

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **14 August 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 to hear Defence Witnesses D-0057, D-0201 and D-0211 by video-link', ICC-01/04-02/06-2004-Conf", 11 August 2017, ICC-01/04-02/06-2007-Conf

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution opposes the Defence Request¹ to hear the evidence of Witness D-0211 *via* video-link, but does not oppose the same request in relation to Witnesses D-0057 and D-0201, in view of the nature of their expected testimony.
2. Contrary to the Defence's assertion, Witness D-0211's expected testimony is not limited in scope. It relates to at least five of the charges faced by the Accused, and is expected to challenge the evidence of two Prosecution witnesses, [REDACTED]. As such, regardless of its expected duration, Witness D-0211's testimony should be elicited in person in The Hague so as to enable the Chamber, Prosecution and Legal Representatives of Victims to observe her demeanour directly and to avoid technical difficulties that may hinder, *inter alia*, the accurate interpretation of her testimony. The fact that [REDACTED] is of no relevance to the determination as to whether she should be authorised to testify *via* video-link in the proceedings against the Accused. Further, measures other than video-link testimony can ensure that D-0211's identity is not disclosed and that she can continue to meet her [REDACTED] commitments.

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 also file a public redacted version of this filing.

¹ ICC-01/04-02/06-2004-Conf.

Prosecution's Submissions

D-0211

4. The Chamber should reject the Defence Request to the extent that it relates to Witness D-0211. Contrary to the Defence's assertion, the anticipated testimony of this witness is not "limited in scope".² The expected duration of a witness's testimony, or its relevance to the acts and conduct of the Accused, do not always provide a reliable indication of the potential importance or impact of the testimony on the case.
5. Witness D-0211's expected testimony relates to at least five of the charges faced by the Accused.³ The Defence [REDACTED],⁴ [REDACTED].⁵ D-0211 is expected to directly challenge various aspects of the evidence of [REDACTED], as well as to challenge the credibility of Prosecution Witness [REDACTED] and/or the reliability of her sources.⁶ The Chamber heard the evidence of both Prosecution Witnesses [REDACTED] while they were physically present before it. It is only fair that the testimony of a witness who is expected to contradict their evidence be heard under the same conditions. This would also put the Chamber in the best position to resolve competing versions of fact and issues of credibility.
6. The Defence fails to explain how the fact that D-0211 [REDACTED] is relevant to the determination as to whether she should be authorised to testify *via* video-link in the case against the Accused.⁷ [REDACTED]. [REDACTED]. [REDACTED].
7. Nor do the other reasons advanced by the Defence provide an adequate basis to depart from what remains the clearly preferred norm of in-person testimony

² Defence Request, para. 9.

³ [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ See Defence Request, para. 9.

before Chambers of this Court.⁸ While the Prosecution is sympathetic to any [REDACTED] commitments that Witness D-0211 may have,⁹ these should not be given undue weight in the Chamber's determination of the Defence Request. Several Prosecution witnesses faced issues similar to those described by the Defence in relation to D-0211 but the Prosecution and the Victims and Witnesses Section ("VWS") were able to cater to their needs, [REDACTED]. [REDACTED].¹⁰ [REDACTED].

8. Similarly, necessary logistical measures can be put in place in order to ensure that D-0211's identity is not revealed due to her traveling to The Hague.¹¹ Such precautions are routinely employed by the VWS for witnesses travelling to the seat of the Court and nothing regarding the circumstances of this witness indicates that they cannot also be taken in her case.
9. Authorising the testimony of D-0211 *via* video-link would disadvantage the Prosecution¹² and impede the truth-finding mandate of the Chamber, since it is easier for the Chamber to properly assess a witness's demeanour when the witness is sitting inside the courtroom immediately before it and not in an *ad hoc* hearing room. Further, in a number of instances when witnesses have testified *via* video-link in this case, there have been several instances of background noise at the video-link location preventing the interpreters from properly hearing and interpreting the witness's responses. This further militates against hearing the testimony of a Defence witness who is expected to give important and disputed evidence *via* video-link.

⁸ See ICC-02/11-01/15-721, para.12: "Pursuant to Article 69(2) of the Statute, the testimony of a witness at trial shall be given in person, except to the extent provided for in the Rules. Thus, although **the preference for testimony in person before the Chamber is clear**, the Chamber may authorise measures such as testimony by video-link, whenever this becomes necessary and appropriate, and is not prejudicial to or inconsistent with the rights of the accused" (emphasis added).

⁹ Defence Request, para. 10.

¹⁰ [REDACTED].

¹¹ See Defence Request, para. 8.

¹² *Contra* Defence Request, para. 12.

D-0057 and D-0201

10. The Prosecution concurs with the Defence's description of the expected testimony of Witnesses D-0057 and D-0201 as limited in scope.¹³ Accordingly, the Prosecution does not oppose the Defence Request to hear the testimony of these two witnesses *via* video-link.
11. Nevertheless, the Prosecution notes that budgetary considerations such as the expenses incurred in order to secure a witness's appearance in person at the seat of the Court, while a factor to be considered, are not in themselves determinative of a request for testimony to be heard *via* video-link.¹⁴
12. Given that the Defence Request is further based on the witnesses' [RDDACTED],¹⁵ the Prosecution notes that its non-opposition to the Defence Request in relation to these witnesses is without prejudice to its position in relation to any request for in-court protective measures that may be filed in their regard.

Conclusion

13. The jurisprudence of this Court¹⁶ and the ICTY¹⁷ highlights the importance of equality of arms and procedural fairness to *both* Parties. While these vital

¹³ Defence Request, paras. 1, 6.

¹⁴ *See* Defence Request, paras. 1, 6, 11.

¹⁵ Defence Request, para. 7.

¹⁶ 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 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.

¹⁷ In *Marti*, 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. Marti*, IT-95-11-

principles will not be unduly hindered should the Chamber authorise the testimony of D-0057 and D-0201 to be heard *via* video-link, for the foregoing reasons, authorising D-0211's testimony to be heard in this manner would prejudice the Prosecution and impede the truth-seeking function of the Chamber. The grounds advanced by the Defence are inadequate to support the Defence Request in relation to D-0211 in view of the expected scope and impact of her testimony. As such, the Chamber should reject the Defence Request to the extent that it relates to D-0211.



Fatou Bensouda
Prosecutor

Dated this 14th day of August 2017
At The Hague, the Netherlands

AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babi , 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 *Tadi* , 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. Tadi* , IT-94-1-A, Judgment, 15 July 1999, para. 48.