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**International
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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang ho-Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

**Public
With Confidential Annex A**

Public redacted version of "Prosecution response to 'Request on behalf of Mr Ntaganda to admit the prior recorded testimony of Defence Witness D-0017 pursuant to Rule 68(3)', 7 November 2017, ICC-01/04-02/06-2101-Conf", 15 November 2017, ICC-01/04-02/06-2112-Conf

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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 for the admission of Witness D-0017's prior recorded testimony pursuant to rule 68(3) of the Rules¹ should be rejected. Witness D-0017's evidence is not appropriate for admission under rule 68(3).

2. First, the majority of the issues addressed in Witness D-0017's prior recorded testimony are materially in dispute and central to the Accused's case. Witness D-0017 is being put forward as [REDACTED] who will testify about 15 of the 18 charges against the Accused. As an insider, who allegedly was in close proximity to the Accused, D-0017 will testify about the Accused's acts, conduct and behaviour during the temporal scope of the charges, and his evidence is pertinent to both the crimes and the modes of liability that have been charged in this case. Further, as acknowledged by the Defence, a considerable part of Witness D-0017's statement directly refers to, and seeks to contradict the testimony of several Prosecution Witnesses who testified entirely *viva voce*. In the interests of justice and the fairness of the proceedings Witness D-0017 should testify fully *viva voce* so that the Prosecution can properly test, and the Chamber be placed in the best position to evaluate, his memory and ability to recall and narrate the events in question, as well as his credibility and any potential bias.

3. Second, it is necessary for the Chamber to test the veracity and spontaneity of Witness D-0017's prior recorded testimony by assessing his evidence in full and live. Witness D-0017's statement was obtained only [REDACTED], *after* the completion of the Accused's testimony. Moreover, as explained below, there are reasonable grounds to believe that D-0017 may have been coached to testify favourably to the Accused. The timing of the collection of the statement, the allegations of witness coaching and the fact that the statement's content

¹ ICC-01/04-02/06-2101-Conf ("Defence Request"); Rules of Procedure and Evidence.

completely aligns with the Accused's testimony - at a questionable level of detail - militate in favour of a full delivery of the witness's testimony. The passage of time between the giving of a statement and date of testimony is not an issue; the witness signed the statement very recently. Cross-examination alone is insufficient for the Chamber to evaluate the spontaneity and credibility of the witness's account.

4. Third, admitting Witness D-0017's statement pursuant to rule 68(3) would not significantly contribute to the expeditiousness of proceedings. Granting the Defence Request would save just 4 hours of court time. While saving any amount of court time is generally favourable, it would not be in the interests of justice to grant the Defence Request in the present circumstances.

Confidentiality

5. In accordance with regulation 23*bis*(2) of the Regulations of the Court ("Regulations"), this response is classified as Confidential since it responds to a Confidential Defence Request.

Background

6. On 30 January 2017, the Chamber ordered the Defence, *inter alia*, to provide a further provisional list of witnesses as well as a summary of the anticipated testimony of the witnesses by 31 March 2017² and provide the final version of its list of witnesses and summaries of anticipated testimony, as well as its final list of evidence by 26 April 2017.³ The Chamber also set 26 April 2017 as the final deadline for all disclosure by the Defence.⁴

² ICC-01/04-02/06-1757, para. 10.

³ ICC-01/04-02/06-1757, para. 11.

⁴ ICC-01/04-02/06-1757, para. 14.

7. On 31 March 2017, the Defence filed its provisional witness list, including D-0017,⁵ together with a provisional summary of anticipated testimony for D-0017.⁶
8. On 26 April 2017, the Defence filed an updated summary of anticipated testimony for D-0017.⁷
9. Between April and October 2017, the Defence unsuccessfully attempted to call D-0017 to testify during the first,⁸ second,⁹ and fourth¹⁰ evidentiary blocks. In this context, the Defence emphasised the importance of the witness appearing in Court, indicating in an email to the Chamber that *“due to the nature of Witness D-0017’s testimony, it [is] important as well as in the interest of justice to have him testify viva voce in person”*. The Defence further indicated that *“D-0017 is expected to testify on the acts and conduct of the Accused at times relevant to the UDCC”* and, accordingly, submitted that it was *“not in the interest of justice to call this Witness to testify during the first evidentiary block”*.¹¹
10. When advised by the Chamber to consider calling D-0017 by video-link, on two occasions,¹² the Defence indicated that it preferred to have D-0017 appear live before the Chamber,¹³ arguing that *“Witness D-0017 is a witness of fact who can be*

⁵ ICC-01/04-02/06-1843-Conf-AnxB.

⁶ ICC-01/04-02/06-1843-Conf-AnxC, p. 4. The Defence indicated that it would require 4 hours to complete its examination-in-chief of D-0017.

⁷ ICC-01/04-02/06-1881-Conf-AnxB, p. 13-14. The Defence indicated that it would require 5 hours to complete its examination-in-chief of D-0017.

⁸ See the Defence’s Forthcoming Witness List for the First Defence Evidentiary Block (Email from Sandrine De Sena to Trial Chamber VI of 26 April 2017 at 17:51) and the Defence’s Updated Forthcoming Witness List for the First Defence Evidentiary Block (Email from Sandrine De Sena to Trial Chamber VI of 10 May 2017 at 14:50).

⁹ See the Defence’s Forthcoming Witness List for the Second Defence Evidentiary Block (Email from Sandrine De Sena to Trial Chamber VI of 2 June 2017 at 12:17). D-0017 was listed as a reserve witness for this evidentiary block.

¹⁰ See the Defence’s Forthcoming Witness List for the Fourth Defence Evidentiary Block (Email from Sandrine De Sena to Trial Chamber VI of 18 September 2017 at 16:08) and the Defence’s Updated Forthcoming Witness List for the Fourth Defence Evidentiary Block (Email from Sandrine De Sena to Trial Chamber VI of 12 October 2017 at 13:44).

¹¹ Email from Stéphane Bourgon to Trial Chamber VI of 23 May 2017 at 15:18.

¹² Emails from Trial Chamber VI to Stéphane Bourgon of 10 October 2017 at 15:03 and 19 October 2017 at 13:12.

¹³ Email from Stéphane Bourgon to Trial Chamber VI of 12 October 2017 at 19:17.

*expected to address a number of important issues relevant to the adjudication of the charges laid against Mr Ntaganda during the period from early 2002 to the end of 2003, a period of almost two years” and that “unless the Witness is unable to travel to The Hague, all efforts should be made to secure his appearance to testify viva voce before the Chamber, at the seat of the Court”.*¹⁴ The Defence also increased the estimated duration of its examination-in-chief from an initial 4 hours¹⁵ to 6 hours.¹⁶ Lastly, in the context of planning for the testimony of D-0017, the Defence indicated that its *“decision to call Witness D-0017 to testify might possibly change following the testimony of the Accused”*.¹⁷

11. On 19 October 2017, the Defence indicated its intention to obtain a statement from Witness D-0017¹⁸ and informed the Chamber of its willingness *“to consider the possibility of adducing the evidence of Witness D-017 pursuant to Rule 68(3)”*.¹⁹
12. On 27 October 2017, the Defence filed its forthcoming witness list for the fifth evidentiary block, scheduling D-0017 as the fifth witness of the block.²⁰
13. On 31 October 2017, the Defence filed a request for an extension of time to file a request pursuant to rule 68(3) for D-0017.²¹ On 1 November 2017, the Chamber granted the requested extension.²²

¹⁴ Email from Stéphane Bourgon to Trial Chamber VI of 19 October 2017 at 15:59.

¹⁵ See ICC-01/04-02/06-1843-Conf-AnxC, p. 4.

¹⁶ The Defence initially increased its estimate to 5 hours (see ICC-01/04-02/06-1881-Conf-AnxB, pp. 13-14 and Email from Sandrine De Sena to Trial Chamber VI of 26 April 2017 at 17:51 submitting the Forthcoming Witness List for the First Defence Evidentiary Block) and subsequently increased it to 6 hours (see Email from Sandrine De Sena to Trial Chamber VI of 10 May 2017 at 14:50 submitting the Updated Forthcoming Witness List for the First Defence Evidentiary Block).

¹⁷ Email from Stéphane Bourgon to Trial Chamber VI of 23 May 2017 at 15:18.

¹⁸ Email from Stéphane Bourgon to Trial Chamber VI of 19 October 2017 at 10:09.

¹⁹ Email from Stéphane Bourgon to Trial Chamber VI of 19 October 2017 at 15:59.

²⁰ Email from Sandrine De Sena to Trial Chamber VI of 27 October 2017 at 16:25. The Defence indicated that it required 6 hours for its examination-in-chief and did not anticipate the filing of a request under rule 68(3) of the Rules for D-0017.

²¹ ICC-01/04-02/06-2090.

²² Email from Trial Chamber VI to the Parties and participants of 1 November 2017 at 13:27.

14. On 6 November 2017, the Defence informed the Chamber that D-0017 would be called as the first witness of the fifth evidentiary block.²³
15. On 7 November 2017, the Defence filed the Defence Request²⁴ and disclosed D-0017's 50-page statement for the first time.²⁵ The Defence further requests the Chamber's authorisation to conduct a supplementary examination-in-chief of 1.5 hours, with a total of 2 hours for examination-in-chief.²⁶

Submissions

16. Rule 68(3) provides that the Chamber may allow the introduction of the previously recorded testimony of a witness who is present before the Chamber where he/she does not object to the submission, and the Parties and Chamber have the opportunity to examine the witness.
17. The Defence states that the Chamber's power to admit prior recorded testimony pursuant to rule 68(3) "is not subject to express conditions or criteria."²⁷ However, the Chamber's determination in relation to rule 68(3) must be "in accordance with article 69, paragraphs 2 and 4".²⁸ Article 69(4) of the Statute requires the Chamber to take into account, *inter alia*, "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness" when ruling on the relevance or admissibility of any evidence.
18. Moreover, article 69(2) provides that the "testimony of a witness shall be given in person". The Chamber has noted that admission pursuant to rule 68(3) "constitutes an exception to the principle of the primacy of orality before the

²³ Email from Stéphane Bourgon to Trial Chamber VI of 6 November 2017 at 11:33.

²⁴ ICC-01/04-02/06-2101-Conf.

²⁵ ICC-01/04-02/06-2101-Conf-Anx1.

²⁶ ICC-01/04-02/06-2101-Conf, paras. 28-31.

²⁷ Defence Request, para. 6.

²⁸ Rule 68(1).

Court” and that “a cautious, case-by-case assessment is therefore required, and the impact of any such request on the rights of an accused *and the fairness of the proceedings more generally* should be considered”.²⁹

I. D-0017’s evidence is materially in dispute and central to the Accused’s case

19. In rejecting prior requests to admit the prior recorded testimony of witnesses pursuant to rule 68(3), the Chamber has noted, *inter alia*, the centrality of the witnesses’ prior recorded testimony to the case against the Accused and that the charges against the Accused and his alleged actions were discussed at length in the prior recorded testimony.³⁰

20. The Chamber has also referred to the issue of whether or not the testimony of a witness is disputed is a factor relevant to admission of prior recorded testimony pursuant to rule 68(3).³¹

21. The Defence does not fully set out the relevant jurisprudence when arguing that “prior recorded testimony may still be introduced even if they relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated”.³² What the Defence does not state is that Trial Chamber IX acknowledged that these were all factors that may be relevant to a Trial Chamber’s decision.³³ In this instance, these are critical issues for the assessment of the request to admit D-0017’s prior recorded statement.

²⁹ ICC-01/04-02/06-845, para. 6; *See also* ICC-01/04-02/06-961, para. 8; ICC-01/05-01/08-1386 OA5 OA6, para. 76; ICC-01/09-01/11-2024 OA10, para. 84.

³⁰ ICC-01/04-02/06-988, para. 11 ; ICC-01/04-02/06-961, para. 10.

³¹ *See* ICC-01/04-02/06-T-52-CONF-ENG CT, p. 35, ln. 22 – p. 36, ln. 1 (open session).

³² Defence Request, para. 6, fn.10 citing ICC-01/04-01/15-621, para.7.

³³ ICC-02/04-01/15-621, para. 7.

22. Indeed, the Appeals Chamber has held that:

where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally. This must be the Chamber's overriding concern, in particular bearing in mind 'the general requirement of in-court personal testimony'. Whether such testimony may be introduced under rule 68 (3) of the Rules will, therefore, depend upon the circumstances of the case.³⁴

23. The Appeals Chamber also held that "the more important the Chamber assesses the evidence in question to be, the more likely it is that the Chamber will have to reject any application under [rule 68 (3)]."³⁵

24. . Moreover, consistent with the Appeals Chamber, Trial Chamber IX considered that a Chamber must ensure that introducing the prior recorded testimony is not prejudicial to or inconsistent with the rights of the Accused "*or with the fairness of the trial generally*".³⁶ Trial Chamber IX also considered whether the materials sought for admission needed to be presented orally in their entirety due to their "*nature and content*".³⁷

25. As argued by the Defence in relation to a Prosecution witness:

"[t]he more the expected testimony of a witness is central to the Prosecution's case [...] the more it is in the interest of justice to hear the witness's testimony *viva voce* in full. This allows the judges to have the opportunity to assess the witness's evidence in full and to determine, in real-time based on their own assessment, the probative value it can be afforded".³⁸

³⁴ ICC-02/11-01/15-744, para. 69.

³⁵ ICC-02/11-01/15-744, para. 71.

³⁶ ICC-01/05-01/08-1386, para.78; ICC-02/04-01/15-621, para. 6.

³⁷ ICC-02/04-01/15-621, paras. 14, 17-28, 31.

³⁸ See ICC-01/04-02/06-908-Conf, para. 20.

This argument equally applies to D-0017.

26. Witness D-0017 is, currently, one of only 15 witnesses that the Defence will call to testify. He is [REDACTED] who are scheduled to testify on behalf of the Accused. His statement relates to information that is highly relevant to several core issues in the proceedings that are materially in dispute and central to the Accused's case. As indicated in Witness D-0017's summary of anticipated evidence,³⁹ and as evident from his witness statement,⁴⁰ he is expected to testify in relation to 15 of the 18 charges against the Accused.

27. D-0017's testimony will relate to the acts and conduct of the Accused⁴¹ as well as other key issues, such as: the UPC/FPLC's attack on Mongbwalu in November 2002;⁴² the Accused's whereabouts during the attacks on Lipri and other areas,⁴³ and, nearly all of the UPC/FPLC attacks relied upon by the Prosecution to prove the contextual element of its crimes against humanity charges, including the attacks in Komanda, Zumbe, Songolo and Bunia.⁴⁴ Moreover, D-0017's prior recorded testimony addresses issues related to the evidence or credibility of Prosecution witnesses, including P-0010⁴⁵ and P-0907,⁴⁶ and Defence witnesses, such as D-0251⁴⁷ and, more importantly, the Accused himself.⁴⁸

28. The Defence now attempts to minimise the significance of Witness D-0017's evidence in order to admit his statement under rule 68(3).⁴⁹ Yet, in its Request, the

³⁹ See ICC-01/04-02/06-1881-Conf-AnxB, pp. 13-14.

⁴⁰ ICC-01/04-02/06-1881-Conf-AnxB, pp. 13-14.

⁴¹ No less than 78 of the 257 substantive paragraphs of D-0017's statement relate to the acts and conducts of the Accused at times relevant to the charges against him (see ICC-01/04-02/06-2101-Conf-Anx1, paras. 50-51, 64, 77-81, 85, 93-95, 112, 118-119, 126, 131, 136-137, 139-140, 142, 146, 148, 151, 154, 157, 159-166, 171, 176-181, 183-186, 188-192, 196-197, 200-202, 204-205, 208-210, 220-221, 224-225, 229-230, 245-246, 250, 255-261 and 263).

⁴² See ICC-01/04-02/06-2101-Conf-Anx1, paras. 125-154.

⁴³ See ICC-01/04-02/06-2101-Conf-Anx1, paras. 171-195.

⁴⁴ See ICC-01/04-02/06-2101-Conf-Anx1, paras. 72-93, 106-112 and 218 to 222.

⁴⁵ See ICC-01/04-02/06-2101-Conf-Anx1, paras. 167 and 227.

⁴⁶ See ICC-01/04-02/06-2101-Conf-Anx1, paras. 101-105.

⁴⁷ See ICC-01/04-02/06-2101-Conf-Anx1, paras. 260-262.

⁴⁸ See ICC-01/04-02/06-2101-Conf-Anx1, paras. 255-263.

⁴⁹ See Defence Request, paras. 2, 16 and 20-21.

Defence acknowledges that D-0017's testimony "touches upon certain issues that are materially dispute [sic]"⁵⁰ as well as "certain events, which can be considered as central to core issues in the case".⁵¹ The Defence also previously described D-0017 as "a witness of fact who can be expected to address a number of important issues relevant to the adjudication of the charges laid against Mr Ntaganda"⁵² and a witness who "is expected to testify on the acts and conduct of the Accused at times relevant to the UDCC".⁵³ The Defence's current attempts to downplay D-0017's importance to its case are further contradicted by its insistence to call him to testify *viva voce*, despite being advised to consider testimony *via* video-link.⁵⁴

II. The reliability of D-0017's prior recorded testimony needs full testing

29. In determining whether to admit prior recorded testimony pursuant to rule 68(3), the Chamber has considered its reliability⁵⁵ as well as its relative temporal proximity to the events described therein.⁵⁶

30. First, D-0017's statement was not taken temporally proximate to the events to which it relates, which took place between 14 and 15 years ago. Witness D-0017's statement was obtained only [REDACTED]. Requiring D-0017 to testify in examination-in-chief will best allow the Chamber to evaluate how well the witness recalls the events which took place well over a decade ago, and his ability to recollect and narrate the critical portions of his testimony.

31. Second, the Prosecution questions the reliability and truthfulness of D-0017's account as set out in his written statement. D-0017's statement contradicts nearly

⁵⁰ Defence Request, para. 20.

⁵¹ See Defence Request, para. 16.

⁵² Email from Stéphane Bourgon to Trial Chamber VI of 19 October 2017 at 15:59.

⁵³ Email from Stéphane Bourgon to Trial Chamber VI of 23 May 2017 at 15:18.

⁵⁴ Emails from Trial Chamber VI to Stéphane Bourgon of 10 October 2017 at 15:03 and 19 October 2017 at 13:12.

⁵⁵ See ICC-01/04-02/06-1733, para. 25.

⁵⁶ See ICC-01/04-02/06-T-161-CONF-ENG ET, p. 28, lns. 7-8 (open session); ICC-01/04-02/06-T-188-CONF-ENG ET, p. 3, lns. 23-24 (private session).

all core aspects of the Prosecution's case and is currently only corroborated by the Accused's own testimony and that of some – though not all - Defence witnesses whose own reliability and truthfulness is challenged. Aspects of his testimony are contradicted by Defence witnesses, such as the testimony of D-0172⁵⁷ and D-0057⁵⁸ regarding the conscription or enlistment and use of children below the age of 15 by the FPLC.

32. Moreover, D-0017's statement appears carefully crafted, and on the face of it lacks spontaneity and, in fact, strikingly mirrors the Accused's testimony in the details.⁵⁹

33. D-0017's statement was obtained after the completion of the Accused's testimony, which was mainly conducted in open session and fully articulates the Accused's case. There was a lapse of almost three years between the Defence's first contact with this witness in [REDACTED] 2014, well before the Accused's testimony, and the taking of his statement in [REDACTED] 2017, after the conclusion of the Accused's testimony. The Defence provided no explanation as to why Witness D-0017's statement could not have been taken and finalised earlier,⁶⁰ and before the Accused testified.

34. The absence of any audio or video recording of the interview further deprives the Chamber of any means of assessing the process by which D-0017's statement was taken over the course of his interviews from 2014 until 2017.

35. The circumstances in which D-0017's statement appears to have been taken also raise concerns as to its reliability. According to the statement, D-0017 was met on 5 separate occasions for a total of 13 days prior to the final statement being

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ See ICC-01/04-02/06-2101-Conf-Anx1, cover page.

taken.⁶¹ While there is no indication as to the specific dates on which each participant met with D-0017, the statement indicates that [REDACTED] both served as interpreters during these meetings.⁶² Neither of these two individuals is a qualified interpreter. Both are known to be influential UPC supporters.

36. [REDACTED].⁶³ [REDACTED].⁶⁴ [REDACTED].⁶⁵ [REDACTED].⁶⁶

37. Critically, the Accused's Detention Centre calls suggest that D-0017 may have been coached by [REDACTED] prior to and following his first meeting with the Defence. [REDACTED].⁶⁷ [REDACTED]⁶⁸ [REDACTED]:

[REDACTED].⁶⁹

38. [REDACTED]. [REDACTED].⁷⁰ [REDACTED].⁷¹

39. [REDACTED].⁷² [REDACTED].⁷³ [REDACTED].⁷⁴ [REDACTED].⁷⁵ [REDACTED].⁷⁶
[REDACTED].⁷⁷

⁶¹ See ICC-01/04-02/06-2101-Conf-Anx1, cover page and para. 6: the cover page of D-0017's statement indicates that he was met by Defence representatives on [REDACTED]. The cover page further indicates that the statement was taken on [REDACTED] 2017.

⁶² The Prosecution notes that a third individual is listed as having served as interpreter in meetings with D-0017, but his/her identity is redacted and, accordingly, the Prosecution is not able to determine whether this individual has any role within or connection to the UPC or is even a qualified interpreter.

⁶³ [REDACTED]

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED].

⁶⁸ [REDACTED].

⁶⁹ [REDACTED].

⁷⁰ [REDACTED]

⁷¹ [REDACTED]

⁷² [REDACTED].

⁷³ [REDACTED].

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

40. The identity of the third interpreter has been redacted from the witness statement so that the Prosecution cannot investigate whether the interpreter has any links to the UPC/FPLC.

III. Admitting D-0017's statement pursuant to rule 68(3) would impact on the fairness of the trial

41. In these circumstances, where the Chamber is aware of possible efforts to distort witness testimony or the truth-finding process, the Chamber is placed under a heightened duty to scrutinise D-0017's evidence.⁷⁸

42. Witness D-0017 should testify entirely *viva voce* – spontaneously - in order for the Chamber to be best placed to assess his reliability and credibility, as well as his recollection of the events.⁷⁹ Cross-examination alone will not be sufficient to properly assess the truthfulness of his prior recorded testimony. The Chamber should have an opportunity during the entirety of D-0017's examination-in-chief to directly observe his demeanour and question him where required.

43. As stated by Judge Ozaki in a Partially Dissenting Opinion, "[t]he primacy of the principle of orality is founded on the importance which should be attached to direct observation and oversight on the part of a chamber of the giving of a witness's evidence, including from the perspective of evaluating the credibility of the account."⁸⁰

44. Whilst the concept of a fair trial is commonly understood to be, first and foremost, inured to the benefit of the Accused,⁸¹ the rights of the Accused are not the only factor to assess whether a trial has been fair. A majority of the Appeals Chamber held that "a fundamental aspect of the trial, which touches upon the core

⁷⁸ ICC-01/04-02/12-271-Corr, para. 275 (emphasis added).

⁷⁹ See Defence Request, paras. 21 and 24.

⁸⁰ ICC-02/11-01/15-744-Anx, para. 8.

⁸¹ ICC-01/04-02/12-271-Corr, para. 255.

functions of both the Prosecutor and the Trial Chamber [are the] objective of establishing the truth as well as the Prosecutor's ability to present evidence in order to prove the charges against the accused".⁸²

IV. Admitting D-0017's statement pursuant to rule 68(3) would not significantly contribute to the expeditiousness of proceedings

45. The Defence misrepresents the jurisprudence that it cites to support its argument that "[t]he mere fact that testimony 'can be considerably shortened through the admission of prior recorded testimony can be, in itself, a sufficient reason for granting a Rule 68(3) request' as long as the formal requirements of admission are satisfied".⁸³ While Trial Chamber VII did make such a statement, it went on to require that the additional factors referred to by the Appeals Chamber in this context also be borne in mind.⁸⁴ The additional factors include that the fairness of the trial generally is not prejudiced by the admission of the prior recorded testimony and the factors that may be taken into account include whether the evidence relates to issues that are not materially in dispute and whether the evidence is not central to core issues in the case.⁸⁵

46. While expeditiousness is a relevant factor in relation to the admission of prior recorded testimony pursuant to rule 68(3) it "cannot justify a deviation from statutory requirements."⁸⁶ As stated by Judge Ozaki in a Partially Dissenting Opinion while sitting on the Appeals Chamber, "[e]xpeditiousness must be achieved in a manner consistent with the statutory framework including, in particular, with the fairness and integrity of the proceedings."⁸⁷ Therefore, the fact that a witness consents to the admission of his or her prior recorded testimony

⁸² ICC-01/04-02/12-271-Corr, para. 256.

⁸³ Defence Request, para. 8, fn. 12 citing to ICC-01/05-01/13-1478-Red-Corr, para. 48.

⁸⁴ ICC-01/05-01/13-1478-Red-Corr, para. 48, fn. 69 citing ICC-01/05-01/08-1386 (OA 5 & OA6), para. 78 with further jurisprudence cited therein.

⁸⁵ ICC-01/05-01/08-1386, para. 78.

⁸⁶ ICC-02/11-01/15-744, para. 62 ; ICC-01/05-01/08-1386, para. 55.

⁸⁷ ICC-02/11-01/15-744-Anx, para. 6 (footnote omitted, emphasis in original).

and is available for examination does not automatically mean that such requests should be granted if the testimony can be considerably shortened.

47. Regardless, 4 hours, the time that the Defence posits would be saved should the Chamber grant the Defence Request,⁸⁸ is not a considerable shortening of the proceedings. While saving any amount of court time is generally favourable, it would not be in the interests of justice in this instance to grant the Defence Request.

48. The Defence notes that the Chamber's supplemental decision on matters related to the conduct of proceedings expressly directed the Prosecution to increase the use of rule 68(3).⁸⁹ This was one of the Chamber's directions aimed at "significantly reducing the size of [the Prosecution's] remaining case".⁹⁰ The situation with the Defence case is wholly different, with a current total of 15 witnesses scheduled to be heard live on behalf of the Accused and only five witnesses scheduled for the next evidentiary block.⁹¹

49. The Defence states that the concern for Witness D-0017 to return home as soon as possible is of particular importance given his circumstances, namely the need to take care of children and loss of work-related income.⁹² Several Prosecution witnesses had to make arrangements related to their work and/or to the care of their children due to their need to testify in court for many more hours than Witness D-0017. Any alleged inconvenience by requiring Witness D-0017 to testify by a further 4 hours should be remedied through the assistance of the Victims and Witnesses Section, [REDACTED].

⁸⁸ Defence Request, para. 4.

⁸⁹ Defence Request, para. 23, fn. 27 citing ICC-01/04-02/06-1342, para. 15.

⁹⁰ See ICC-01/04-02/06-1342, para. 15.

⁹¹ Several requests to admit witness statements under rule 68(2)(b) are pending. The Chamber may decide that some of these witnesses need to be heard *viva voce*.

⁹² Defence Request, para. 26.

50. In support of its argument, the Defence cites to “P-0010 Decision, para. 14”.⁹³ It is unclear to which decision the Defence refers. However, Witness P-0010 was ordered to testify entirely *viva voce* despite her personal circumstances and the fact that the Prosecution had requested the admission of her prior recorded testimony, [REDACTED].

51. In any event, any potential inconvenience to D-0017 in requiring him to testify for 6 hours during his examination-in-chief does not constitute extraordinary circumstances warranting a departure from the norm that witnesses testify *viva voce*.

V. The Defence fails to explain its need for supplementary examination

52. The Defence requests one hour and thirty minutes in order to conduct a supplementary direct examination as well as to conduct the necessary formalities associated with the admission of Witness D-0017’s prior recorded testimony.⁹⁴

53. However, the Defence fails to identify a single topic it intends to cover during the supplementary examination that it requests and simply refers to the need to “clarify certain issues raised in the prior recorded testimony of Witness D-0017 as well as to put questions to the witness in relation to limited additional topics either not addressed or superficially addressed in his [REDACTED] 2017 statement”.⁹⁵

54. Parties must adequately establish the reasons for requiring a certain amount of time to conduct a supplementary examination of a witness whose testimony is admitted pursuant to rule 68(3) of the Rules.⁹⁶ The Chamber would only be in a position to appropriately determine the length of any requested supplementary

⁹³ Defence Request, para. 27, fn. 29.

⁹⁴ Defence Request, para. 1.

⁹⁵ Defence Request, para. 29.

⁹⁶ See ICC-01/04-02/06-T-188-CONF-ENG ET, p. 5, ln. 23 – p. 6, ln. 3 (open session).

examination if it receives notice, as the Prosecution provided,⁹⁷ of the topics that the Party proposes to address during such examination.

55. To the extent that the Defence intends to cover any additional topics that are neither addressed in his statement, nor listed in his summary, it should provide notice of these topics to the Prosecution and the Chamber. D-0017's statement was obtained by the Defence [REDACTED]. As such, the witness is unlikely to have much to clarify, change or add to this statement.

56. In rejecting a Prosecution application for the admission of prior recorded testimony pursuant to rule 68(3), the Chamber noted, *inter alia*, that the Prosecution's submissions did not make it clear how the Prosecution proposed to limit the scope of its supplementary examination if the prior recorded testimony were to be admitted.⁹⁸ The Chamber should reject the Defence Request for the same reason.

57. Alternatively, should the Defence Request be granted, the Defence should be required to follow the established procedure in relation to the admission of the prior recorded testimony, including that any clarifications to it should be elicited in a non-leading manner.⁹⁹

VI. Time required for cross-examination

58. The Chamber has held that "Rule 68(3) procedures necessarily constitute exceptions to its general principle that cross-examination shall not last longer than examination-in-chief".¹⁰⁰ Therefore, should the Defence Request be granted,

⁹⁷ See, e.g. ICC-01/04-02/06-1600-Conf, paras. 6, 36; ICC-01/04-02/06-1479-Conf, paras. 5, 25; ICC-01/04-02/06-1488-Conf, paras. 5, 44.

⁹⁸ ICC-01/04-02/06-961, para. 11.

⁹⁹ ICC-01/04-02/06-T-110-CONF-ENG ET, p. 34, ln. 23 – p. 35, ln.1 (open session); see also ICC-01/04-02/06-T-106-CONF-ENG ET, p. 91, lns.8-10 (open session); and ICC-01/04-02/06-T-99-CONF-ENG ET, p. 63, lns. 10-12 (open session).

¹⁰⁰ ICC-01/04-02/06-T-127-ENG ET, p. 72, ln. 22 – p. 73, ln. 3 (open session).

the Prosecution would not be limited to the abbreviated time allotted for examination-in-chief to conduct its cross-examination.

59. The Chamber also stated that although the initial time estimate provided by a Party for examination-in-chief without the use of rule 68(3) may be of guidance, the Chamber will consider on a case-by-case basis how much time it considers appropriate to grant for cross-examination.¹⁰¹ The Defence estimated that it would require 6 hours to elicit Witness D-0017's entirely *viva voce*.¹⁰²

60. Should the Chamber grant the Defence Request, the Prosecution estimates that it would require 6 hours for D-0017's cross-examination. Such time is required in order to address the witness's [REDACTED], his evidence covering at least 15 of the 18 charged crimes and modes of liability, as well as his evidence intended to directly contradict Prosecution witnesses.

Conclusion

61. For the foregoing reasons, the Chamber should reject the Defence Request.



Fatou Bensouda
Prosecutor

Dated this 21st day of December 2017

At The Hague, The Netherlands

¹⁰¹ *Ibid.*

¹⁰² See the Updated Forthcoming Witness List for the First Defence Evidentiary Block attached to the email from Sandrine De Sena to Trial Chamber VI of 10 May 2017 at 14:50.