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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 the testimony of Defence Witness D-0054 *via* video-link and advance notice concerning Defence Witness D-0210’, ICC-01/04-02/06-1906-Conf”, 22 May 2017, ICC-01/04-02/06-1917-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 a persuasive basis to warrant hearing Witness D-0054's testimony *via* video-link.¹ Nevertheless, the Prosecution does not oppose the Defence Request due to the nature of the expected testimony of this witness.
2. Moreover, the Prosecution understands the Defence's Notice concerning Defence Witness D-0210² to actually be a request for a video-link testimony in anticipation of its failure to obtain the witness's passport in due time. The Prosecution does not oppose the Defence request despite the failure of the Defence to provide a basis for the request.

Confidentiality

3. This filing is classified as "Confidential" pursuant to regulation 23bis(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 a persuasive basis to hear D-0054 via video-link

4. The Defence fails to articulate why hearing Defence Witness D-0054's testimony *via* video-link is appropriate.³ Although the Defence reproduces the non-exhaustive list of factors that the Chamber has previously considered in relation to requests to hear testimony *via* video-link,⁴ it fails to substantiate how such factors affect D-0054's case.

¹ "Request on behalf of Mr Ntaganda to hear the testimony of Defence Witness D-0054 *via* video-link and advance notice concerning Defence Witness D-0210", ICC-01/04-02/06-1906-Conf ("Defence Request").

² Defence Request, paras. 13-14.

³ Defence Request, para. 7.

⁴ Defence Request, para. 6, fn. 4 citing ICC-01/04-02/06-897-Conf-Red, para. 12.

5. D-0054 is not of advanced age.⁵ Whereas the Defence refers to [REDACTED],⁶ it provides no information indicating [REDACTED] and how they affect the witness's vulnerability and health, or adversely impact on her psychological well-being preventing her from appearing in person in The Hague.⁷
6. D-0054 is of [REDACTED] ethnicity and resides in [REDACTED].⁸ The Defence fails to explain the circumstances which would place D-0054 in a precarious situation should she be away from her village for the period strictly necessary to travel to The Hague to testify in person.⁹
7. Even though the Chamber's list of factors is non-exhaustive,¹⁰ convenience to the witness,¹¹ taken alone, is an insufficient basis on which to ground such a request.
8. The Chamber has also referred to procedural and logistical considerations as factors that may warrant hearing the testimony of a witness *via* video-link.¹² However, the Defence's failure to promptly ensure D-0054 obtained a passport for her to travel to The Hague during the First Evidentiary Block¹³ should not be given undue weight.
9. As previously stated by the Prosecution,¹⁴ it is the duty of the Parties and Participants to ensure that the logistical issues necessary to secure the attendance

⁵ The Defence informed the Prosecution that D-0054 was born in [REDACTED], email from Stéphane Bourgon to Nicole Samson dated 5 April 2017 at 15:04.

⁶ "Request for in-court protective measures for Witnesses D-0052, D-0054 and D-0012", ICC-01/04-02/06-1890-Conf ("In-Court Protective Measure Request"), para. 15.

⁷ See ICC-01/04-02/06-897-Red2, para. 12.

⁸ In-Court Protective Measure Request, para. 13.

⁹ Defence Request, para. 10.

¹⁰ ICC-01/04-02/06-897-Red2, para. 12.

¹¹ "Video-link testimony [...] avoiding a substantial disruption to the witness's daily life by travelling for an extended period of time to The Hague", Defence Request, para. 11.

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

¹³ Defence request, paras. 9, 11.

¹⁴ "Prosecution's response to the "Request on behalf of Mr Ntaganda to hear DRC-D18-0052's testimony *via* video-link" ("Prosecution's Response on D-0052's video-link Request"), ICC-01/04-02/06-1905-Conf, para. 5. In para. 12, the Prosecution indicated that: "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 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.

10. The Defence does not explain how hearing the witness's evidence *via* video-link, as opposed to in person in The Hague, would protect her privacy.¹⁵ 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.

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

The Defence fails to explain that measures to obtain D-0210's passport were diligent

12. The Defence fails to explain which measures have been taken to obtain D-0210's passport to ensure his presence before the Court and what impediments are potentially undermining it.¹⁶

13. The Prosecution submits that failure to obtain the witnesses' passports is not in itself a cogent reason to request a video-link testimony.

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

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".

¹⁵ Defence Request, para. 5.

¹⁶ Defence Request, paras. 13-14.

Failure to provide early notice of the requests for D-0054's and D-0210's testimony via video-link

15. Defence's failure to obtain D-0054's passport and as well as the potential failure to obtain D-0210's passport¹⁷ before the imminent start of the First Evidentiary Block¹⁸ should not add pressure on the Chamber in deciding whether to grant the Defence Request in order to avoid wasting court time.
16. As already indicated by the Prosecution, whether a witness is heard *via* video-link or in person could have an impact on the assessment of the demeanour for the determination of the truth 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.¹⁹
17. The Prosecution reiterates the request to the Chambers that the Defence be ordered for the next Evidentiary Blocks: a) 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 and b) to file any requests for video-link testimony at a minimum 30 days before the expected start of the witnesses' testimony.²⁰

¹⁷ Defence Request, paras. 9, 13-14.

¹⁸ See Email from the Chamber to the Prosecution, the Defence and Legal Representatives of the Victims dated 17 May 2017 at 15:05.

¹⁹ See also Prosecution's Response on D-0052's video-link Request, para. 11.

²⁰ See also Prosecution's Response on D-0052's video-link Request, paras. 14-15.

Conclusion

18. Despite the lack of an adequate basis to grant the Defence Request, the Prosecution does not object to D-0054's and D-0210's evidence being heard *via* video-link.



Fatou Bensouda
Prosecutor

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