

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-01/04-02/06
Date: 22 February 2018

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

**Public redacted version of 'Decision on certain requests related to the admission of
the prior recorded testimony of Witness D-0080'**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
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Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
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Legal Representatives of Victims

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**The Office of Public Counsel for
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REGISTRY

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Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 51(4), 56, 64, and 67 to 69 of the Rome Statute ('Statute'), Rules 63(2) and 68(2)(c) of the Rules of Procedure and Evidence ('Rules'), and Regulations 24 and 28 of the Regulations of the Court ('Regulations'), issues the following 'Decision on certain requests related to the admission of the prior recorded testimony of Witness D-0080'.

I. Background

1. On 16 October 2017, the defence team for Mr Ntaganda ('Defence') filed the 'Request to admit prior recorded testimony of eleven witnesses under Rule 68(2)', which included a request to admit the prior recorded testimony of Witness D-0080 ('Witness') under Rule 68(2)(c) of the Rules ('First Request').¹
2. On 24 October 2017, the Chamber directed the Registry to provide further information on the feasibility of the Witness testifying via video-link, including whether this could be facilitated by the Registry in a safe manner.²
3. On 30 October 2017, the Registry filed its observations on the matter ('First Registry Observations'), in which it noted the existence of a possibility of facilitating the Witness's testimony via video-link, subject to securing the cooperation of the [REDACTED] authorities ('Authorities').³
4. On 7 November 2017, having also received submissions from the Office of the Prosecutor ('Prosecution'),⁴ the Chamber issued a decision rejecting the First

¹ ICC-01/04-02/06-2066-Conf, with confidential Annexes I to XII. A corrected version was filed on 27 October 2017 as ICC-01/04-02/06-2066-Conf-Corr.

² See email communication from the Chamber to the Registry and the parties and participants on 24 October 2017 at 12:05.

³ Registry's observations on the feasibility of Witness D-0080's testimony through video-link, ICC-01/04-02/06-2088-Conf.

⁴ 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, with confidential Annexes 1-2 ('First Prosecution Response').

Request ('Decision on First Request') on the basis that, at that stage, the Witness could not be considered unavailable to testify orally due to obstacles that could not be overcome with reasonable diligence.⁵ The Chamber also indicated therein that it would be appropriate for the witness to testify by way of video-link, should it be possible for this to be safely facilitated, and that any such arrangements should be finalised in sufficient time to allow the Witness's testimony to be scheduled during the sixth evidentiary block.⁶

5. On 1⁷ and 15 December 2017,⁸ the Registry reported that it had endeavoured to communicate with the Authorities to discuss appropriate arrangements for the Witness to testify via video-link from their territory, but had not yet been successful in doing so.
6. On 14 December 2017, the Prosecution filed the 'Prosecution request to order the Defence to facilitate contact between the Registry and the Government of [REDACTED] regarding the testimony of Witness D-0080' ('Contact Request').⁹
7. On 27 December 2017, the Defence responded to the Contact Request ('Contact Request Response'), arguing that it should be dismissed *in limine*.¹⁰
8. On 10 January 2018, the Chamber instructed the Registry to indicate, by 19 January 2018, whether or not it would be possible to facilitate the video-link

⁵ Decision on Defence request for admission of the prior recorded testimony of Witness D-0080, ICC-01/04-02/06-2100-Conf, para. 16. A public redacted version was filed on the same day as ICC-01/04-02/06-2100-Red.

⁶ Decision on First Request, ICC-01/04-02/06-2100-Red, para. 17.

⁷ Email communication from the Registry to the Chamber and the parties and participants on 1 December 2017 at 15:19.

⁸ Email communication from the Registry to the Chamber and the parties and participants on 15 December 2017 at 12:28, responding to an email communication from the Chamber to the Registry and the parties and participants on 13 December 2017 at 15:12.

⁹ ICC-01/04-02/06-2159-Conf, with one confidential annex.

¹⁰ Response on behalf of Mr Ntaganda to the "Prosecution request to order the Defence to facilitate contact between the Registry and the Government of [REDACTED] regarding the testimony of Witness D-0080", ICC-01/04-02/06-2169-Conf. *See in particular* para. 1.

testimony of the Witness in the sixth evidentiary block, which was scheduled to run from 29 January to 23 February 2018.¹¹

9. On 19 January 2018, the Registry filed its observations ('Second Registry Report').¹²
10. On 22 January 2018, the Chamber ordered the Defence to indicate, by 24 January 2018, how it intended to proceed in relation to the Witness, including whether it would seek to renew its application to admit the Witness's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.¹³
11. On 24 January 2018, the Defence filed the 'Renewed Request on behalf of Mr Ntaganda for admission of the prior recorded testimony of Witness D-0080' (Renewed Request'), consisting of his 15-page statement ('Statement').¹⁴
12. On 29 January 2018, in accordance with the Chamber's order,¹⁵ the Prosecution filed its response to the Renewed Request ('Response to Renewed Request'), opposing it.¹⁶ The Prosecution argued that in its Renewed Request, the Defence impermissibly responded to arguments made in the First Prosecution Response and averred that the Chamber should not consider the submissions contained in paragraphs 29 to 61 of the Renewed Request on this basis ('Exclusion Request'). In the event that the Chamber was minded to consider

¹¹ Email communication from the Chamber to the Registry and the parties and participants on 10 January 2018 at 10:57.

¹² Registry Report in relation to the testimony of Witness D-0080, ICC-01/04-02/06-2189-Conf, with one confidential annex.

¹³ Email communication from the Chamber to the parties and participants on 22 January 2018 at 12:33.

¹⁴ ICC-01/04-02/06-2193-Conf, with one confidential annex bearing the Statement.

¹⁵ Email communication from the Chamber to the parties and participants on 25 January 2018 at 10:19, shortening the response deadline to the Renewed Request to 29 January 2018 at noon.

¹⁶ Prosecution response to the "Renewed Request on behalf of Mr Ntaganda for admission of the prior recorded testimony of Witness D-0080", ICC-01/04-02/06-2193-Conf, ICC-01/04-02/06-2196-Conf, with four confidential annexes, referring to First Prosecution Response, ICC-01/04-02/06-2087-Conf, paras 111-122.

the latter submissions, the Prosecution requested leave to reply to ten issues ('Request for Leave to Reply').¹⁷

13. Finally, the Prosecution requests that, should the Chamber decide to admit the Statement pursuant to Rule 68(2)(c), certain further items be admitted ('Additional Admission Request').¹⁸

14. On 31 January 2018, noting certain further communications from the parties,¹⁹ the Chamber rejected the Exclusion Request and the Request for Leave to Reply ('Decision of 31 January 2018').²⁰ In addition, pursuant to Regulation 28 of the Regulations, the Chamber invited further submissions, by 5 February 2018, on 'Issue 1' identified at paragraph 23 of the Response to Renewed Request, namely:

Whether, given the Defence's knowledge of D-0080's status, including that he was [REDACTED], it could have anticipated the need for measures pursuant to [A]rticle 56 of the Rome Statute, which are a precondition for the satisfaction of [R]ule 68(2)(c). The Defence's failure to do so must be considered in rejecting the Original Request and Renewed Request [('Article 56 Issue')].²¹

15. Accordingly, on 5 February 2018, the Prosecution filed further submissions on the Article 56 Issue ('Prosecution Article 56 Submissions').²²

16. On 5 February 2018, the Defence also filed further submissions on the Article 56 Issue ('Defence Article 56 Submissions').²³

¹⁷ Response to Renewed Request, ICC-01/04-02/06-2196-Conf, paras 22-23.

¹⁸ Response to Renewed Request, ICC-01/04-02/06-2196-Conf, paras 24-33, referring to Annexes A-D thereof.

¹⁹ Email communication from the Defence to the Chamber, Prosecution, and participants on 31 January 2018 at 13:02; email communication from the Prosecution to the Chamber, Defence, and participants on 31 January 2018 at 15:27.

²⁰ Email communication from the Chamber to the parties and participants on 31 January 2018 at 15:40.

²¹ See Response to Renewed Request, ICC-01/04-02/06-2196-Conf, paragraph 23 (footnotes omitted).

²² Prosecution further submissions concerning the "Renewed Request on behalf of Mr Ntaganda for admission of the prior recorded testimony of Witness D-0080", ICC-01/04-02/06-2193-Conf, ICC-01/04-02/06-2205-Conf, para. 18.

17. Further on 5 February 2018, in accordance with the Chamber's order,²⁴ the Defence filed its response to the Additional Admission Request ('Defence Response'),²⁵ opposing it.
18. Also on 5 February 2018, the Defence filed a request for the admission into evidence of 20 items from the bar table ('Bar Table Request'),²⁶ including one video depicting, *inter alia*, the Rwampara and Ndromo training camps ('Video').²⁷ In its 'Decision on second Defence request for admission of evidence from the bar table' ('Bar Table Decision'),²⁸ the Chamber noted the Defence's submission that admission of the Video, in full, 'is necessary in order to understand [the Witness's] testimony and the images he refers to therein'.²⁹ Accordingly, and having considered the Prosecution's submissions in this regard ('Bar Table Response'),³⁰ the Chamber considered that it would be most appropriate to consider the requested admission of the Video by way of the present decision.³¹
19. On 6 February 2018, the Prosecution requested leave to reply to the Defence Response on six issues ('Second Request for Leave to Reply').³²
20. On 9 February 2018, having been granted leave to do so,³³ the Prosecution filed a reply ('Prosecution Reply') on one issue ('Issue One').³⁴

²³ Submission on behalf of Mr Ntaganda concerning applicability and foreseeability of Article 56 measures regarding Witness D-0080, ICC-01/04-02/06-2207-Conf.

²⁴ Email communication from the Chamber to the parties and participants on 31 January 2018 at 15:40, shortening the response deadline to the Additional Admission Request to 5 February 2018 at noon.

²⁵ Response to Prosecution's request for admission of evidence for the purpose of assessing D-0080's credibility, ICC-01/04-02/06-2206-Conf.

²⁶ Second Defence Request for the admission of evidence from the bar table, ICC-01/04-02/06-2208-Conf, with two confidential annexes.

²⁷ DRC-D18-0001-0463.

²⁸ 21 February 2018, ICC-01/04-02/06-2240.

²⁹ Bar Table Decision, ICC-01/04-02/06-2240, para. 11, referring to ICC-01/04-02/06-2208-Conf-AnxA, page 15.

³⁰ Prosecution response to the "Second Defence request for the admission of evidence from the bar table", ICC-01/04-02/06-2208-Conf", 12 February 2018, ICC-01/04-02/06-2223-Conf, paras 20-30.

³¹ Bar Table Decision, ICC-01/04-02/06-2240, para. 11.

³² Prosecution request for leave to reply to the "Response to Prosecution's request for admission of evidence for the purpose of assessing D-0080's credibility", ICC-01/04-02/06-2206-Conf, ICC-01/04-02/06-2210-Conf.

II. Analysis

Preliminary issues

21. At the outset, the Chamber places on the record its reasons for two rulings already rendered in relation to the current litigation.
22. The Chamber shall first give reasons for the Decision of 31 January 2018,³⁵ in which it rejected the Exclusion Request and Request for Leave to Reply. In so deciding, the Chamber considered that, in light of the broadness of its instruction to the Defence on 22 January 2018 to indicate ‘how it intends to proceed in relation to the potential testimony of [the Witness], including whether it renews its application to admit the [W]itness’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules’, the Defence was *not* required to seek leave to reply pursuant to Regulation 24(5) of the Regulations in order to address certain arguments made in the First Prosecution Response. Accordingly, the Chamber considered the basis for the Exclusion Request to be misguided, and rejected it.
23. Having so found, the Chamber was of the view that the Request for Leave to Reply lacked the correct legal basis, and that it was open to the Prosecution to simply address the ten issues identified therein in its Response to the Renewed Request. Accordingly, the Chamber rejected the Request for Leave to Reply, further considering that it would not have been assisted by additional submissions on the majority of issues identified by the Prosecution. However, finding that it would be assisted by further

³³ Email communication from the Chamber to the parties and participants on 7 February 2018 at 11:19, authorising the Prosecution leave to reply, by 9 February 2018, in relation to issue (i).

³⁴ Prosecution reply to the “Response to Prosecution’s request for admission of evidence for the purpose of assessing D-0080’s credibility”, ICC-01/04-02/06-2206-Conf, ICC-01/04-02/06-2218-Conf, footnote 2 (footnotes omitted).

³⁵ Email communication from the Chamber to the parties and participants on 31 January 2018 at 15:40.

clarification of the Article 56 Issue, the Chamber invited submissions on this matter pursuant to Regulation 28 of the Regulations.

24. The Chamber turns to the Second Request for Leave to Reply, in relation to which it authorised the Prosecution to file a reply on Issue One identified therein,³⁶ namely:

Whether items must constitute “prior recorded testimony” or “associated documents” in order to be admitted for the purposes of assessing the credibility of a witness whose testimony is proposed for admission pursuant to [R]ule 68(2)(c), in particular in view of the Chamber’s previous admission, pursuant to [A]rticles 64 and 69 of the Rome Statute, of evidence for such purposes in comparable circumstances.³⁷

25. In so deciding, the Chamber considered it would be assisted by further submissions in relation to the applicable law governing the Additional Admission Request, including the permissibility of the admission of items not considered to be ‘prior recorded testimony’ or ‘associated documents’ in the context of a request under Rule 68(2)(c). The Chamber did not consider it would be assisted by further submissions in relation to the other five issues identified in the Second Request for Leave to Reply.

Applicable law

26. The Chamber incorporates by reference the applicable law set out in previous decisions on applications for admission of evidence under Rule 68(2)(c) of the Rules,³⁸ and as referred to in its Decision on First Request.³⁹

³⁶ Email communication from the Chamber to the parties and participants on 7 February 2018 at 11:19, authorising the Prosecution leave to reply, by 9 February 2018, in relation to issue (i).

³⁷ Prosecution Reply, ICC-01/04-02/06-2218-Conf, footnote 2 (footnotes omitted).

³⁸ *See, for example*, 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, 20 November 2015, ICC-01/04-02/06-1029, paras 12-15.

³⁹ Decision on First Request, ICC-01/04-02/06-2100-Red, para. 12.

Whether the Witness is unavailable to testify

27. At the outset, the Chamber must determine whether the Witness can be considered 'unavailable' within the meaning of Rule 68(2)(c) of the Rules, in the sense that he has 'died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally'.
28. In this connection, in the Second Registry Report, filed on 19 January 2018, the Registry indicates that the Authorities had not communicated a position in relation to the Registry's request for assistance to facilitate the video-link testimony of the Witness from [REDACTED] territory, and noting that, even if the request was approved, further discussions on the relevant arrangements may yet be lengthy.⁴⁰
29. In its Renewed Request, the Defence argues that the Witness is indeed unavailable within the meaning of Rule 68(2)(c), on the basis that, as noted in the Second Registry Report, agreement from the Authorities regarding a potential video-link has not been obtained to date, no other options are available in the circumstances, and sufficient efforts have been exerted to try to secure the *viva voce* testimony of the Witness.⁴¹
30. In its Contact Request, the Prosecution requests that, if the Registry confirms that the Authorities are unresponsive to its requests for cooperation in relation to the Witness, prior to declaring the Witness to be 'unavailable' within the meaning of Rule 68(2)(c), the Chamber should order the Defence to use its unique position *vis-à-vis* the Authorities to facilitate contact, having successfully obtained their cooperation to conduct investigations on its territory on previous occasions.⁴² The Defence argues that this request should

⁴⁰ Second Registry Report, ICC-01/04-02/06-2189-Conf, paras 7-9.

⁴¹ Renewed Request, ICC-01/04-02/06-2193-Conf, paras 4 and 20-27.

⁴² Contact Request, ICC-01/04-02/06-2159-Conf, para. 2.

be dismissed *in limine* on the basis that the responsibility for ensuring that the Witness is available to testify rests primarily with various divisions of the Registry, and, ultimately, the Chamber.⁴³

31. In ruling on the Contact Request, the Chamber observes that, in accordance with, *inter alia*, Regulation 45 of the Regulations of the Registry, the responsibility to facilitate arrangements for witnesses testifying before the Court via video-link resides with the Registry. Furthermore, it is the Court's responsibility to ensure the safety, physical and psychological wellbeing, dignity, and privacy of witnesses, pursuant to Article 68 of the Statute. Accordingly, the Chamber considers the Contact Request to be inapposite and without legal basis, and it is therefore dismissed *in limine*.

32. In assessing whether the Witness can now be considered 'unavailable', the Chamber recalls its previous direction that any arrangements for the Witness to testify via video-link must be 'finalised in sufficient time to allow the [W]itness's testimony to be scheduled during the sixth evidentiary block'.⁴⁴ The Chamber notes that the Registry has been unable to provide for this, despite its repeated efforts to obtain cooperation from the Authorities. Accordingly, given the poor prospect of being able to successfully provide for the Witness's *viva voce* testimony at a reasonable stage of the proceedings, and noting the lack of disagreement of the parties on the issue of unavailability,⁴⁵ the Chamber considers the Witness to be 'unavailable' to testify orally within the meaning of Rule 68(2)(c) of the Rules.

⁴³ Contact Request Response, ICC-01/04-02/06-2196-Conf. *See in particular* para. 3.

⁴⁴ Decision on First Request, ICC-01/04-02/06-2100-Red, para. 17.

⁴⁵ While the Prosecution makes brief submissions on the availability of the Witness (*see* Response to Renewed Request, ICC-01/04-02/06-2196-Conf, paras 4 and 21), it does not affirmatively assert that the Witness is available to testify orally.

Whether the necessity of measures under Article 56 of the Statute could have been anticipated

33. Having so found, the Chamber shall proceed to the next requirement of Rule 68(2)(c) of the Rules, namely, that the necessity of measures under Article 56 could not have been anticipated. The Chamber has been assisted by the parties' submissions in this regard, on both the law and its application to the Renewed Request.

34. The Prosecution argues that, in its First Request, the Defence made no submissions concerning whether it could have anticipated the necessity for measures under Article 56, and that the Renewed Request should therefore be rejected *in limine*.⁴⁶ In terms of the merits, the Prosecution argues, *inter alia*, that: (i) the Article 56 requirement is an integral component of an application under Rule 68(2)(c) 'without distinction as to which party is making the application', noting the availability of such measures to the Defence under the mirror provision of Article 57(3)(b);⁴⁷ (ii) the Defence could have anticipated the need for Article 56 measures, noting that the Defence met with the Witness in September 2017, at which time it knew or should have known that, *inter alia*, the Witness was [REDACTED];⁴⁸ and (iii) such measures may have been successfully taken to preserve the Witness's evidence.⁴⁹

35. The Defence argues that: (i) Article 56 of the Statute is addressed exclusively to 'the Prosecutor', and Rule 68(2)(c) must be interpreted accordingly;⁵⁰ (ii) Article 56 applies only to situations where there is a 'unique investigative opportunity' to take or secure evidence 'which may not be available subsequently', which was not the case for the Witness;⁵¹ and (iii) the Defence

⁴⁶ Prosecution Article 56 Submissions, ICC-01/04-02/06-2205-Conf, paras 2 and 15.

⁴⁷ Prosecution Article 56 Submissions, ICC-01/04-02/06-2205-Conf, paras. 16. *See also* paras 9 and 14.

⁴⁸ Prosecution Article 56 Submissions, ICC-01/04-02/06-2205-Conf, paras 3 and 10-12.

⁴⁹ Prosecution Article 56 Submissions, ICC-01/04-02/06-2205-Conf, para. 18.

⁵⁰ Defence Article 56 Submissions, ICC-01/04-02/06-2207-Conf, paras 2 and 21-22.

⁵¹ Defence Article 56 Submissions, ICC-01/04-02/06-2207-Conf, paras 2 and 23-25.

could not have anticipated that the Witness's testimony could have been obtained in a different form than is currently available, noting the flexible interpretation of 'foreseeability' accorded to Rule 68(2)(c) previously at the Court.⁵²

36. In relation to the law, the Chamber considers that, while this issue has not been squarely addressed before by the Chamber in the context of Rule 68(2)(c) of the Rules, previous chambers have found Article 56 measures to be equally available to the Defence and the Prosecution,⁵³ despite the fact that Article 56 is 'addressed' to the Prosecution. However, the Chamber notes that this has typically been framed more as a 'right' for the accused rather than a Defence 'obligation'. Indeed, in the context of a criminal trial, in which the Prosecution is tasked with bringing incriminating evidence against the accused, the obligation to preserve such evidence when presented with a 'unique investigative opportunity' to do so, and where there is a danger that such evidence may be later unavailable for the purposes of trial, cannot be said to apply with equal potency to the Defence as to the Prosecution.

37. Moreover, noting the Authorities' non-cooperation with the Court to date in facilitating the video-link testimony of the Witness, the Chamber considers that ordering the type of measures envisaged by Article 56 would very likely be, in any event, ineffective. Therefore, and notwithstanding that the Defence did not initially address this limb of Rule 68(2)(i), and noting further: (i) the finding of Trial Chamber VII in analogous circumstances that the non-effectiveness of potential Article 56 measures is enough to satisfy the Article

⁵² Defence Article 56 Submissions, ICC-01/04-02/06-2207-Conf, paras 2 and 26-29.

⁵³ See, in this regard, Pre-Trial Chamber II, *Situation in Uganda*, DECISION ON PROSECUTOR'S APPLICATIONS FOR LEAVE TO APPEAL DATED THE 15th DAY OF MARCH 2006 AND TO SUSPEND OR STAY CONSIDERATION OF LEAVE TO APPEAL DATED THE 11th DAY OF MAY 2006, 10 July 2006, ICC-02/04-01/05-90, para. 35; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on Defence requests related to the continuation of the confirmation Proceedings, 14 February 2014, ICC-02/11-01/11-619, para. 37. See also, *critically*, Article 57(3)(b) of the Statute.

56 requirement in the context of a Rule 68(2)(c) application;⁵⁴ and (ii) the high degree of uncertainty that ordering such measures would have *ever* been effective, even if previously anticipated, the Chamber is satisfied that this requirement in Rule 68(2)(c)(i) of the Rules is met in the present circumstances.

Whether the prior recorded testimony has sufficient indicia of reliability

i. Statement

38. In its Renewed Request, the Defence argues that: (i) the Statement has sufficient indicia of reliability, given that it was taken during the ordinary course of investigations, was translated into a language the Witness understands, was signed on all pages by the Witness, who expressly confirmed that it was given voluntarily, and that it is internally coherent and provides a detailed narrative of the events based on the Witness's own experience;⁵⁵ (ii) the calls from the Detention Centre involving Mr Ntaganda and the Witness, referred to in the First Prosecution Response,⁵⁶ do not impact on the Statement's credibility, on the basis that, *inter alia*, they do not address the topics covered in the prior recorded testimony of the Witness, and do not reveal evidence of coaching;⁵⁷ and (iii) the Statement is corroborative and cumulative of other evidence on the record.⁵⁸

39. In its Response to Renewed Request, the Prosecution indicates that it maintains its objection to the admission of the Witness's prior recorded testimony under Rule 68(2)(c), on the basis of: (i) the Statement's low probative value and serious issues of its reliability; (ii) the [REDACTED]

⁵⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence', 12 November 2015, ICC-01/05-01/13-1481-Red-Corr, para. 19.

⁵⁵ Renewed Request, ICC-01/04-02/06-2193-Conf, paras 4 and 28-37.

⁵⁶ See First Prosecution Response, ICC-01/04-02/06-2087-Conf, para. 112.

⁵⁷ Renewed Request, ICC-01/04-02/06-2193-Conf, paras 38-50.

⁵⁸ Renewed Request, ICC-01/04-02/06-2193-Conf, paras 51-53.

position that the Witness occupied in the UPC/FPLC; (iii) the references to Mr Ntaganda's conduct and the 'highly contentious issues' in the Statement; and (iv) the late disclosure of the Statement. The Prosecution indicates that it further relies on the arguments set out in the First Prosecution Response.⁵⁹

ii. Video

40. As previously indicated, the Chamber will also consider admission of the Video as an associated exhibit, noting the submission of the Defence in the context of the Bar Table Request that the Video is necessary in order to understand the Witness's Statement and the images he refers to therein.⁶⁰ While the Chamber notes the concern of the Prosecution in relation to the way in which admission of the Video was sought, including that the Defence ought to have sought its admission via its Rule 68(2)(c) requests in relation to the Witness,⁶¹ the Chamber considers it to be appropriate and expeditious, and in the interests of its truth-finding function, to adjudicate the admission of the Video as an 'associated exhibit' by way of the present decision.

41. In terms of substance, the Chamber notes that the Prosecution also further opposes admission of the Video on the basis that the Statement 'fails to adequately explain crucial details related to his viewing of [the Video] that affect the reliability and probative value of his [S]tatement'.⁶²

iii. Finding of the Chamber on the Statement and Video

42. In assessing whether the Statement is appropriate for admission under Rule 68(2)(c), the Chamber has taken into consideration, *inter alia*: (i) the fact

⁵⁹ Response to Renewed Request, ICC-01/04-02/06-2196-Conf, para. 5, referring to First Prosecution Response, ICC-01/04-02/06-2087-Conf, paras 111-122.

⁶⁰ Bar Table Decision, ICC-01/04-02/06-2240, para. 11, referring to ICC-01/04-02/06-2208-Conf-AnxA, page 15.

⁶¹ Bar Table Response, ICC-01/04-02/06-2223-Conf, paras 20 and 22-23.

⁶² Bar Table Response, ICC-01/04-02/06-2223-Conf, paras 24-25.

that the Statement is signed by the Witness on every page, is stated to have been given voluntarily, in anticipation of potentially being called as a witness before the Court, and contains a narrative of events that appears to be based on the Witness's own experience as a [REDACTED] UPC/FPLC military insider that is cumulative of certain of the evidence of other Defence witnesses; (ii) the timing of the Statement, including that it was given in [REDACTED] and thus lacks temporal proximity to the events described therein; (iii) the fact that the Statement was prepared using a non-qualified interpreter; and (iv) the Prosecution's arguments in relation to the alleged impact of the Video and the Detention Centre conversations on the reliability of the Statement.

43. While the Chamber notes the concerns of the Prosecution in relation to points (ii) and (iii) above, it considers that the Statement has sufficient indicia of reliability on the factors noted at point (i) to render it appropriate for admission under Rule 68(2)(c). In addition, in relation to point (iv), the Chamber does not consider the Detention Centre calls referred to in the First Prosecution Response to have unduly impacted on the reliability of the information contained in the Statement, given the differences in subject matter between the two. Similarly, while the Chamber notes the Prosecution's concerns in relation to the impact of the Video on the reliability of the Statement, it does not consider the purported issue of the timestamps, or the way in which the Video was used with the Witness, to impact the *reliability* of the Statement itself, rather the *weight* that may eventually be accorded to it.

44. In light of the foregoing, the Chamber considers the Statement to have sufficient indicia of reliability for admission under Rule 68(2)(c).

45. Noting that the Video is used and explained at paragraphs 57 to 61 of the Statement, the Chamber also considers that the Video is appropriate for

admission as an associated exhibit. In this regard, the Chamber notes that it is already in possession of detailed information from various witnesses with regard to the content of this exhibit, some of whom have also identified themselves in the excerpts played in Court.⁶³ Many portions thereof have notably been admitted through previous witnesses, both as Prosecution and Defence exhibits, and thus the general admissibility criteria, including in relation to the reliability of the Video, have been previously found to be fulfilled.

46. In this regard, as noted above in relation to the Statement, the Chamber considers that the Prosecution's arguments in relation to the Video do not go to the *reliability* of the Video, but rather to the *weight* the Chamber may ultimately attach to it, if admitted. However, in light of these considerations, more specifically: (i) the issues identified by the Prosecution in relation to the errors in timestamps of the accompanying transcript and translation for the Video;⁶⁴ (ii) the apparent disagreement as to the parts of the Video already in evidence, and the fact that DRC-OTP-0120-0293-Ex01_Sb is in evidence in full;⁶⁵ and (iii) the limited utility to the Chamber of admitting mere further 'portions' of the Video described by the Witness in his Statement, the

⁶³ See, for example, **P-0010**: T-49, page 15, line 10 to page 25, line 10; page 33, line 9 to page 40, line 11; and Decision on Defence request seeking the admission of certain documents following the testimony of Witness P-0010, 23 December 2015, ICC-01/04-02/06-1070-Conf, page 12; **D-0300**: T-220, page 33, line 11 to page 44, line 19; and **D-0017**: T-253, page 57, line 21 to page 60, line 22; page 69, line 4 to page 79, line 7; and T-255, page 45, line 10 to page 46, line 25. The Chamber notes that another video exhibit, DRC-OTP-0120-0293, contains the same images and has been admitted into evidence in full, as well as discussed with witnesses. See, for example, **P-0010**: T-47, page 58, line 17 to page 62, line 19; T-48, page 3, line 13 to page 20, line 1; and T-50, page 66, line 16 to page 72, line 25; **P-0030**: DRC-OTP-2054-2951, page 2974, line 23 to page 2998, line 19; **D-0300**: T-240, page 33, line 2 to page 41, line 15; and T-226, page 4, line 19 to page 8, line 10; and **D-0017**: T-253, page 79, line 12 to page 81, line 5.

⁶⁴ ICC-01/04-02/06-2208-Conf-AnxA, pages 19-20.

⁶⁵ ICC-01/04-02/06-2208-Conf-AnxA, pages 15-20.

Chamber considers that the Video, as well as its transcript and translation, are appropriate for admission in full.⁶⁶

iv. Additional Admission Request

47. The Prosecution argues that, should the Statement be admitted, the following items should also be admitted for the purpose of assessing the credibility of the Witness: (i) two telephone calls from the Detention Centre between the accused and the Witness, together with their respective transcriptions and translations ('Detention Centre Calls');⁶⁷ and (ii) the relevant excerpts of a [REDACTED] on the Witness, a Human Rights Watch report, and a letter and report by the Group of Experts on the Democratic Republic of the Congo ('Four Items'), all four of which, in the Prosecution's submission, refer to the [REDACTED] relationship between the Witness and Mr Ntaganda.⁶⁸ The Prosecution argues that it is not necessary to establish that the items referred to in the Additional Admission Request constitute prior recorded testimony or associated documents, as the items can simply be admitted under Articles 64 and 69 of the Statute without contravening any applicable rules, and that the interests of justice dictate that the items should be admitted if general admissibility criteria are satisfied.⁶⁹

48. The Defence avers that: (i) none of the six documents tendered by the Prosecution in its Additional Admission Request are admissible under Rule 68(2)(c), which is limited to 'prior recorded testimony' and associated

⁶⁶ The Chamber notes in this regard the impact on the transcript (DRC-D18-0001-5576) and translation (DRC-D18-0001-5587) of its Order on admission of items marked for identification, 6 February 2018, ICC-01/04-02/06-2211.

⁶⁷ First call: DRC-OTP-2101-0690 (Audio recording); DRC-OTP-2104-0282, page 0284, line 55 to page 0296, line 472(transcription); and DRC-OTP-2104-0306, page 0309, line 59 to page 0321, line 486 (translation). Second call: DRC-OTP-2101-0007 (Audio recording); DRC-OTP-2103-0826, page 0829, line 83 to page 0832, line 197 (transcription); and DRC-OTP-2103-0847, page 0851, line 91 to page 0855, line 220 (translation).

⁶⁸ Response to Renewed Request, ICC-01/04-02/06-2196-Conf, paras 24-33, referring to Annexes A-D thereof.

⁶⁹ Prosecution Reply, ICC-01/04-02/06-2218-Conf, paras 2-6.

documents;⁷⁰ (ii) the Four Items are unreliable in relation to the purpose of admission cited by the Prosecution, which is purportedly to establish the [REDACTED] relationship between the Witness and Mr Ntaganda;⁷¹ and (iii) the Detention Centre Calls are manifestly irrelevant to assessing the reliability of the Statement, due, *inter alia*, to the fact that they do not relate to the subject matter of the Witness's Statement, and noting that the Chamber placed stringent conditions on the Prosecution's use of Mr Ntaganda's Detention Centre conversations.⁷²

49. As a preliminary matter, the Chamber finds that, as argued in the Prosecution Reply, it is always open to the Chamber to admit items under Articles 64 and 69 of the Statute, subject to the requirements of those provisions being met. The Chamber is therefore not persuaded that the Prosecution was required to fulfil the requirements of an 'associated exhibit' or of 'prior recorded testimony' to successfully tender an item in the context of the present request.

50. However, for the reasons noted below, the Chamber is not persuaded that any of the six items meets the general admissibility criteria. In relation to the Detention Centre Calls, the Chamber recalls its previous rulings that such material is 'not admissible through the "bar table", as its probative value at this stage, due its nature and lack of direct materiality to the charges in the case, is low when balanced with the potential prejudice to the accused'.⁷³ Accordingly, the Chamber considers that admitting the Detention Centre Calls without the Witness having been provided with an opportunity to comment on them, and noting that the Prosecution did not confront Mr Ntaganda with these calls during his testimony, would give rise to undue prejudice to the

⁷⁰ Defence Response, ICC-01/04-02/06-2206-Conf, paras 2 and 20-23.

⁷¹ Defence Response, ICC-01/04-02/06-2206-Conf, paras 3 and 24-33.

⁷² Defence Response, ICC-01/04-02/06-2206-Conf, paras 4 and 34-42.

⁷³ *See, for example*, Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence, 23 February 2017, ICC-01/04-02/06-1799, para. 6.

accused. The Chamber therefore considers that, in the present circumstances, they are not appropriate for admission under Articles 64 and 69 of the Statute.

51. In relation to the Four Items, the Chamber notes that the Prosecution wishes to adduce these items to establish that the Witness shared a [REDACTED] relationship with Mr Ntaganda, and to impeach the Witness's credibility more generally. However, noting that: (i) they constitute open source material, which, though emanating from 'reputable' sources, contain simple and broad suppositions, the provenance of which is often unclear;⁷⁴ or (ii) include similar listings in relation to persons who have not been found guilty by the Court,⁷⁵ the Chamber does not consider any of the Four Items to be of sufficient reliability or probative value for the purposes for which they are sought to be adduced. Accordingly, the Additional Admission Request is rejected in full.

Whether any prejudicial effect outweighs the probative value of the prior recorded testimony

52. The Chamber notes that the Defence argues that the probative value of the Statement outweighs any prejudicial effect to the Prosecution, on the basis that, *inter alia*, the Prosecution: (i) had ample opportunity to present its case, including on the matters addressed in the Statement; (ii) had ample opportunity to cross-examine other Defence witnesses, including the accused, on these matters; and (iii) has long been aware of the identity of the Witness and the topics expected to be covered in his testimony.⁷⁶

53. The Prosecution argues that the Statement is of low probative value due to potential issues relating to its translation and the lack of precision of Video

⁷⁴ See, for example, Additional Admission Request, ICC-01/04-02/06-2196-Conf-Anx-C, page 2553, the broad statement that [REDACTED].

⁷⁵ See Additional Admission Request, ICC-01/04-02/06-2196-Conf-Anx-A, referring to Mathieu Ngudjolo and Callixte Mbarushimana, pages 0266 and 0271.

⁷⁶ Renewed Request, ICC-01/04-02/06-2193-Conf, paras 58-61.

timestamps referenced therein.⁷⁷ It argues further that admission of the Statement would be highly prejudicial to the Prosecution, averring that the Witness's 'centrality to the charges, the extensive references to the [a]ccused in his statement and the clear need for the Prosecution to test this evidence' militates against admission under Rule 68(2). The Prosecution also argues that the provision of the Statement only on 16 October 2017, 'after the [a]ccused and most other Defence witnesses testified', significantly adds to the prejudice that the Prosecution would suffer by the admission of the Statement.⁷⁸

54. In assessing whether any prejudicial effect outweighs the probative value of the Statement, the Chamber notes that it indeed contains numerous references to the acts and conduct of Mr Ntaganda. In this regard, the Chamber recalls that Rule 68(2)(c) does not prohibit the introduction of prior testimony which goes to proof of the acts and conduct of an accused, but rather stipulates that it 'may be a factor' against its introduction.⁷⁹ Further, the Chamber considers this factor relates principally to the fair trial rights of the accused and his right to examine the witnesses testifying as to his acts and conduct.⁸⁰

55. The Chamber notes its finding in the Decision on First Request that the Witness is a [REDACTED] insider witness whose testimony may be relevant to several charges, and may assist the Chamber in its determination of the truth.⁸¹ Noting further: (i) the [REDACTED] role of the Witness in the UPC/FPLC, which renders him well-placed to provide information in relation to the described issues; (ii) the fact that the Witness [REDACTED], and thus has direct knowledge of him [REDACTED]; and (iii) the fact that the Statement

⁷⁷ First Prosecution Response, ICC-01/04-02/06-2087-Conf, paras 115-117.

⁷⁸ First Prosecution Response, ICC-01/04-02/06-2087-Conf, paras 118-123.

⁷⁹ *See, in this regard*, Rule 68(2)(c)(ii); 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, 20 November 2015, ICC-01/04-02/06-1029, para. 37.

⁸⁰ *See in this regard* Article 67(1)(e) of the Statute.

⁸¹ Decision on First Request, ICC-01/04-02/06-2100-Red, para. 17.

appears internally consistent, the Chamber considers the *prima facie* probative value of the Statement, and its relevance, to be sufficiently established.

56. In balancing the foregoing with any potential prejudice, including to the fairness of the proceedings, the Chamber shall, in assessing the Statement, consider the nature of the evidence provided by the Witness, particularly whether it is direct evidence, and the extent to which it is corroborated by any other evidence admitted into the record.⁸²

57. In the present circumstances, noting that: (i) the Chamber has had the benefit of hearing from several other military insider witnesses on the topics referred to in the Statement and the Video, including concerning certain alleged acts and conduct of the accused; (ii) the ultimate weight to be attributed to the Statement and Video shall be assessed in light of the evidence as a whole; and (iii) the Chamber will approach the Statement and Video with caution in accordance with the considerations noted above, including in relation to the timing of the Statement, the Chamber is satisfied that the requirements of sub-rule (2)(c) of Rule 68 and Article 69(4) to be met. Accordingly, the Chamber decides to admit the Statement, Video and accompanying transcript and translation into evidence.

⁸² See, in this regard, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, 24 February 2017, ICC-01/04-02/06-1802-Conf, para. 29.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Renewed Request;

ADMITS INTO EVIDENCE the Statement of the Witness (DRC-D18-0001-6163) and the Video referred to therein (DRC-D18-0001-0463), with accompanying transcript and translation (DRC-D18-0001-5576 and DRC-D18-0001-5587);

PLACES ON THE RECORD the reasons for the decisions made by way of email communication, referred to above;

REJECTS all other requests; and

CONSIDERS the phase for the presentation of evidence by the Defence closed and directs the Defence to file a formal notice forthwith.

Done in both English and French, the English version being authoritative.



Judge Robert Fremr, Presiding Judge



Judge Kuniko Ozaki



Judge Chang-ho Chung

Dated 22 February 2018

At The Hague, The Netherlands