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Date: 27 February 2015

**TRIAL CHAMBER VI**

**Before:** Judge Robert Fremr, Presiding Judge  
Judge Kuniko Ozaki  
Judge Geoffrey Henderson

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF  
*THE PROSECUTOR V. BOSCO NTAGANDA***

**Public**

**Response on Behalf of Mr Ntaganda to  
“Prosecution motion regarding witness preparation”**

**Source:** Defence Team of Mr Bosco Ntaganda

**Document 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 the Defence**

Me Stéphane Bourgon  
Me Luc Boutin

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation / Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verril

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Further to the submission of the *“Prosecution motion regarding witness preparation”* on 5 February 2015 (‘Prosecution Motion’), Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit this:

**Response on Behalf of Mr Ntaganda to  
“Prosecution motion regarding witness preparation”**

## OVERVIEW

1. The Defence does not oppose the proposed practice of witness preparation by a calling party but nonetheless takes issue with three key aspects of the Office of the Prosecutor’s proposed Witness Preparation Protocol<sup>1</sup> (‘Prosecution’ and ‘Proposed Protocol’).
2. First, the Prosecution’s requirement for the video recording of every single witness preparation session is not based on realistic considerations. Moreover, the video recording of witness preparation sessions has not proved to be an essential measure. The proposed practice would also result in considerable logistic challenges for the calling party, especially for the Defence. As such, it would neither be of assistance to the parties nor serve the interests of justice. For this reason, the video recording of witness preparation sessions should be limited to specific cases in which it has the potential to make a difference such as, for example, the testimony of witnesses for whom there are risks of self-incrimination pursuant to Article 55(2) of the Statute.
3. Second, the absence in the Proposed Protocol of provisions setting out clearly how the parties may gain access to and/or use the video recording of a witness preparation session deprives the proposed practice of any real efficiency. While the Defence agrees that there is no basis for assuming that either party will fail to adhere to the limitations in the Proposed Protocol, it is incorrect to argue that the video recording of witness preparation sessions

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<sup>1</sup> ICC-01/04-02/06-444-Anx1

provides a solid safeguard for witness preparation unless the procedure and the standard to be met for either the calling party or the cross-examining party to make use of the video recording and how is clearly known and objective.

4. Third, while Article 30 of the Proposed Protocol provides that the calling party shall disclose to the non-calling party information obtained during a preparation session that is subject to disclosure, this provision is too vague as well as insufficient for the purposes of achieving the aim of witness preparation while having in place the necessary safeguards. Accordingly, it is essential for the calling party – whether Prosecution or Defence – to provide to the non-calling party with a “proofing note” setting out all relevant information arising from a preparation session, which is material to the preparation of its cross-examination. Such a procedure, which has been in place for a long time in proceedings before *ad hoc* tribunals, will undoubtedly prevent misunderstandings arising from preparation sessions, foster transparency and increase the efficiency of the proceedings, thereby promoting judicial economy.

## SUBMISSIONS

### I. Requirement for video recording

5. Part V of the Proposed Protocol<sup>2</sup> provides that the calling party shall video record its preparation sessions with witnesses and keep a log of each preparation session. This log, listing the location and duration of the session as well as the attendees at the session shall be promptly provided to the non-calling party.
6. The Defence does not oppose the requirement to prepare and disclose a log to the non-calling party for each preparation session conducted with a witness.

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<sup>2</sup> ICC-01/04-02/06-444-Anx1, paras.12-14.

In fact, as discussed below the Defence takes the view that much more is required in this regard.

7. Nevertheless, considering the anticipated total number of witnesses likely to be called by both parties, the Defence posits that the video recording of all preparation sessions conducted with every single witness is neither necessary nor practical. From the Defence perspective, considering the limited resources and facilities available, such a requirement would create an unnecessary logistical burden without yielding any advantage. To a certain extent, this also applies to the Prosecution.
8. Moreover, considering the very limited circumstances in which access to and/or the use of video recordings is likely to be authorised, any benefit gained by video recording all preparation sessions with every single witness is clearly not proportional to the burden imposed on the parties.
9. In this regard, it is crucial to strike a balance between the necessity and/or advantages of video recording proofing sessions and the resources necessary - both financial and in terms of manpower - as well the limits imposed on the parties by having to conduct proofing sessions in locations where they can be video recorded.
10. The Defence respectfully submits that such a balance can be established by limiting the necessity to video record preparation sessions to that conducted with witnesses for which a genuine need for video recording exists.
11. Such a need exists, for example, when there are risks of self-incrimination by a witness pursuant to Article 55(2) of the Statute. Witnesses testifying pursuant to Article 55(2) are in a unique position if only because any interview conducted with these witnesses must be recorded.<sup>3</sup> Accordingly, conducting a

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<sup>3</sup> Rule 112 of Rules of Procedure and Evidence.

proofing session with an Article 55(2) witness without video recording the same would be contrary to existing regulations.

12. A genuine need to video record the preparation session of a witness might also exist when a party has obtained information that the witness has engaged in illegal / inappropriate behaviour, which it intends to raise in cross-examination. In these circumstances, the non-calling party might request the calling party to video record its preparation session with the witness, which would be warranted. Of course, this would be an exceptional application.
13. Consequently, the Defence respectfully submits that the video recording of preparation sessions with witnesses should be limited to Article 55(2) witnesses as well as, upon request from the non-calling party, to witnesses for whom there exists a legitimate reason to video record the preparation session.

## **II. Request by the non-calling party to access the video recording**

14. While the Prosecution Motion addresses the possibility for a party to gain access to and/or make use of the video recording of a preparation session with a witness, the Proposed Protocol is silent on this issue.
15. In light of the underlying rationale for the adoption of the Proposed Protocol – that is *inter alia*, the implementation of procedures to facilitate the fair and expeditious conduct of proceedings – the absence of any provision dealing with the procedure to be followed and the standard to be met by a party to request and gain access to and/or make use of the video recording of a preparation session, defeats the purpose of the Proposed Protocol.
16. Having a well-known and transparent mechanism making it objectively possible for a party to gain access to and/or make use of the video recording of a preparation session with a witness would provide a significant incentive to the parties to abide strictly with the limitations enshrined in the Proposed Protocol.

17. A well-known and transparent mechanism would also have the benefit of making it much easier to solve potential disputes arising between the parties during the testimony of witnesses.
18. In this regard, the Defence agrees with the Prosecution that a non-calling party must apply to the Chamber on a concrete and credible basis and its application must be grounded on well-founded motives.<sup>4</sup>
19. The defence acknowledges that the video recording of a preparation session is likely to produce a mixture of information, some of which might be privileged. Accordingly, any application for access to and/or to make use of the video recording should be the object of a determination by the Chamber after the holding of a *voir-dire*.
20. Both the standard to be met and the procedure must be included in the Proposed Protocol. To this end, the Defence proposes the following provision:

“A party wishing to gain access to and/or make use of the video recording of a witness preparation session shall apply to the Chamber, orally or in writing, setting out: (i) the reason why access to and/or use of the video recording is necessary; and (ii) the information in its possession, evidentiary or other, demonstrating that access to and/or use of the video is warranted. The Chamber shall grant the application, if necessary following the holding of a *voir-dire*, if the party has shown genuine objective motives and the disclosure and/or use of the video recording will: (i) assist in either solving a dispute between the parties or proceeding swiftly with the testimony of the witness; and (ii) facilitate the search for the truth in the interests of justice.”

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<sup>4</sup> ICC-01/04-02/06-444, para.34.

### III. Information provided to the non-calling party

21. Pursuant to Part VIII of the Proposed Protocol<sup>5</sup>, where a party obtains information during a preparation session that is subject to disclosure, it shall disclose that information to the non-calling party as a soon as practicable, and in any event before the witness begins his or her examination-in-chief. According to the Prosecution any “relevant new information” is subject to such disclosure<sup>6</sup> while disclosable information also “includes” contradictions with the witness statement and new information or clarification provided by the witness.<sup>7</sup> Further, the Prosecution opines that it is unnecessary to prescribe further the form of such disclosure or its content.<sup>8</sup> The Prosecution relies on its established practice in the *Ruto & Sang* case, which has been to disclose notes containing disclosable information following a witness preparation session.
22. The Prosecution’s proposed disclosure standard is, in and of itself, very subjective. It also lends itself to unintended misapplication or misunderstanding by the providing party and even to outright arbitrariness. In addition, Prosecution’s disclosure “practice” is subject to unilateral amendment without notice at any given time. Thus, disclosing notes containing disclosable information with no specific and objective guidance as to the content and scope of the information to be provided can only lead to confusion, uncertainty, arbitrariness and more importantly disputes among the parties, which have the potential to prejudice the testimony of witnesses, delay the proceedings and lead to time consuming litigation.
23. More importantly, Article 30 of the Proposed Protocol erroneously focuses on the disclosure of information obtained during preparation sessions rather

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<sup>5</sup> ICC-01/04-02/06-444-Anx1, paras.30.

<sup>6</sup> ICC-01/04-02/06-444, paras.18-19.

<sup>7</sup> ICC-01/04-02/06-444, paras.18-19.

<sup>8</sup> ICC-01/04-02/06-444, para.19.



than on achieving the objective of the Proposed Protocol as set out in Paragraph 4 of the Prosecution Motion.

24. Achieving these objectives requires full transparency by the parties regarding the holding of preparation sessions with witnesses, which rests on the provision to the non-calling party of all relevant information material to the preparation of its cross-examination.
25. Indeed, where a party might take the view that certain information provided by a witness during a preparation session is not disclosable *per se*, such information might very well be of high importance and thus material to the non-calling party's preparation for cross examination. To provide but one example, upon being shown a document, a witness might provide information which does not appear to be relevant, identify one person therein or even simply say that he never saw this document. Whereas the calling party might take the view that the answer provided by the witness is not relevant, it might be crucial to the non-calling party's cross examination, which will waste time seeking to obtain the same from the witness. What is more, the non-calling party will use a lot of time to establish, for any and all documents used, whether it was shown to him during his preparation session. Then, finding out that the document was indeed shown to the witness although this information was not provided by the calling party, the non-calling party will likely spend a lot of time going over everything that happened during his preparation session, thereby defeating the purpose of the Proposed Protocol, if not producing the reverse effect. Time consuming disputes if not litigation can also arise from such situations.
26. Many additional examples could be provided to demonstrate that full transparency, in the interest of the Court's truth finding function, focussed cross-examinations and expeditious proceedings, is the most important aspect of the Proposed Protocol with a view to ensuring that its objectives are met.

27. A long-standing process used in proceedings before *ad hoc* tribunals makes it possible to achieve the aim of the Proposed Protocol while avoiding the pitfalls of the same, namely the provision of “proofing notes” by the calling party to the non-calling party which include (i) all information material to the preparation of the non-calling party’s cross-examination; as well as (ii) all other information provided by the witness which is not privileged information.
28. Not only will the provision of such information allow to achieve the objectives of the Proposed Protocol, it will also provide the best incentive to witnesses – being informed that the non-calling party will be informed of what was discussed during the preparation session, other than privileged information – to tell the truth and nothing but the truth.
29. The preparation of proofing notes does not impose an unacceptable burden on the parties and its advantages far outweigh any time spent in preparing the same.
30. Proofing notes also foster good relationships and trust among the parties while greatly facilitating the work of the Chamber during the testimony of witnesses. They have proven to be very effective in proceedings before *ad hoc* tribunals and the fact that no such provision is included in the Kenya witness preparation protocol is not a reason not to include it in the Proposed Protocol to be used in this case. Proceedings before the Court can always be improved.
31. Consequently, the Defence respectfully requests the Chamber to add a provision in the Proposed Protocol calling upon the parties to provide proofing notes to the non-calling party following every preparation session with a witness.
32. Moreover, for the sake of clarity for the parties and with a view to alleviating or mitigating the potential risks associated with the preparation of witnesses

and actually gaining from the implementation of the Proposed Protocol, the Defence suggests to include in the Proposed Protocol specific guidance on the contents of proofing notes based on the above criteria.

33. Hence, in addition to providing to the non-calling party the location, duration and attendees at any given “proofing” sessions, the parties should be instructed in the Proposed Protocol to provide a “proofing note” containing the following specific information, as applicable:
  - a. Any changes or corrections made by the witness to his previous statements and the reasons advanced by the witness, if any, to justify the change or correction;
  - b. Any clarification with regard to prior statements and the details of such clarification;
  - c. Any new information obtained from the witness as well as that which is material to the preparation of the non-calling party’s cross-examination or which is intended for use by the Prosecution as evidence at trial; and
  - d. A list of all documents – including prior statements provided by the witness – which have been shown to the witness and his comments thereon where applicable.
34. To be sure, proper and timely notice of the above elements to the other party in the form of a “proofing note” would be an efficient and transparent safeguard, as demonstrated by the long standing practice of the *ad hoc* tribunals. In addition, it would alleviate the potential and/or need for protracted investigative cross-examinations, hence, encouraging judicial economy and promoting the interest of justice.

35. Furthermore, the above suggested modifications will ease the meetings of the non-calling party with the calling party's witnesses before their testimony, in accordance with the "Protocol on the Handling of Confidential Information During Investigations and Contact Between a Party or Participant and Witnesses of The Opposing Party or of a Participant"<sup>9</sup>.

## RELIEF SOUGHT

36. In light of the above submissions, the Defence respectfully requests the Chamber to adopt the Proposed Protocol with the following modifications:

- a. RESTRICT the video recording to witnesses where there are risks of self-incrimination by the witness<sup>10</sup> or at the request of the opposing party for certain witnesses in exceptional circumstances;
- b. PRESCRIBE that in order to gain access to the video of a proofing session, a party must apply to the Chamber which shall grant the application based on the above mentioned proposed provision; and
- c. PRESCRIBE that the calling party must submit a "proofing note" to the other party containing all information mentioned in Paragraph 33 above.

**RESPECTFULLY SUBMITTED ON THIS 27<sup>th</sup> DAY OF FEBRUARY 2015**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

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<sup>9</sup> ICC-01/04-02/06-412-AnxA.

<sup>10</sup> Article 55(2) of the Rome Statute.