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No.: ICC-01/04-02/06
Date: 27 September 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 “Prosecution’s response to the ‘Request on behalf of Mr Ntaganda to hear DRC-D18-0052’s testimony *via* video-link’, ICC-01/04-02/06-1889-Conf”, 15 May 2017, ICC-01/04-02/06-1905-Conf

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

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Other

Introduction

1. The Defence fails to provide any cogent reason why Witness D-0052's testimony should be heard *via* video-link.¹ Nevertheless, in view of the nature of the expected testimony of this witness, the Prosecution does not oppose the Defence Request.

Confidentiality

2. This filing is classified as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it responds to a confidential submission. The Prosecution will file a public redacted version of this filing.

Prosecution's Submissions

The Defence fails to provide cogent reasons for D-0052 to be heard via video-link

3. Although the Defence reproduces the non-exhaustive list of factors that the Chamber has held need to be considered in relation to requests to hear testimony *via* video-link,² it fails to present any cogent reason warranting the hearing of D-0052's testimony in this manner.
4. D-0052 is not of advanced age,³ and the Defence provides no information indicating that he is particularly vulnerable, unhealthy, or that appearing in person in The Hague would adversely impact his psychological well-being.⁴ Even

¹ "Request on behalf of Mr Ntaganda to hear DRC-D18-0052's testimony *via* video-link", ICC-01/04-02/06-1889-Conf ("Defence Request").

² Defence Request, para. 4, fn. 4 citing ICC-01/04-02/06-897-Conf-Red, para. 12.

³ The Defence informed the Prosecution that D-0052 was born on [REDACTED], email from Stéphane Bourgon to Nicole Samson dated 5 April 2017 at 15:04.

⁴ See ICC-01/04-02/06-897-Red2, para. 12.

though the Chamber's list of factors is non-exhaustive,⁵ convenience to the witness,⁶ taken alone, is an insufficient basis on which to ground such a request.

5. The Chamber has also referred to procedural and logistical considerations as factors that may warrant the need to hear the testimony of a witness *via* video-link.⁷ However, the Defence argument that the expeditiousness of proceedings would be facilitated by granting its request because D-0052 would otherwise not be able to testify in the first evidentiary block⁸ should not be given undue weight. It is the duty of the Parties and Participants to ensure that the logistical issues necessary to secure the attendance of witnesses in The Hague are met in sufficient time. While recognising that, at times, such matters are beyond Parties' control, every effort should be made to secure witnesses' attendance at the seat of the Court since testimony *via* video-link is often *less* conducive to the expeditiousness of proceedings due to technical issues that do not arise when witnesses are physically present in Court.⁹
6. The Defence does not explain how hearing the witness's evidence *via* video-link, as opposed to in person in The Hague, would protect his privacy.¹⁰ The witness's privacy may be protected through in-court protective measures and recourse to private session, should the Chamber deem such measures necessary and warranted.
7. In view of the dearth of information provided in the summary of his anticipated evidence about the witness's background and expected testimony, no weight can

⁵ ICC-01/04-02/06-897-Red2, para. 12.

⁶ "Video-link testimony would avoid a substantial disruption to the witness's daily life by travelling for an extended period of time to The Hague", Defence Request, para. 5.

⁷ ICC-01/04-02/06-897-Red2, para. 12.

⁸ Defence Request, para. 7.

⁹ See para. 12, below.

¹⁰ Defence Request, para. 3.

be put on the Defence assertion that “[t]he witness’s testimony, in particular, does not raise any substantial or subtle issues of credibility assessment.”¹¹

8. Nevertheless, considering the nature of the expected testimony of this witness, the Prosecution does not oppose the Defence Request.

Testimony via video-link is not appropriate for every Defence witness

9. The Defence has indicated that it will seek to hear three out of the four witnesses scheduled to testify in its first evidentiary block *via* video-link.¹² During the 4 May 2017 Status Conference, the Defence also indicated that it was experiencing difficulties in obtaining passports for witnesses and other logistical requirements.¹³
10. While the Prosecution does not oppose this Defence Request, it provides advance notice that, should similarly unfounded requests be made for video-link testimony in respect of certain other Defence witnesses, it will strongly oppose them. In particular, the Prosecution would oppose unfounded requests to hear the testimony *via* video-link of: (i) insider witnesses; and (ii) witnesses in relation to whom, according to the information in its possession, the Prosecution has reasons to believe the Accused and/or others coached or otherwise interfered with.
11. The Defence asserts that the Prosecution does not possess rights under the Rome Statute,¹⁴ yet the jurisprudence of this Court¹⁵ and the ICTY¹⁶ highlights the

¹¹ Defence Request, para. 6.

¹² Updated Forthcoming Witness List, 1st Evidentiary Block, *see* email from the Defence to the Chamber, Prosecution and Legal Representatives of the Victims dated 10 May 2017 at 14:50.

¹³ ICC-01/04-02/06-T-204-CONF-ENG ET, p.26, ln. 10 – p.27, ln. 1 (private session).

¹⁴ Defence Request, para. 6.

¹⁵ Pre-Trial Chamber II recognised “that the requirement of fairness exists for all participants in the proceedings and therefore also operates to the benefit of the Prosecutor”, ICC-02/04-01/05-20-US-Exp, para. 31; Pre-Trial Chamber I noted that “In the view of the Chamber, fairness of the proceedings includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes”, ICC-01/04-135-tEn, para. 38; The Appeals Chamber, when assessing an issue of fairness at trial, acknowledged that it

importance of equality of arms and procedural fairness to *both* Parties, in particular in the context of the determination of the truth. The Appeals Chamber has also upheld the importance that the Prosecution be able to properly present its case.¹⁷ Whether a witness is heard *via* video-link or in person could have an impact on these vital principles. The importance of being able to assess the demeanour for the determination of the truth, especially for the types of witnesses referred to above, as effectively as possible cannot be overstated, and it is far easier to do so when the witnesses are sitting inside the courtroom immediately before the Chamber and not several thousands of miles away in a makeshift hearing room.

12. Further, technical difficulties with the video-link at times slow down proceedings.

In a number of instances when witnesses have testified *via* video-link in this case, there have been issues with showing documents to witnesses in a smooth, efficient manner, and there have been several instances of background noise in the field office and other sound factors impeding the interpreters from properly hearing and interpreting the witness's responses. This militates against hearing the testimony of key Defence witnesses *via* video-link.

is relevant to consider the core functions of both the Prosecutor and the Trial Chamber to establish the truth, envisaged by articles 54(1)(a) and 69(3) of the Rome Statute, ICC-01/04-02/12-271-Corr, para. 256.

¹⁶ In *Martić*, the ICTY Appeals Chamber rejected “the Appellant’s claim that the fairness of a trial is uniquely predicated on the fairness accorded to the Accused” and recalled that the Appeals Chamber has previously observed that the “application of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community) [...] Seen in this way, it is difficult to see how a trial could ever be considered fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections”, *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 13 citing *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 25; In *Tadić*, the ICTY Appeals Chamber found that “[i]t can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case”, *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 48.

¹⁷ ICC-01/04-02/12-271-Corr, para. 256.

Need for early notice of requests for testimony via video-link

13. The Defence initially included six witnesses on its forthcoming list of witnesses.¹⁸

This number has now been reduced to four.¹⁹ The Defence clearly indicates that, should the Defence Request not be granted, D-0052 would not be able to testify during the first evidentiary block.²⁰ This would mean that only three witnesses, for whom the Defence requests eleven hours of direct examination, would be heard in a two-week block of evidence.

14. These factors add pressure on the Chamber to grant the Defence Request in order to avoid wasting court time. In order to avoid similar situations in the next blocks of evidence, the Prosecution asks that the Chamber order the Defence to take all necessary logistical steps to ensure that, absent cogent reasons, its witnesses are able to testify at the seat of the Court so that video-link does not become a standard means of testifying solely because early measures to secure passports and visas were not undertaken.

15. The Prosecution also asks that the Chamber order the Defence to file any requests for video-link testimony as early as possible, and at a minimum 30 days before the expected start of the witnesses' testimony. This would provide sufficient time for the Prosecution to respond, the Chamber to issue a decision, and for the Defence to make the necessary travel arrangements should the Chamber dismiss its request.

¹⁸ Forthcoming Witness List, 1st Evidentiary Block, *see* email from the Defence to the Chamber, Prosecution and Legal Representatives of the Victims dated 26 April 2017 at 17:51.

¹⁹ Updated Forthcoming Witness List, 1st Evidentiary Block, *see* email from the Defence to the Chamber, Prosecution and Legal Representatives of the Victims dated 10 May 2017 at 14:50.

²⁰ Defence Request, para. 7.

Conclusion

16. Despite the fact that the Defence Request is not well-founded, the Prosecution does not object to D-0052's evidence being heard *via* video-link.



Fatou Bensouda
Prosecutor

Dated this 27th day of September 2017
At The Hague, the Netherlands