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Date: 9 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, A.1 – A.3 and B.1 – B.10 and Public Annex 2

Public redacted version of “Prosecution’s application under rule 68(2)(c) to admit the prior recorded testimony and related documents of Prosecution Witness P-0016”, 22 December 2016, ICC-01/04-02/06-1698-Conf

Source: Office of the Prosecutor

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Introduction

1. The Office of the Prosecutor ("Prosecution") requests that Trial Chamber VI ("Chamber") admit the prior recorded testimony and relevant associated documents of Witness P-0016 under rule 68(2)(c) of the Rules of Procedure and Evidence ("Rules") and articles 64(9)(a) and 69(2), (3) and (4) of the Rome Statute ("Statute").¹
2. Specifically, the materials the Prosecution seeks to admit include Witness P-0016's 2005 witness statement and two documents annexed to it,² and [REDACTED] and the documents and audio-visual material shown to him [REDACTED].³
3. Witness P-0016's prior recorded testimony and associated documents are admissible under rule 68(2)(c) because: (i) the witness has recently become unavailable to testify due to a significant medical condition [REDACTED]; (ii) the Prosecution could not have anticipated the need to take measures under article 56 of the Statute; and (iii) the prior recorded testimony and associated documents are reliable.
4. The Prosecution is aware of P-0016's current medical condition through oral and written communications with VWS. The Prosecution understands that VWS will file *ex parte* its assessment of the witness, which will contain medical information supporting this application. In order to enable the Defence to make informed submissions on this application, the Prosecution requests that the Chamber reclassify pertinent portions of the VWS assessment.

¹ Attached as **Annex 1** is a list of Witness P-0016's prior recorded testimony and the associated documents that the Prosecution seeks to admit in this application.

² Witness P-0016 met with investigators on [REDACTED]. His witness statement and two of the documents annexed to it are listed in **Annex 1, section (A)**.

³ [REDACTED] are listed in **Annex 1, section (B)**. [REDACTED].

5. As the Chamber held in its “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103”, admitting these documents under rule 68(2)(c) does not give rise to retroactive application of this provision of the Statute to the detriment of the Accused within the meaning of article 51(4) of the Statute, nor does it offend the principles of legality.⁴
6. The prior recorded testimony and associated documents of Witness P-0016 are *prima facie* relevant and probative given [REDACTED]. While portions of Witness P-0016’s evidence go to proof of the acts and conduct of the Accused, this is not a reason to exclude admission of these materials. The probative value of this evidence outweighs any potential prejudice to the Accused. It is in the interest of justice to admit the prior recorded testimony and associated documents of Witness P-0016.

Confidentiality

7. This filing and its annexes are classified as “Confidential” because they contain identifying information about the witness. The Prosecution will file a public redacted version of the filing.

Prosecution’s Submissions

I. The materials are admissible under rule 68(2)(c) of the Rules

8. The prior recorded testimony of Witness P-0016 and associated documents that the Prosecution seeks to admit under rule 68(2)(c) fulfil the requirements under this provision as : (i) he is unavailable to testify; (ii) the Prosecution could not have anticipated the need to take measures under article 56 of the Statute to

⁴ ICC-01/04-02/06-1029, para. 11.

preserve his evidence; and (iii) his prior recorded testimony and associated documents are reliable.

9. Rule 68 applies equally to statements and transcripts of interviews made out-of-court, as it does to in-court testimony.⁵ Further, applying amended rule 68 is not retroactive or detrimental to the Accused.⁶

(i) Witness P-0016 is unavailable to testify due to obstacles that cannot be overcome with reasonable diligence

10. Witness P-0016 met with the Prosecution [REDACTED] for the purpose of providing a witness statement. He signed the statement on [REDACTED]. [REDACTED].
11. Witness P-0016 was re-interviewed between [REDACTED], and this interview was transcribed (and has been disclosed). Prior to the [REDACTED] interview, the Prosecution requested a pre-interview assessment due to [REDACTED] by the investigators who initially met with him briefly to attain his consent to be interviewed. On [REDACTED], assessed Witness P-0016's [REDACTED] fitness to be interviewed.⁷ Witness P-0016 was found fit to be interviewed, as such, the Prosecution proceeded to interview him.
12. The Prosecution recently learned that Witness P-0016 suffers from [REDACTED]. [REDACTED]. [REDACTED]. According to information provided to the Prosecution by VWS on [REDACTED], during a [REDACTED] assessment Witness P-0016 showed [REDACTED].⁸

⁵ ICC-01/04-02/06-1029, paras. 23, 34-35 and ICC-01/04-02/06-1205, paras. 15-16, 20.

⁶ ICC-01/04-02/06-1029, para. 11.

⁷ DRC-OTP-2099-0372 and DRC-OTP-2099-0374.

⁸ Email from VWS sent on [REDACTED]. The Prosecution understands that VWS will file the pertinent underlying information with the Chamber.

13. On this basis, Witness P-0016 is unavailable to testify.⁹

(ii) Measures under article 56 were not taken as Witness P-0016's medical issues were unforeseen

14. The Prosecution did not anticipate the need to take measures under article 56 of the Statute as the medical issues that prevent Witness P-0016 from being able to testify were unexpected.

15. Between [REDACTED], the Prosecution sought on numerous occasions to make contact with Witness P-0016, including [REDACTED]. In [REDACTED], the Prosecution learned from [REDACTED] that Witness P-0016 was receiving medical care, which Witness P-0016 confirmed [REDACTED] was for [REDACTED].¹⁰

16. On [REDACTED], Prosecution investigators were finally able to meet with Witness P-0016 in person for the purpose of completing a "Request for provision of VWS services for Victims/Witnesses appearing before the Court and their accompanying persons" and making [REDACTED] travel arrangements. During this meeting, Witness P-0016 advised that he was recently hospitalised for [REDACTED] and prescribed medication. The investigators also observed that he had difficulty [REDACTED] and may need assistance during travel.¹¹

17. On [REDACTED], Prosecution investigators once again met with Witness P-0016 and requested that [REDACTED] medical file.¹² At this meeting, Witness P-0016 also signed a medical authorisation form.¹³ On [REDACTED],

⁹ ICC-01/04-02/06-1325, para. 9, in which the Chamber referred to Witness P-0039 not having a condition or situation that rendered him "inaccessible or otherwise incapable of testifying orally". See also ICC-01/05-01/13-1481-Red, para. 16.

¹⁰ DRC-OTP-2099-0500.

¹¹ DRC-OTP-2099-0501.

¹² DRC-OTP-2089-1194.

¹³ DRC-OTP-2089-1196.

Prosecution investigators contacted Witness P-0016 to advise that they wished to meet with him [REDACTED] and requested that [REDACTED] his medical file prior to this meeting.¹⁴ On [REDACTED], Prosecution investigators met Witness P-0016 and [REDACTED] his personal medical file.¹⁵

18. Dr Eric Baccard, Head of the Prosecution Forensic Science Section, was asked to review Witness P-0016's medical record to assess his fitness to travel and advise whether any specific VWS support should be requested. In [REDACTED], the Prosecution submitted a support referral for Witness P-0016 to VWS, which was accepted. In [REDACTED], VWS requested Prosecution assistance [REDACTED] contact with Witness P-0016 [REDACTED]. Despite numerous attempts, [REDACTED] were unable to make contact with Witness P-0016. In [REDACTED], representatives of [REDACTED] requested the assistance [REDACTED]. [REDACTED]; however, all attempts to establish contact with Witness P-0016 were unsuccessful. On [REDACTED], a representative of [REDACTED] with additional contact information and also advised that, according to [REDACTED], Witness P-0016 was quite ill.
19. On [REDACTED], Prosecution field staff succeeded in meeting with Witness P-0016. During this meeting, he observed that Witness P-0016's general health condition was poor. Notably, he observed that Witness P-0016's [REDACTED]. [REDACTED].¹⁶ VWS were informed.
20. On [REDACTED], VWS advised the Prosecution that a medical assessment would be conducted, but that Witness P-0016 appeared to suffer from [REDACTED].

¹⁴ DRC-OTP-2091-0126.

¹⁵ DRC-OTP-2091-0132 and DRC-OTP-2091-0128.

¹⁶ DRC-OTP-2099-0503.

21. On [REDACTED], the Prosecution received the conclusions of VWS's [REDACTED] assessment of Witness P-0016 setting out the significant limitations [REDACTED].¹⁷

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

22. Witness P-0016 is a [REDACTED].¹⁸ [REDACTED].
23. Witness P-0016's prior recorded testimony and the associated documents are relevant to and are *prima facie* probative of issues in the proceedings, *inter alia*: the military command structure of the UPC/FPLC including the role and authority of Bosco NTAGANDA; [REDACTED]; the ethnic composition of the UPC/FPLC; the existence of a common plan to take over Ituri and the intention of the UPC/FPLC to expel the *non-originaires*; the recruitment of children under the age of 15 into the UPC/FPLC; the training of children under the age of 15 at [REDACTED] other camps; the deployment of children under the age of 15 into UPC/FPLC battalions, their active participation in hostilities, and their use as bodyguards for commanders, including Bosco NTAGANDA; the rape and sexual slavery of girls under the age of 15 by commanders within the UPC/FPLC; crimes committed by UPC/FPLC soldiers, including murder, pillaging; and the rape of Lendu women by UPC/FPLC soldiers.
24. It is only necessary to establish *prima facie* – not definitive – proof of reliability based on sufficient indicia.¹⁹ Moreover, absence of certain indicia of reliability

¹⁷ Email from VWS sent on [REDACTED].

¹⁸ **Annex A.1:** DRC-OTP-0126-0422 at 0437, paras. 86-89; and **Annex B.3:** DRC-OTP-2054-1447 at 1449, ln. 25 to 1450, ln. 9.

¹⁹ See ICC-01/09-01/11-1353, para. 15. See also ICTY, *Prosecutor v Popović et al*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 22: “[p]rima facie proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.”

may be considered when assessing the weight of that evidence but should not be a reason for excluding the evidence.²⁰

25. The prior recorded testimony of Witness P-0016 bears sufficient indicia of reliability, as defined by the Chambers of this Court and of the *ad hoc* tribunals. His prior recorded testimony and the associated documents are authentic,²¹ truthful and voluntarily provided.²² His prior recorded testimony is consistent, both internally and as between each other.²³
26. Witness P-0016 provided a [REDACTED] statement to Prosecution investigators in 2005.²⁴ He initialled each page and signed the cover page of the statement in the presence of the investigators.²⁵ [REDACTED].²⁶ In his statement, Witness P-0016 provided detailed information about the structure of the UPC/FPLC and a detailed narrative of events, including military operations, [REDACTED]. During his interview, Witness P-0016 [REDACTED], which are explained and annexed to his statement.²⁷
27. Witness P-0016 demonstrated the reliability of his statement by explaining the basis of his knowledge and noting areas in which his knowledge is limited. For instance, he was candid when he stated that [REDACTED]²⁸ and acknowledged

²⁰ See e.g. ICTY, *Prosecutor v Popović et al*, IT-05-88-T, Decision on Prosecution Motion for Admission of Evidence pursuant to rule 92quater, 21 April 2008, para. 41, citing *Prosecutor v Rasim Delić*, IT-04-83-PT, Decision on Prosecution Motion for Admission of evidence pursuant to rule 92quater, 9 July 2007 and *Prosecutor v Miluntinovic et al*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92quater, 16 February 2007.

²¹ See ICC-01/09-01/11-1353, para. 15: “in order to have such probative value, the item must also be seen to have the indicia of reliability, including of authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles.”

²² See ICC-01/04-01/06-1399, paras. 28-29 and ICTY, *Prosecutor v Aleksovski*, IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

²³ ICC-01/04-02/06-1029, paras. 24-25. See also ICC-01/04-01/06-1399, para. 40.

²⁴ **Annex A.1:** DRC-OTP-0126-0422.

²⁵ Witness P-0016 also attests to having provided the statement voluntarily and of his own free will (DRC-OTP-0126-0422 at 0423, para. 4) and [REDACTED] (DRC-OTP-0126-0422 at 0423, para. 7).

²⁶ **Annex B.5:** DRC-OTP-2054-1625 at 1679, lns. 4-10, 23-25.

²⁷ **Annex A.2:** DRC-OTP-0126-0471 and **Annex A.3:** DRC-OTP-0126-0475.

²⁸ **Annex A.1:** DRC-OTP-0126-0422 at 0439-0440, para. 97.

that he did not know the exact date of a UPC/FPLC attack on Lipri.²⁹ His statement is coherent and is consistent with [REDACTED]. For example, [REDACTED] Witness P-0016 provided similar details on [REDACTED],³⁰ and about the presence of children under the age of 15 within the UPC/FPLC and particularly one child named [REDACTED].³¹ Moreover, he refers to individuals in his statement who are witnesses in these proceedings such as Witnesses [REDACTED],³² [REDACTED],³³ [REDACTED],³⁴ [REDACTED]³⁵ and [REDACTED].³⁶

28. [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].³⁹ [REDACTED].⁴⁰
[REDACTED].⁴¹

29. The materials that Witness P-0016 was shown [REDACTED] are reliable because Witness P-0016 authenticated and provided further information about them. These materials include: the [REDACTED] sketch he created [REDACTED];⁴² [REDACTED];⁴³ and two excerpts of an audio-visual item that Witness P-0016 watched and commented upon.⁴⁴

²⁹ **Annex A.1:** DRC-OTP-0126-0422 at 0443, para. 116.

³⁰ **Annex A.1:** DRC-OTP-0126-0422 at 0433-0435, paras. 62-73; **Annex B.1:** DRC-OTP-2054-1255 at 1348, ln. 21 to 1349, ln.13; **Annex B.3:** DRC-OTP-2054-1447 at 1451, ln. 17 to 1452, ln. 1; at 1523, lns. 6-19; and at 1526, lns.1-13.

³¹ **Annex A.1:** DRC-OTP-0126-0422 at 0466, para. 256; **Annex B.3:** DRC-OTP-2054-1447 at 1462, lns. 4-19; at 1469, ln. 18 to 1470, ln. 5; and at 1478, ln. 4 to 1479, ln. 8.

³² For example, **Annex A.1:** DRC-OTP-0126-0422 at 0438, para. 91.

³³ For example, **Annex A.1:** DRC-OTP-0126-0422 at 0434, para. 68.

³⁴ For example, **Annex A.1:** DRC-OTP-0126-0422 at 0467, paras. 262-267.

³⁵ For example, **Annex A.1:** DRC-OTP-0126-0422 at 0435, para. 76.

³⁶ For example, **Annex A.1:** DRC-OTP-0126-0422 at 0435, para. 71.

³⁷ **Annex B.1:** DRC-OTP-2054-1255 at 1340, lns. 7-10.

³⁸ For example, **Annex B.3:** DRC-OTP-2054-1447 at 1453, ln. 21 to 1454, ln. 10.

³⁹ **Annex B.3:** DRC-OTP-2054-1447 at 1517, lns. 14-20.

⁴⁰ **Annex B.5:** DRC-OTP-2054-1625 at 1678, ln. 15 to 1701, ln. 16 and **Annex B.7:** DRC-OTP-2054-1781 at 1784, ln. 2 to 1794, ln. 25. [REDACTED], DRC-OTP-2054-1781 at 1813, ln. 10 to 1824, ln. 10.

⁴¹ **Annex B.7:** DRC-OTP-2054-1781 at 1795, ln. 5 to 1798, ln. 4.

⁴² **Annex B.9:** DRC-OTP-2090-0110 (the reference where this document was discussed [REDACTED] is set out in **Annex 1, Section (B)**).

⁴³ **Annex B.10:** DRC-OTP-0091-0778 (the reference where this document was discussed [REDACTED] is set out in **Annex 1, Section (B)**).

⁴⁴ DRC-OTP-0082-0016, minutes 3:00-5:10 and 7:00-9:00 were shown to Witness P-0016 [REDACTED] and he commented upon them (the references are set out in **Annex 1, Section (B)**).

30. Witness P-0016 was interviewed by Prosecution investigators [REDACTED] in [REDACTED]. He voluntarily agreed to the interview and had legal representation present. During this interview, Witness P-0016 was asked for additional details about certain events, including by being referred to portions of his 2005 witness statement and his [REDACTED] and asked to elaborate. Witness P-0016 was unable to provide much detail as [REDACTED]. Further, it appears that Witness P-0016 was [REDACTED] during this interview. For instance, towards the end of the interview Witness P-0016 questioned whether [REDACTED].⁴⁵ Given the information that has recently been provided to the Prosecution about [REDACTED]. Due to these combined factors, the Prosecution is not seeking to tender the transcripts of this interview into evidence.

(iv) Witness P-0016's prior recorded testimony that relates to the acts and conduct of the Accused can be admitted

31. The prior recorded testimony and associated documents of Witness P-0016 are admissible, including those portions that go to proof of the acts and conduct of the Accused. Indeed, the Prosecution seeks to admit his 2005 witness statement and [REDACTED], in addition to various associated documents referred to in this prior recorded testimony.
32. As previously acknowledged by the Chamber, rule 68(2)(c) does not prohibit the introduction of prior recorded testimony that goes to proof of acts and conduct of an accused, rather it is a factor to be considered.⁴⁶
33. While jurisprudence from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") is not binding on Chambers of this Court, prior recorded testimony going to the acts and conduct of an accused have been admitted

⁴⁵ DRC-OTP-2067-2348 at 2351, ln. 80 to 2355, ln. 245.

⁴⁶ ICC-01/04-02/06-1029, para. 37. *See also*, ICC-01/09-01/11-1353, para. 24-26.

provided it was found to be reliable. ICTY Chambers assessed whether the statements were corroborated by other evidence and were internally consistent.⁴⁷ ICTY Chambers will not base a conviction solely on evidence that has not been subject to examination by both Parties.⁴⁸

34. Although Witness P-0016 refers to the Accused in his prior recorded testimony, his evidence is admissible because it is relevant, reliable and probative. It both corroborates and is corroborated by the evidence of other witnesses who are available for cross-examination. The Chamber need not rely solely on Witness P-0016's evidence to convict the Accused on any charge.
35. In his prior recorded testimony, Witness P-0016 provides background information about the Accused, such as about his relationship with [REDACTED],⁴⁹ [REDACTED]⁵⁰ and [REDACTED].⁵¹
36. Witness P-0016 also provides information that may also go to prove the acts and conduct of the Accused including, inter alia: his power and authority within the structure of the UPC/FPLC;⁵² his command over the attack

⁴⁷ *Prosecutor Haradinaj et al.*, IT-04-84-T, Decision on Prosecution's Motion to Admit Five Statements of Witness 1 into Evidence pursuant to Rule 92quater with Confidential Annex, 28 November 2007, paras. 10-11.

⁴⁸ *Prosecutor v Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement pursuant to Rule 92quater of the Rules (Hasan Rizvic), 14 January 2008, para. 22, citing *Prosecutor v Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 20.

⁴⁹ **Annex A.1:** DRC-OTP-0126-0422 at 0434, paras. 64-65; and at 0452-0453, paras. 174-177, 180-181.

⁵⁰ **Annex A.1:** DRC-OTP-0126-0422 at 0454, paras. 184-186.

⁵¹ **Annex A.1:** DRC-OTP-0126-0422 at 0454, para. 187; at 0455-0458, paras. 195-204; and **Annex B.3:** DRC-OTP-2054-1447 at 1489, ln. 20 to 1490, ln. 5.

⁵² **Annex A.1:** DRC-OTP-0126-0422 at 0433-0434, paras. 62-75; at 0439, para. 97; at 0440-0441, paras. 101-103; at 0452, para 173; at 0463, para 237; at 0464, para. 241; **Annex B.1:** DRC-OTP-2054-1255 at 1349, lns. 6-13; **Annex B.3:** DRC-OTP-2054-1447 at 1451, ln. 17 to 1453, ln. 20; at 1461, lns. 10-16; at 1451, ln. 17 to 1453, ln. 20; at 1463, lns. 15-20; at 1513, lns. 1-10; at 1531, ln. 13 to 1532, ln. 1; and **Annex B.5:** DRC-OTP-2054-1625 at 1688, lns. 1-21.

[REDACTED],⁵³ as well as his command over an operation in [REDACTED];⁵⁴ his benefiting from the pillaging of Mongbwalu;⁵⁵ and his use of child soldiers.⁵⁶

37. This evidence is reliable because Witness P-0016 affirmed the accuracy of his 2005 witness statement [REDACTED] was consistent with his prior statement and given voluntarily [REDACTED]. [REDACTED]. Any prejudice arising from his unavailability for cross-examination does not outweigh the probative value of his testimony. Witness P-0016's [REDACTED] corroborates, and is corroborated by, the evidence of other witnesses who have testified and were cross-examined.⁵⁷ Moreover, his evidence is reliable because [REDACTED].⁵⁸
38. The Chamber is able to admit all of Witness P-0016's evidence, including those portions that relate to the Accused, and assess it against the totality of the evidence at the end of the trial.

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

39. As the Chamber has confirmed in its previous decisions regarding the statements of deceased Witnesses P-0022, P-0041 and P-0103, rule 68(2)(c) applies to both statements made out-of-court, as well as in-court testimony.⁵⁹ The plain reading of rule 68 (as amended) also makes it clear that "prior recorded testimony" includes written statements taken from the witness as it includes "other documented evidence of such testimony."

⁵³ **Annex A.1:** DRC-OTP-0126-0422 at 0446-0447, paras. 130-138.

⁵⁴ **Annex A.1:** DRC-OTP-0126-0422 at 0434-0435, paras. 116-118.

⁵⁵ **Annex A.1:** DRC-OTP-0126-0422 at 0465, paras. 248-250; **Annex B.5:** DRC-OTP-2054-1625 at 1632, ln. 4 to 1633, ln. 2; and at 1650, lns. 4-13; at 1651, ln. 14 to 1652, ln. 16.

⁵⁶ **Annex A.1:** DRC-OTP-0126-0422 at 0466, para. 256; and **Annex B.3:** DRC-OTP-2054-1447 at 1466, lns. 16- 25; at 1478, lns.4-11.

⁵⁷ [REDACTED]. [REDACTED].

⁵⁸ See e.g. *R v Kharsekin* (1994, 30 C.R (4th) 252, 88 C.C.C. (3d) 193 (Nfld. C.A.).

⁵⁹ ICC-01/04-02/06-1029, paras. 23, 34-35 ; ICC-01/04-02/06-1205, paras. 15-16, 20.

40. This interpretation was also adopted by other Chambers of this Court including in *Prosecutor v Lubanga*⁶⁰ and *Prosecutor v Katanga et al.*⁶¹ These Chambers allowed the admission of prior recorded witness statements.⁶² 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.⁶³ This interpretation is further affirmed by the express requirements of rule 68(2)(b)(ii), which require an accompanying declaration to admit “testimony.” This would be unnecessary if rule 68 applies only to in-court testimony which is always given under oath.

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

41. As this Chamber has previously found, admitting the prior recorded testimony and associated documents of an unavailable witness under rule 68(2)(c) of the Rules complies with article 51(4) of the Statute because its application is not retroactive or detrimental to the Accused.⁶⁴

II. Admitting the materials under rule 68(2)(c) is not prejudicial or inconsistent with the rights of the Accused

42. The prior recorded testimony and associated documents sought to be admitted under rule 68(2)(c) of the Rules are not new evidence. They were properly disclosed to the Accused well in advance of the disclosure deadline as material

⁶⁰ See ICC-01/04-01/06-1603, paras. 18-19.

⁶¹ See 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.”

⁶² See 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.

⁶³ See ICC-ASP/12/37/Add.1, Annex II, A, Study Group on Governance Cluster I: Expediting the Criminal Process Working Group on Lessons Learnt Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para. 13. See also paras. 3, 35 that confirm the intent was to match or exceed the scope of ICTY Rules 92*quater* and 92*quinqies* that explicitly allow for introduction of written statements or transcripts of evidence.

⁶⁴ ICC-01/04-02/06-1029, para. 11. See also, ICC-01/09-01/11-1938-Red-Corr, paras. 23-26.

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.

43. As the Chamber has previously decided, the inability to cross-examine a deceased, or otherwise unavailable, witness on his or her evidence does not deprive the Accused of his right to challenge the evidence. He retains the right to lead evidence during the Defence case or to question other witnesses generally on the basis of information contained in the statements and associated documents.
44. The Defence's inability to cross-examine the Witness P-0016 is simply a factor to be considered in the final determination of the weight to be given to that testimony. The prior recorded testimony and associated documents of Witness P-0016 should be accorded significant weight, bearing in mind their probative value and indicia of reliability, as well as their being corroborative of other witness's testimony, which can be tested by the Defence in cross-examination.
45. As set out above, the prior recorded testimony and associated documents have prima facie probative value because they are relevant and bear sufficient indicia of reliability.
46. Finally, the prior recorded testimony and associated documents should be admitted because after weighing any prejudicial effect against the probative value – in particular the lack of an opportunity to cross-examine Witness P-0016 – admitting these documents would not violate the Accused's right to a fair trial.
47. Both Trial Chamber V(A) and Trial Chamber I have held that any prejudicial effect must be weighed against the probative value. Evidence may be excluded where its prejudicial effect is high and its probative value is comparatively

low.⁶⁵ This is a fact-specific enquiry.⁶⁶ Trial Chamber I further stated that it is trite to observe that all evidence that tends to incriminate the accused is also “prejudicial” to him, but the Chamber must be careful to ensure that it is not unfair to admit disputed material.⁶⁷

48. The right of the Accused to cross-examine a witness is not an absolute right.⁶⁸ Chambers enjoy a significant discretion in admitting documents, even if the author of the document is not available to testify or to be cross-examined.⁶⁹ The fairness of admitting evidence of a deceased witness, where there is no ability to cross-examine, will depend on factors such as whether it is corroborated by other evidence, has no obvious inconsistencies,⁷⁰ and an assessment of the proceedings as a whole.⁷¹ Corroboration is just one factor to be considered. Rule 63(4) explicitly provides that there is no legal requirement that corroboration is required in order to prove a crime within the jurisdiction of the Court. Similarly, at the ICTY, the equivalent rule 92quater evidence does not require corroboration, although uncorroborated evidence cannot form the sole basis for a conviction.⁷²
49. Admitting the prior recorded testimony and associated documents is not unfair to the Accused – when balancing their probative value against their prejudicial effect. The documents are reliable, internally consistent, legible, authentic and

⁶⁵ See ICC-01/09-01/11-1353, para. 16; ICC-01/04-01/06-1399-Corr, para. 31.

⁶⁶ See ICC-01/09-01/11-1353, para. 16.

⁶⁷ See ICC-01/04-01/06-1399, para. 31.

⁶⁸ See ICC-01/04-01/06-1399, para. 36. See also e.g. ICTY, *Prosecutor v Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, paras. 15-16, 20-21; ECHR, *Ferrantelli and Santangelo v Italy*, Application No.48/1995/554/640; *Doorson v The Netherlands*, Application No.54/1994/501/583; National systems, see e.g. sections 116 and 117 (UK) Criminal Justice Act 2003; *R v Finta* (1992), 14 C.R. (4th) 1, 73 C.C.C (3d) 65 (Ont. C.A).

⁶⁹ ICC-01-04-01/06-1399, para. 24.

⁷⁰ See e.g. ICTY *Prosecutor v Stanišić & Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Evidence of Witness Milan Babić pursuant to rule 92quater, 16 December 2010, para. 36 and ICTY, *Prosecutor v Karadžić*, IT-95-5/18-T, Decision on Accused’s Motion for Admission of Evidence of Radislav Krstić Pursuant to Rule 92quater, 26 November 2013, para. 12.

⁷¹ See e.g. ICTY, *Kostovski v The Netherlands*, Application No.11454/85, para. 39; *Prosecutor v Milan Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Milan Babić, 14 September 2006, para. 13.

⁷² See e.g. ICTY, *Prosecutor v Perišić*, IT-04-81-T, 6 September 2011, para. 44.

can be tested by rebuttal evidence. The documents corroborate evidence of witnesses who will testify and will be tested by cross-examination. None of the documents are submitted as the sole evidence upon which to convict the Accused.

Request

50. The Prosecution requests that the Chamber admit the prior recorded testimony and associated documents of Witness P-0016 listed in Annex 1 to this filing, and attached as Annexes A.1-A.3 and B.1 to B.10. The Prosecution requests that the Chamber reclassify pertinent portions of the VWS assessment of P-0016.



Fatou Bensouda
Prosecutor

Dated this 9th day of March 2017
At The Hague, The Netherlands