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No.: **ICC-01/04-02/06**

Date: **23 January 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

Observations on behalf of Mr Ntaganda on the possibility of hearing Witness P-0551's testimony *via* video-link

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the “*Decision on Prosecution application under Rule 68(2)(b) and regulation 35 for admission of prior recorded testimony of Witness P-0551*” (“Decision”) issued on 19 January 2017 by Trial Chamber VI (“Chamber”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit these:

Observations on behalf of Mr Ntaganda on the possibility of hearing Witness P-0551’s testimony *via* video-link

“Defence Observations”

1. The Chamber, having granted the Prosecution’s application to add Witness P-0551 to its List of witnesses but denied admission of his statement without cross-examination under Rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”),² has invited the parties to offer submissions on the appropriateness of hearing Witness P-0551’s testimony *via* video-link rather than in-person before the Chamber.³
2. The Defence does not consider, in the absence of a request by the Prosecution explaining Witness P-0551’s personal circumstances and justifying video-link testimony, that it is in a position to offer informed submissions as to whether hearing this witness *via* video-link is appropriate. The Defence requests, however, given that the burden for establishing the conditions of video-link testimony rests on the moving party, and in the absence of information and arguments to which the Defence can respond, that video-link testimony be denied.

¹ ICC-01/04-02/06-1733.

² ICC-01/04-02/06-1601-Conf.

³ Decision, para.15.

SUBMISSIONS

3. Article 69(2) of the Rome Statute ("Statute") states that "[t]he testimony of a witness at trial shall be given in person." The Statute accordingly privileges the latter as the primary mode of receiving testimony. Article 69(2) also confers discretion on a Trial Chamber to "also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology." This is, accordingly, also an accepted but exceptional mode of receiving testimony.
4. This Trial Chamber has departed from the pronouncement in *Bemba* that video-link testimony is an "exceptional remedy"⁴ but has nevertheless required some articulated and substantiated reasons to justify granting video-link testimony. For example, in respect of Witness P-0005, the Chamber relied on medical information indicating that the witness could not travel and, in respect of Witness P-0863, that there was a possibility that the witness might not be able to obtain a visa in time to undertake travel to the seat of the Court.⁵ No such circumstances have been substantiated, let alone raised, in respect of Witness P-0551.
5. If the Prosecution or the VWU puts forward such circumstances or reasons in their submissions, the Defence will have no opportunity to comment or respond to those circumstances or reasons. This would violate principles of natural justice and should not be entertained as a basis justifying video-link.
6. The "nature of the evidence" is also a relevant consideration in assessing whether video-link testimony is appropriate, including whether the subject-matter is "strongly contested by the parties or [...] pertain to core issues in the case."⁶ The Defence notes that Witness P-0551 may need to be shown a significant number of documents in order to comment on their authenticity or

⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the "Decision on 'Defence Motion for authorization to hear the testimony of Witness D04-21 via video-link'", 3 April 2013, para.11.

⁵ ICC-01/04-02/06-1706-Red, paras.9-10.

⁶ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the mode of testimony of Rule 68(3) witnesses, Partially Dissenting Opinion of Judge Henderson, para.2.

meaning. The witness's commentary on these documents will likely be facilitated by permitting him to review these documents in hardcopy, including in order to move back and forth quickly within and between documents. Although this may be possible in the context of a video-link, such an exercise is likely to be facilitated by having the witness in the same room as the parties and the judges.

RESPECTFULLY SUBMITTED ON THIS 23RD DAY OF JANUARY 2017

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands