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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***

**Confidential
With Confidential Annex A**

Prosecution's request for the Chamber to conduct a judicial site visit

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") renews its request that Trial Chamber VI ("Chamber") conduct a judicial site visit to the Ituri district of the Democratic Republic of the Congo ("DRC"), pursuant to articles 64, 69, and 74 of the Rome Statute ("Statute"), in order to visit a number of the locations in which the crimes charged in the Updated Document Containing the Charges¹ are alleged to have taken place. The Prosecution proposes that such a visit be conducted at the earliest possible opportunity and, in any event, well before the end of the Prosecution's case.
2. The Prosecution, the Legal Representatives of Victims ("Legal Representatives") and the Defence have all previously expressed their support for a judicial site visit.² Although the Chamber has indicated that it does not intend to undertake such a visit during the current stage of the proceedings, the Prosecution considers it important to reiterate the need for a judicial site visit as early as possible, particularly in light of the Presidency's decision not to hold the opening statements *in situ*.³ As submitted below, the concerns which led the Presidency to reach this decision would not apply to a judicial site visit. In particular, there is no requirement for the Accused to be physically present during the site visit because no testimony would be given by any witnesses during the visit.
3. Conducting a judicial site visit as soon as possible would provide the Chamber with a more complete appreciation of the evidence, which is being presented during the course of the trial. It will also provide the Chamber with an

¹ ICC-01/04-02/06-458-AnxA.

² See ICC-01/04-02/06-409-Conf-Exp, paras. 3, 44, 46 with confidential redacted version at ICC-01/04-02/06-409-Conf-Red, paras.3, 44, 46 and public redacted version at ICC-01/04-02/06-409-Red2, paras.3, 44, 46 ("Prosecution's Submissions"); ICC-01/04-02/06-T-17-CONF-ENG p.23, ln.14- p.24, ln.13 (open session); p.26, ln.16 – p.27, ln.11 (private session) ; p.27, ln.22 – p.28, ln.17 (private session).

³ ICC-01/04-02/06-645-Conf-Exp with public redacted version at ICC-01/04-02/06-645-Red ("Presidency's Decision").

appreciation of the terrain – such as distances and views from various observation-points - on which the events allegedly took place. Moreover, conducting a judicial site visit during the early phase of the trial and before the end of the Prosecution's case, will better place the Chamber to assess witnesses' testimony and to ask the witnesses questions whilst they are still present.

Confidentiality

4. This filing is classified as "Confidential" pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court in view of the fact that, should the Chamber decide to conduct a site visit, this should remain confidential until the visit has taken place. The filing also refers to submissions made in filings and transcriptions bearing the same designation.

Background

5. On 28 November 2014, the Prosecution filed its submissions on conducting part of the trial *in situ* in which it noted, *inter alia*, that "subject to adequate logistical and security arrangements for participants, the Prosecution submits that a judicial site visit to the Ituri district of the DRC before the commencement of the trial would be extremely beneficial to the Chamber for a full appreciation of the evidence to be adduced at trial."⁴
6. On 28 November 2014, the Legal Representatives also filed their submissions on conducting part of the trial *in situ* and suggested that a judicial site visit "might better achieve the goal of bringing the proceedings closer to the victims."⁵

⁴ Prosecution's Submissions, para.3; *See also* paras.44, 46.

⁵ ICC-01/04-02/06-407-Conf, para.13.

7. During the 2 December 2014 Status Conference, the Prosecution and Legal Representatives reiterated their support for a judicial site visit.⁶ The Defence also supported this proposal.⁷
8. During the 22 April 2015 Status Conference, the Presiding Judge stated that “[t]he Chamber does not intend to undertake a judicial site visit prior to the commencement of trial. It considers that the judicial site visit should be conducted only where it would serve a specific purpose in relation to facts in issue. Thus the parties should, in making any application for a site visit, keep in mind this guidance. The need for a site visit may be reassessed, either *proprio motu* or upon application, at the end of the presentation of evidence by the Prosecution, and again after the closing of the Defence case. So that is the current position of the Chamber.”⁸
9. On 15 June 2015, the Presidency decided that opening statements shall be held at the seat of the Court at The Hague rather than in Bunia, DRC.⁹
10. Opening statements took place on 2¹⁰ and 3¹¹ September 2015, and the Prosecution called its first witness on 15 September 2015.¹²

⁶ ICC-01/04-02/06-T-17-CONF-ENG p.23, ln.14- p.24, ln.13 (open session); p.26, ln.16 – p.27, ln.11 (private session).

⁷ ICC-01/04-02/06-T-17-CONF-ENG p.27, ln.22 – p.28, ln.17 (private session).

⁸ ICC-01/04-02/06-T-19-ENG, p.9, lns.1-8 (open session).

⁹ Presidency’s Decision.

¹⁰ ICC-01/04-02/06-T-23-ENG.

¹¹ ICC-01/04-02/06-T-24-ENG.

¹² ICC-01/04-02/06-T-25-Red-ENG.

Prosecution's Submissions

The Chamber is empowered to order a site visit to the relevant locations

11. The Chamber is empowered to authorise a judicial site visit to the relevant locations, pursuant to articles 64, 69, and 74 of the Statute.
12. In particular, the Chamber may order a judicial site visit in the context of its mandate to ensure the trial is fair under article 64(2) and to enable the Chamber to properly assess evidence pursuant to article 69(3) and (4), and article 74(2).

A site visit would enhance the Chamber's understanding of the evidence it will hear

13. As previously noted by the Prosecution,¹³ a site visit would permit the Chamber to physically see the area where it is alleged the charged crimes occurred. This would give the Chamber a greater understanding of the context in which the evidence is being presented and assist it in properly assessing the evidence. The Defence has agreed that a site visit "might very well be necessary in order [...] for the Trial Chamber to see the area where the alleged crimes were committed" and noted that this could be beneficial for all parties involved.¹⁴
14. These views are in line with the jurisprudence of chambers of both this Court and the *ad hoc* tribunals, which have recognised the importance and confined purpose of judicial site visits.
15. In *Prosecutor v Katanga & Ngudjolo* ("Katanga"), Trial Chamber II noted that, besides providing an opportunity to gain a better understanding of the context of events before it for determination, the main purpose of a site visit was to enable

¹³ ICC-01/04-02/06-T-17-CONF-ENG p.23, lns.19-23 (open session).

¹⁴ ICC-01/04-02/06-T-17-CONF-ENG p.27, lns.22-25 (private session).

the Chamber to “conduct the requisite verifications *in situ* of specific points and to evaluate the environment and geography of locations mentioned by witnesses and the accused persons”.¹⁵

16. Trial Chambers of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) have similarly stated that the purpose of a site visit is to enable the Chamber to “observe certain landmarks and locations referred to in the Indictment in order to get a tri-dimensional and first-hand impression of these locations and of the general geography and topography of the area.”¹⁶ The Trial Chamber in *Hadžić* noted that “[t]his insight would significantly benefit the Trial Chamber in its analysis of the evidence and its ultimate determination of the charges”.¹⁷

17. Similarly, Trial Chambers of the International Criminal Tribunal for Rwanda (“ICTR”) have noted that the purpose of site visits is “to see the locations of certain alleged events of relevance in the case, and thus to better appreciate the evidence to be adduced during the trial.”¹⁸ In reaching their decision as to whether to conduct a site visit, ICTR Trial Chambers have also noted that “[a] site visit may assist a Chamber in its assessment of issues of visibility, layout of buildings, distances between locations and correlative proximity of places”.¹⁹

¹⁵ See ICC-01/04-01/07-3436, paras.108, 168, 224, 278; ICC-01/04-01/07-3234-Anx-Red; ICC-01/04-01/07-3213-tENG, para.9; ICC-01/04-01/07-3203-tENG, para.9.

¹⁶ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Site Visit, 28 January 2011, para.12 ; See also *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Site Visit, 4 June 2013, para.6.

¹⁷ *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Site Visit, 4 June 2013, para.6; See also *Prosecutor v. Perišić*, IT-04-081-T, Order on site visit with annex containing rules of procedure and conduct during site visit, 21 May 2009, p.2.

¹⁸ See *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement , 7 June 2001, para.10;

¹⁹ *Prosecutor v. Ntawukulilyayo*, ICTR-05-82, Scheduling order for site visit to Rwanda and Hearing of closing arguments, 9 March 2010, para.3; *Prosecutor v. Nindiliyimana et al.*, ICTR-00-56-T, Decision on locations for the site visit to Rwanda, 9 mars 2009, para.6 ; *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Defence motion for a view *locus in quo*, 16 December 2005, para.8 (“While photographs, sketches and maps have been tendered as exhibits regarding these locations, the Chamber is of the view that, in the particular circumstances of this case a first- hand knowledge of the area will be in the interests of justice.”).

The site visit should take place as soon as possible

18. In *Katanga*, Trial Chamber II conducted a judicial site visit on 18 and 19 January 2012, two months after the presentation of evidence in that case was concluded, and three months before rendering its decision pursuant to article 74 of the Statute.²⁰ However, as early as 25 November 2008, Trial Chamber II had asked the Parties' and participants' views on a site visit and whether this should take place before the commencement of the hearings or in the course of the hearings.²¹ When the issue was raised for a second time in November 2010, after the commencement of trial, Trial Chamber II stated that it would have liked to have conducted a site visit before the beginning of the trial and then returned there at the end of the trial, but this was not possible.²²

19. While the Prosecution does not at this stage oppose any subsequent judicial site visit,²³ the Prosecution respectfully submits that it would be more beneficial for such a visit to take place during the early phase of the trial whilst Prosecution witnesses are still testifying.²⁴ This would allow the Chamber to gain a deeper understanding from the outset of the context surrounding the facts being addressed in the live testimony and other evidence, as well as in the submissions of the Parties and participants throughout the course of the trial. It would also allow the Chamber to ask effective and better informed questions during witness' testimony.

²⁰ ICC-01/04-01/07-3436, paras.20, 107.

²¹ ICC-01/04-01/07-747-tENG, para.13(3).

²² ICC-01/04-01/07-T-224-ENG p.47, lns.1-2 (open session).

²³ See ICC-01/04-02/06-T-19-ENG, p.9, lns.1-8 (open session). The Prosecution reserves its right to make submissions on any request for a subsequent site visit.

²⁴ In this regard, the Defence has noted that it is "happy to look at [the] possibility" of the site visit taking place prior to the start of the trial, see ICC-01/04-02/06-T-17-CONF-ENG p.28, lns.13-16 (private session).

The concerns about holding opening statements in situ do not apply to a site visit

20. The Presidency decided against holding opening statements in Bunia in view of (i) the associated high costs; (ii) the affected communities having limited access to the proceedings; (iii) the security of the victims and their families, the witnesses and the broader affected communities – including risks of reprisals and ignition of ethnic tension; and (vi) concerns expressed by the victims that the Accused's return would remind them of their suffering and trauma.²⁵

21. These concerns do not apply to a judicial site visit.

22. First, the costs necessary for a judicial site visit would be significantly lower than those required to hold the opening statements *in situ*²⁶ given the more limited attendance from staff based at the seat of the Court,²⁷ the significantly less demanding logistical requirements, and the fact that the Accused need not attend.

23. Second, while the main objective of the site visit is not, as was the case for holding the opening of the trial *in situ*, that the affected communities be given access to the proceedings, the visit to several of the affected communities will still ensure that, to some extent, these communities are given at least some access to the process.

24. Third, the judicial site visit does not involve the same level of risks to witnesses, risks of reprisals and the ignition of ethnic tension which the Presidency considered in reaching its decision.²⁸ While proceedings *in situ* would have rightly been publicised in order to reach the objective of bringing the proceedings

²⁵ Presidency's Decision, para.26. See also paras.8-15, 18-25.

²⁶ See Presidency's Decision, para.21.

²⁷ For example, in *Katanga*, the Chamber decided that it would be accompanied by a legal assistant and an analyst while the Prosecution and the defence were to be represented, respectively, by two persons, and each team of legal representatives were to be represented by one person, ICC-01/04-01/07-3213-tENG, pp.8-9; See also ICC-01/04-01/07-3436, para.107.

²⁸ Presidency Decision, para.20.

closer to affected communities, a site visit would not be publicised and, as such, would attract minimal attention.²⁹ As already advanced, and set out below in more detail, the Accused need not be present during a site visit. This would also serve to alleviate the concerns considered by the Presidency since the Accused would not be there to remind victims of their suffering and trauma and would not create potential security risks as a result of his presence.³⁰

The Accused does not need to be present during a judicial site visit

25. In contrast to the conduct of trial proceedings *in situ*, there is no requirement for an accused person to be present in the DRC during a judicial site visit because the purpose is not for witnesses to present evidence to the judges or for the parties to make submissions, but is narrowly confined to giving the judges a better understanding of the terrain.³¹ As such, any site visit in the absence of the Accused does not breach his right to be present at his trial as envisaged in articles 63 and 67(1)(d). Even if this right had been engaged, which it is not in these circumstances, the European Court of Human Rights has recognised that the right is not absolute and there may be special circumstances where the accused need

²⁹ Decisions concerning the site visit undertaken in *Katanga* were filed confidentially before the visit was undertaken and only reclassified as public after the visit was completed. For example, ICC-01/04-01/07-3203-tENG was initially issued on 18 November 2011. At para.13 of this decision concerning the site visit the Chamber “emphasises the absolute imperative of maintaining the confidentiality of this decision”. ICC-01/04-01/07-3213-tENG was issued confidentially on 1 December 2011. The site visit took place on 18 and 19 January 2012 (ICC-01/04-01/07-3436-tENG, para.20). Both these filings were reclassified as public pursuant to Trial Chamber II’s instruction dated 27 January 2012. Further, according to the Protocol on the site visit in this case, no contact between the media and Parties or participants was authorised during the site visit, ICC-01/04-01/07-3213-AnxB-tENG, para.6.

³⁰ Presidency Decision, paras.8-9, 12-15, 20, 22, 23, 26.

³¹ See, e.g. ICC-01/04-01/07-3213-AnxB-tENG (*Katanga and Ngudjolo* Protocol for conduct during the site visit), paras. 2 and 3 establishing that the Parties and participants may not seek the admission of evidence and shall not be authorised to make written or oral submissions; ICC-01/04-01/07-3436, para.107; *Prosecutor v. Perišić*, IT-04-081-T, Order on site visit with annex containing rules of procedure and conduct during site visit, Confidential Annex A, Rules of Procedure and Conduct site visit in *Prosecutor v. Perišić* 21 May 2009, para.5 (“Neither party shall seek the admission of evidence throughout the entire duration of the site visit.”)

not be present.³² Indeed, the Accused's presence would create a security risk to all persons involved, including the Accused himself.

26. Moreover, the Accused would not be prejudiced because his Counsel would be present to represent his interests. During the only ICC judicial site visit to date, the accused persons were not present but were represented by their counsel.³³ Arrangements were made so that counsel for both accused could contact their clients by telephone during the visit.³⁴ The same procedure could potentially be adopted in this instance.

27. There is a body of existing jurisprudence at the *ad hoc* tribunals on judicial site visits conducted without the accused's presence. For instance, in *Prosecutor v. Karadžić*, the Trial Chamber considered that because the purpose of a site visit is not to gather evidence or to receive submissions from the parties, it is not necessary or appropriate for the accused to participate in the site visit.³⁵

28. The Prosecution submits that just as occurred during judicial site visits at the ICTY and ICTR, and in the *Katanga* case, the purpose of the site visit in this case should not be for the Chamber to hear any witnesses or for parties to make submissions.³⁶ The role of the Parties and participants should be strictly limited to acting as observers, and only assisting the Chamber, should the Chamber deem

³² See e.g. *Colozza v. Italy*, February. 12, 1985, Series A, No. 89, 7 E.H.R.R. 516. An accused's right to be present during criminal proceedings is not absolute, as in special circumstances where witnesses have to be heard anonymously or where the accused is unruly.

³³ ICC-01/04-01/07-3436, para.107.

³⁴ See ICC-01/04-01/07-3213-tENG, para.11, p.9; ICC-01/04-01/07-T-334-Red-ENG, p.42, lns.10-22.

³⁵ See e.g. *Prosecutor v. Karadžić*, IT-95-5/18-T, Order on Submissions for a Site Visit, 15 November 2010, para. 6: "The Chamber emphasises that the purpose of such a site visit would not be to gather evidence or to receive any submissions from the parties. Rather, it is intended to permit the Chamber to become more familiar with the topography of certain key locations and thus assist its determination of the charges in the Indictment related to Sarajevo. For this reason, the Chamber does not consider it necessary or appropriate for the Accused to himself participate in the site visit"; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Site Visit, 28 January 2011, paras.5, 8, 12; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Second Site Visit, 10 February 2012, para.7; *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, Annex B to Decision on Site Visit, "Rules of Procedure and Conduct for the Site Visit in the Case of *Prosecutor v. Ildephonse Nizeyimana*", 6 September 2011, paras.1, 4-5.

³⁶ ICC-01/04-01/07-3436-tENG, para.107.

this necessary, in identifying relevant locations, sites or buildings where events occurred.³⁷

Request

29. Based on the foregoing, the Prosecution reiterates its request for the Chamber to conduct a judicial site visit to relevant locations in the Ituri district of the DRC at the earliest possible opportunity during the initial phase of trial and before the end of the Prosecution's case. If the Chamber is minded to grant this request, the Prosecution proposes that the Parties and participants be invited to make submissions on relevant locations for the site visit and on the terms of a protocol to govern the rules and procedures for that visit.



Fatou Bensouda,
Prosecutor

Dated this 24th day of November 2015
At The Hague, the Netherlands

³⁷ ICC-01/04-01/07-3436-tENG, para.107.