

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **3 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 redacted version of

**Decision on Prosecution's requests to hear the testimony of Witnesses P-0863,
P-0005 and P-0108 via video-link**

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 Christopher Gosnell

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**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

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, in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64 and 67-69 of the Rome Statute ('Statute') and Rule 67 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution's requests to hear the testimony of Witnesses P-0863, P-0005 and P-0108 via video-link'.

I. Procedural history and submissions

1. On 20 December 2016, the Office of the Prosecutor ('Prosecution') requested that the testimony of Witnesses P-0005 and P-0108 be heard via video-link ('First Request').¹ The Prosecution states that both witnesses have serious health conditions which prevent them from travelling to The Hague to testify.²
2. In the case of P-0005, the Prosecution informs the Chamber that the witness is in the process of recovering from [REDACTED].³ The Prosecution states that the Victims and Witnesses Unit ('VWU') advised that Witness P-0005 is 'unlikely' to be able to travel to The Hague to testify.⁴
3. In the case of P-0108, the Prosecution informs the Chamber that, in addition to his age and prior injuries, the witness has [REDACTED] for which he is currently undergoing treatment.⁵ The Prosecution states that the VWU has advised that Witness P-0108 'will not' be able to travel to The Hague for testimony.⁶

¹ Prosecution's Request to Hear Witnesses P-0005's and P-0108's Testimony *via* Video-link, ICC-01/04-02/06-1694-Conf.

² First Request, ICC-01/04-02/06-1694-Conf, para. 1.

³ First Request, ICC-01/04-02/06-1694-Conf, paras 1 and 6.

⁴ First Request, ICC-01/04-02/06-1694-Conf, paras 1 and 6.

⁵ First Request, ICC-01/04-02/06-1694-Conf, paras 2 and 5.

⁶ First Request, ICC-01/04-02/06-1694-Conf, para. 2.

4. Also on 20 December 2016, the Prosecution requested that the testimony of Witness P-0863⁷ be heard via video-link ('Second Request', and together with the First Request the 'Requests').⁸ The Prosecution informs the Chamber that due to logistical difficulties, including the fact that the Dutch Consulate in Kinshasa has been temporarily closed, it is 'unlikely' that the witness's visa application will be processed in sufficient time to enable him to travel to The Hague for testimony as scheduled.⁹
5. The Prosecution submits that the Requests are not prejudicial to or inconsistent with the rights of the accused, and will not 'detrimentally affect the fairness of the trial'.¹⁰
6. On 24 December 2016, the defence team for Mr Ntaganda ('Defence') provided a consolidated response ('Response'),¹¹ indicating its opposition to the portions of the Requests relating to Witnesses P-0005 and P-0863, but that it does not oppose the hearing of Witness P-0108's testimony by way of video-link.¹² In particular, the Defence argues that the requests in respect of Witnesses P-0005 and P-0863 are 'inadequately substantiated' which it submits, in conjunction with the 'importance' of the anticipated testimony, renders use of video-link 'inappropriate'.¹³
7. In the case of P-0005 the Defence submits that a 'medical opinion in writing' must be provided so that the Chamber can assess whether the 'conditions for video-link testimony are satisfied'.¹⁴ The Defence further argues that the

⁷ Witnesses P-0005, P-0108 and P-0863 are hereafter collectively referred to as the 'Witnesses'.

⁸ Prosecution's Request to Hear Witness P-0863's Testimony *via* Video-link, ICC-01/04-02/06-1695-Conf, notified on 21 December 2016.

⁹ Second Request, ICC-01/04-02/06-1695-Conf, paras 1, 6 and 10.

¹⁰ First Request, ICC-01/04-02/06-1694-Conf, para. 4; Second Request, ICC-01/04-02/06-1695-Conf, para. 9.

¹¹ Consolidated Response on behalf of Mr Ntaganda to "Prosecution's Request to Hear Witnesses P-0005's and P-0108's Testimony *via* Video-link" and "Prosecution's Request to Hear Witness P-0863's Testimony *via* Video-link", ICC-01/04-02/06-1701-Conf, notified on 27 December 2016.

¹² Response, ICC-01/04-02/06-1701-Conf, para. 1.

¹³ Response, ICC-01/04-02/06-1701-Conf, paras 2-3, 9-10 and 13-14.

¹⁴ Response, ICC-01/04-02/06-1701-Conf, para. 10.

nature and content of Witness P-0005's anticipated testimony, [REDACTED], renders his presence in the courtroom 'particularly important', submitting that he 'may have motives to lie' which, it argues, would be more easily detected and countered if the witness was in the courtroom.¹⁵ In respect of P-0863, the Defence argues that the Prosecution has not established that a visa cannot be obtained despite the closure of the Consulate, and that the request is 'premature' as it may yet be possible for the visa to be obtained in time.¹⁶

II. Analysis

8. As previously held,¹⁷ the Chamber considers that the Statute and the Rules give the Chamber a 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.
9. In respect of Witness P-0005, the Chamber notes the VWU's assessment that the witness is unlikely to be able to travel, that he has limited mobility and has reportedly been advised by his doctor to 'avoid exhausting activities'.¹⁸ The Chamber recalls, in this regard, that it does not consider the use of video-link to require exceptional justification,¹⁹ and that it has not, in such circumstances, previously found it necessary to obtain further information concerning a witness's inability to travel.²⁰ The Chamber also notes the Defence's

¹⁵ Response, ICC-01/04-02/06-1701-Conf, para. 12.

¹⁶ Response, ICC-01/04-02/06-1701-Conf, paras 14-15.

¹⁷ Decision on Prosecution's request to hear P-0933's testimony via video-link, 16 March 2016, ICC-01/04-02/06-1213-Red, para. 6; Decision on Prosecution's request to hear P-0039's testimony by way of video-link, 12 October 2015, ICC-01/04-02/06-897-Red2, para. 12, making reference, *inter alia*, to *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; and *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the defence request for a witness to give evidence via video-link, 9 February 2010, ICC-01/04-01/06-2285-Red, paras 14-15; and Decision on Prosecution's request to hear Witness P-0668's testimony via video-link, 9 September 2016, ICC-01/04-02/06-1499 ('Decision of 9 September 2016').

¹⁸ First Request, ICC-01/04-02/06-1694-Conf, paras 1 and 6.

¹⁹ Decision of 9 September 2016, ICC-01/04-02/06-1499, para. 4.

²⁰ See, for example, Decision on Prosecution's request to hear Witness P-0918's testimony via video-link, 4 November 2016, ICC-01/04-02/06-1612-Conf, para. 5; Decision on Prosecution's request to hear P-0039's

submissions regarding the nature of Witness P-0005's anticipated testimony. While the Chamber does consider this to be a relevant consideration, the Chamber does not consider that the hearing of the testimony by way of video-link would by itself give rise to prejudice. It is noted that the Chamber, the accused, the parties and participants will be able to see and hear the witness testifying in real-time, the testimony is anticipated to be elicited *viva voce*, it will be given under the Chamber's supervision and control, and the Chamber and both parties will have the opportunity to examine the witness.

10. In respect of P-0863, the Chamber recalls its finding that practical and logistical considerations are amongst the factors which may be relevant to an assessment of whether the use of video-link is appropriate in any particular instance.²¹ While it remains possible that the necessary travel documentation may be obtained in sufficient time, the Chamber considers that, in the reported circumstances, and given the imminence of the witness's testimony, logistical clarity is in the interests both of the witness and of the proceedings.

11. The Chamber notes that the Defence made no concrete submissions as to prejudice specifically arising in the case of Witness P-0863,²² and the Chamber does not consider that it would be prejudicial to or inconsistent with the rights of the accused for the testimony of the witness to be heard by way of video-link. In so deciding the Chamber has had regard to the nature of the witness's anticipated testimony, the fact that the Chamber, parties and participants will be able to see and hear the witness testifying in real-time, the testimony is

testimony by way of video-link, 12 October 2015, ICC-01/04-02/06-897-Red2, para. 13; and Decision of 9 September 2016, ICC-01/04-02/06-1499, para. 4.

²¹ Decision on Prosecution's request to hear P-0039's testimony by way of video-link, 12 October 2015, ICC-01/04-02/06-897-Red2, para. 12; Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68, 2 December 2016, ICC-01/04-02/06-1667-Conf, para. 23.

²² While paragraph 3 of the Response refers to the 'importance' of both Witnesses P-0005 and P-0863, no further submissions in this regard are made specifically in relation to Witness P-0863.

anticipated to be elicited *viva voce* and both the Chamber and the parties will have the opportunity to examine the witness.

12. In the circumstances, and for the reasons given above, the Chamber finds it appropriate to hear the testimony of Witnesses P-0005 and P-0863 by way of video-link.

13. Finally, in respect of Witness P-0108, noting the witness's reported state of health and age, as well as the nature and length of the anticipated testimony, and that the Defence does not object, the Chamber finds it appropriate for Witness P-0108's testimony to also be heard by way of video-link.

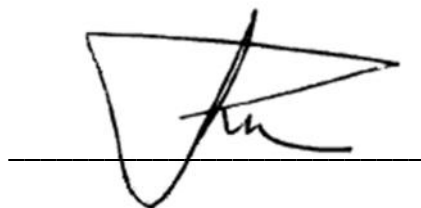
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Requests;

DIRECTS the Registry to make the necessary arrangements for the hearing of the Witnesses' testimony by way of video-link; and

DIRECTS the parties to file public redacted versions of their submissions within three weeks from the date of notification of this decision.

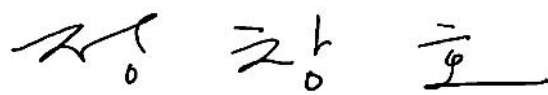
Done in both English and French, the English version being authoritative.

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Judge Robert Fremr, Presiding Judge

A handwritten signature in black ink, appearing to be 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

A handwritten signature in black ink, consisting of Korean characters '장호중' followed by a stylized '이', written over a horizontal line.

Judge Chang-ho Chung

Dated this 3 January 2017

At The Hague, The Netherlands