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TRIAL CHAMBER V

Before:

Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Chang-ho Chung

Judge Beti Hohler, Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Decision on the Yekatom Defence Requests for Formal Submission of Prior
Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules concerning
Witnesses D29-6035 and D29-4011**

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

☒ **The Office of the Prosecutor**

☒ **Counsel for the Defence**

Yekatom Defence

Ngaïssona Defence

☒ **Legal Representatives of the Victims**

Common Legal Representative of the Former
Child Soldiers

Common Legal Representatives of Victims of
Other Crimes

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

☐ **Unrepresented Applicants
(Participation/Reparation)**

☐ **The Office of Public Counsel for Victims**

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

☐ **States' Representatives**

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☒ **Victims and Witnesses Unit**

☐ **Detention Section**

☐ **Victims Participation and Reparations
Section**

☐ **Other**

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64, 67(1) and 69 of the Rome Statute (the ‘Statute’), and Rules 68(1) and (2)(c) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Yekatom Defence Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules concerning Witnesses D29-6035 and D29-4011’.

I. Procedural history

1. The Chamber recalls the procedural history as set out in its ‘Decision on the Prosecution Request for Extension of Time to Respond to [the Yekatom Defence’s (the ‘Defence’)] Current and Prospective Requests under Rule 68(2)(b) and 68(3) of the Rules’.¹ It notably recalls that, on 17 November 2023, in accordance with the time limit set by the Chamber,² the Defence filed its lists of evidence and of witnesses,³ indicating that D29-4011 would testify *viva voce* and that it would seek to introduce D29-6035’s prior recorded testimony into evidence pursuant to Rule 68(2) of the Rules.⁴
2. On 2 February 2024, the Chamber ordered the Defence to submit any requests under Rule 68(2)(c) of the Rules no later than one week after the testimony of the last witness called by either defence teams.⁵
3. On 26 March 2024, in response to a request from the Defence,⁶ the Chamber decided to introduce into evidence D29-6035’s prior recorded testimony pursuant

¹ 30 November 2023, ICC-01/14-01/18-2229, paras 1-10.

² Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence), 29 May 2023, ICC-01/14-01/18-1892, para. 21(i).

³ See Yekatom Defence’s List of Witnesses and Evidence, ICC-01/14-01/18-2212-Conf (with confidential Annexes A, B, C and D).

⁴ See Annexes A and B to the Yekatom Defence’s List of Witnesses and Evidence, 17 November 2023, ICC-01/14-01/18-2212-Conf-AnxA and ICC-01/14-01/18-2212-Conf-AnxB.

⁵ Further Directions on the Conduct of the Proceedings (End of Defence Presentation of Evidence and Closure of Evidence), ICC-01/14-01/18-2342, para. 5.

⁶ First Defence Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b), 17 November 2023, ICC-01/14-01/18-2213-Conf (with Confidential Annex A), paras 1, 73-75, 107 (public redacted version notified on 3 April 2024, ICC-01/14-01/18-2213-Red).

to Rule 68(2)(b) of the Rules, subject to the receipt of the declaration under said provision (the ‘Rule 68(2)(b) Decision on D29-6035’).⁷

4. On 29 May 2024, after D29-4011’s testimony was re-scheduled on several occasions due to the witness’s health condition,⁸ the Defence informed the Chamber that the medical practitioner had not cleared the witness to testify in person. It further indicated that it would collect her statement in June 2024, and seek leave to add it to its list of evidence and introduce it under Rule 68(2) of the Rules.⁹
5. On 30 May 2024, pursuant to the Chamber’s order,¹⁰ the Registry provided a report on its efforts in securing the attendance of all remaining witnesses, indicating that D29-4011 had been declared ‘medically unfit to testify on 14 May 2024, due to several chronic health conditions that pose a high risk’, and that the medical conclusion was that ‘the witness cannot testify now or in the future’ (the ‘Registry Report’).¹¹
6. On 19 June 2024, the Defence filed a request seeking the formal submission of D29-6035’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, as the witness passed away (the ‘First Rule 68(2)(c) Request’).¹²

⁷ Second Decision on the Yekatom Defence Requests for the Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b) and Related Requests, ICC-01/14-01/18-2424-Conf, para. 70, p. 33.

⁸ *See, inter alia*, email from the Yekatom Defence, 14 November 2023, at 14:01; email from the Chamber, 13 December 2023, at 14:40; emails from the Yekatom Defence, 8 January 2024, at 11:25; 16 January 2024, at 12:52; 15 February 2024, at 16:20; 6 March 2024, at 17:06; 8 March 2024, at 18:34; 20 March 2024, at 13:25.

⁹ Email from the Yekatom Defence, 29 May 2024, at 12:47. *See also* email from the Yekatom Defence, 31 May 2024, at 09:50.

¹⁰ Email from the Chamber, 28 May 2024, at 16:04.

¹¹ Registry’s Report on its Efforts to Secure the Attendance of Defence Witnesses, ICC-01/14-01/18-2513-Conf-Exp, confidential *ex parte*, only available to the Registry, para. 21 (corrected and corrected confidential redacted versions notified on 3 June 2024, ICC-01/14-01/18-2513-Conf-Exp-Corr and ICC-01/14-01/18-2513-Conf-Red-Corr; lesser redacted confidential *ex parte* version, only available to the Registry and the Yekatom Defence, notified on 4 June 2024, ICC-01/14-01/18-2513-Conf-Exp-Corr-Red).

¹² Yekatom Defence Request for the introduction of CAR-D29-P-6035’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/14-01/18-2535-Conf (with confidential Annexes A, B and C), paras 1, 3, 10, 20-21, 40. The annexes respectively contain the statement of D29-6041, D29-6035’s sister, regarding the latter’s death, ICC-01/14-01/18-2535-Conf-AnxA (the ‘D29-6041’s statement’); D29-6035’s death certificate, ICC-01/14-01/18-2535-Conf-AnxB (the ‘D29-6035’s Death

7. On 21 June 2024, the Office of the Prosecutor (the ‘Prosecution’) informed the Chamber that it does not intend to respond to the First Rule 68(2)(c) Request and defers to the discretion of the Chamber.¹³
8. On 24 June 2024, the Ngaïssona Defence, the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes, respectively, informed the Chamber that they do not intend to respond to the First Rule 68(2)(c) Request.¹⁴
9. On 25 June 2024, the Defence requested the Chamber’s leave to (i) add D29-4011’s statement (CAR-D29-0009-0680) and her medical assessment (CAR-D29-0009-0691), both produced in June 2024 (collectively, the ‘D29-4011 Material’), to its list of evidence (the ‘Request to Add’); and (ii) introduce the witness’s prior recorded testimony into evidence pursuant to Rule 68(2)(c) of the Rules (the ‘Rule 68(2)(c) Request concerning D29-4011’; collectively, the ‘Second Rule 68(2)(c) Request’).¹⁵
10. On 1 July 2024, the Ngaïssona Defence informed the Chamber that it does not intend to respond to the Second Rule 68(2)(c) Request.¹⁶
11. On 8 July 2024, the Prosecution opposed the Second Rule 68(2)(c) Request (the ‘Prosecution Response’).¹⁷

Certificate’); and an investigation report related to D29-6035’s death, ICC-01/14-01/18-2535-Conf-AnxC.

¹³ Email from the Prosecution, 21 June 2024, at 16:36.

¹⁴ Email from the Ngaïssona Defence, 24 June 2024, at 12:17; email from the Common Legal Representative of the Former Child Soldiers, 24 June 2024, at 12:32; email from the Common Legal Representatives of Victims of Other Crimes, 24 June 2024, at 12:24.

¹⁵ Yekatom Defence Request for Formal Submission of Prior Recorded Testimony of CAR-D29-P-4011 Pursuant to Rule 68(2)(c), ICC-01/14-01/18-2549-Conf (with confidential Annex A, ICC-01/14-01/18-2549-Conf-AnxA), paras 1, 4, 66.

¹⁶ Email from the Ngaïssona Defence, 1 July 2024, at 09:24.

¹⁷ Réponse de l’Accusation à la “Yekatom Defence Request for Formal Submission of Prior Recorded Testimony of CAR-D29-P-4011 Pursuant to Rule 68(2)(c)” (ICC-01/14-01/18-2549-Conf), ICC-01/14-01/18-2579-Conf.

12. On 29 July 2024, the Defence provided information it received from the Victims and Witnesses Unit (the ‘VWU’) concerning D29-4011’s health status, informing that [REDACTED].¹⁸

II. Analysis

13. The Chamber incorporates by reference the applicable law as previously set out regarding Rule 68(2)(c) of the Rules.¹⁹
14. The Chamber further notes the Appeals Chamber’s recent judgment in relation to Rule 68(2)(c) of the Rules.²⁰ The Appeals Chamber found that, pursuant to Rule 68(2)(c) of the Rules, the decision whether to allow the introduction, in whole or in part, of a prior recorded testimony that goes to the acts and conduct of the accused ‘is a matter for the trial chamber’s consideration in making its discretionary decision with respect to the particular prior recorded testimony in issue’.²¹ In this context, it further found that ‘while not a requirement, the existence of corroborative evidence in relation to the prior recorded testimony as a whole may be a relevant factor for assessing any prejudice or inconsistency with the rights of the accused arising from its introduction’.²²

A. The First Rule 68(2)(c) Request

15. Witness D29-6035 is the father of eight children, including [REDACTED]. He is also the stepfather of [REDACTED], who are the children of [REDACTED], his former spouse.²³ In 2014, [REDACTED] lived with [REDACTED], and

¹⁸ Email from the Yekatom Defence, 29 July 2024, at 11:45.

¹⁹ See First Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules, 12 July 2023, ICC-01/14-01/18-1975-Conf (the ‘First Rule 68(2)(c) Decision’), paras 17-39 (confidential version notified on the same date, ICC-01/14-01/18-1975-Red); Decision on the Prosecution Request for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules concerning Witnesses P-0460, P-0732, P-1779, P-1864 and P-1871, 23 July 2024, ICC-01/14-01/18-2605-Conf, paras 13-16.

²⁰ Appeals Chamber, Judgment on the appeal of Mr Patrice Edouard Ngaïssona against the decision of Trial Chamber V of 6 October 2023 entitled “Third Decision on the Prosecution Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(c) of the Rules”, 20 May 2024, ICC-01/14-01/18-2502-Conf (the ‘Appeals Chamber Judgment’) (public redacted version notified on the same date, ICC-01/14-01/18-2502-Red).

²¹ Appeals Chamber Judgment, ICC-01/14-01/18-2502-Red, para. 56.

²² Appeals Chamber Judgment, ICC-01/14-01/18-2502-Red, para. 59.

²³ See Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, para. 58.

[REDACTED] joined her there.²⁴ The Chamber refers to its Rule 68(2)(b) Decision on D29-6035 for the summary of the witness's prior recorded testimony,²⁵ which consists of his statement²⁶ and six associated items.²⁷

16. The Defence informs the Chamber that D29-6035 passed away on 10 January 2024.²⁸ It submits that D29-6035's death was sudden and unexpected, as it appears to have been the result of complications arising from a surgery.²⁹ It further argues that D29-6035's prior recorded testimony (i) has sufficient indicia of reliability; (ii) does not go to proof of the acts and conduct of the accused; and (iii) is not prejudicial to or inconsistent with the rights of the accused.³⁰
17. Having regard to the submissions made by the Defence and the documents provided, in particular the death certificate,³¹ the Chamber is satisfied that D29-6035 is unavailable to testify within the meaning of Rule 68(2)(c) of the Rules. The Chamber further notes that the witness's death appears to have been unexpected,³² and that the necessity of measures under Article 56 of the Statute could not have been anticipated for this witness.
18. The Chamber further recalls its findings in the context of the Rule 68(2)(b) Decision on D29-6035. In particular, it noted that D29-6035's statement was obtained by fulfilling the formal requirements³³ and considered that it shows sufficient indicia of reliability.³⁴ It further found that the associated items have

²⁴ Statement, CAR-D29-0009-0444, at 0447, para. 22.

²⁵ Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, paras 58-59. *See also* First Rule 68(2)(c) Request, ICC-01/14-01/18-2535-Conf, para. 2.

²⁶ Statement, CAR-D29-0009-0444.

²⁷ Annex 1, CAR-D29-0009-0451; Annex 2, CAR-D29-0009-0452; Annex 3, CAR-D29-0009-0453; Annex 4, CAR-D29-0009-0454; Annex 5, CAR-D29-0009-0455; Annex 6, CAR-D29-0009-0456. The Chamber recalls that, in its Rule 68(2)(b) Decision on D29-6035, it found that video CAR-OTP-2055-2610 formed an integral part of D29-6035's statement, but that it need not rule on this item again as it has already been recognised as formally submitted (*see* Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, paras 59, 67, 70).

²⁸ First Rule 68(2)(c) Request, ICC-01/14-01/18-2535-Conf, paras 10, 20-24; D29-6035's Death Certificate, ICC-01/14-01/18-2535-Conf-AnxB; D29-6041's statement, ICC-01/14-01/18-2535-Conf-AnxA, pp. 4-5, paras 15, 17-21.

²⁹ First Rule 68(2)(c) Request, ICC-01/14-01/18-2535-Conf, para. 27.

³⁰ First Rule 68(2)(c) Request, ICC-01/14-01/18-2535-Conf, paras 30-38.

³¹ D29-6035's Death Certificate, ICC-01/14-01/18-2535-Conf-AnxB.

³² D29-6041's statement, ICC-01/14-01/18-2535-Conf-AnxA, pp. 4-5, paras 17-18.

³³ *See* First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, paras 32-34.

³⁴ Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, para. 66.

been used and explained by the witness in his statement and thus form an integral part of it.³⁵ Finally, the Chamber concluded that the introduction of D29-6035's prior recorded testimony was not prejudicial to or inconsistent with the rights of the accused and that the interests of justice were better served by its introduction.³⁶ The Chamber considers these findings to be also relevant to its present assessment of the introduction of D29-6035's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules.

19. In this context, the Chamber notes that D29-6035 does not mention Mr Ngaïssona in his statement, but that he mentions Mr Yekatom.³⁷ It recalls that these references are either indirect or limited and peripheral and do not constitute the core of D29-6035's testimony. Moreover, the references to identifying information and/or 'challenges' to the 'very presence of children under the age of fifteen in the Anti-Balaka group under Mr Yekatom's command' do not mention the latter's personal actions and/or omissions as such. Nevertheless, the Chamber decided in its Rule 68(2)(b) Decision on D29-6035 that it would not rely on paragraph 27 of D29-6035's statement for the purposes of establishing Mr Yekatom's acts and conduct.³⁸
20. The Chamber notes that, contrary to Rule 68(2)(b) of the Rules, while the fact that a prior recorded testimony goes to 'acts and conduct' of the accused may be a factor against its introduction pursuant to Rule 68(2)(c) of the Rules, this is not an absolute bar.³⁹ It nonetheless observes that the information provided by the witness in paragraph 27 of his statement goes to issues that are materially in dispute and is not cumulative or corroborative of other evidence on the record. As such, the Chamber is of the view that, in the circumstances, it is not appropriate to rely on this part of D29-6035's statement for the purposes of establishing Mr Yekatom's acts and conduct.

³⁵ Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, para. 67.

³⁶ Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, para. 69.

³⁷ See Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, para. 61 *referring to* CAR-D29-0009-0444, at 0046-48, paras 18-22, 25, 27, 34-35.

³⁸ Rule 68(2)(b) Decision on D29-6035, ICC-01/14-01/18-2424-Conf, para. 61.

³⁹ See First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, para. 38.

21. In light of the above, and noting that the Defence is the party seeking introduction and that the participants did not respond to the First Rule 68(2)(c) Request, the Chamber considers that the introduction pursuant to Rule 68(2)(c) of the Rules of D29-6035's prior recorded testimony is not prejudicial to or inconsistent with the accused's rights and that the interests of justice are better served by its introduction.
22. The Chamber is therefore satisfied that D29-6035's prior recorded testimony is suitable to be introduced pursuant to Rule 68(2)(c) of the Rules. However, it will not rely on paragraph 27 of D29-6035's statement for the purposes of establishing Mr Yekatom's acts and conduct. Accordingly, the Chamber grants the introduction of D29-6035's statement⁴⁰ and associated items⁴¹ pursuant to that provision.

B. The Second Rule 68(2)(c) Request

23. Witness D29-4011 resided in Boeing at the relevant time, close to the Boeing mosque and market, and worked at the market until 2013.⁴²

1. The Request to Add

24. The Chamber recalls the applicable law for requests to add items to the list of evidence, as set out in its previous decision.⁴³
25. The Chamber notes that D29-4011 was expected to testify live until the end of May 2024, when the Defence informed the Chamber that the medical practitioner

⁴⁰ Statement, CAR-D29-0009-0444.

⁴¹ Annex 1, CAR-D29-0009-0451; Annex 2, CAR-D29-0009-0452; Annex 3, CAR-D29-0009-0453; Annex 4, CAR-D29-0009-0454; Annex 5, CAR-D29-0009-0455; and Annex 6, CAR-D29-0009-0456.

⁴² Statement, CAR-D29-0009-0680, at 0683-84, paras 15-18, 25. *See* Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, para. 31.

⁴³ *See* Decision on the Prosecution Request to Add Six Email Threads to its List of Evidence, 6 May 2021, ICC-01/14-01/18-989-Conf, paras 5-6 (public redacted version notified on 30 September 2022, ICC-01/14-01/18-989-Red). *See also* the jurisprudence referenced therein, nn. 15-20. *See also* Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request to Add 14 Items to its List of Evidence, 24 July 2018, ICC-02/04-01/15-1314, para. 7.

had not cleared the witness to testify in person and that, as a result, it would seek to collect D29-4011's statement in June 2024.⁴⁴

26. The Chamber considers that the Defence acted swiftly to collect the D29-4011 Material as soon as it became aware that the witness was not cleared to testify. Having reviewed the D29-4011 Material, the Chamber notes that it bears prospective significance to the case, in particular with regard to the destruction of the Boeing mosque, and is limited in nature. Finally, the Chamber notes that D29-4011 has been part of the Defence's list of witnesses since 17 November 2023,⁴⁵ and that the D29-4011 Material does not raise any novel issues which could not have been foreseen by the Prosecution.
27. In light of the above, the Chamber considers that no undue prejudice arises in the circumstances and finds it appropriate to grant the Request to Add.

2. The Rule 68(2)(c) Request concerning D29-4011

28. The Defence submits that D29-4011's prior recorded testimony fulfils the requirements of Rule 68(2)(c) of the Rules. In particular, it argues that D29-4011's current health condition and unfitness to testify in person qualify as an obstacle that cannot be overcome with reasonable diligence and makes her unavailable to testify pursuant to said provision.⁴⁶ It also submits that (i) in the context of Rule 68(2)(c) of the Rules, measures under Article 56 of the Statute are properly understood not as an obligation but as a 'right' for the accused; (ii) such measures were not warranted at an earlier stage; and (iii) there is no procedural prejudice to the Prosecution arising from the lack of such measures.⁴⁷ Finally, the Defence contends that the prior recorded testimony (i) has sufficient indicia of reliability;⁴⁸ (ii) does not go to proof of the acts and conduct of the

⁴⁴ Email from the Yekatom Defence, 29 May 2024, at 12:47. *See also* email from the Yekatom Defence, 31 May 2024, at 09:50; Registry Report, ICC-01/14-01/18-2513-Conf-Red-Corr, para. 21.

⁴⁵ *See* Annex B to the Yekatom Defence's List of Witnesses and Evidence, 17 November 2023, ICC-01/14-01/18-2212-Conf-AnxB, pp. 2-3; Annex C to the Yekatom Defence's List of Witnesses and Evidence, 17 November 2023, ICC-01/14-01/18-2212-Conf-AnxC, pp. 8-9.

⁴⁶ Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, paras 35-41.

⁴⁷ Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, paras 42-46.

⁴⁸ Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, paras 47-52.

accused;⁴⁹ (iii) is not prejudicial or inconsistent with the rights of the accused or the procedural rights of the Prosecution;⁵⁰ (iv) is cumulative and corroborative of other evidence;⁵¹ and (v) is relevant and probative.⁵²

29. The Prosecution opposes the Rule 68(2)(c) Request concerning D29-4011, arguing, *inter alia*, that measures under Article 56 of the Statute could have been anticipated,⁵³ and that taking such measures is still possible given the witness's health condition.⁵⁴ It further argues that the Defence seeks to deprive it of the opportunity to cross-examine the witness and that it would be severely and unduly prejudiced by the introduction of D29-4011's prior recorded testimony.⁵⁵
30. In her statement,⁵⁶ D29-4011 describes, *inter alia*, (i) the arrival of the Seleka in Boeing and the exactions they allegedly committed; (ii) the Seleka's headquarters at the Boeing market; (iii) 'délégué' Hassan's relationship with the Seleka; (iv) Muslim traders at the Boeing market keeping weapons in their shops and shooting in the air at the arrival of the Seleka; (v) the witness taking refuge at the Mokassa church from time to time; and (vi) the destruction of the Boeing mosque by the local youth in 2013, which she witnessed, notably the perpetrators, their attire and the manner in which they destroyed the building. The witness states that she does not know and has never seen Mr Yekatom.⁵⁷ She does not mention Mr Ngaïssona.
31. Several videos, photographs and GPS coordinates of the witness's house and surroundings are annexed to D29-4011's statement.⁵⁸ The Defence further seeks

⁴⁹ Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, paras 53-54.

⁵⁰ Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, paras 55-61.

⁵¹ Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, paras 62-64.

⁵² Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, paras 30-34.

⁵³ Prosecution Response, ICC-01/14-01/18-2579-Conf, paras 2, 7-12.

⁵⁴ Prosecution Response, ICC-01/14-01/18-2579-Conf, paras 3, 13-16.

⁵⁵ Prosecution Response, ICC-01/14-01/18-2579-Conf, paras 4-5, 17.

⁵⁶ Statement, CAR-D29-0009-0680.

⁵⁷ Statement, CAR-D29-0009-0680, at 0687, para. 55.

⁵⁸ Video CAR-D29-0008-0105 and transcript CAR-D29-0006-1404 (Annex 1); video CAR-D29-0008-0106 and transcript CAR-D29-0006-1405 (Annex 2); video CAR-D29-0008-0107 (Annex 3); video CAR-D29-0008-0108 (Annex 4); photograph CAR-D29-0010-0205 (Annex 5); photograph CAR-D29-0010-0206 (Annex 6); photograph CAR-D29-0010-0207 (Annex 7); screenshot of GPS coordinates CAR-D29-0003-0202 (Annex 8); screenshot of GPS coordinates CAR-D29-0003-0203 (Annex 9); screenshot of GPS coordinates CAR-D29-0003-0204 (Annex 10); screenshot of GPS coordinates CAR-

to submit into evidence a medical statement from D29-4011's doctor (CAR-D29-0009-0691), who was present during the witness's interviews with the Defence.⁵⁹

32. The Chamber notes the Registry Report stating that a medical doctor declared D29-4011 unfit to testify and that the medical conclusion was that she could not 'testify now or in the future'.⁶⁰ Further noting the medical statement provided and the latest developments regarding the witness's health,⁶¹ and having regard to the submissions made by the Defence regarding their efforts to secure the witness's live testimony, the Chamber is satisfied that D29-4011 is unavailable within the meaning of Rule 68(2)(c) of the Rules, since she suffers from a medical condition that impacts her ability to testify orally.⁶² In light of this finding, the Chamber dismisses the Prosecution's submissions regarding the propriety of adopting measures under Article 56 of the Statute at this stage.⁶³
33. Furthermore, having regard to the specific circumstances at hand, the Chamber is satisfied that the necessity of measures under Article 56 of the Statute could not have been anticipated for this witness. It recalls that the final medical determination of D29-4011's unfitness to testify 'now or in the future' was only reached in May 2024.⁶⁴ The Chamber notes that the Defence was in regular contact with the VWU regarding the witness's health condition and that, until then, it reasonably believed that the witness would be able to appear in court, with possible accommodations due to her medical situation.⁶⁵

D29-0003-0205 (Annex 11); and PowerPoint document CAR-D29-0003-0206 (Annex 12). See Statement, CAR-D29-0009-0680, at 0687-88, paras 52, 56.

⁵⁹ CAR-D29-0009-0691; Statement, CAR-D29-0009-0680, at 0681, at 0682, para. 13, and at 0690.

⁶⁰ Registry Report, ICC-01/14-01/18-2513-Conf-Red-Corr, para. 21.

⁶¹ See CAR-D29-0009-0691; email from the Yekatom Defence, 29 July 2024, at 11:45.

⁶² See also First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, para. 27 *with reference to* Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, ICC-01/12-01/18-1588-Conf (public redacted version notified on 11 August 2021, ICC-01/12-01/18-1588-Red); Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, 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 (public redacted version notified the same day, ICC-01/04-02/06-1802-Red).

⁶³ See Prosecution Response, ICC-01/14-01/18-2579-Conf, paras 13-16.

⁶⁴ See Registry Report, ICC-01/14-01/18-2513-Conf-Red-Corr, para. 21.

⁶⁵ See Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf, para. 44; emails from the Yekatom Defence, 29 May 2024, at 12:47; 31 May 2024, at 09:50. See also emails from the Yekatom Defence, 14

34. Further, the Chamber considers that D29-4011's statement shows sufficient indicia of reliability. Notably, it was obtained by fulfilling the formal requirements previously set out by the Chamber.⁶⁶ Moreover, D29-4011's doctor was present while the statement was taken and monitored the witness's health status, and certified that her health condition had no impact on her capacity of discernment and that she was capable of giving a statement based on her recollection.⁶⁷
35. As regards the associated items to D29-4011's statement, the Chamber observes that most of them were produced by the Defence in connection with a visit to the witness.⁶⁸ In her statement, D29-4011 recalled the Defence's visit and the fact that videos and photographs were taken on that occasion, and identified her voice and that of a Defence team member on two videos.⁶⁹ Regarding the medical statement (CAR-D29-0009-0691), the Chamber recalls that D29-4011's doctor was present while the witness's statement was taken and notes that it contains information regarding the process followed.⁷⁰ The Chamber thus considers that these items form an integral part of D29-4011's statement.
36. In light of the above, and noting that the Defence is the party seeking introduction, the Chamber considers that the introduction into evidence of D29-4011's prior recorded testimony is not prejudicial to or inconsistent with the accused's rights, and that the interests of justice are better served by its introduction. In this context, the Chamber notes the Prosecution's allegation that it is prejudiced by the introduction into evidence of D29-4011's prior recorded testimony.⁷¹ The

November 2023, at 14:01; 16 January 2024, at 12:52; 15 February 2024, at 16:20; 6 March 2024, at 17:06; 8 March 2024, at 18:34; 20 March 2024, at 13:25.

⁶⁶ See First Rule 68(2)(c) Decision, ICC-01/14-01/18-1975-Red, paras 32-34.

⁶⁷ CAR-D29-0009-0691; Statement, CAR-D29-0009-0680, at 0681, at 0682, para. 13, and at 0690.

⁶⁸ See Second Defence request for leave to amend its List of Evidence, 11 March 2024, ICC-01/14-01/18-2402-Conf (public redacted version notified on 3 April 2024, ICC-01/14-01/18-2402-Red), paras 12-13 *referring notably to* items CAR-D29-0008-0105, CAR-D29-0008-0106, CAR-D29-0006-1404, CAR-D29-0006-1405, CAR-D29-0008-0107, CAR-D29-0008-0108, CAR-D29-0003-0202, CAR-D29-0003-0203, CAR-D29-0003-0204, CAR-D29-0003-0205, CAR-D29-0003-0206, CAR-D29-0010-0205, CAR-D29-0010-0206, and CAR-D29-0010-0207.

⁶⁹ Statement, CAR-D29-0009-0680, at 0687-88, paras 52-53, 56 *referring to* items CAR-D29-0008-0105 and CAR-D29-0008-0106.

⁷⁰ CAR-D29-0009-0691; Statement, CAR-D29-0009-0680, at 0681, at 0682, para. 13, and at 0690.

⁷¹ Prosecution Response, ICC-01/14-01/18-2579-Conf, paras 5, 17.

Chamber notes that the fact that the evidence relates to issues that are materially in dispute is not a bar to its introduction pursuant to Rule 68(2)(c) of the Rules. Further, it will consider the Prosecution's arguments when assessing the probative value of D29-4011's prior recorded testimony in the context of its deliberation of the judgment.

37. Accordingly, the Chamber grants the introduction of D29-4011's statement⁷² and its associated items pursuant to Rule 68(2)(c) of the Rules, with the following exceptions: items CAR-D29-0008-0105 and CAR-D29-0008-0107 have already been recognised as submitted and therefore the Chamber need not rule on them again.⁷³

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request to Add;

DECIDES that the prior recorded testimonies of the following witnesses are introduced into evidence, pursuant to Rule 68(2)(c) of the Rules:

- **D29-6035:** Statement, CAR-D29-0009-0444 and associated items CAR-D29-0009-0451 (Annex 1); CAR-D29-0009-0452 (Annex 2); CAR-D29-0009-0453 (Annex 3); CAR-D29-0009-0454 (Annex 4); CAR-D29-0009-0455 (Annex 5); and CAR-D29-0009-0456 (Annex 6). However, it will not rely on paragraph 27 of the statement for the purposes of establishing Mr Yekatom's acts and conduct.
- **D29-4011:** Statement, CAR-D29-0009-0680 and associated items CAR-D29-0006-1404 (Annex 1); CAR-D29-0008-0106 and CAR-D29-0006-1405 (Annex 2); CAR-D29-0008-0108 (Annex 4); CAR-D29-0010-0205 (Annex 5); CAR-D29-0010-0206 (Annex 6); CAR-D29-0010-0207 (Annex 7); CAR-D29-0003-0202 (Annex 8); CAR-D29-0003-0203 (Annex 9); CAR-D29-0003-0204

⁷² Statement, CAR-D29-0009-0680.

⁷³ Annex 1, CAR-D29-0006-1404; Annex 2, CAR-D29-0008-0106 and CAR-D29-0006-1405; Annex 4, CAR-D29-0008-0108; Annex 5, CAR-D29-0010-0205; Annex 6, CAR-D29-0010-0206; Annex 7, CAR-D29-0010-0207; Annex 8, CAR-D29-0003-0202; Annex 9, CAR-D29-0003-0203; Annex 10, CAR-D29-0003-0204; Annex 11, CAR-D29-0003-0205; Annex 12, CAR-D29-0003-0206; and CAR-D29-0009-0691.

(Annex 10); CAR-D29-0003-0205 (Annex 11); CAR-D29-0003-0206 (Annex 12); and CAR-D29-0009-0691.

ORDERS the Defence and the Prosecution to file public redacted versions of the First Rule 68(2)(c) Request, ICC-01/14-01/18-2535-Conf; the Second Rule 68(2)(c) Request, ICC-01/14-01/18-2549-Conf; and the Prosecution Response, ICC-01/14-01/18-2579-Conf, within one week of notification of this decision; and

REMINDS the Defence of its directions to publish public redacted versions of the aforementioned prior recorded testimonies.

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



Judge Péter Kovács



Judge Bertram Schmitt

Presiding Judge



Judge Chang-ho Chung

Dated 18 July 2025

At The Hague, The Netherlands