

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **7 November 2017**

TRIAL CHAMBER VI

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Public redacted version of 'Decision on Defence request for 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
Ms Nicole Samson

Counsel for Bosco Ntaganda

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

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), 64, and 67-69 of the Rome Statute, and Rules 63(2) and 68(2)(c) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence request for admission of the prior recorded testimony of Witness D-0080'.

I. Procedural history

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)', including a request to admit the prior recorded testimony of Witness D-0080 under Rule 68(2)(c) ('Request').¹
2. On 24 October 2017, the Chamber directed the Registry to provide further information on the feasibility of Witness D-0080 testifying orally via video-link, including whether this could be facilitated by the Registry in a safe manner.²
3. On 27 October 2017, the Office of the Prosecutor ('Prosecution') filed its response to the Request, opposing it ('Response').³
4. On 30 October 2017, in accordance with the Chamber's instruction,⁴ the Registry filed the 'Registry's observations on the feasibility of Witness D-0080's testimony through video-link' ('Registry Observations').⁵

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, the parties, and the participants, on 24 October 2017 at 12:05.

³ 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, ICC-01/04-02/06-2087-Conf, with confidential Annexes 1-2.

⁴ See email communication from the Chamber to the Registry, the parties, and the participants, on 24 October 2017 at 12:05.

⁵ ICC-01/04-02/06-2088-Conf.

5. On 2 November 2017, the Defence filed a request for leave to reply to the Response.⁶ As the submissions therein do not relate to Witness D-0080, the Chamber shall not address it further in the present decision.

II. Submissions

Defence

6. The Defence seeks the admission of the prior recorded testimony of Witness D-0080, described as the [REDACTED], in the form of a witness statement taken on [REDACTED].⁷ In support of its Request, the Defence submits that the prior recorded testimony of Witness D-0080 is ‘manifestly relevant’.⁸ The Defence further argues that the statement of Witness D-0080 bears sufficient indicia of reliability for admission under Rule 68(2)(c) as it: (i) was obtained in the ordinary course of investigations; (ii) was translated to the witness in a language he understands; (iii) was signed by the witness on all pages; (iv) contains a declaration that the testimony was given voluntarily; (v) is internally coherent; (vi) provides a detailed narrative of the events based on the witness’s own experience; and (vii) is cumulative of other in-court evidence.⁹
7. The Defence further submits that Witness D-0080 is unavailable within the meaning of Rule 68(2)(c) of the Rules, being [REDACTED]. It avers that Witness D-0080 has no travel documents permitting travel outside [REDACTED], and that the Registry indicated via email to the Defence that it

⁶ Request for leave to reply to the “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, ICC-01/04-02/06-2095-Conf.

⁷ Request, ICC-01/04-02/06-2066-Conf-AnxXI.

⁸ Request, ICC-01/04-02/06-2066-Conf-Corr, para. 56.

⁹ Request, ICC-01/04-02/06-2066-Conf-Corr, para. 56.

is unable to obtain such documentation or to facilitate testimony by video-conference.¹⁰

Prosecution

8. The Prosecution opposes the Request on the basis that, in its view, the Defence is premature in asserting that Witness D-0080 is unavailable within the meaning of Rule 68(2)(c) of the Rules, arguing that: (i) the Defence has failed to elaborate on Witness D-0080's legal status, which it describes as [REDACTED], a category not recognised under international law; (ii) the email correspondence from the Victims and Witnesses Unit ('VWU') indicates that travel for the witness may be possible if the VWU it can, *inter alia*, secure the permission and assistance of [REDACTED] to facilitate video-link testimony; (iii) the Defence provides no indication that the witness was placed at risk following the taking of his statement, or of meeting him, on [REDACTED]; (iv) the Defence has not presented any information that suggests that Witness D-0080's testimony cannot be secured with the exercise of reasonable diligence or that such testimony would subject the witness to unnecessary hardship; (v) as the witness's evidence is potentially highly significant to the case, all relevant options must be explored before admitting his prior recorded testimony without providing the Prosecution the opportunity to test its veracity; and (vi) the issues as to Witness D-0080's purported unavailability should have been raised earlier.¹¹
9. The Prosecution submits that, even if the Chamber determines that Witness D-0080 is unavailable, either now or at a later stage, the Request should be rejected on the basis that: (i) the prior recorded testimony of the witness is not reliable; (ii) the prior recorded testimony of the witness is of low probative

¹⁰ Request, ICC-01/04-02/06-2066-Conf-Corr, para. 56. *See also* ICC-01/04-02/06-2066-Conf-AnxXII.

¹¹ Response, ICC-01/04-02/06-2087-Conf, paras 99-110.

value; and (iii) admission of the prior recorded testimony would be unduly prejudicial to the Prosecution. Accordingly, in the submission of the Prosecution, the witness 'must be heard entirely *viva voce*'.¹²

Registry

10. The Registry states that Witness D-0080's legal status is unclear, that he has no identification or travel documentation, and that there are a [REDACTED]. Accordingly, in the view of the Registry, 'it will be very difficult for the [w]itness to leave the territory of [REDACTED] with the hope to return'.¹³
11. In relation to the feasibility of Witness D-0080 testifying via video-link, the Registry observes that there are two locations where video-link testimony may take place, both of which would require state cooperation: (i) on the territory of [REDACTED], noting that the VWU is of the view that [REDACTED]; or (ii) in a neighbouring country, if the [REDACTED] and the witness obtains travel documentation. The Registry indicates that, if the Chamber decides that video-link arrangements should be pursued, it would request the assistance of [REDACTED], which it considers to be 'the safest option for a video-link testimony'. In this respect, the Registry indicates that it would require a minimum of two months to obtain a reply [REDACTED], and an additional unspecified time for logistical arrangements. In terms of the potential for video-link from a neighbouring country, the Registry indicates that, given the specific circumstances of the witness, it cannot guarantee the witness's safety outside [REDACTED], or his return thereto.¹⁴

¹² Response, ICC-01/04-02/06-2087-Conf, paras 111-122.

¹³ Registry Observations, ICC-01/04-02/06-2088-Conf, paras 8-10.

¹⁴ Registry Observations, ICC-01/04-02/06-2088-Conf, paras 11-23.

III. Analysis

12. 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.¹⁵
13. At the outset, the Chamber must determine whether Witness D-0080 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’. The Chamber notes that, on the basis of the information available to it at that stage, the Defence submits that the witness is unavailable as ‘[h]e has no travel documents permitting travel outside [REDACTED] and the Registry has indicated that it is unable to obtain such documentation or to facilitate testimony by video-conference’.¹⁶
14. Notwithstanding, the subsequently-ordered Registry Observations clearly indicate that such testimony via video-link may yet be possible. The Chamber is not of the view that video-link *outside* [REDACTED] would be feasible, given the observations of the Registry on this option regarding the attendant risk this would pose to the witness. However, the Chamber notes that the Registry indicates that video-link testimony from [REDACTED] may be an option, provided that [REDACTED].¹⁷
15. The Chamber further notes the Registry Observations that, according to the VWU, [REDACTED], and the VWU was informed by the Defence that the witness’s identity was disclosed in the cooperation request to interview the

¹⁵ 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.

¹⁶ See Request, ICC-01/04-02/06-2066-Conf-Corr, para. 57.

¹⁷ See Registry Observations, ICC-01/04-02/06-2088-Conf, paras 15-17.

witness [REDACTED].¹⁸ Accordingly, it appears that the possibility of video-link testimony from [REDACTED] could be explored without placing the witness at undue risk, despite his uncertain legal status.

16. In light of foregoing, the Chamber considers that, even in according a broad interpretation to the term ‘unavailable’ under Rule 68(2) of the Rules,¹⁹ at this stage, the witness cannot be considered unavailable to testify orally due to obstacles that cannot be overcome with reasonable diligence. Having found that the first Rule 68(2)(c) criterion is not met, the Chamber is not required to consider the remaining criteria under this provision, and rejects the Request.

17. Notwithstanding, the Chamber notes that Witness D-0080 is [REDACTED] whose testimony may be relevant to several charges, and may assist the Chamber in its determination of the truth.²⁰ In order to facilitate any discussions between the Registry and the Defence regarding arrangements for the *viva voce* testimony of the witness, and noting that the Chamber has previously considered that use of video-link testimony does not require exceptional justification,²¹ the Chamber indicates already at this stage 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. In this respect, the Chamber emphasises that, given the current stage of proceedings, any such

¹⁸ Registry Observations, ICC-01/04-02/06-2088-Conf, para. 12.

¹⁹ See *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. 16.

²⁰ See Request, ICC-01/04-02/06-2066-Conf-Corr, para. 55 and Defence Final Lists of Witnesses and Evidence, 26 April 2017, ICC-01/04-02/06-1881-Conf-AnxB, pages 80-81.

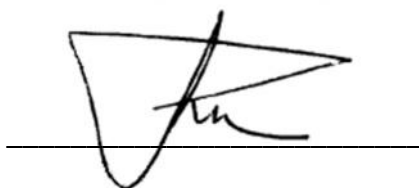
²¹ See Transcript of hearing on 29 May 2017, ICC-01/04-02/06-T-206-CONF-ENG ET, pages 36-37; Decision on Defence’s request to hear Witness D-0054’s testimony via video-link and advance notice concerning Witness D-0210, 23 May 2017, ICC-01/04-02/06-1919, para. 3; Decision on Prosecution’s request to hear Witness P-0668’s testimony via video-link, 9 September 2016, ICC-01/04-02/06-1499, para. 4; Public redacted version of ‘Decision on Prosecution’s request to hear Witness P-0918’s testimony via video-link’, 4 November 2016, ICC-01/04-02/06-1612-Conf, ICC-01/04-02/06-1612-Red, para. 5.

arrangements should be finalised in sufficient time to allow the witness's testimony to be scheduled during the sixth evidentiary block, as appropriate.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request, insofar as it relates to Witness D-0080.

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 a cursive 'remr', positioned above a horizontal line.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', positioned above a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct characters, positioned above a horizontal line.

Judge Chang-ho Chung

Dated 7 November 2017

At The Hague, The Netherlands