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**International
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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***

Public

Prosecution's submissions on certain matters related to the conduct of proceedings

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 provides its submissions on certain matters related to the conduct of proceedings, as ordered by Trial Chamber VI (the “Chamber”).¹
2. Given the stage of the proceedings and the issues that have arisen to date, the Chamber invited further submissions on seven topics: (i) the length of evidentiary blocks; (ii) the sitting schedule; (iii) witness preparation sessions; (iv) the implementation of in-court protective measures; (v) the modalities of witness’s testimony; (vi) the mode of questioning; and (vii) interpretation and transcription.² The Chamber also invited the Parties and participants to address any other related matters.
3. In addition to its submissions on these seven items, the Prosecution has added one related matter it wishes to address at this stage: the applicability of the Witness Preparation Protocol to expert witnesses.³

Prosecution’s Submissions

I. The Length of Evidentiary Blocks

4. The Prosecution supports lengthening the evidentiary blocks but requests that appropriate adjournments (two to three weeks) between blocks are scheduled to enable the Parties and participants to undertake the necessary arrangements and preparations in relation to forthcoming witnesses.
5. A number of factors have precluded sitting more continuously to date, including:
 - (i) allowing the Defence the opportunity to better prepare for the appearance of

¹ See ICC-01/04-02/06-1198 (“Order”).

² See Order, para.3(i)-(vii).

³ The Prosecution makes these submissions in view of the Chamber’s invitation to the Parties and Participants to file submissions in relation to any other related matter which they would like to raise, *see* Order, para.3(viii).

certain witnesses;⁴ (ii) moving to the permanent premises;⁵ (iii) the sitting schedule of Judges in other ongoing cases at the Court;⁶ and (iv) sharing two courtrooms between multiple ongoing trials.⁷ These factors, while unavoidable, slowed the progress of the trial. It is likely that the *Bemba et al.* trial will end soon, which will remove one significant restriction to sitting extended periods.

6. The Prosecution agrees that increasing the length of the evidentiary blocks will enhance the expeditiousness of the proceedings. Nonetheless, appropriate adjournments would still be required between evidentiary blocks in order to enable the Parties and participants to undertake the necessary logistical and other arrangements in relation to forthcoming witnesses, including final review of all material for disclosure, preparing the witness's travel, obtaining necessary documentation and setting the witness familiarisation and preparation dates in coordination with the Victims and Witnesses Unit ("VWU") and rule 74 counsel, if required, attendance at witness preparation sessions, completion of the list documents to be used with witnesses in the upcoming evidentiary block, finalizing examination plans, conduct the review of transcripts for interpretation discrepancies, and other matters.
7. Finally, as previously noted by the Chamber, breaks between evidentiary blocks provide time to deal with any pending issues and facilitate the work of the Parties, thereby enabling them to proceed in the most efficient and expeditious manner possible.⁸

⁴ ICC-01/04-02/06-661-Conf-Red, para.11 with public redacted version at ICC-01/04-02/06-661-Red2, para.11.

⁵ ICC-01/04-02/06-T-52-ENG ET p.46, ln.25 – p.47, ln.7 (open session); Email from the Chamber to the Parties and Participants dated 29 September 2015 at 17:49.

⁶ ICC-01/04-02/06-T-19-ENG ET p.10, ln.21, p.11, ln.2 (open session).

⁷ ICC-01/04-02/06-T-19-ENG ET p.10, ln.21, p.11, ln.2 (open session); ICC-01/04-02/06-619, para.15; ICC-01/04-02/06-T-52-ENG ET p.46, ln.2 – p.47, ln.7.

⁸ ICC-01/04-02/06-T-19-ENG ET p.11, lns.2-6 (open session).

II. The Sitting Schedule

8. The Prosecution sees no impediment to sitting five hours daily by starting hearings at 9h00 and/or finishing at 16h30.⁹ The Prosecution's preference is to maintain 9h30 as the start time and to finish at 16h30, rather than to start at 9h00. This would allow an extra half hour in the morning to deal with any last-minute issues and final preparations before the start of the court day.

III. Witness Preparation Sessions

9. Witness preparation sessions have proven useful in ensuring that witness examinations are conducted as expeditiously as possible, inter alia, by allowing the calling Party to determine which, if any, potential exhibits should be used with a witness in court. This has been achieved by showing a witness the potential exhibits and asking limited questions to determine whether the witness can provide meaningful information about the exhibit.
10. The Prosecution submits that such potential exhibits can include items not previously shown to a witness provided that there is a connection between the witness and the item. Given the significant amount of time that generally passes between a witness's interview and his or her testimony in court, it happens that new material related to that witness comes into the calling party's possession in the interim period. Other reasons, such as the provider's lack of consent to lift restrictions on the material in question, may also have impeded showing such material to the witness during the interview.
11. The "Witness Preparation Protocol"¹⁰ at paragraph 24 provides that "[d]uring preparation sessions, the questioning lawyer may [...] Show the witness potential exhibits and ask him or her to comment on them for the purpose of determining

⁹ See Order, para.3(ii).

¹⁰ ICC-01/04-02/06-652-Anx ("Protocol").

the utility of using the exhibits in court.”¹¹ The Protocol also provides that “[w]itness preparation should not be conducted for the purpose of seeking new evidence or continuing the calling party's investigations.”¹²

12. During the witness preparation session held with Witness P-0055 in February 2016, the Prosecution showed the Witness three documents¹³ which it had not previously shown to him but which either referred to him by name¹⁴ or by his former title.¹⁵ While it may have been possible to show two¹⁶ of these three documents to the Witness on a prior occasion, the United Nations had not lifted the conditions of receipt in relation to the third document¹⁷ in time for the Prosecution to show it to the Witness significantly prior to the preparation session in February 2016.

13. The Prosecution submits that, as it did with Witness P-0055, it is appropriate to show a witness potential exhibits which have not previously been shown to him or her in order to determine the utility of using the exhibits in court.

14. First, it must be stressed that there are no further investigative steps, *stricto sensu*, that are being taken in such instances: the real investigative step – the collection of the relevant material – predates the preparation session. Second, the purpose of showing the potential exhibits is not the identification of new leads, investigative avenues, or additional evidence, but to focus the witness’s testimony and avoid wasting courtroom time by showing the witness documents in relation to which that witness has nothing to say. These boundaries can be further reinforced, if necessary, by limiting the questions put to the witness in relation to the potential exhibits to whether or not the witness recognises them and/or to

¹¹ Protocol, p.5, para.24.

¹² Protocol, para.2.

¹³ DRC-OTP-0138-0774, DRC-OTP-0147-0443 and DRC-OTP-0017-0024.

¹⁴ DRC-OTP-0138-0774 and DRC-OTP-0147-0443.

¹⁵ DRC-OTP-0017-0024.

¹⁶ DRC-OTP-0138-0774 and DRC-OTP-0147-0443.

¹⁷ DRC-OTP-0017-0024.

establishing the extent to which the witness would be able to comment on them during his or her testimony. In this sense, the Prosecution acknowledges that, to the extent possible, showing new items to a witness should be focused and limited.

15. Such an exercise is consistent with the Protocol's provisions and the purpose of witness preparation,¹⁸ and, as advanced, it is conducive to the expeditiousness of the proceedings as it can act as a filtering mechanism which helps to streamline the calling party's examination-in-chief. By way of example, since Witness P-0055 indicated that he could not recall whether one of the documents emanated from his office, the Prosecution elected not to show him this document during his testimony. This meant that valuable courtroom time that the Prosecution would have used to lay the foundation for the document, have the Witness read through it, and elicit information, was saved.
16. Finally, prohibiting a party from showing a witness material not previously shown to him or her during preparation would not render any meaningful benefit to the opposing party, since the calling party would still be fully entitled to show such material during the witness's testimony, provided it can establish a connection between the witness and the material. In fact, the converse would be true since by showing the witness the relevant material during witness preparation, the opposite party will at least be alerted in advance to any relevant information provided by the witness on the potential exhibits during preparation.

¹⁸ The Chamber has held that it "considers that witness preparation could, in principle, advance the fairness and expeditiousness of trial and at the same time help protect the well-being of witnesses" and that "relevant, accurate and complete witness testimony facilitates a fair, effective and expeditious trial. The Chamber considers that in light of the complexity of the present case, in particular the alleged events dating back to 2002 and 2003, as well as the large number of potential exhibits, witness preparation will enable the calling party to engage with the witness in order to define the most effective way to discover the truth during trial", ICC-01/04-02/06-652, paras.17-18 (footnotes omitted).

IV. The Implementation of In-Court Protective Measures

17. The Prosecution is mindful of the need to elicit information in public session to the extent possible and to limit moving back and forth between public and private sessions by grouping topics more effectively. At times, however, the Prosecution has sought to elicit evidence in a chronological manner for a clearer, more focused presentation of the evidence. The exercise of grouping together questions likely to elicit confidential information while maintaining a chronological narrative is not always an easy one. Nevertheless, both the calling and opposing Parties should endeavour to group topics or questions together if they are likely to elicit confidential information.
18. The need for private session requires a case-by-case assessment. Where multiple persons can testify about a certain event and/or location, there may not be a need to resort to private session. On the other hand, when there is only one or a limited number of persons who could testify about a particular event, the need for private session is often unavoidable.
19. To date, the Prosecution has called a number of high and mid-level insider witnesses whose testimony is generally unique and, as such, often identifying, thereby necessitating extensive recourse to private sessions. The need for private sessions was further exacerbated by the fact that some of these witnesses have also been the subject of attempted interference regarding their testimony.¹⁹ The Prosecution will now be calling fewer insider witnesses, focusing instead on expert and crime-base witnesses. As such, the Prosecution expects the need to resort to extensive private session to diminish.

¹⁹ See ICC-01/04-02/06-785-Red, para.55.

V. The Modalities of Witness Testimony

Testimony by video-link

20. Testimony by video-link is a necessary alternative when witnesses are unable to travel to the seat of the Court. Testimony by video-link does not, however, generally speed up proceedings to any significant extent. If, for example, ten hours are required to complete examination-in-chief when the witness appears in person at the seat of the Court, the same amount of time will still be required if the witness were to testify by video-link. Moreover, there is a possibility that testimony by video-link could lengthen proceedings, in particular when the witness testifies from the Democratic Republic of the Congo or other locations where the physical internet connection could be less strong or intermittent.
21. Further, the use of video-link to adduce witness testimony may make it more difficult for a Party or participant to use documents, as well as video and audio files with the witness. While the calling party should provide hard copies of such material in advance to the Registry representative in the field, this could prove more difficult for the opposing party, since the identification of which documents to use during cross-examination is generally only finalised during the witness's examination-in-chief.²⁰ The Registry's access to Citrix is critical in this regard, but depends on the strength and continuity of the internet connection.
22. Finally, there may be little or no financial benefit obtained by adducing evidence by video-link testimony. One or more lawyers from the calling party may need to travel to the witness's location in order to conduct witness preparation, and one or more members of the Registry would need to travel there to facilitate the witness's testimony. Ensuring that the necessary technology is in place may also

²⁰ The Decision on the conduct of proceedings provides that "[a]s regards the use of documents that have not previously been admitted into evidence the party intending to make use of the documents during cross-examination shall provide a list, by e-mail, no later than 24 hours before the commencement of the cross-examination", ICC-01/04-02/06-619, para.33.

incur further costs. Conversely, when a witness testifies at the seat of the Court, the only significant expenses related to that exercise are the cost of travel and accommodation for that witness.

23. It could also be more difficult to establish a rapport with a witness when his or her testimony is adduced via video-link as opposed to in person at the seat of the Court. Testimony by video-link may also make it more difficult for the Chamber to assess the witness's demeanour.

24. Nevertheless, the option of adducing evidence by video-link testimony is an important one for situations in which witnesses are unable to travel to the seat of the Court. The Prosecution will engage with the Defence for any witnesses in relation to whom it foresees the need to rely on video-link testimony.

Rule 68(3)

25. Hearing a witness's testimony live in court generally allows a Chamber to better and more fairly assess the witness's demeanour and credibility than when a witness's previously recorded statement is introduced pursuant to rule 68(3) of the Rules of Procedure and Evidence ("Rules"). This is due, inter alia, to the fact that witnesses who testify following a successful rule 68(3) application spend less time in the Chamber's presence, and are asked fewer questions by the calling party than by the opposite party in court.

26. In addition, for a number of witnesses - chiefly, but not only, crime-base witnesses - the opportunity to tell their story before this Court is a very significant one. These accounts, which form an important part of the narrative of international criminal trials, should not be glossed over or reduced to minimal expression, only to then subject the witness to the rigours of cross-examination. Proceeding in such a manner would not be consistent with the Statute's

deontological principles in relation to the treatment of victims and witnesses, as enshrined in articles 68 and 69 (2) and (4), *inter alia*.

27. Nevertheless, rule 68(3) of the Rules is a useful tool to increase the expeditiousness of the trial, in particular in relation to witnesses who have testified in prior proceedings before this Court.

28. The Prosecution will engage with the Defence to determine whether the Parties could jointly identify witnesses for which rule 68(3) could be relied on to tender all, or part, of a witness's evidence.

VI. The Mode of Questioning

Whether some witnesses should first provide a narrative about events

29. During the testimony of Witness P-0290, the Presiding Judge noted that it was reasonable and, at times, better to elicit information from a witness by allowing the witness to provide a narrative since it can save court time.²¹ On this occasion, the narrative elicited by the examining lawyer related to the witness's professional experience in a particular field over a period of time.²²

30. The Prosecution agrees that eliciting a narrative from a witness on a discrete issue or event is at times appropriate and can increase expeditiousness. However, this must be decided on a case-by-case basis, depending on the witness and on the scope of the topic to be covered.

31. A witness's ability to provide a free narrative account of events varies. A crime-base witness may be able to do so only after being guided by focused questions to the time and place of the event. Thereafter, the calling party can ask for a narrative account of the event, and can ask follow-up questions on the free

²¹ See ICC-01/04-02/06-T-65-CONF-ENG ET, p.31, ln.22 – p.32, ln.2 (private session).

²² See ICC-01/04-02/06-T-65-CONF-ENG ET, p.30, lns.16-17 (private session).

narrative, as necessary. The Parties and participants should exercise caution, however, with certain crime-base witnesses, in particular those who are also victims and may suffer from Post-Traumatic Stress Disorder, as asking them to narrate the full details of a traumatic event can be very stressful and difficult and risks re-traumatising them to a greater extent than a series of short focused questions.

32. Insider witnesses should not be asked to provide a free narrative account of their time within the armed group at the start of testimony. Such witnesses will generally be providing evidence on a variety of topics such as the structure of the armed group, its communication abilities, reporting structures, access to weapons, ammunition, uniforms, recruitment, training, use of children under the age of 15 within the armed group, planning of attacks and operations, roles assigned to particular individuals, battles, the nature of the armed conflict and crimes committed. It would not be desirable or save any time to ask a witness to provide such a narrative at the outset of testimony. It may be possible to do so once the witness is at a particular topic, depending on the assessment of the witness's ability to do so in a focused and clear manner.
33. Accordingly, the Prosecution submits that although a calling party should elicit a narrative of certain events when possible with witnesses who are able to do so, a calling party should not be specifically required to do so in all cases.
34. Most witnesses need help directing their mind to the relevant issues. Should the witnesses be given the opportunity to provide a narrative about certain events, the examining party or participant would very often have to go back to the witness's narrative in order to punctuate it with supplementary questions. The latter process could be a time-consuming and at times confusing approach to eliciting a witness's testimony.

35. The fact that over a decade has elapsed since the temporal scope of the charges against the Accused only adds to the difficulties which witnesses face in providing a structured narrative on relevant events absent focused questions by the calling party.
36. It is also not infrequent that witnesses tend to provide information that is not strictly relevant to the charges against the Accused when they are not asked focused questions at the outset. The time constraints placed on the Parties and participants to conduct their examinations and elicit the relevant information specific to their case means that the testimony must focus solely on relevant evidence.
37. Further, witnesses tend to speak faster when giving a narrative account, thereby rendering the process of interpretation more difficult. This often results in the need for wholesale repetition of answers or continuous clarification, thereby consuming significant amounts of time. Finally, witnesses are often more nervous during their first day of testimony. Asking them to provide a narrative at the outset of their testimony may not always be conducive to helping them testify to the best of their ability and well-being.
38. Nevertheless, when possible and appropriate, allowing a witness to provide a narrative account on certain events before asking specific and focused questions could be beneficial, both in terms of the expeditiousness of proceedings as well as in terms of providing the Chamber with the best evidence possible. The examining Parties and participants should strive to allow the witness such an opportunity when they consider that the witness is able to do so.

Whether background information should be elicited through leading questions

39. The Decision on the conduct of proceedings establishes that:

During examination-in-chief, the calling party shall use, as a matter of principle, non-leading questions. On preliminary matters necessary to provide background or context, as well as any other matter which is not contested or when the opposing party agrees to leading questions, or where such questions are otherwise deemed appropriate by the Chamber, the calling party may put information to a witness by way of leading questions.²³

40. Generally, eliciting information regarding a witness's personal background through leading questions should not be controversial. Indeed, such a practice has been undertaken in other proceedings at the Court.²⁴

41. The Prosecution proposes that the calling party should elicit information regarding a witness's background by way of leading questions. Where the opposing party opposes such a procedure for a particular witness, it should inform the calling party. Any disagreements can thereafter be raised with the Chamber.

42. In view of the wording of paragraph 26 of the Decision on the conduct of proceedings, the Parties may also consider eliciting other information by way of leading questions when there are no issues in dispute on the particular topic.

VII. Interpretation and Transcription

43. As noted by the Chamber,²⁵ there have been a number of differences between the French and English transcripts of the hearings held to date, including in relation to material aspects of the witnesses' testimony. The Prosecution shares the Chamber's concerns about this issue.

²³ ICC-01/04-02/06-619, para.26.

²⁴ See, e.g. DRC-OTP-2054-1921, p.1933, ln.25 – p.1934, ln.19 (private session).

²⁵ Order, para.3(vii).

44. In *Lubanga*, Trial Chamber I stated, relying on article 64(10) of the Statute and rule 137(1) of the Rules, that:

Although the parties and the participants may notice discrepancies *en passant*, they cannot be expected to act as the judges or custodians of the accuracy of the French and English transcripts, together with the interpretation of the witnesses' evidence. At best, they can only make a contribution, by identifying and reporting those apparent difficulties that they observe during, and following, hearings.²⁶

45. In line with the decision on conduct of proceedings,²⁷ and consistent with the approach referred to by Trial Chamber I in *Lubanga*, the Prosecution has been communicating its suggested edits to the Registry upon completion of each witness's testimony. This has proven to be a highly time-consuming exercise in view of the large amount of errors which the Prosecution has noted. For example, during the testimony of Witness P-0017, the Prosecution discovered errors in all six transcripts,²⁸ most notably in one transcript where 91 errors were detected²⁹ and in another transcript where 66 errors were found.³⁰ These errors included missing names of persons and missing sentences.

46. Trial Chamber I took action on this issue towards the end of the Prosecution case, instructing the Registry to conduct an extensive backdated review of the transcripts of the hearings held to date.³¹ Unlike the situation in *Lubanga*, the proceedings against the Accused are still in their initial phase. As such, it would be best to find a solution to these issues now to avoid having to resort to expensive, time-consuming measures such as the review ordered in *Lubanga*.

²⁶ ICC-01/04-01/06-1974, para.35.

²⁷ ICC-01/04-02/06-619, para.62, fn.36 citing ICC-01/04-02/06-549-Conf-Anxl, pp.2-3.

²⁸ ICC-01/04-02/06-T-58-ENG ET to ICC-01/04-02/06-T-63-ENG ET and ICC-01/04-02/06-T-58-FRA ET to ICC-01/04-02/06-T-63-FRA ET.

²⁹ ICC-01/04-02/06-T-63-ENG ET.

³⁰ ICC-01/04-02/06-T-59-ENG ET.

³¹ ICC-01/04-01/06-1974, para.36.

47. In order to ensure greater consistency going forward, the Prosecution proposes that the Chamber instruct the Registry to make it standard practice at the completion of each day of testimony to check every transcript against the audio recording in the language of the transcript and thereafter compare the French and English transcripts to each other. This was among the measures ordered in Lubanga.³²
48. The Parties should continue to flag relevant discrepancies at an opportune moment on the record during the witness's testimony if they are noticed at the time. Minor discrepancies, or those not noticed during testimony, should be notified by way of email in accordance with the Chamber's orders to avoid disrupting the witness's testimony.
49. The Parties should also continue to provide suggestions for the corrected versions of the transcripts once the edited versions are circulated. The Prosecution appreciates the Chamber's lifting of the five-day deadline set in this regard³³ and suggests two weeks as a more realistic deadline.

VIII. The Applicability of the Witness Preparation Protocol to Expert Witnesses

50. The Witness Preparation Protocol does not explicitly distinguish between the preparation of experts and other types of witnesses.
51. The Prosecution submits that the Protocol should not apply to expert witnesses to the extent that it requires meetings with such witnesses to be video-recorded. The Trial Chamber in Lubanga did not permit witness preparation sessions in advance of their testimony in Court, but held that "different considerations apply as between 'lay witnesses as to fact' and experts" and permitted discussions

³² ICC-01/04-01/06-1974, para.36.

³³ Order, para.3(vii).

between the Parties and their experts at any stage prior to calling them as witnesses.³⁴

52. Nevertheless, the calling party should still provide the opposing party with any disclosable information, including clarifications, changes or corrections to the expert's report, obtained during any interaction prior to the expert's testimony in Court.

Conclusion

53. The Prosecution respectfully submits its observations on the matters addressed above, and remains at the Chamber's disposal should the Chamber require further information or clarification.



Fatou Bensouda
Prosecutor

Dated this 17th day of March 2016
At The Hague, The Netherlands

³⁴ ICC-01/04-01/06-T-104-ENG ET p.28, ln.18 – p.29, ln.11.