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Pénale
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**International
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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

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

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 Office of the Prosecutor (“Prosecution”) replies to the Defence’s response to the Prosecution’s motion regarding witness preparation, in which the Defence seeks three modifications to the witness preparation protocol proposed by the Prosecution (“Proposed Protocol”).¹
2. In its first proposed modification, the Defence seeks to remove or limit the requirement to video record witness preparation sessions. This proposal is not justified and defeats the purpose of this safeguard.
3. The Defence also requests that the protocol detail the procedure and standard by which a party can gain access to the video recording of a proofing session and the form and content of the disclosure note following witness preparation. These additions to the Proposed Protocol are not necessary.
4. The basis for seeking access to the witness preparation videos and the procedure to do so is set out in the Court’s jurisprudence. If Trial Chamber VI (“Chamber”) were to accept that the protocol should include substantive legal tests, the provision should fully reflect the language used by Trial Chamber V in the *Kenya* cases.² As to the Defence’s proposed provision on the form and content of the disclosure note, the Proposed Protocol contains sufficient provisions to ensure all relevant information is disclosed. Nor would it be possible to identify all possible disclosure scenarios resulting from witness preparation sessions, such that the Defence’s proposed wording does not resolve the concerns raised.

¹ ICC-01/04-02/06-444-Anx1.

² ICC-01/09-01/11-524, para.47 and ICC-01/09-02/11-588, para.50.

Procedural History

5. On 18 December 2014, the Chamber directed the Parties to file any request for witness preparation by 6 February 2015.³
6. On 5 February 2015, the Prosecution filed a motion seeking authorisation to conduct witness preparation ("Prosecution Motion") and a proposed witness protocol ("Proposed Protocol").⁴
7. On 27 February 2015, the Defence filed its response to the Prosecution Motion in which it sought three amendments to the Proposed Protocol ("Defence Response").⁵
8. On 2 March 2015, the Prosecution sought leave to reply to the Defence Response, and in particular, to the first issue raised by the Defence that video recording of the witness preparation sessions be limited in scope to particular witnesses, as this issue had not been raised in the *inter partes* discussion.⁶
9. On 3 March 2015, the Chamber granted the Prosecution's request to file a reply and invited the Prosecution to respond to all three issues identified by the Defence.⁷

Prosecution's Observations

10. In the Defence Response, the Defence seeks three modifications to the Proposed Protocol. The Prosecution requests that each modification be rejected.

³ ICC-01/04-02/06-416, p. 6.

⁴ ICC-01/04-02/06-444 and ICC-01/04-02/06-444-Anx1, respectively.

⁵ ICC-01/04-02/06-484, para.36.

⁶ ICC-01/04-02/06-485, paras.5-6.

⁷ ICC-01/04-02/06-494, para.5.

I. Every witness preparation session must be video recorded in order for this safeguard to be effective

11. The requirement to video record the witness preparation sessions was ordered by Trial Chamber V in the “Decision on witness preparation” in the *Kenya* cases as a safeguard against witness coaching or other inappropriate influence by counsel during the preparation sessions.⁸
12. The Defence claims that this requirement imposes a “logistical burden” that is not proportional to the benefits it provides.⁹ First, to the contrary, the equipment required to video record these sessions is minimal, easily transported and simple to use. As such, the Defence argument that its limited resources and facilities create a burden both financially and in terms of manpower is unsubstantiated.¹⁰
13. Second, the purpose of the requirement to video record preparation sessions is to have a record of the session in the event of an allegation of impropriety. The fact that access to these recordings is limited does not reduce the utility of the recording or render them moot. Nonetheless, in order for this measure to provide any benefit, it must be applied equally to both Parties and to all preparation sessions.
14. There is no basis to apply this requirement only to those witnesses specified in the Defence Response.¹¹ The Defence conflates the protections afforded to witnesses in investigations under rule 112 of the Rules of Procedure and Evidence (rights during investigations of persons who may have committed crimes under the jurisdiction of the Court) with the safeguards against coaching or inappropriate influence by counsel or others during the witness preparation

⁸ ICC-01/09-01/11-524, paras.47-48 and ICC-01/09-02/11-588, paras.50-51.

⁹ Defence Response, paras.7-8.

¹⁰ Defence Response, paras.7-9.

¹¹ Defence Response, paras.10-13.

sessions. The rationale to video record witness preparation sessions is not protection against self-incrimination and it applies to all witnesses alike.

15. The Defence posits that video recordings may be limited to cases where a party has obtained information that a witness has engaged in illegal/inappropriate behaviour.¹² Again, this suggestion misses the point of the exercise. It is unlikely that concerns about coaching or inappropriate interference by counsel *during* the preparation session could be known to the non-calling party *in advance* of the testimony of the witness, such that the party would have a reason to request the session be recorded. Rather, in order to be effective this requirement must be applied to all witnesses and all witness preparation sessions.
16. The Prosecution respectfully requests the Chamber dismiss this request on the basis that it is ill-founded and defeats the purpose of the requirement to video record witness preparation sessions.

II. The standard and process by which to access the video recordings of witness preparation sessions has been sufficiently articulated

17. In the Prosecution Motion, the Prosecution cites and reproduces the relevant and applicable language from the “Decision on witness preparation” in the *Kenya* cases, which clearly articulates how and on what basis a non-calling party may request the Chamber to order the disclosure of the video record of a witness preparation session.¹³ Trial Chamber V stated:

...in the event of allegations of coaching or a witness or of any other improper interference with the evidence to be presented by a witness, the non-calling party may request the Chamber order the disclosure of the video. The party making such a request shall satisfy the Chamber that there is a concrete and credible basis for the request. On being so satisfied as to the basis of the request, the Chamber, in its discretion, may consider whether to review the video recording prior to making any disclosure order, mindful of the need, among other things, to

¹² Defence Response, para.12.

¹³ Prosecution Motion, para 34 citing ICC-01/09-01/11-524, para.47 and ICC-01/09-02/11-588, para.50.

protect such privileged information as may be revealed in the video recording.¹⁴

18. The above constitutes a “well-known and transparent mechanism” as sought by the Defence.¹⁵ As such, it was not necessary to articulate this “mechanism” further in the Proposed Protocol.
19. The Prosecution submits that the provision proposed by the Defence in the Defence Response is overly prescriptive and interferes with the Chamber’s discretion.¹⁶
20. On a related note, the Defence suggests that having a mechanism that makes it “objectively possible for a party to gain access to/or make use of the video recording of a preparation session with a witness would provide significant incentive to abide strictly with [the Proposed Protocol].”¹⁷ It is not apparent how explicitly referring to such a mechanism in the Proposed Protocol would provide any additional incentive to abide by it, or why the Parties would require such incentive.
21. Should the Chamber find it preferable to explicitly refer to the mechanism and legal test by which a party can seek access to the video recorded witness preparation sessions in the protocol, the Prosecution submits that that the language set about above by Trial Chamber V is more appropriate and in keeping with the established jurisprudence.

III. The Proposed Protocol sufficiently articulates the disclosure obligation

22. The Defence request to include a requirement to provide a “proofing note” and to specify the information to be included therein is unnecessary as the Proposed

¹⁴ ICC-01/09-01/11-524, para.47 and ICC-01/09-02/11-588, para.50.

¹⁵ Defence Response, para.16.

¹⁶ Defence Response, para.20.

¹⁷ Defence Response, para.16.

Protocol sufficiently articulates the requirement to disclose all of the information the Defence is seeking.

23. The Prosecution does not dispute that disclosable information arising from a witness preparation session must be provided to the non-calling party. The Proposed Protocol obliges the calling party to create and disclose a record of any witness preparation sessions¹⁸ and mandates that any information subject to disclosure which a party obtains during a preparation session shall be disclosed to the non-calling party.¹⁹
24. The Prosecution maintains that these provisions are clear. Moreover, the Prosecution further articulated the nature of the information falling within this disclosure obligation in the Prosecution Motion.²⁰
25. Pursuant to the Proposed Protocol, as part of witness preparation, counsel is required to reiterate a witness' obligation to tell the truth.²¹ Should information arise in the course of the preparation session that does not accord with or contradicts previous statements, or suggests the witness has been anything other than truthful, it would be disclosed. As such, it is not apparent how the Defence's proposed provision adds anything to what is already included in the Proposed Protocol. It is even less clear how the provision of a "proofing note" is the best incentive for witnesses to tell the truth, as suggested by the Defence.²² Importantly, as it is not possible to anticipate and set out every possible disclosure issue arising from a witness preparation session, attempting to do so could be unduly limiting.
26. Finally, the Prosecution is unable to meaningfully comment on the argument in paragraph 35 of the Defence Response. The Defence does not explain how

¹⁸ Proposed Protocol, paras.13-14.

¹⁹ Proposed Protocol, para.30.

²⁰ Prosecution Motion, para.19.

²¹ Proposed Protocol, para.15.

²² Defence Response, para.28.

expressly requiring the Parties to provide a “proofing note” will ease the meetings between the non-calling party and a witness in accordance with the Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party and Participant and Witnesses of the Opposing Party or of a Participant, as suggested. Meetings with witnesses of the opposing party occur *before* witness preparation sessions, which typically take place just prior to a witness’s testimony.

Conclusion

27. The Proposed Protocol adequately articulates the purpose of witness preparation, the manner in which the Parties are to engage in witness preparation and the obligation to disclose information arising during witness preparation.
28. The Defence’s modifications are unnecessary and should be rejected or modified.



Fatou Bensouda,
Prosecutor

Dated this 16th day of March 2015
At The Hague, The Netherlands