

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-02/06**
Date: **23 August 2019**

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 ‘Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing’

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

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Trial Chamber VI of the International Criminal Court ('Chamber'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), pursuant to Articles 64(2), 67, 68, 69, 76 and 78(1) of the Rome Statute ('Statute') and Rules 68(2)(b), 86, 87 and 145 of the Rules of Procedure and Evidence ('Rules'), issues this 'Preliminary ruling on prior recorded testimony pursuant to Rule 68(2)(b) in relation to sentencing'.

I. PROCEDURAL HISTORY

1. On 8 July 2019, following its conviction of Mr Ntaganda of several crimes against humanity and war crimes,¹ the Chamber ordered the Office of the Prosecutor ('Prosecution'), the defence team for Mr Ntaganda ('Defence') and the Legal Representatives of Victims ('LRVs') to file any requests to submit further evidence or to call witnesses in relation to sentencing by 29 July 2019, with any responses to follow by 5 August 2019.² The Chamber encouraged the parties and participants to consider whether any witness evidence could most efficiently be presented as prior recorded testimony pursuant to Rule 68(2) of the Rules.³
2. On 29 July 2019, the Prosecution requested, *inter alia*, to have the evidence of four witnesses admitted pursuant to Rule 68(2)(b) of the Rules, and to shield the identity of two of them from the public.⁴
3. On the same day, the Defence requested, *inter alia*, to have the evidence of five witnesses admitted pursuant to Rule 68(2) of the Rules and indicated its intention to have a number of items admitted into evidence ('Defence Request').⁵ For one of the proposed witnesses, certain arrangements to have his evidence admitted before the

¹ Judgment, ICC-01/04-02/06-2359 ('Judgment').

² Order on sentencing procedure, ICC-01/04-02/06-2360 ('Order on Sentencing Procedure').

³ Order on Sentencing Procedure, para. 2(iv). The Chamber indicated that any requests pursuant to Rule 68(2)(b) of the Rules did not need to include the actual statement, but rather an indication that the relevant witness, if permitted to be called, would provide a witness statement to be submitted for admission under the aforementioned rule. *See* Order on Sentencing Procedure, footnote 2.

⁴ Prosecution's request to submit additional evidence on sentencing, ICC-01/04-02/06-2368-Conf ('Prosecution Request').

⁵ Defence request for admission of sentencing evidence, ICC-01/04-02/06-2369-Conf-Exp (with confidential *ex parte* Annexes A, B and C only available to the Chamber and the Registry and confidential Annex D; confidential redacted versions were notified the same day, ICC-01/04-02/06-2369-Conf-Red, ICC-01/04-02/06-2369-Conf-AnxA-Red and ICC-01/04-02/06-2369-Conf-AnxB-Red, respectively). The Defence indicated that three of the five proposed statements had already been obtained at the time of filing of the request (Defence Request, para. 33).

Chamber had not yet been finalised at the time of filing of the Defence Request.⁶ In relation to this proposed witness, the Defence sought guidance on 5 August 2019 as to the form in which his evidence was to be presented.⁷ On 14 August 2019, the Chamber filed an order in relation to the aforementioned proposed witness,⁸ whose proposed evidence is therefore no longer subject of the present decision.

4. The LRVs both informed the Chamber that they did not intend to request leave to submit further evidence or to call witnesses for the purposes of the sentencing proceedings.⁹
5. On 5 August 2019, the Prosecution, the Defence and the LRVs filed their respective responses. The Prosecution requested, *inter alia*, that the Chamber decline to admit the evidence of one of the witnesses proposed by the Defence, and limit the scope of the evidence of one other ('Prosecution Response').¹⁰ Furthermore, in relation to the Defence's request to present certain evidence, the Prosecution requested the Chamber to admit several items of documentary evidence to assist the Chamber's evaluation of the evidence proposed by the Defence.¹¹ The Defence opposed the admission of the prior recorded testimony of the four witnesses proposed by the Prosecution ('Defence Response').¹² The LRVs, *inter alia*, supported the Prosecution's requests to admit the proposed witness evidence and for protective measures for two of its proposed Rule 68(2)(b) witnesses, and opposed the Defence's request in its entirety.¹³
6. On 6 August 2019, the VWU provided the Chamber with its protective measures assessment in relation to the witnesses proposed by the Prosecution and the Defence,

⁶ Defence Request, paras 26-28, and footnote 20.

⁷ Notice concerning the status of proposed Witness D-0308, ICC-01/04-02/06-2376-Conf-Exp (a confidential redacted version was notified the next day, ICC-01/04-02/06-2376-Conf-Red).

⁸ Order in relation to D-0308, ICC-01/04-02/06-2382-Conf.

⁹ Email from the Common Legal Representative for the former child soldiers to the Chamber, 29 July 2019, at 15:19; and email from the Common Legal Representative for the victims of the attacks to the Chamber, 29 July 2019, at 16:45.

¹⁰ Prosecution's response to the "Defence request for admission of sentencing evidence", ICC-01/04-02/06-2369-Conf-Red, 29 July 2019, ICC-01/04-02/06-2375-Conf (a corrected version was notified on 8 August 2019, ICC-01/04-02/06-2375-Conf-Corr, with confidential annex ICC-01/04-02/06-2375-Conf-Corr-Anx).

¹¹ Prosecution Response, paras 2, 28-33, 41.

¹² Defence response to "Prosecution's request to submit additional evidence on sentencing", ICC-01/04-02/06-2373-Conf.

¹³ Joint Response of the Common Legal Representatives of Victims to the "Prosecution's request to submit additional evidence on sentencing" (ICC-01/04-02/06-2368-Conf) and the "Confidential redacted version of Defence request for admission of sentencing evidence" (ICC-01/04-02/06-2369-Conf-Red), ICC-01/04-02/06-2374-Conf ('LRVs Response').

supporting the measures requested, as well as with an update concerning the security situation in eastern Democratic Republic of the Congo ('DRC').¹⁴

7. On 7 August 2019, the Prosecution requested leave to reply to three issues which in its submission arose from the Defence Response.¹⁵ The Defence also produced additional submissions in response to the Prosecution's tendering of a number of documents in the Prosecution Response.¹⁶ On 9 August 2019, the Chamber granted the Prosecution's request for leave to reply, by 13 August 2019, in relation to one issue and rejected its request for leave to reply in relation to the two other identified issues, noting that it would not be assisted by further submissions thereon.¹⁷
8. On 13 August 2019, the Prosecution submitted its reply ('Reply').¹⁸

II. ANALYSIS

A. Rule 68(2)(b) witnesses

Preliminary matter

9. As regards admission under Rule 68(2)(b) of the Rules generally, the Prosecution submits that it is not necessary for the parties to meet the procedural pre-requisites of Rule 68 of the Rules in order to submit post-conviction witness statements in writing for sentencing.¹⁹ It nonetheless submits that all four proposed statements: (i) are relevant to confined issues in the case related to sentencing and each deal with the harm suffered by victims of the crimes for which Mr Ntaganda was found criminally liable, as well by their families and the broader community; (ii) do not concern the acts and conduct of Mr Ntaganda; and (iii) corroborate the testimony of witnesses who testified at trial without duplicating such testimony, since they cover a broader

¹⁴ Email from the VWU to the Chamber, 6 August 2019, at 14:41.

¹⁵ Prosecution's Request for leave to Reply to "Defence response to 'Prosecution's request to submit additional evidence on sentencing'", ICC-01/04-02/06-2373-Conf, ICC-01/04-02/06-2379-Conf (notified on 8 August 2019).

¹⁶ Response and request for leave to reply to Prosecution's response to the "Defence request for admission of sentencing evidence", ICC-01/04-02/06-2369-Conf-Red, 29 July 2019, ICC-01/04-02/06-2377-Conf ('Further Defence Response'), paras 2, 12-17.

¹⁷ Email from the Chamber to the parties and participants, 9 August 2019, at 09:55.

¹⁸ Prosecution's Reply to "Defence response to 'Prosecution's request to submit additional evidence on sentencing'", ICC-01/04-02/06-2373-Conf, 5 August 2019, ICC-01/04-02/06-2381-Conf.

¹⁹ Prosecution Request, para. 34, referring to *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Sentencing Witnesses and Setting an Article 76(2) Hearing, 11 November 2016, ICC-01/05-01/13-2025 ('*Bemba et al.* Decision on Sentencing Witnesses'), paras 6-7, and footnote 19.

range of victims and additional types of harm.²⁰ Finally, the Prosecution submits that the Defence will not be prejudiced as it is entitled to present its own evidence on similar grounds and as the right to cross-examine a witness is not absolute.²¹

10. In this regard, the Chamber recalls that Rule 68(2)(b)(ii) of the Rules requires any prior recorded testimony submitted pursuant to Rule 68(2)(b) to be accompanied by ‘a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief’. The witness statements of the witnesses whose evidence the Chamber decided below to receive must be accompanied by such a declaration. Rule 68(2)(b)(iii) further sets out that such accompanying declarations must be witnessed by a person authorised to do so by, *inter alia*, the relevant chamber. For the purpose of witness evidence to be submitted at trial, the Chamber designated on 16 July 2015 the Registry Legal Counsel, or any appropriate person delegated by him, as the person authorised to witness such declarations.²² However, mindful of the present stage of the proceedings, the Chamber considers that declarations of the witnesses whose prior recorded testimony will be submitted pursuant to Rule 68(2)(b) for the purposes of sentencing need not be witnessed by a member of the Registry as was the case for the declarations accompanying prior recorded testimony admitted under Rule 68(2)(b) during the previous phase of the trial.²³

1. [REDACTED] (‘First Proposed Prosecution Witness’)

Submissions

11. The First Proposed Prosecution Witness is [REDACTED] and was [REDACTED] in Mongbwalu in 2002.²⁴ His proposed testimony concerns the impact of [REDACTED] on the [REDACTED] and the Ituri community.²⁵ The Prosecution submits that the proposed evidence is unique and goes beyond other evidence on the record and is significant in demonstrating the gravity of the crimes and the extent of the damage

²⁰ Prosecution Request, paras 35-36.

²¹ Prosecution Request, paras 38-39.

²² Decision on Prosecution’s request to designate a person authorised to witness a declaration under Rule 68(2)(b) of the Rules, ICC-01/04-02/06-729, para. 5.

²³ See similarly *Bemba et al.* Decision on Sentencing Witnesses, paras 6-7.

²⁴ Prosecution Request, para. 13.

²⁵ Prosecution Request, paras 14.

caused.²⁶ The Prosecution further requests that the First Proposed Prosecution Witness's identity not be disclosed to the public.²⁷ It submits that he is well-known in Ituri and regularly travels around the region for work, and resides in a place where Mr Ntaganda's and the UPC/FPLC's supporters remain active.²⁸ The Prosecution avers that the witness would be at risk if his identity and cooperation with the Court were to become known in the region, particularly as he interacts on a regular basis with UPC supporters, who expressed a strong reaction to Mr Ntaganda's conviction.²⁹

12. The Defence opposes the admission of the evidence of the First Proposed Prosecution Witness on the ground that it is duplicative of other evidence on the record and would describe consequences of [REDACTED], such as [REDACTED] in Mongbwalu, that are too remote to ascribe to Mr Ntaganda.³⁰ It further argues that the Prosecution could have explored the impact of [REDACTED] further with witnesses who were previously called to testify about [REDACTED].³¹ The Defence does not take any position in relation to the Prosecution's request that the identity of the First Proposed Prosecution Witness not be disclosed to the public.³²

13. In its Reply, the Prosecution submits that the evidence of the First Proposed Prosecution Witness is not duplicative of other evidence on the record and could not have been elicited from other witnesses.³³ It further notes that the Chamber never ordered the parties to elicit all available evidence on sentencing during the trial, and argues that therefore, the fact that similar evidence could have been elicited from other witnesses is not sufficient to exclude the proposed evidence.³⁴ The Prosecution specifically avers that: (i) none of the witnesses referred to in the Defence Response who described the reaction to [REDACTED] referred to the impact thereof, nor could they have done so based on their positions at the relevant time;³⁵ and (ii) the First Proposed Prosecution Witness's long-term engagement with [REDACTED] in Ituri

²⁶ Prosecution Request, paras 7, 15, 26-28, 32.

²⁷ Prosecution Request, para. 41.

²⁸ Prosecution Request, paras 41, 45, 47.

²⁹ Prosecution Request, paras 41, 47, 53.

³⁰ Defence Response, paras 1, 3, 21-23.

³¹ Defence Response, para. 22.

³² Defence Response, para. 30.

³³ Reply, paras 10, 12-15.

³⁴ Reply, para. 11.

³⁵ Reply, paras 13-14.

and his personal knowledge of [REDACTED] puts him in an incomparable position to testify about the impact of [REDACTED].³⁶

Analysis

14. The Chamber considers that the evidence of the First Proposed Prosecution Witness is unique and goes beyond other evidence on the record. It further considers that the proposed testimony may serve to demonstrate the extent of the damage caused by some of the crimes that Mr Ntaganda has been convicted of, thereby assisting the Chamber in its assessment of the gravity of the crimes and its determination of the appropriate sentence.³⁷ Having further considered the content of the proposed evidence, in light of the present stage of the proceedings and in the interests of expeditiousness and efficiency, the Chamber finds that the prior recorded testimony of the First Proposed Prosecution Witness is, in principle, appropriate for admission under Rule 68(2)(b) of the Rules, subject to the fulfilment of the necessary formal requirements, as discussed above.³⁸

15. As for the Prosecution's protective measures request for the First Proposed Prosecution Witness, the Chamber has considered the witness's place of residence and areas of travel, and the Prosecution's submission that, due to his occupation, he comes into contact with a large number of persons who are said to support the UPC.³⁹ The Chamber has also considered the information received from the VWU about the security situation in eastern DRC.⁴⁰ While the witness is not reported to have experienced any specific security incidents, the Chamber recalls that threats to a witness or his or her family are not a prerequisite to determining whether the witness faces an objectively justifiable risk, and that there are reported instances where other witnesses were allegedly threatened as a result of their involvement with the Court.⁴¹

³⁶ Reply, para. 15.

³⁷ Article 78(1) of the Statute.

³⁸ See paragraph 10.

³⁹ See Prosecution Request, para. 47.

⁴⁰ Email from the VWU to the Chamber, 6 August 2019, at 14:41.

⁴¹ E.g. transcript of hearing on 12 December 2016, ICC-01/04-02/06-T-176-CONF-ENG ET, page 4, lines 18-23. See also Decision on request for in-court protective measures relating to the first Prosecution witness, 14 September 2015, ICC-01/04-02/06-824-Conf (a public redacted version was notified on 16 September 2015, ICC-01/04-02/06-824-Red), para. 14.

Moreover, the Chamber has taken into account the nature of the witness's anticipated testimony as put forward by the Prosecution.⁴²

16. Furthermore, the Chamber has considered the protective measures assessment of the VWU in relation to the witness, wherein the VWU noted that it is prudent for measures to be taken to avert potential harm to the witness.⁴³ In its view, restricting the public dissemination of the witness's statement would avert the employment of more intrusive measures to mitigate potential risks to the witness or his associates.⁴⁴
17. In light of the foregoing, the Chamber is satisfied that an objectively justifiable risk exists with respect to the security of the witness, warranting the shielding of his identity from the public. Accordingly, and pursuant to Rule 87 of the Rules, the Chamber decides that, once made available on the case record, the witness's prior recorded testimony be classified as confidential and that a pseudonym be used to refer to him for the purposes of the trial.

2. Mirella Papinutto ('Second Proposed Prosecution Witness')

Submissions

18. The Prosecution requests that the evidence of the Second Proposed Prosecution Witness, former Project Manager for the NGO *Cooperazione Internazionale* ('COOPI'), based in Bunia from 2003 to 2006, be admitted for the purposes of sentencing.⁴⁵ It indicates that the proposed witness worked with children associated with armed groups in a transit and orientation centre ('CTO') and is expected to provide evidence on the impact of rape, sexual slavery, enlistment, conscription and the use of individuals under 15 to participate actively in hostilities on direct victims, their families and communities in Ituri.⁴⁶ It further argues that the proposed witness's evidence goes well beyond the previous accounts of harm from individual witnesses, as she worked extensively with victims of sexual violence within the UPC/FPLC, including individuals under the age of 15, and that such evidence is significant in

⁴² See Prosecution Request, para. 14.

⁴³ Email from the VWU to the Chamber, 6 August 2019, at 14:41.

⁴⁴ Email from the VWU to the Chamber, 6 August 2019, at 14:41.

⁴⁵ Prosecution Request, paras 17, 19.

⁴⁶ Prosecution Request, para. 17.

demonstrating the gravity of the crimes and the extent of the damage caused, in particular the harm caused to the victims and their families and community.⁴⁷

19. The LRVs support the Prosecution's request in full, specifically arguing that the full impact of the conscription, enlistment and use of children under the age of 15 to participate actively in hostilities can only be assessed properly by taking into account the harm caused to the victims' families.⁴⁸
20. The Defence submits that the expected testimony of the Second Proposed Prosecution Witness substantially overlaps with that of witnesses already heard by the Chamber and is likely to introduce evidence concerning victims of crimes of which Mr Ntaganda has not been convicted.⁴⁹ It specifically argues that the witness's evidence substantially overlaps with that of two witnesses previously heard by the Chamber, who described CTOs and the long-term effects of crimes.⁵⁰
21. In its Reply, the Prosecution argues that the evidence of the Second Proposed Prosecution Witness is not duplicative of other evidence on the record and could not have been elicited from other witnesses.⁵¹ It specifically distinguishes her from other witnesses who appeared before the Chamber.⁵² It further submits that the Second Proposed Prosecution Witness is the only one who was focussed on working with girls and who remained in Ituri until 2006, and 'is therefore far better placed to testify about the impact of [Mr Ntaganda]'s crimes in the mid-2004 to 2006 period'.⁵³

Analysis

22. The Chamber considers that the Prosecution has not demonstrated that the evidence of the Second Proposed Prosecution Witness is sufficiently unique or goes beyond other evidence on the record, specifically considering the overlap of her expected testimony with the evidence of two witnesses⁵⁴ previously heard by the Chamber. Further, and specifically in relation to any evidence that the proposed witness may be

⁴⁷ Prosecution Request, paras 7, 18, 26-28, 32.

⁴⁸ LRV Response, paras 2, 12-13, 16.

⁴⁹ Defence Response, paras 1-2, 18-20.

⁵⁰ Defence Response, para. 19.

⁵¹ Reply, paras 10, 16-18.

⁵² Reply, paras 16-17.

⁵³ Reply, para. 18.

⁵⁴ [REDACTED].

able to provide in relation to the 2004 to 2006 period, the Chamber considers that it is inappropriate to hear evidence about alleged crimes during this period that falls outside the scope of the charges and for which Mr Ntaganda has not been convicted. To the extent the Prosecution meant to submit that the proposed witness would testify about any continued impact of crimes of which Mr Ntaganda has been convicted during the 2004 to 2006 period, the Chamber considers that it would be difficult or impossible to establish a connection between the individuals that the proposed witness was in contact with, and thus her direct observations, and the crimes that Mr Ntaganda has been convicted of. In light of the foregoing, the Chamber decides that it will not receive the evidence of the Second Proposed Prosecution Witness.

3. [REDACTED] ('Third Proposed Prosecution Witness')

Submissions

23. The Prosecution indicates that the Third Proposed Prosecution Witness, [REDACTED], will draw on her experience [REDACTED], including individuals under the age of 15, to provide evidence on the impact of Mr Ntaganda's crimes.⁵⁵ It argues that the proposed witness's expected testimony is unique, particularly as her work put her in direct contact with the victims of the conflict over many years.⁵⁶ The Prosecution further requests that the identity of the Third Proposed Prosecution Witness not be made known to the public, submitting that she expressed fears for her security which are well-founded and that her work would be compromised were it to become known that she provided evidence in the *Ntaganda* case.⁵⁷
24. The Defence objects to the admission of the evidence of the Third Proposed Prosecution Witness, arguing that her proposed testimony is likely to be substantially similar to the testimony of [REDACTED], as they both worked for the same organisation and share the same regional background.⁵⁸ It specifically highlights that [REDACTED] gave testimony about [REDACTED] of how the war affected women and girls and offered testimony on the long-term impact of sexual violence and argues that if the Prosecution was not satisfied with the scope of such evidence, it could have

⁵⁵ Prosecution Request, paras 7, 20-21, 26, 32.

⁵⁶ Prosecution Request, paras 21, 27, 31.

⁵⁷ Prosecution Request, paras 41, 45, 48.

⁵⁸ Defence Response, paras 2, 11-13.

asked [REDACTED] further questions.⁵⁹ The Defence does not take any position in relation to the Prosecution's request that the evidence of the Third Proposed Prosecution Witness remain anonymous on the public record.⁶⁰

Analysis

25. The Chamber considers that the evidence of the Third Proposed Prosecution Witness is unique and goes beyond other evidence on the record. Although the Chamber previously received evidence and made findings on the demobilisation of child soldiers as such,⁶¹ the proposed prior recorded testimony focusses on the short and long-term effects of enlistment, conscription and use in hostilities from [REDACTED] demobilised individuals under the age of 15 during or soon after the relevant time. Such evidence may be relevant for the Chamber's determination of the gravity of some of the crimes that Mr Ntaganda has been convicted of.⁶² Having further considered the content of the proposed evidence, in light of the present stage of the proceedings and in the interests of expeditiousness and efficiency, the Chamber finds that the prior recorded testimony of the Third Proposed Prosecution Witness is, in principle, appropriate for admission under Rule 68(2)(b) of the Rules, subject to the fulfilment of the necessary formal requirements, as set out above.⁶³

26. As for the Prosecution's request for protective measures for the Third Proposed Prosecution Witness, the Chamber has considered the witness's place of residence and her areas of activity, as put forward by the Prosecution,⁶⁴ and the information received from the VWU on the security situation in eastern DRC.⁶⁵ The Chamber further notes the Prosecution's submissions with respect to the subjective fears expressed by the witness⁶⁶ and the nature of the witness's anticipated testimony.⁶⁷

27. Furthermore, the Chamber has considered the protective measures assessment of the VWU in relation to the witness, wherein the VWU noted that that the implementation

⁵⁹ Defence Response, paras 12-13.

⁶⁰ Defence Response, para. 30.

⁶¹ Judgment, paras 417-430.

⁶² Article 78(1) of the Statute.

⁶³ See para. 10.

⁶⁴ See Prosecution Request, para. 48.

⁶⁵ Email from the VWU to the Chamber, 6 August 2019, at 14:41.

⁶⁶ Prosecution Request, para. 48.

⁶⁷ Prosecution Request, paras 20-21.

of the requested measure would avert the need of future implementation of more intrusive and life-altering measures.⁶⁸

28. In light of the foregoing, the Chamber is satisfied that an objectively justifiable risk exists with respect to the security of the witness, warranting the shielding of her identity from the public. Accordingly, and pursuant to Rule 87 of the Rules, the Chamber decides that, once made available on the case record, the witness's prior recorded testimony be classified as confidential and that a pseudonym be used to refer to her for the purposes of the trial.

4. [REDACTED] ('Fourth Proposed Prosecution Witness')

Submissions

29. The Prosecution requests admission of the evidence of [REDACTED], based in [REDACTED] from 2002 and subsequently in [REDACTED] from June 2004 to December 2006, to provide unique testimony on the short and long-term impact of the crimes for which Mr Ntaganda has been convicted on the victims and their communities, on the basis of his extensive and unique knowledge obtained in such capacity.⁶⁹

30. The Defence argues that the proposed witness comes from the same organisation as previous witnesses and is likely to give substantially similar testimony, informed by the same information.⁷⁰ It further submits that the Prosecution could have asked such other witnesses for further information on the subjects of long-term effects of the crimes on the victims.⁷¹

31. In its Reply, while acknowledging that the Fourth Proposed Prosecution Witness, due to his position at the time, would have the same basis of knowledge to testify about relevant events as certain other witnesses heard by the Chamber during the trial, the Prosecution nevertheless submits that he is better placed than those witnesses to

⁶⁸ Email from the VWU to the Chamber, 6 August 2019, at 14:41.

⁶⁹ Prosecution Request, paras 7, 23-24, 26-27, 32.

⁷⁰ Defence Response, paras 1-2, 14-16.

⁷¹ Defence Response, para. 17.

testify about the impact of Mr Ntaganda's crimes in the period from 2004 to 2006 as he was exclusively focussed on and permanently based in Ituri during that period.⁷²

Analysis

32. The Chamber considers that the Prosecution has not demonstrated that the evidence of the Fourth Proposed Prosecution Witness is sufficiently unique and goes beyond other evidence on the record, specifically considering the overlap with the evidence of two witnesses⁷³ previously heard by the Chamber. Further, the Chamber considers that it would likely be difficult or impossible to establish a connection between the witness's direct observations and the crimes that Mr Ntaganda has been convicted of. In light of the foregoing, the Chamber decides that it will not receive the evidence of the Fourth Proposed Prosecution Witness.

5. D-0020

Submissions

33. The Defence submits that the testimony of D-0020, a former member of the FPLC, is expected to cover: (i) the demobilisation of a large number of FPLC members, including himself; (ii) the integration of FPLC members in the FARDC in 2004; (iii) Mr Ntaganda's positive attitude and contribution towards demobilisation; and (iv) the effective collaboration between the UPC/FPLC and MONUC towards demobilisation.⁷⁴ The Defence argues that D-0020's evidence is relevant for the purposes of mitigation, as it details efforts made by Mr Ntaganda after the period of the charges to bring about peace and stability and to encourage demobilisation.⁷⁵

34. The LRVs argue that the proposed evidence is cumulative in nature and pertains to matters that have been extensively litigated at trial.⁷⁶ They highlight the Chamber's dismissal of previous arguments regarding Mr Ntaganda's efforts to bring about peace and ethnic reconciliation and argue that the Chamber already found that the UPC/FPLC did not effectively engage in the demobilisation process and some

⁷² Reply, paras 10, 19-22.

⁷³ [REDACTED].

⁷⁴ Defence Request, para. 21; and D-0020 Witness Summary in Annex A, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 6.

⁷⁵ Defence Request, paras 3, 16, 21.

⁷⁶ LRVs Response, paras 3, 19, 25-27.

individuals who were demobilised were rearmed or threatened into reintegrating into the UPC forces.⁷⁷ Further, the LRVs oppose the admission of D-0020's evidence, as they submit that his credibility is questionable, because he appears to have been in touch with a former resource person of Mr Ntaganda, in relation to whom the Chamber received evidence that he arranged for individuals to 'tell the same story'.⁷⁸ They further aver that since D-0020 was listed as a witness for the Defence during the previous stage of the trial and subsequently withdrawn, he cannot now be called for the purposes of sentencing.⁷⁹

35. The Prosecution does not oppose the admission of D-0020's evidence.⁸⁰

Analysis

36. The Chamber considers that D-0020's proposed evidence is unique and goes beyond other evidence on the record. Furthermore, to the extent that it details efforts made by Mr Ntaganda to bring about peace and security in the DRC after the events forming part of the charges, including by the submitted effective cooperation with MONUC, the expected testimony may be relevant for the purposes of mitigation.⁸¹ As for the LRVs' arguments concerning the proposed witness's credibility, the Chamber considers that they are speculative at this stage. The Chamber specifically notes that the LRVs' submissions are not based on 'evidence' that the Chamber 'previously received', but on submissions by the Prosecution before a different chamber.⁸² In addition, the fact that the proposed witness was contacted for the purposes of the case of *The Prosecutor v. Thomas Lubanga* by a person in relation to whom the Chamber several years later, for the purposes of the *Ntaganda* case, placed restrictions on Mr Ntaganda's contacts,⁸³ does not, without more, affect the credibility of the proposed witness or warrant against the admission of his prior recorded testimony.

⁷⁷ LRVs Response, paras 21, 23.

⁷⁸ LRVs Response, paras 3, 28, 31-32, 34.

⁷⁹ LRVs Response, paras 3, 33.

⁸⁰ Prosecution Response, footnote 23.

⁸¹ Rule 145(2)(a)(ii) of the Rules. *See also* Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba*, Decision on requests to present additional evidence and submissions on sentence and scheduling the sentencing hearing, 4 May 2016, ICC-01/05-01/08-3384, para. 27; and Trial Chamber I, *The Prosecutor v. Thomas Lubanga*, Order on the defence request to present evidence during the sentencing hearing, 11 June 2012, ICC-01/04-01/06-2895, paras 10, and 19.

⁸² *See* LRVs Response, para. 31.

⁸³ *See* LRVs Response, para. 31.

Having further considered the content of the proposed evidence, in light of the present stage of the proceedings and in the interests of expeditiousness and efficiency, the Chamber finds that the prior recorded testimony of D-0020 is, in principle, appropriate for admission under Rule 68(2)(b) of the Rules, subject to the fulfilment of the necessary formal requirements, as set out above.⁸⁴

6. D-0302

Submissions

37. The Defence submits that D-0302, former *Aumônier-général* of the FPLC, will testify about: (i) his direct interactions with Mr Ntaganda; (ii) Mr Ntaganda's role in a campaign of ethnic reconciliation and pacification with Lendu leaders in 2004; (iii) his impressions of Mr Ntaganda as a family and religious man; and (iv) Mr Ntaganda's role in contributing to peace and security in Ituri.⁸⁵ It argues that the proposed evidence is relevant to Mr Ntaganda's conduct after the crimes and his personal circumstances.⁸⁶

38. The LRVs oppose the admission of the proposed evidence, arguing that it is cumulative in nature and pertains to matters that have been extensively litigated at trial.⁸⁷ They highlight that the Chamber dismissed arguments regarding Mr Ntaganda's efforts to bring about peace and ethnic reconciliation during the trial in light of significant evidence in contradiction of this alleged goal of Mr Ntaganda.⁸⁸

39. The Prosecution does not oppose the admission of D-0302's evidence.⁸⁹

Analysis

40. The Chamber considers that D-0302's proposed evidence is unique and goes beyond other evidence on the record. Furthermore, as noted above, to the extent that it details efforts made by Mr Ntaganda to bring about peace and security in the DRC and to ensure ethnic reconciliation after the events forming part of the charges, the expected

⁸⁴ See para. 10.

⁸⁵ Defence Request, para. 23; and D-0302 Witness Summary in Annex A, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 7.

⁸⁶ Defence Request, paras 3, 16, 23.

⁸⁷ LRVs Response, paras 3, 19, 25-27.

⁸⁸ LRVs Response, para. 21.

⁸⁹ Prosecution Response, footnote 23.

testimony may be relevant for the purposes of mitigation. Having further considered the content of the proposed evidence, in light of the present stage of the proceedings and in the interests of expeditiousness and efficiency, the Chamber finds that the prior recorded testimony of D-0302 is, in principle, appropriate for admission under Rule 68(2)(b) of the Rules, subject to the fulfilment of the necessary formal requirements, as set out above.⁹⁰

7. D-0303

Submissions

41. The Defence submits that D-0303 will describe the conduct of Mr Ntaganda in LARGU after he moved there with his family in 2004, in particular speeches and meetings in which Mr Ntaganda was vocal about building peace and encouraging ethnic reconciliation, as well as his attitude towards women, including his own wife.⁹¹ It argues that her proposed testimony is relevant to Mr Ntaganda's conduct after the crimes aimed at bringing about peace and reconciliation and his personal circumstances.⁹²
42. The LRVs oppose the admission of the proposed evidence, arguing that it is cumulative in nature and pertains to matters that have been extensively litigated at trial, including Mr Ntaganda's alleged efforts to bring about peace and reconciliation in Ituri.⁹³ They further refer to the Chamber's findings on Mr Ntaganda's attitude towards women, rejecting the argument that Mr Ntaganda was mindful of the need to punish instances of rape.⁹⁴
43. The Prosecution does not oppose the admission of the witness's evidence as such, but requests that the scope of her testimony be limited as some aspects are irrelevant to sentencing.⁹⁵ It specifically requests that certain aspects of her proposed evidence be

⁹⁰ See para. 10.

⁹¹ Defence Request, para. 22; and D-0303 Witness Summary in Annex A, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 8.

⁹² Defence Request, paras 3, 16, 22.

⁹³ LRVs Response, paras 3, 19, 21, 25-27.

⁹⁴ LRVs Response, para. 22.

⁹⁵ Prosecution Response, paras 2, 17, 20, 22, 41.

dismissed due to a lack of context and/or in the absence of information as to when they are alleged to have occurred.⁹⁶

Analysis

44. The Chamber considers D-0303's expected testimony to be unique and to go beyond other evidence on the record, in so far as it concerns events which occurred outside the temporal scope of the charges, as well as to some extent concerning Mr Ntaganda's character *vis-à-vis* others.⁹⁷ Furthermore, as noted above, efforts made by Mr Ntaganda to bring about peace and security after the events forming part of the charges may be relevant for the purposes of mitigation. Having further considered the content of the proposed evidence, in light of the present stage of the proceedings and in the interests of expeditiousness and efficiency, the Chamber finds that the prior recorded testimony of D-0303 is, in principle, appropriate for admission under Rule 68(2)(b) of the Rules, subject to the fulfilment of the necessary formal requirements, as set out above.⁹⁸ However, the relevance⁹⁹ and the timing¹⁰⁰ of certain parts of the proposed testimony are at this stage unclear. The Chamber therefore instructs the Defence to ensure that the witness's statement remains limited to what is relevant for the purposes of sentencing and that it does not address matters that were already litigated at trial.

45. The Chamber further notes that the video DRC-OTP-0159-0477 is referred to in the summary of D-0303's expected testimony.¹⁰¹ Following receipt of the witness statement, the Chamber will consider whether excerpts of the video commented on by the witness, as well as the related transcription and translation¹⁰² will be admitted into evidence as associated items.

⁹⁶ Prosecution Response, para. 22.

⁹⁷ See Defence Request, para. 22; and D-0303 Witness Summary in Annex A, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 8.

⁹⁸ See para. 10.

⁹⁹ E.g. D-0303 Witness Summary in Annex A, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 8, para. 1.

¹⁰⁰ E.g. D-0303 Witness Summary in Annex A, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 8, para. 3.

¹⁰¹ D-0303 Witness Summary in Annex A, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 8, para. 4.

¹⁰² Annex B, *annexed to* ICC-01/04-02/06-2369-Conf-Red, page 2, documents 2 and 3.

8. D-0304

Submissions

46. The Defence requests admission of the evidence of D-0304, former UPC *Secrétaire national des communications et aux relations avec les médias*, who is expected to testify about several meetings attended by Mr Ntaganda and their context, as well as about speeches given by Mr Ntaganda in 2003 in which he expressed his desire for ethnic reconciliation and pacification and stressed the importance of discipline.¹⁰³ It argues that D-0304's evidence is particularly probative as he is a non-Hema and goes to show Mr Ntaganda's efforts and undertakings to bring about ethnic reconciliation and maintain military discipline.¹⁰⁴
47. The LRVs oppose the admission of the proposed evidence, arguing that it is cumulative in nature and pertains to matters that have been extensively litigated at trial.¹⁰⁵ In particular, the LRVs argue that the Chamber already heard evidence on Mr Ntaganda's reputation and conduct after the crimes, including his ability to maintain military discipline.¹⁰⁶
48. The Prosecution requests that the Chamber decline to admit D-0304's testimony as his proposed evidence is irrelevant, cumulative of evidence admitted at trial and addresses issues on which the Chamber has already made factual findings.¹⁰⁷ It argues that: (i) the Defence has not demonstrated the relevance of certain aspects of the proposed evidence to the factors set out in Article 78 of the Statute and Rule 145(2) of the Rules; and (ii) in any case, the Defence has already presented evidence – and the Chamber made factual findings – on these issues at trial.¹⁰⁸ Should the Chamber deem relevant one or more of the issues that D-0304 is expected to provide evidence about, the Prosecution requests that the Chamber issue an order limiting his evidence to any such issues.¹⁰⁹

¹⁰³ Defence Request, para. 24; and D-0304 Witness Summary in Annex A, *annexed to ICC-01/04-02/06-2369-Conf-Red*, page 9.

¹⁰⁴ Defence Request, paras 3, 16, 24.

¹⁰⁵ LRVs Response, paras 3, 19, 21, 25-27.

¹⁰⁶ LRVs Response, para. 24.

¹⁰⁷ Prosecution Response, paras 2, 17-18, 41.

¹⁰⁸ Prosecution Response, para. 18.

¹⁰⁹ Prosecution Response, para. 19.

Analysis

49. The Chamber considers that the Defence has not sufficiently demonstrated that D-0304's anticipated testimony is unique and goes beyond other evidence on the record. It specifically notes that, in its Judgment, the Chamber did make certain finding concerning Mr Ntaganda's role in enforcing order among his troops, including in relation to instances where crimes committed remained unpunished.¹¹⁰ Furthermore, the Chamber also dismissed arguments concerning the alleged genuineness of the message of peace and ethnic reconciliation of the UPC.¹¹¹ In light of the foregoing, the Chamber decides not to receive the evidence of D-0304.

B. Documentary evidence

Submissions

50. The Prosecution requests that in case the Chamber grants the Defence's request to receive the evidence of D-0020 and D-0047, four documents – a series of letters between representatives of MONUC and members of the DRC government, Thomas Lubanga and Mr Ntaganda¹¹² – be admitted to assist the Chamber in contextualising and evaluating the evidence proposed by the Defence.¹¹³ It argues that all four documents are relevant to Mr Ntaganda's or D-0047's cooperation with MONUC and bear sufficient indicia of reliability for the purposes of admission.¹¹⁴

51. The Defence does not oppose the Prosecution's request.¹¹⁵

Analysis

52. As the Chamber previously decided to hear D-0047 as a *viva voce* witness,¹¹⁶ and in the present decision decided to receive the prior recorded testimony of D-0020, it will consider the aforementioned Prosecution request.

¹¹⁰ Judgment, paras 260-261, 331-332, 371, 376-377, 639, 846, 855.

¹¹¹ Judgment, paras 686-689.

¹¹² Prosecution Response, para. 30; DRC-OTP-2057-0099; DRC-OTP-0151-0306; DRC-OTP-0142-0038; and DRC-OTP-0142-0042.

¹¹³ Prosecution Response, paras 30-31.

¹¹⁴ Prosecution Response, para. 31.

¹¹⁵ Further Defence Response, paras 13-14.

¹¹⁶ See Decision on requests to call witnesses in relation to sentencing and for increased monitoring of Mr Ntaganda's contacts and scheduling the sentencing hearing, 20 August 2019, ICC-01/04-02/06-2384-Conf (a public redacted version was notified on 21 August 2019, ICC-01/04-02/06-2384-Red).

53. The Prosecution submits that the first document, DRC-OTP-2057-0099,¹¹⁷ a letter from William Swing to DRC President Joseph Kabila dated 24 January 2004, shows, *inter alia*, the former complaining about Mr Ntaganda ordering his troops to fire on MONUC forces, and demanding his arrest.¹¹⁸ The second document, DRC-OTP-0151-0306, a letter sent by Dominique McAdams to Thomas Lubanga dated 21 June 2004, refers to D-0047's alleged lack of cooperation with MONUC.¹¹⁹ The third document, DRC-OTP-0142-0038, a letter from Dominique McAdams to a DRC government minister dated 16 November 2004, lists a number of incidents reported by NGOs in areas controlled by the UPC.¹²⁰ The fourth document, DRC-OTP-0142-0042, a letter from Dominique McAdams to Mr Ntaganda, dated 17 November 2004, contains complaints about the UPC's actions and demands that Mr Ntaganda put an end to such actions.¹²¹ The Chamber notes that the Defence does not dispute the authenticity of the documents. In light of the foregoing, the Chamber finds that the aforementioned four documents are *prima facie* relevant to the Chamber's assessment of Mr Ntaganda's conduct after the events forming part of the charges, especially as concerns issues the Defence wishes to bring to the attention of the Chamber, such as his cooperation with MONUC, and may therefore assist the Chamber and thus have probative value. Furthermore, the Chamber is satisfied that no undue prejudice would arise from their admission. Although D-0047 still has to testify, and the Chamber still has to receive the evidence of D-0020, the Chamber considers it most efficient to admit these items into evidence by way of the present decision.¹²²

54. The Chamber further notes that, in the Defence Request, the Defence refers to a number of documents which it intends to tender in support of Mr Ntaganda's alleged efforts and undertakings towards peace and reconciliation, ensuring security, demobilisation and the maintenance of military discipline and which are meant to corroborate and contextualise the evidence of the witnesses proposed by the Defence.¹²³ Some of these items are not specifically referred to in the summaries of

¹¹⁷ Pages 0101-0103.

¹¹⁸ Prosecution Response, para. 30.

¹¹⁹ Prosecution Response, para. 30.

¹²⁰ Prosecution Response, para. 30.

¹²¹ Prosecution Response, para. 30.

¹²² For document DRC-OTP-2057-0099, only pages 0101-0103 are admitted.

¹²³ Defence Request, paras 5, 25.

the expected evidence of the proposed Defence witnesses.¹²⁴ The Prosecution further requests that the Chamber admit one additional document and excerpts of six others, should the Chamber admit one of the documents mentioned by the Defence.¹²⁵ In relation to such documents that relate to witnesses who will testify *viva voce*, the Chamber expects the Defence to tender them through these witnesses. Noting the parties' intention to seek the admission of certain documents other than through a witness, the Chamber further directs the parties and the participants to file any requests for admission of documentary evidence other than through witnesses by 30 August 2019.

IN VIEW OF THE ABOVE, THE CHAMBER HEREBY

REJECTS the request to receive the evidence of the Second Proposed Prosecution Witness, the Fourth Proposed Prosecution Witness and D-0304;

GRANTS the request to receive the evidence of the First Proposed Prosecution Witness, the Third Proposed Prosecution Witness, D-0020, D-0302 and D-0303;

GRANTS the protective measure of use of a pseudonym for the purposes of the sentencing proceedings in relation to the First Proposed Prosecution Witness and the Third Proposed Prosecution Witness;

INSTRUCTS the Prosecution and the Defence to submit the prior recorded testimony of the First Proposed Prosecution Witness, the Third Proposed Prosecution Witness, D-0020, D-0302 and D-0303 by 9 September 2019;

ADMITS the following items into evidence:

- DRC-OTP-2057-0099 (pages 0101 to 0103 only);
- DRC-OTP-0151-0306;
- DRC-OTP-0142-0038; and

¹²⁴ See Defence Request, para. 25; and Annex A and Annex B *annexed to* ICC-01/04-02/06-2369-Conf-Red.

¹²⁵ Prosecution Response, paras 2, 32, 41.

- DRC-OTP-0142-0042;

INSTRUCTS the Registry to update the eCourt metadata of the aforementioned items accordingly; and

SETS as the deadline for any requests for admission of documentary evidence other than through witnesses for 30 August 2019.

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

A handwritten signature in black ink, consisting of a large, stylized 'F' followed by 'remr', written over a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'K. Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, appearing to be 'Chang-ho Chung', written over a horizontal line.

Judge Chang-ho Chung

Dated 23 August 2019
At The Hague, The Netherlands