58. [REDACTED].⁹⁰ [REDACTED].

59. [REDACTED].

60. Cross-examination is the only manner in which the Prosecution may test this prior recorded testimony. [REDACTED].⁹¹ [REDACTED].⁹²

61. [REDACTED]⁹³ [REDACTED].⁹⁴ [REDACTED].⁹⁵

⁸⁸ [REDACTED].

⁸⁹ *Contra* Defence Request, para. 29.

⁹⁰ [REDACTED].

⁹¹ Email from Stéphane Bourgon to Nicole Samson dated 26 October 2017 at 15:45.

⁹² *Contra* Addendum, paras. 2-3.

⁹³ Defence Request, para. 28 (ii).

⁹⁴ [REDACTED].

⁹⁵ [REDACTED].

V. Witnesses D-0148, D-0150 and D-0163

62. The prior recorded testimony of D-0148, D-0150 and D-0163 is not suitable for admission pursuant to rule 68(2)(b). While the prior recorded testimony of these Witnesses does not refute [REDACTED]'s account,⁹⁶ it relates to matters that could have an impact on the Chamber's assessment of [REDACTED]. Rather than being a matter "of background relevance to the case",⁹⁷ this is an issue that is materially in dispute since [REDACTED]. Further, no other witnesses have given or will give oral testimony of similar facts. Admission of the prior recorded testimony of all three Witnesses pursuant to rule 68(3) would be appropriate in the circumstances.

63. The Chamber found that it was not appropriate to admit the prior recorded testimony of Witness P-0551 – whose evidence is comparable to that of all three of these Defence Witnesses - pursuant to rule 68(2)(b). The Chamber decided that admission pursuant to rule 68(3) was more appropriate after having considered that: (i) the issue that Witness P-0551 addressed in his prior recorded testimony, that of school records, had been materially in dispute with respect to the testimony of several witnesses; (ii) the alleged prejudice resulting from the lateness of the disclosure of Witness P-0551's statements and of the Prosecution's request to admit them would be greater if the prior recorded testimony was admitted without cross-examination; and (iii) Witness P-0551's comments on specific school records were exclusively elicited by the Prosecution without any opportunity for the Defence to ask him additional questions, challenge his account or ask him to comment on other documents.⁹⁸

⁹⁶ [REDACTED].

⁹⁷ Defence Request, para. 32.

⁹⁸ ICC-01/04-02/06-1733, paras. 23-25.

64. The same considerations apply to these three Defence Witnesses since [REDACTED] is materially in dispute in relation to more than one witness; the statements of all three Witnesses were provided to the Prosecution near the end of the Defence case, at the same time that the Defence's request to admit these statements was filed; and the Prosecution has not had the opportunity to challenge any of these Witnesses in any way or to ask them to comment on other documents.
65. The Defence makes serious allegations of "forgery" on the basis of the prior recorded testimony of two of these three Witnesses.⁹⁹ It would be prejudicial to the Prosecution's rights to admit this testimony without giving the Prosecution the opportunity to test its veracity.
66. The statements of all three Witnesses contain broad assertions [REDACTED]. The Prosecution should be afforded an opportunity to ask these Witnesses about the limits to their knowledge and about the practical application of rules and procedures in the DRC since this may shed light on the reliability of the challenged documents. The Prosecution should also be permitted to test the credibility of these witnesses through cross-examination.
67. The examination of all three Witnesses would be brief. As such, there would be no undue prolongation of the proceedings. The Prosecution does not oppose the use of video-link for their testimony, if necessary.

⁹⁹ D-0148 and D-0150, *see* Defence Request, paras. 31, 36.

D-0148

68. Although D-0148 [REDACTED],¹⁰⁰ [REDACTED].¹⁰¹ [REDACTED].¹⁰²
[REDACTED].¹⁰³

69. [REDACTED].¹⁰⁴ [REDACTED].¹⁰⁵ [REDACTED]¹⁰⁶ [REDACTED].

70. [REDACTED].¹⁰⁷ [REDACTED].

71. [REDACTED]¹⁰⁸ [REDACTED]¹⁰⁹ [REDACTED]¹¹⁰ – [REDACTED].¹¹¹

72. The Prosecution should be allowed to ask D-0148 about these issues as it may lead to an explanation of the circumstances under which [REDACTED].

73. Should the Chamber admit the prior recorded testimony of D-0148 pursuant to rule 68(2)(b), the Prosecution requests that it also admit, for the purpose of impeachment,¹¹² [REDACTED].¹¹³

D-0150

74. [REDACTED].¹¹⁴ [REDACTED],¹¹⁵ [REDACTED].

75. The Prosecution needs to put this information to D-0150 [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

¹⁰⁷ [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ [REDACTED].

¹¹² [REDACTED].

¹¹³ [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

76. [REDACTED]¹¹⁶ [REDACTED].

77. The two items that the Defence requests to admit as associated documents to D-0150's Statement are photographs of an original document.¹¹⁷ These photographs should not be admitted before the Prosecution is provided an opportunity to inspect [REDACTED] to which they relate.

D-0163

78. While D-0163's prior recorded testimony relates to [REDACTED]'s testimony, it is also potentially relevant to that of other Prosecution Witnesses. This adds to the need to test the information provided by D-0163. While the Defence states that D-0163 [REDACTED],¹¹⁸ D-0163's statement makes no mention of [REDACTED].

VI. Witness D-0179

79. The prior recorded testimony of D-0179 is not suitable for admission pursuant to rule 68(2)(b) since it is irrelevant. It also lacks sufficient indicia of reliability.

80. D-0179's prior recorded testimony relates exclusively to the age and level of education of [REDACTED] who is alleged to be one of the persons whose photographs¹¹⁹ the Defence showed to Prosecution Witnesses before asking them to guess that person's age.

81. The Presiding Judge described the latter exercise as "useless"¹²⁰ and the Chamber expressed "strong doubts" as to the probative value of the exercise.¹²¹ The

¹¹⁶ [REDACTED].

¹¹⁷ [REDACTED].

¹¹⁸ Defence Request, para. 38.

¹¹⁹ [REDACTED].

¹²⁰ ICC-01/04-02/06-T-146-CONF-ENG ET, p.67, lns.16-20 (open session).

¹²¹ ICC-01/04-02/06-T-103-CONF-ENG ET, p.22, ln.24 – p.23, ln.3 (open session) ; ICC-01/04-02/06-T-146-CONF-ENG ET, p.69, lns.15-17 (open session).

Presiding Judge himself queried whether showing a photograph of somebody who really looks very young, even though he is actually older, proves anything.¹²²

82. The Defence put their questions and suggestions regarding the photograph of the person who is allegedly [REDACTED] to Prosecution Witnesses during cross-examination, and those witnesses provided their responses: [REDACTED];¹²³ [REDACTED],¹²⁴ [REDACTED].¹²⁵ Therefore, the Prosecution Witnesses did not contradict D-0179's prior recorded testimony. The answers provided by [REDACTED] preclude the Defence from adducing evidence to prove its suggestions.¹²⁶

83. D-0179's prior recorded testimony would only be relevant to determining the age of the child who appears in the relevant photographs. Since that child is not alleged to have been a UPC/FPLC child soldier during the temporal scope of the charges, the prior recorded testimony would not assist the Chamber in its determination of any of the charges against the Accused.

84. Not only is D-0179's prior recorded testimony irrelevant, but it lacks sufficient indicia of reliability since it: (i) does not indicate who took the statement;¹²⁷ (ii) does not contain language indicating that it was given with an awareness that it may be used in legal proceedings before the Court; and (iii) is not in a language read by the witness and does not contain a certification by a qualified

¹²² ICC-01/04-02/06-T-153-CONF-ENG ET, p.9, lns.1-24 (private session); *see also* ICC-01/04-02/06-T-146-CONF-ENG ET, p.71, lns.18-25 (open session).

¹²³ ICC-01/04-02/06-T-103-CONF-ENG ET, p.24, lns.20-25 (open session). Witness P-0046 also stated that she "would not estimate the...age of a child based on an appearance or of anyone; it would depend on so many factors that I find the exercise useless", ICC-01/04-02/06-T-103-CONF-ENG ET, p.24, lns.7-9 (open session).

¹²⁴ ICC-01/04-02/06-T-138-CONF-ENG ET, p.88, ln.4-15 (open session).

¹²⁵ ICC-01/04-02/06-T-138-CONF-ENG ET, p.89, ln.24 – p.91, ln.2 (open session).

¹²⁶ *See* paras. 52-53 and fns. 85-86, above.

¹²⁷ The statement simply refers to the Accused's team, and it appears that [REDACTED] was present, *see* D-0179 Statement, paras. 1, 14.

interpreter.¹²⁸ The statement makes no mention of any subsequent meeting with a Registry interpreter¹²⁹ and, absent that, remains deficient in this regard.

VII. Witness D-0185

85. The Prosecution objects to the addition of D-0185 to the Defence list of witnesses.¹³⁰ Should the Chamber authorise such addition, D-0185's prior recorded testimony should not be admitted pursuant to rule 68(2)(b) since it is irrelevant. Additionally, it does not contain sufficient indicia of reliability.

86. D-0185's prior recorded testimony relates, exclusively, to the age and level of education of two of his children, neither of whom are alleged to have been UPC/FPLC child soldiers and only one of whose photograph¹³¹ was used by the Defence in an exercise devoid of probative value.¹³²

87. When Defence Counsel asked Witness P-0014 whether the person in the photograph, who is allegedly one of D-0185's children, is under 15, 15 or over 15, Witness P-0014 responded that the person is "15 and over"¹³³ and, subsequent to further questioning, that he would not be surprised to learn that this and other persons shown to him in photographs were 16 years old.¹³⁴ Therefore, Witness P-0014 did not contradict the information provided by the Defence at the time, the same information now contained in D-0185's statement, to the effect that D-0185's son was 16 years old when the photograph was taken. Witness P-0014's answers

¹²⁸ Defence Request, para. 43.

¹²⁹ Defence Request, para. 43.

¹³⁰ See "Prosecution response to the Defence 'Request to add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses'".

¹³¹ [REDACTED].

¹³² See, para. 81, fns. 120-122, above.

¹³³ ICC-01/04-02/06-T-138-CONF-ENG ET, p. 88, lns. 16-24 (open session).

¹³⁴ See ICC-01/04-02/06-T-138-CONF-ENG ET, p. 91, ln. 11 – p. 92, ln. 2 (open session).

preclude the Defence from adducing evidence to prove its suggestion as also established in the above-cited jurisprudence.¹³⁵

88. The fact that D-0185 may have two children who are over the age of 15 but still in primary school is irrelevant to the proceedings. The Prosecution has not alleged that D-0185's children were in the UPC/FPLC and were below the age of 15 at the time. Accordingly, none of the charges against the Accused rest on any information concerning these two persons. The irrelevant nature of this proposed evidence applies all the more to the second child, whose image was never even seen or commented on by any Prosecution Witness.

89. Not only is D-0185's prior recorded testimony irrelevant, but it lacks sufficient indicia of reliability since it: (i) does not indicate who took the statement;¹³⁶ (ii) does not contain language indicating that it was given with an awareness that it may be used in legal proceedings before the Court; and (iii) is not in a language understood by the witness and does not contain a certification by a qualified interpreter.¹³⁷ The Defence's proposal to cure the latter defect during any subsequent certification process¹³⁸ amounts to a proposal to conditionally admit prior recorded testimony even when it is unreliable. That is not acceptable.

VIII. Witness D-0207

90. The Prosecution objects to the addition of D-0207 to the Defence list of witnesses.¹³⁹ Should the Chamber authorise such addition, D-0207's prior recorded testimony should not be admitted pursuant to rule 68(2)(b) since it is irrelevant.

¹³⁵ See, paras. 52-53, fns. 85-86, above.

¹³⁶ The statement simply refers to the Accused's team, and it appears that [REDACTED] was present, see D-0185 Statement, paras. 1, 16.

¹³⁷ Defence Request, para. 47.

¹³⁸ Defence Request, para. 47.

¹³⁹ See "Prosecution response to the Defence 'Request to Add Witnesses D-0185, D-0207 and D-0243 to the Defence List of Witnesses'".

91. D-0207's proposed evidence at best establishes that he did not know that Prosecution Witness P-0898 was part of an armed group and that he is unable to recognise an image of Witness P-0898 taken years ago. There are innumerable reasons that could account for the fact that D-0207 did not know that [REDACTED].¹⁴⁰
92. The fact that Defence Counsel put suggestions to Prosecution Witness P-0898 based on information stemming from D-0207,¹⁴¹ does not render D-0207's prior recorded testimony relevant. Evidentiary rules prohibit the admission of evidence on collateral matters.¹⁴²
93. Alternatively, should the Chamber deem that D-0207's prior recorded testimony is relevant to Witness P-0898's credibility, the Chamber should nevertheless decline to admit D-0207's Statement pursuant to rule 68(2)(b) since the credibility of Prosecution witnesses is an issue that is materially in dispute.
94. Further, although the Defence makes no specific mention of this in its request, paragraph 17 of D-0207's Statement contains the assertion that [REDACTED]. This specifically relates to the testimony of Witness P-0190 who testified that [REDACTED].¹⁴³ The latter issue is also materially in dispute and relates to the acts and conduct of the Accused. This is added reason to reject the admission of D-0207's Statement pursuant to rule 68(2)(b).¹⁴⁴

¹⁴⁰ [REDACTED].

¹⁴¹ [REDACTED].

¹⁴² See, paras. 52-53, fns. 85-86, above.

¹⁴³ [REDACTED].

¹⁴⁴ Should the Chamber authorise admission of D-0207's prior recorded testimony pursuant to rule 68(2)(b), the Prosecution asks that the Chamber decline to rely on paragraph 17 of D-0207's Statement, see ICC-01/04-02/06-1730-Conf, paras. 7, 9.

95. Finally, the Prosecution has information that D-0207 [REDACTED].¹⁴⁵ The Prosecution should be authorised to test D-0207's credibility and any potential bias through cross-examination.

96. Admitting D-0207's prior recorded testimony pursuant to rule 68(2)(b) would not best serve the interests of justice and would deprive the Prosecution of an opportunity to test D-0207's evidence. In view of the fact that the Prosecution's case is now closed, the only other avenue to test this evidence would be to call evidence in rebuttal, which would not be as effective as cross-examination and would also be subject to the Chamber's authorisation.

B. The Chamber should reject the rule 68(2)(c) application

97. Pursuant to rule 68(2)(c), the Chamber may authorise the introduction of prior recorded testimony coming from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. The Chamber must be satisfied that: (i) the person is unavailable in the latter sense; (ii) the necessity of measures under article 56 of the Statute could not have been anticipated; and (iii) the prior recorded testimony has sufficient indicia of reliability.¹⁴⁶ The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.¹⁴⁷

98. The Prosecution opposes the Defence request to admit the prior recorded testimony of D-0080 pursuant to rule 68(2)(c) since the Defence fails to establish that this person is unavailable. Even if D-0080 were considered unavailable, the request must still fail since his statement is not reliable, is of low probative value,

¹⁴⁵ [REDACTED].

¹⁴⁶ Rule 68(2)(c)(i) of the Rules.

¹⁴⁷ Rule 68(2)(c)(ii) of the Rules.

and its admission would be unduly prejudicial to the Prosecution. D-0080's evidence should be elicited entirely *viva voce*.

D-0080 is not unavailable

99. The rationale that the Defence provides to support its assertion that D-0080 is unavailable within the meaning of rule 68(2)(c) is that: (i) D-0080 [REDACTED] has no travel documents permitting travel outside [REDACTED]; and (ii) the Registry indicated it is unable to obtain travel documents or to facilitate testimony *via* video-link.¹⁴⁸ Based on this information, the Defence's assertion that D-0080 is unavailable is, at best, premature.

100. First, [REDACTED] is not a status known in international law. [REDACTED]. The Defence fails to elaborate upon D-0080's legal status, which is a relevant consideration for the Chamber's determination on unavailability. According to information available to the Prosecution, [REDACTED].¹⁴⁹ The Defence does not provide any information as to whether it, or D-0080, has taken any steps to obtain travel [REDACTED] documents.

101. Second, the Defence misrepresents the VWS's views on the possibility of D-0080 testifying.¹⁵⁰ The VWS has not ruled out the option that D-0080's testimony could be conducted *via* video-link from [REDACTED] or that it could facilitate travel to the seat of the Court for testimony. Rather, the VWS notes that it would require permission and assistance from [REDACTED] authorities to be able to facilitate video-link testimony, or that the Witness could make his own way [REDACTED] and the VWS could secure travel documentation.¹⁵¹ In the absence

¹⁴⁸ Defence Request, para. 57.

¹⁴⁹ [REDACTED].

¹⁵⁰ Defence Request, para. 57.

¹⁵¹ *See* Defence Request, Annex XII.

of such a request being made through the appropriate channels, or exploring the feasibility of travel, it is premature to assert that these are not viable options.

102. [REDACTED].¹⁵² [REDACTED]. This means that the ICC *is* able to operate in [REDACTED] securely and safely with the co-operation of [REDACTED] authorities. Accordingly, there is no reason why the ICC Registry could not seek to conduct D-0080's testimony *via* video-link from that country, pursuant to an order compelling testimony if necessary.

103. [REDACTED]¹⁵³ [REDACTED]. The VWS's response, referring to [REDACTED], also indicates that the VWS has been misinformed about D-0080's legal status. [REDACTED]. The VWS must be provided with complete and accurate information to provide relevant advice.

104. [REDACTED].¹⁵⁴ [REDACTED].¹⁵⁵ [REDACTED].¹⁵⁶ [REDACTED].¹⁵⁷ [REDACTED]. The Defence fails to mention any of these relevant considerations.

105. The Defence first met D-0080 on [REDACTED].¹⁵⁸ To the Prosecution's knowledge, D-0080's situation has not changed since that time. As such, it was incumbent on the Defence to bring any concerns as to D-0080's unavailability when it included him on its final list of witnesses on 26 April 2017. Instead, the Defence waited until 16 October 2017 to provide its views on D-0080's purported unavailability for the first time.

106. In *Bemba et al.*, Trial Chamber VII noted that the intention of the drafters in effecting the amendment to rule 68(2)(c) was to include "a situation in which it

¹⁵² [REDACTED].

¹⁵³ Defence Request, Annex XII.

¹⁵⁴ [REDACTED].

¹⁵⁵ [REDACTED].

¹⁵⁶ [REDACTED].

¹⁵⁷ [REDACTED].

¹⁵⁸ [REDACTED].

was not possible to secure or reach a witness, although that witness could, with reasonable diligence be traced".¹⁵⁹ The Defence was able to reach D-0080 just one month ago, when it obtained his statement. D-0080 is willing to testify before the Court, as long as his security and that of his family are assured.¹⁶⁰ Regardless, the Chamber has the power to compel the witness to testify.¹⁶¹

107. In finding that a witness was unavailable for the purposes of rule 68 (2)(c) in *Bemba et al.*, Trial Chamber VII considered: (i) whether the witness's situation was such as to present obstacles to the witness's ability to cooperate with the Court and to the ability of the Court to secure the witness's oral testimony that cannot be overcome with reasonable diligence, referring to the options of both in person and video link testimony;¹⁶² and (ii) whether the reasonably foreseeable consequences of the witness testifying before the Court, whether in answer to a summons or otherwise, would place the witness under unnecessary hardship that is disproportionate to the purported significance of her evidence.¹⁶³

108. The Defence presents no information that suggests that D-0080's testimony cannot be secured with the exercise of reasonable diligence or that such testimony would place D-0080 under unnecessary hardship. D-0080's evidence is potentially highly significant to the Accused's case. Accordingly, all relevant options must be explored before admitting this witness's prior recorded testimony without providing the Prosecution the opportunity to test its veracity. The fact that the Court's attempts to secure D-0080's testimony may result in [REDACTED], should not be factors against taking such steps.

109. In *Karadžić*, an ICTY Trial Chamber determined that the accused person had not established the unavailability of a witness since the information provided

¹⁵⁹ ICC-01/05-01/13-1481-Red-Corr, para. 16 (footnote omitted).

¹⁶⁰ [REDACTED].

¹⁶¹ See ICC-01/09-01/11-1598.

¹⁶² ICC-01/05-01/13-1481-Red-Corr, para. 17.

¹⁶³ ICC-01/05-01/13-1481-Red-Corr, para. 18.

only indicated that the witness was not able to travel, noting that “[w]hile this information should have led the Accused to look into alternative modes of obtaining the Witness’s live testimony without him travelling to The Hague to give it, for instance through the use of a video-conference link, it cannot satisfy the Chamber that the Witness is unavailable”.¹⁶⁴ The Defence request in relation to D-0080 contains the same failings.

110. Since the Defence has failed to establish D-0080’s unavailability, the Chamber must dismiss the request and need not consider whether the other requirements of rule 68(2)(c) are met.¹⁶⁵ Should it prove too difficult for the witness to travel to The Hague to testify, the Prosecution would not oppose his testimony being conducted *via* video-link.

111. Should the Chamber determine, now, or at a later stage, that D-0080 is unavailable within the meaning of rule 68(2)(c), it should nevertheless reject the Defence’s request to admit this witness’s prior recorded testimony pursuant to this rule since it fails to satisfy the other relevant criteria.

D-0080’s prior recorded testimony is not reliable

112. D-0080’s prior recorded testimony is not reliable. [REDACTED]¹⁶⁶
 [REDACTED]¹⁶⁷ [REDACTED].¹⁶⁸ [REDACTED],¹⁶⁹ [REDACTED],¹⁷⁰
 [REDACTED].¹⁷¹ These issues directly impact on the reliability of D-0080’s prior

¹⁶⁴ See *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion to Admit Testimony of Pero Rendi pursuant to rule 92 *bis*, 6 February 2014, para. 9.

¹⁶⁵ See *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion to Admit Testimony of Pero Rendi pursuant to rule 92 *bis*, 6 February 2014, para. 10.

¹⁶⁶ [REDACTED].

¹⁶⁷ [REDACTED].

¹⁶⁸ [REDACTED].

¹⁶⁹ [REDACTED].

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

recorded testimony. The only way to explore them is through examination in court.

113. Further, although the Defence first met D-0080 on [REDACTED], his statement was only obtained on [REDACTED] 2017,¹⁷² [REDACTED] after the end of the Accused's testimony. The strong resemblances between D-0080's statement and the Accused's testimony¹⁷³ raise concerns as to the truthfulness and spontaneity of this statement. Indeed, the Defence acknowledges that "many if not all elements of Witness D-0080's Statement are cumulative of other *viva voce* evidence that has been heard by the Trial Chamber" citing, exclusively, to the Accused's testimony.¹⁷⁴ In these circumstances, the cumulative nature of D-0080's testimony should be exceptionally considered as a factor *against* admission pursuant to rule 68(2)(c), rather than in favour of such admission.

114. Finally, as the Defence itself acknowledges, whether the prior recorded testimony is obtained in the presence of a qualified interpreter is a relevant criterion in the assessment of its reliability.¹⁷⁵ D-0080's statement indicates that he speaks and writes [REDACTED]. The statement was taken in [REDACTED]. D-0080 states that the statement was translated to him into [REDACTED] by [REDACTED] who also signed the statement as the interpreter.¹⁷⁶ No information is provided about the relevant qualifications of [REDACTED] as an interpreter—he merely affirms that he read and translated the statement to D-0080.¹⁷⁷ [REDACTED].¹⁷⁸ [REDACTED]¹⁷⁹ [REDACTED],¹⁸⁰ [REDACTED].¹⁸¹

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

¹⁷⁴ Defence Request, para. 56, fn. 70.

¹⁷⁵ Defence Request, para. 54 (ii), fn. 58.

¹⁷⁶ [REDACTED].

¹⁷⁷ [REDACTED].

¹⁷⁸ [REDACTED].

¹⁷⁹ [REDACTED].

¹⁸⁰ [REDACTED].

¹⁸¹ [REDACTED].

D-0080's prior recorded testimony is of low probative value

115. Article 69 of the Statute is relevant to decisions on requests for admission of prior recorded testimony pursuant to rule 68(2)(c) and, therefore, the relevance and probative value of the prior recorded testimonies vis-à-vis any prejudice that admission may cause to a fair trial or to a fair evaluation of the testimony of a witness should also be taken into consideration.¹⁸²

116. D-0080's statement was obtained over the course of two days. The Defence does not specify how many hours were spent with the Witness on these days. Regardless, in the Prosecution's experience two days is a very short amount of time to be able to go through all the initial formalities required for an interview, obtain as extensive and detailed a statement as D-0080's, interpret the statement back to the witness in a language that he understands, and conduct the closing formalities. In particular, D-0080 refers to having reviewed the [REDACTED] video during the interview.¹⁸³ That video lasts almost 55 minutes.

117. In his statement, D-0080 provides information about what he describes as several different groups of persons appearing in a video filmed at [REDACTED].¹⁸⁴ However, the information provided in the statement, without precise timestamps for each subset of people described, does not enable the viewer to determine who D-0080 is referring to in each case. For example, it is impossible to determine who [REDACTED]¹⁸⁵ [REDACTED]¹⁸⁶ are. It would be unfair to admit this statement without clarifying such evidence and allowing the Prosecution the opportunity to test it. Otherwise, such obscure references must be attributed no probative value.

¹⁸² ICC-01/04-02/06-1029, para. 15; *See also* ICC-01/04-02/06-1205, para. 7.

¹⁸³ [REDACTED].

¹⁸⁴ [REDACTED].

¹⁸⁵ [REDACTED].

¹⁸⁶ [REDACTED].

Admitting D-0080's prior recorded testimony pursuant to rule 68(2)(c) would be unduly prejudicial to the Prosecution

118. Although rule 68(1) refers to prejudice to or inconsistency with the rights of the Accused, the same considerations must apply in relation to the Prosecution since the Chamber is bound to ensure procedural fairness for *both* Parties as well as for the participants.¹⁸⁷ Indeed, the Chamber has stated that the impact of any request for admission pursuant to rule 68(2)(c) on the fairness of the proceedings more generally needs to be considered.¹⁸⁸

119. D-0080 was [REDACTED]¹⁸⁹ [REDACTED].¹⁹⁰ [REDACTED]. Further, D-0080's statement refers to the Accused's acts and conduct in stating that [REDACTED].¹⁹¹ [REDACTED]¹⁹² [REDACTED].¹⁹³ The witness refers to the Accused as a [REDACTED],¹⁹⁴ and portrays the UPC/FPLC's aims as noble,¹⁹⁵ also stating that it did not accept recruits under the age of 18.¹⁹⁶

120. In rejecting Prosecution requests for the admission of the prior recorded testimony of two witnesses pursuant to rule 68(3), under which rule, unlike rule 68(2)(c), cross-examination would take place, the Chamber referred to the centrality of the prior recorded testimony to the case against the Accused, the fact that the prior recorded testimony referred to the charges against the Accused and his alleged actions at length, and that the Defence would need a significant amount of time to cross-examine the witnesses.¹⁹⁷ D-0080's centrality to the charges, the extensive references to the Accused in his statement and the clear

¹⁸⁷ See ICC-02/04-01/05-20, para. 31; ICC-01/04-135-tEn, para. 38; ICC-01/04-02/12-271-Corr, para. 256.

¹⁸⁸ ICC-01/04-02/06-1029, para. 14.

¹⁸⁹ [REDACTED].

¹⁹⁰ [REDACTED].

¹⁹¹ [REDACTED].

¹⁹² [REDACTED].

¹⁹³ [REDACTED].

¹⁹⁴ [REDACTED].

¹⁹⁵ [REDACTED].

¹⁹⁶ [REDACTED].

¹⁹⁷ See ICC-01/04-02/06-961, para. 10; ICC-01/04-02/06-988, para. 11.

need for the Prosecution to test this evidence similarly means that not only is the admission of his statement pursuant to rule 68(2)(c) inappropriate, but so would admission pursuant to rule 68(3).

121. The fact that the Defence only provided D-0080's statement to the Prosecution on 16 October 2017, after the Accused and most other Defence witnesses testified, significantly adds to the prejudice that the Prosecution would suffer by the admission of D-0080's statement pursuant to rule 68(2)(c) or 68(3). The timing of this disclosure, for which the Defence provides no justification, has deprived the Prosecution of the important opportunity to question the Accused and other Defence Witnesses about several issues addressed in D-0080's statement.

122. Accordingly, even if Witness D-0080 were to be considered unavailable, the low probative value of his statement and the problems with its reliability, [REDACTED], the references to the Accused's conduct and the highly contentious issues in his statement, as well as the late disclosure of this statement, make admission of his prior recorded testimony pursuant to rule 68(2)(c) or even rule 68(3) inappropriate. D-0080 must be heard entirely *viva voce*.

Conclusion

123. For the foregoing reasons, the Chamber should dismiss the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 12th day of December 2017
At The Hague, The Netherlands