

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-02/06  
Date: 12 October 2015

**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 redacted version of

Decision on Prosecution's request to hear P-0039's testimony  
by way of video-link

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 Luc Boutin

**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**

Ms Paolina Massidda

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

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

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**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* ('Ntaganda case'), having regard to Articles 68 and 69(2) of the Rome Statute ('Statute') and Rule 67 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution's request to hear P-0039's testimony by way of video-link'.

## **I. Procedural history and submissions**

1. On 30 September 2015, the Office of the Prosecutor ('Prosecution') filed its 'Prosecution's request to hear DRC-OTP-P-0039's testimony *via* video-link' ('Request').<sup>1</sup> The Prosecution attached a medical report concerning witness P-0039's health condition ('Medical Report'), as a confidential *ex parte* annex, only available to Prosecution and VWU.<sup>2</sup>
2. The Prosecution argues that the use of video-link testimony is not prejudicial to or inconsistent with the accused's rights, as the defence team for Mr Ntaganda ('Defence') will be able to observe and cross-examine witness P-0039 ('Witness').<sup>3</sup> The Prosecution further submits, referring to jurisprudence of the Court on this issue,<sup>4</sup> that given the 'exceptional nature of the personal circumstances of [the Witness]', hearing his testimony by way of video-link would be in accordance with the Chamber's duty to protect the 'physical and psychological well-being' of the witness.<sup>5</sup>
3. On 5 October 2015, the Defence filed its 'Response on behalf of Mr Ntaganda to "Prosecution's request to hear DRC-OTP-P-0039's testimony *via* video-link"' ('Response').<sup>6</sup> Although the Defence observes that the Medical Report was not

<sup>1</sup> ICC-01/04-02/06-875-Conf. A public redacted version was filed the following day (ICC-01/04-02/06-875-Red).

<sup>2</sup> ICC-01/04-02/06-875-Conf-Exp-AnxA.

<sup>3</sup> Request, ICC-01/04-02/06-875-Red, para.4.

<sup>4</sup> Request, ICC-01/04-02/06-875-Red, para.5, citing *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2285-Red, para. 16; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-2101-Red2, para. 11.

<sup>5</sup> Request, ICC-01/04-02/06-875-Red, para.6.

<sup>6</sup> ICC-01/04-02/06-887-Conf.

disclosed to it,<sup>7</sup> it notes that the Witness's [REDACTED] leads to a *prima facie* conclusion that requiring him to travel to the seat of the Court may be harmful to his well-being.<sup>8</sup> In such 'exceptional circumstances' the Defence does not object to the witness testifying by way of video-link.<sup>9</sup>

4. On 9 October 2015, the Registry confirmed that it can support the hearing of the witness's testimony by video-link [REDACTED], as proposed by the Prosecution.<sup>10</sup> It further indicated that 15 calendar days would be required in order to prepare for the video-link testimony.<sup>11</sup>
5. Also on 9 October 2015, the Legal Representative of Victims of the Attacks ('Legal Representative') filed a response ('LRV Response')<sup>12</sup> in which he requested the Chamber to: (i) [REDACTED]; and (ii) defer consideration of the Request pending receipt of the medical records, which he submits should be taken into account by the Chamber together with other relevant factors [REDACTED].<sup>13</sup> The Legal Representative states that he does not oppose the Request, in principle, and that it appears the Request is based on a 'prudent course of action in light of the doctor's assessment'.<sup>14</sup> However, relying on jurisprudence of the *ad hoc* tribunals, the Legal Representative submits that the Medical Report – which does not allow for a 'full assessment' of the Witness's health condition – is an 'insufficient basis' upon which to conclude that the witness is not fit to travel.<sup>15</sup>

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<sup>7</sup> Response, ICC-01/04-02/06-887-Conf, para.3.

<sup>8</sup> Response, ICC-01/04-02/06-887-Conf, para.5.

<sup>9</sup> Response, ICC-01/04-02/06-887-Conf, para.6.

<sup>10</sup> E-mail from the Registry to the Chamber on 9 October 2015 at 16:07.

<sup>11</sup> E-mail from the Registry to the Chamber on 9 October 2015 at 20:02.

<sup>12</sup> ICC-01/04-02/06-894-Conf-Exp. A confidential redacted version (ICC-01/04-02/06-894-Conf-Red) was filed on the same day.

<sup>13</sup> LRV Response, ICC-01/04-02/06-894-Conf-Exp, para. 3. See also paras 21-23.

<sup>14</sup> LRV Response, ICC-01/04-02/06-894-Conf-Red, para. 9.

<sup>15</sup> LRV Response, ICC-01/04-02/06-894-Conf-Red, paras 10-11.

6. [REDACTED].<sup>16</sup> [REDACTED]. [REDACTED].<sup>17</sup> [REDACTED].<sup>18</sup>  
[REDACTED].<sup>19</sup>

## II. Analysis

[REDACTED]

7. [REDACTED]. [REDACTED].
8. [REDACTED],<sup>20</sup> [REDACTED]. [REDACTED].<sup>21</sup> [REDACTED]. [REDACTED].  
[REDACTED]. [REDACTED].
9. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED],<sup>22</sup> [REDACTED].
10. [REDACTED]. [REDACTED].
11. [REDACTED].

### Request for hearing of testimony by way of video-link

12. The Chamber recalls that the term 'given in person' in Article 69(2) of the Statute, does not imply that witness testimony shall necessarily be given by way of live testimony in court. Instead, the Statute and the Rules give the Chamber broad discretion to permit evidence to be given *viva voce* by means of video or audio technology, provided, *inter alia*, that such measures are not prejudicial to, or inconsistent with, the rights of the accused.<sup>23</sup> The Chamber notes that the technology used must be such as to permit the witness to be questioned by the parties and the Chamber at the time of his testimony.<sup>24</sup> The

<sup>16</sup> [REDACTED].

<sup>17</sup> [REDACTED].

<sup>18</sup> [REDACTED]. [REDACTED].

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

<sup>22</sup> [REDACTED].

<sup>23</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the "Second Further Revised Defence Submissions on the Order of Witnesses" (ICC-01/05-01/08-2644) and on the appearance of Witnesses D04-02, D04-09, D04-03, D04-04 and D04-06 via video-link, 31 May 2013, ICC-01/05-01/08-2646, para.8. *See also*, *Prosecutor v Thomas Lubanga Dyilo*, Redacted Decision give on the defence request for a witness to evidence via video-link, 9 February 2010, ICC-01/04-01/06-2285-Red, para.14-15.

<sup>24</sup> Rule 67(1) of the Rules.

assessment of whether or not the use of video-link technology is appropriate in any particular case is fact specific and requires consideration of a range of different factors, such as, non-exhaustively, a witness's age, vulnerability, state of health, psychological well-being, as well as procedural and logistical considerations. At all times, the Chamber has to consider whether using this form of testimony comports with the requirements of a fair trial.

13. In the present case, the Chamber notes that the Prosecution bases the Request upon the Medical Report, which has not been disclosed to the Defence. The Chamber observes that, as noted by the Legal Representative, the Medical Report does not add significantly greater detail, but does confirm the Prosecution's submission that [REDACTED].<sup>25</sup> The Chamber notes the Legal Representative's submission that the Medical Report is an 'insufficient basis' for making a determination. However, in the view of the Chamber, receiving medical records is not always necessary and the advice provided by a medical doctor can in itself be a sufficient basis for the Chamber to decide on a matter such as the use of video-link. Moreover, the Chamber does not consider the required standard to be whether a witness is actually incapable of travelling to the seat of the Court, rather, as noted above, it involves a careful weighing of different factors.
14. As a preliminary matter, the Chamber notes that the Defence does not oppose the Request. The Chamber considers that [REDACTED] the recommendation contained in the Medical Report weigh in favour of hearing the testimony by way of video-link. The Chamber additionally notes that the testimony is not expected to last for more than two days, and therefore the proportionality of requiring the Witness to [REDACTED] travel for an extended period of time is also relevant. The Chamber has given due regard to the submissions of the Legal Representative, noting in particular [REDACTED]. In this regard, the

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<sup>25</sup> Request, ICC-01/04-02/06-875-Red, para. 3; ICC-01/04-02/06-875-Conf-Exp-AnxA, page 2.

Chamber wishes to express its appreciation for the Witness's willingness to assist the Court in its search for the truth. The Chamber also notes the relevant nature of the anticipated testimony, which it considers justifies the making of arrangements to facilitate the hearing of that testimony by way of video-link. Additionally, the Chamber notes that the Legal Representative has indicated that he is not opposed, in principle.

15. For the foregoing reasons, the Chamber finds that, in the circumstances, the hearing of the Witness's testimony by way of video-link is appropriate. [REDACTED].

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**DIRECTS** [REDACTED];

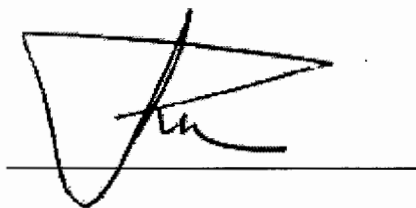
**DIRECTS** [REDACTED];

**GRANTS** the Request;

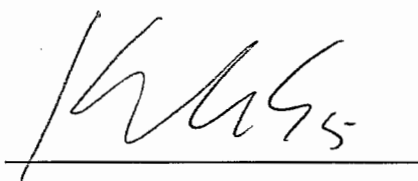
**DIRECTS** the Registry, in consultation with the Prosecution and Legal Representative, to make the necessary arrangements for the hearing of the Witness's testimony by way of video-link [REDACTED]; and

**REJECTS** all other requests.

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

A stylized handwritten signature in black ink, consisting of a large 'V' shape with a horizontal line extending to the right and a diagonal line crossing it.

Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, featuring a series of loops and a long horizontal stroke at the end.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of three distinct, stylized characters.

Judge Chang-ho Chung

Dated 12 October 2015

At The Hague, The Netherlands