

**Cour
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**International
Criminal
Court**

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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

**Response on behalf of Mr Ntaganda to "Prosecution's request for the Chamber to
conduct a judicial site visit"**

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to: (i) Trial Chamber VI's ("Chamber") oral ruling issued on 22 April 2015 ("22 April 2015 Ruling");¹ and (ii) the "*Prosecution's request for the Chamber to conduct a judicial site visit*" submitted by the Office of the Prosecutor ("Prosecution") on 24 November 2015 ("Prosecution Request"),² Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Response on behalf of Mr Ntaganda to "Prosecution's request for the Chamber to conduct a judicial site visit"

"Defence Response"

INTRODUCTION

1. The Prosecution "renews"³ or "reiterates"⁴ its request that the Chamber conduct a judicial site visit to the Ituri district of the Democratic Republic of the Congo ("DRC") – "at the earliest possible opportunity and, in any event, well before the end of the Prosecution's case" – in order to visit a number of the locations in which the crimes charged in the Updated Document Containing the Charges ("UDCC")⁵ are alleged to have taken place.⁶
2. The Prosecution Request is but an impermissible attempt to seek reconsideration of the Chamber's 22 April 2015 Ruling without providing any ground showing a clear error of reasoning on the part of the Chamber or establishing that it is necessary to do so in order to prevent an injustice.
3. In any event, should the Chamber deem appropriate to entertain the merits of the Prosecution Request, the Defence takes issue with the Prosecution's proposed timing for the conduct a judicial site visit. As correctly noted by the Prosecution, the Defence supports the principle of a judicial site visit to the

¹ T-19-ENG, 22 April 2015, p.9, ll.1-8.

² ICC-01/04-02/06-1033-Conf.

³ Prosecution Request, para.1.

⁴ Prosecution Request, para.29.

⁵ ICC-01/04-01/06-458-AnxA.

⁶ Prosecution Request, para.1.

Ituri district.⁷ However, the Defence objects to such a visit taking place at this stage, while the Prosecution's case is unfolding. For the reasons expressed below, the Defence submits that the interests of justice would be best served by the conduct of a judicial site visit at the end of the case.

4. The Defence further submits that in the event the Chamber is inclined to consider conducting a site visit at this point in time, the modalities of a judicial site visit should make the object of *inter partes* consultations – with input from the Legal Representatives of Victims – with a view to submitting a joint proposal protocol for the consideration of the Chamber.

SUBMISSIONS

I. The Prosecution Request is but an impermissible attempt to seek reconsideration of the Chamber's 22 April 2015 Ruling

5. In requesting at this time that a judicial site visit be conducted “at the earliest possible opportunity and, in any event, well before the end of the Prosecution's case”,⁸ the Prosecution is, in fact, seeking reconsideration of the Chamber's 22 April 2015 Ruling.
6. Indeed, at the status conference held on 22 April 2015, in ruling that the Chamber would not undertake a judicial site visit prior to the commencement of trial, the Presiding Judge made clear that the need for a site visit would 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.”⁹ To the extent that it has not appealed the Chamber's 22 April 2015 Ruling, it is incumbent upon the Prosecution to demonstrate that the Chamber's indication that it would reassess the need for a judicial site visit at

⁷ T-17-CONF-ENG, 2 December 2014, p.27, ll.22-25.

⁸ Prosecution Request, paras.1, 3, 29.

⁹ 22 April 2015 Ruling, p.9, ll.5-8.

a later stage, rests on a clear error of reasoning or that its reconsideration is necessary in order to prevent an injustice.¹⁰

7. The Prosecution Request fails to point out to any clear error of reasoning on the part of the Chamber or to establish the need to reconsider the 22 April 2015 Ruling to prevent an injustice. In support of its proposal that a judicial site visit take place during the early phase of the trial *whilst Prosecution witnesses are still testifying*, the Prosecution merely puts forward arguments¹¹ that have already been set out in previous Prosecution submissions in favour of a judicial site visit *prior* to the commencement of trial.¹² These arguments have been duly considered by the Chamber in its 22 April 2015 Ruling. Moreover, bearing in mind that it is not uncommon for a judicial site visit to take place after the presentation of the evidence,¹³ the Prosecution does not demonstrate how the 22 April 2015 Ruling results in an injustice which would be necessary to prevent by way of reconsideration.

II. The conduct of a judicial site visit at this juncture would not serve the interests of justice

8. Should the Chamber deem appropriate to entertain the merits of the Prosecution Request, the Defence takes issue with the Prosecution's proposal

¹⁰ "Decision on the Defence request for reconsideration", ICC-01/04-02/06-611, 27 May 2015, para.12.

¹¹ Prosecution Request, para.19 ("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.")

¹² See "Prosecution submissions on conducting part of the trial in situ", ICC-01/04-02/06-409-Conf-Red, 28 November 2014, para.44 ("The Prosecution submits that, subject to adequate logistical and security arrangements for participants, a judicial site visit to the Ituri district of the DRC before the commencement of the hearings would be beneficial to the Chamber to provide a greater appreciation of the evidence adduced at trial. [...] The Prosecution submits that such a visit should take place prior to the start of trial to give the Chamber greater context of the facts, places and geography that witnesses will describe throughout the trial."); T-17-CONF-ENG, 2 December 2014, p.23, ll.19-23 ("The goal of the site visit is to permit the Judges to be able to see physically the area and the landscape, the geography, the places in which the alleged crimes were to have occurred, and it will give the Chamber a much greater understanding of the context within which the evidence that you will hear during the course of the trial will be presented to you.")

¹³ See notably ICC-01/04-01/07-3436, paras.20, 107.

that a judicial site visit take place whilst Prosecution witnesses are still testifying.

9. The Defence submits that the conduct of a visit to the Ituri district at this juncture of the proceedings would undermine the very purpose of a judicial site visit. Considering that only eight Prosecution witnesses have testified so far, the Chamber would be provided with a very limited perspective on the evidence to be adduced in this case. For example, while evidence has been adduced on the circumstances of the alleged attacks against the *collectivités* of Banyali-Kilo and Walendu-Djatsi, many of the other 'contextual attacks' alleged in the Updated Document Containing the Charges have not yet been touched upon.
10. The Defence posits that, in the absence of any imperious reason, a judicial site visit should not take place during the presentation of evidence by either party. The Prosecution fails to point out to any circumstances stemming from the unfoldment of the presentation of its case which would warrant the conduct of a judicial site visit to the Ituri district at this point in time.
11. As underscored by a trial chamber of the ICTR, "a site visit should be made preferably when the visit will be *instrumental* in the discovery of the truth and the determination of the matters before the Chamber".¹⁴ The instrumentality of a site visit is usually determined in light of the issues *disputed* and *contested* at trial.¹⁵ At this early stage of the trial, whereas only eight Prosecution witnesses have testified, many of the issues that will be disputed at trial have yet to be circumscribed.
12. Moreover, proceeding with a site visit at this stage would result in a differentiated treatment between witnesses, with only forthcoming witnesses

¹⁴ ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-T, "Scheduling Order for Site Visit to Rwanda and Hearing of Closing Arguments", para.3 (emphasis added).

¹⁵ ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-T, "Scheduling Order for Site Visit to Rwanda and Hearing of Closing Arguments", paras.3, 4. See also ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-T, "Decision on the Conduct of a Site Visit", para.14.

being asked 'effective and better informed questions'¹⁶ by the Judges further to their visit to the Ituri district.

13. In the *Katanga* case, in response to the parties' submissions as to the timing of a site visit, the Presiding Judge indicated that Trial Chamber II would have preferred to conduct two site visits, one before the commencement of the trial, and another one at the end of the trial.¹⁷ However, for practical and financial reasons, only one site visit took place, nearly two months after the parties had completed the presentation of their evidence.¹⁸ The Presiding Judge explained that "*nous avons pensé qu'il était plus raisonnable de nous rendre en RDC une fois en possession de tous les éléments que vous [the Defence] nous aurez apportés*".¹⁹
14. The Prosecution Request is premature. In this instant case, for a site visit to be meaningful and materially assist the Chamber in its understanding of the disputed issues at trial, the Defence respectfully submits that such a visit should be envisaged at the end of the case.

III. The modalities of a judicial site visit should make the object of *inter partes* consultations

15. Should the Chamber be inclined to conduct a judicial site visit at this stage, the Defence submits that the modalities of such a visit, including *inter alia* the determination of the locations to be visited and the procedure applicable during the visit, should make the object of discussions between the Parties – with input from the Legal Representatives of Victims – with a view to providing the Chamber with a joint proposal protocol. If deemed necessary, the Chamber could provide the Parties with prior guidance on the objectives it intends to achieve with a judicial site visit.

¹⁶ Cf. Prosecution Request, para.19.

¹⁷ ICC-01/04-01/07-T-224-ENG, p.47, ll.1-11.

¹⁸ ICC-01/04-01/07-3436-tENG, para.20.

¹⁹ ICC-01/04-01/07-T-224-FRA, p.43, ll.24-26 (emphasis added).

16. With a view to ensuring that the judicial site visit is not a means to improperly influence the Judges, the Defence respectfully submits that the joint proposal protocol should address *inter alia*: (i) the procedure to be followed when the participants arrive at a specific location; (ii) the identity of the persons who are entitled to speak to the Judges; (iii) the maintaining of a record of the locations viewed and/or visited, the date and time at which the locations were viewed and/or visited, as well any questions asked by the Judges and answers provided thereon; and (iv) the procedure for photographs to be taken.
17. Considering that the purpose of a judicial site visit is limited to providing the Judges with an opportunity to acquire a first-hand impression of some geographical landmarks and locations referred to in the Updated Document Containing the Charges, and not to gather evidence, the Defence does not object to the Accused not being present during the visit.

CONFIDENTIALITY

18. Pursuant to Regulations 23bis (1) and (2) of the Regulations of the Court, this Defence Response is submitted on a confidential basis as it responds to a filing bearing the same classification.
19. However, the Defence submits that there exists no basis for such a classification. The Defence notes that in the *Gbagbo et al.* case, the Prosecution has submitted public observations on the conduct of a site visit in Côte d'Ivoire which address in great detail both the timing and the modalities of such a visit.²⁰ Accordingly, for the sake of publicity of the proceedings, the Defence respectfully requests that the Prosecution be ordered to file a public redacted version of its Request and that the Parties and participants be

²⁰ *Gbagbo et al.* case, "Prosecution's submissions concerning a site visit", ICC-02/11-01/15-268, 5 October 2015, paras.8, 9, 12-14.

ordered to file any related submissions with the same classification, with appropriate redactions to technical details, if need be.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

REJECT the Prosecution Request; and

ORDER the Prosecution to submit a public redacted version of its Request.

RESPECTFULLY SUBMITTED ON THIS 16TH DAY OF DECEMBER 2015

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands