

ANNEX II

PUBLIC

From: Trial Chamber IX Communications
Sent: 28 September 2017 15:05
To: [REDACTED]

Cc: Trial Chamber IX Communications; [REDACTED]
Subject: RE: P-0038

Follow Up Flag: Follow up
Flag Status: Flagged

Dear parties and participants,

The Chamber has taken note of the proposal by the Prosecution to question P-38 via video link and the objections raised by the Defence.

The Chamber re-iterates its Initial Directions on the Conduct of Proceedings (filing -497), in which gives deference to the parties 'in whether they wish for witnesses to appear in-court or via video-link.' (para.17).

The Defence raises two principal concerns in its objection: the necessity to observe the 'immediate reactions to questions, i.e. his body language and voice inflections' and the concern that the witness cannot properly view all the documents the Defence wishes to put to him (as voiced by counsel in court today).

It further requests that the Chamber takes into account that 'this particular witness is important to the entirety of this case' and the fact that a Rule 68(2)(b) request for P-38 was rejected.

In respect of the first concern, the Chamber repeats that it considers the differences between in-court and video-link testimony to be insignificant. Other witnesses have already testified via video link and the possibility to appreciate their mannerism and spontaneity was not noticeably different from a testimony at the seat of the court.

With regards to the second concern, the Chamber instructs the Defence to liaise with the Registry in order to assure that all the necessary documents are printed and available to the witness by the time the testimony starts on Monday.

The fact that the Chamber considered that P-38's prior recorded testimony should not be introduced via Rule 68(2)(b) in order to provide the Defence with the possibility to question this witness does in no way suggest that this must be done at the seat of the court. The Defence has all the possibilities to ask the witness relevant questions and – as explained above – is not prejudiced by the witness testifying via video-link.

Accordingly - and under full consideration of the circumstances raised by the Defence - the Chamber sees no impediment to the testimony of P-38 via video link.

Kind regards,

Trial Chamber IX

From: [REDACTED]
Sent: 28 September 2017 14:30
To: Trial Chamber IX Communications; [REDACTED]

Cc: [REDACTED]
Subject: RE: P-0038

Dear Trial Chamber IX,

The Defence is aware of the jurisprudence of this Court regarding video link testimony. However, the Defence notes the particular facts relating to this witness:

As noted in the prior email from [REDACTED], this particular witness is important to the entirety of this case. Further, the Defence invites the Chamber to consider the reasoning behind why this witness was called in the first place rather than submitted through Rule 68(2)(b).

There is jurisprudence from the Ntaganda Chamber that emphasises that “whether the use of video technology is appropriate in any particular case is fact specific and requires consideration of a range of different factors [...] including 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” (ICC-01/04-02/06-897-Red2, para 12)

Here the Prosecution is suggesting that the Defence should send the list of materials to the field office sooner than is required by the conduct of proceedings decision.

The Defence thus invites the Chamber to consider the particular circumstances in this case and deny the video link.

Very best,
[REDACTED]

From: Trial Chamber IX Communications [REDACTED]
Sent: 28 September 2017 14:11
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
[REDACTED]
Cc: [REDACTED]
Subject: RE: P-0038

Dear Defence,

In light of the very limited submissions of the Prosecution and considering that they do not contain any new facts, the Chamber allows the Defence to make any further submissions, should they consider it necessary, by no later than **14:30**.

Kind regards,
Trial Chamber IX

From: [REDACTED]
Sent: 28 September 2017 14:00
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
[REDACTED]
Cc: [REDACTED]
Subject: RE: P-0038

Dear Trial Chamber IX,

The Defence is constrained in formulating its response adequately since we have only returned from the courtroom to properly consult with Counsels on the matter. In addition, the Prosecution is adding more submissions to its original request, only 5 minutes before the deadline. As such, we request leave to reply to the new email by 15:30 today.

Very best,

[REDACTED]

From: [REDACTED]
 Sent: 28 September 2017 13:54
 To: Trial Chamber IX Communications; [REDACTED]
 [REDACTED]
 Cc: [REDACTED]
 Subject: RE: P-0038

Dear Trial Chamber IX,

I write on behalf of Ben Gumpert.

As indicated in its original email, the Prosecution's position is that P-0038's testimony should proceed as scheduled, via video link.

Prior decisions of this Court confirm that Chambers "do[] not consider that video-link and in-person testimony are meaningfully different" (ICC-01/05-01/13-1697, para. 9; *see also* ICC-01/04-02/06-2011-Red, para. 5; ICC-01/05-01/08-947-Red, paras. 10-14). The Prosecution proposes that the Defence send electronically to the VWU in Kampala the documents it intends to use with the witness for binders to be made up over the long weekend.

Kind regards,

[REDACTED]

From: Trial Chamber IX Communications
 Sent: 28 September 2017 11:56
 To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
 [REDACTED]
 Cc: [REDACTED]
 Subject: RE: P-0038

Dear parties and participants,

Could you kindly provide comments to the Prosecution's information below, if any, by 14:00 today.

Kind regards,
 Trial Chamber IX

From: [REDACTED]
 Sent: 28 September 2017 11:51
 To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
 [REDACTED]

Cc: [REDACTED]

Subject: RE: P-0038

Dear All,

The Common Legal Representative has no objection to the witness appearing by video-link.

Kind regards,

Paolina Massidda

From: [REDACTED]

Sent: 28 September 2017 11:42

To: Trial Chamber IX Communications; [REDACTED]

Cc: [REDACTED]

Subject: P-0038

I write concerning P-0038, whose evidence is scheduled to start on Monday morning.

It appears that he has sent his passport away for visa applications unrelated to his appearance as a witness in this case.

He has apparently miscalculated the time within which he would receive his passport back. It will not be returned until Monday or Tuesday of next week. This will prevent him travelling and testifying in The Hague as scheduled. The prosecution has made inquiries with the VWS. I understand that, with the kind assistance of the registry and CMS, it would be possible for P-0038 to give his evidence by video link from Kampala rather than in the courtroom. He could do so at exactly the times currently scheduled for his evidence. The prosecution has informed the defence. The prosecution currently intends to proceed in this fashion. Given the lateness of the change I believe it is appropriate for the Chamber to approve the proposed course of action (or otherwise) particularly since I understand that the defence have reservations about it.

Realistically, at this stage, if P-0038 does not give evidence as scheduled it will not be possible to arrange for the testimony of any other witness to be given in substitution.

I apologise for this disturbance of the smooth running of the trial.

Ben Gumpert