

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06

Date: 17 March 2016

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

**Submissions of the Common Legal Representative of the Victims of the Attacks
on certain matters related to the conduct of the proceedings**

Source: Office of Public Counsel for Victims (CLR2)

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

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Mohamed Abdou

Legal Representatives of the Applicants

Mr Dmytro Suprun
Ms Anne Grabowski

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks (the “Legal Representative”) hereby respectfully files his submissions on certain matters related to the conduct of the proceedings as ordered by the Chamber.

II. PROCEDURAL BACKGROUND

2. On 8 March 2016, Trial Chamber VI (the “Chamber”) issued an “Order requesting submissions on certain matters related to the conduct of proceedings”¹ (the “Order”) wherein it, *inter alia*, requested the parties and participants to file, by 17 March 2016, written submissions on (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 witnesses’ testimony, (vi) the mode of questioning, (vii) interpretation and transcription, and (viii) any other related matters.²

III. SUBMISSIONS OF THE LEGAL REPRESENTATIVE

(i) *Length of evidentiary blocks*

3. In its Order, the Chamber requested the parties and participants to file written submissions on the length of evidentiary blocks, including the prospect of sitting more continuously.

4. Although the Legal Representative does not oppose any changes to the arrangement or length of evidentiary blocks as such, should they be needed, the initial/current arrangement, *i.e.* 4-5 weeks of evidentiary block with 3 weeks of break in between them, is the most convenient option, as the current length of the intermittent breaks between evidentiary blocks allows him to meaningfully conduct

¹ See the “Order requesting submissions on certain matters related to the conduct of proceedings” (Trial Chamber VI), No. ICC-01/04-02/06-1198, 8 March 2016 (the “Order”).

² *Idem*, para. 3.

his field activities amongst victims. Given the large number of victims he represents who live in geographically spread out and often remote locations in the Ituri region, it is important that breaks in between evidentiary blocks last for a minimum two weeks at a time to allow him to effectively fulfil his duties in the field and, in particular, to maintain regular and in-person contact with his clients. If the Chamber is minded to give effect to the previous suggestion put forth by the Defence in the hearing held on 29 February 2016, namely that in the future evidentiary blocks be shortened,³ the Legal Representative respectfully requests that break times be maintained at a minimum of two weeks.

(ii) *Sitting Schedule*

5. The Chamber, in particular, requested submissions on whether a modification to the sitting schedule to sitting hours from 9:00 and/or adjourning at 16:30 would pose any impediment. As such, the Legal Representative has no objection to said modification should it be deemed necessary for the purpose of the expeditiousness of the proceedings. However, it appears that resort to sitting in extended hours should only be had on a case-by-case basis taking into account the specific requirements of the witness who is called to testify.

6. While extending sitting hours may increase the expeditiousness of the trial, a number of factors need to be considered so as not to defeat the very purpose of the measure taken. Especially with regard to vulnerable crime base witnesses who are put under enormous stress when having to recall the events that often gave rise to significant trauma, the Legal Representative submits that the regular sitting schedule, *i.e.* 9:30-16:00 with sessions of 1,5 hours and 30 min break in between, is more appropriate.⁴ The shorter sitting hours will allow the witness to take more

³ See the transcript of the hearing held on 29 February 2016, No. ICC-01/04-02/06-T-74-CONF-ENG, p. 103.

⁴ In this regard the Legal Representative recalls that the Presiding Judge himself ordered a break being taken ahead of time when a vulnerable witness [P-0010] was testifying: “*My decision is we will break now because I feel that the witness is not very well now [...]*”. See the transcript of the hearing held on 10

frequent breaks. This will not only ensure that their psychological well-being is appropriately taken into account, but also likely increase the quality of their testimony. If the witnesses are tired, unwell or ask that intermittent breaks are taken in order to allow them to properly concentrate on the questions asked, any endeavoured efficiency gains by way of extended sitting hours are essentially nullified. The same considerations also apply to elderly witnesses and those who suffer from a medical condition. The practice has shown that extended hours may even impact those witnesses who come to testify before the Chamber for a number of days in a row, such as Witness P-0055 who asked for a break to be taken and on another occasion voiced that he was tired when, according to the regular sitting hours, the session would already have ended.⁵

7. It should also be considered that continuously sitting in extended hours further puts ongoing strain on interpreters, court-reporters, and audio-visual support, all of which may affect the quality of the recording of the proceedings.

8. The Legal Representative therefore respectfully submits that extended sitting hours should rather be used on an exceptional and case-by-case basis where doing so is necessary, appropriate and in the interests of justice.

(iii) Witness preparation session

9. The victims the Legal Representative represents have a vested interest in the Chamber establishing the truth in the present case, which can only be achieved if the Chamber is presented with the best possible evidence available. In this regard, the Chamber has previously set the parameters for appropriate preparation of witnesses and these parameters should be respected, including paragraph 24 of the Witness

November 2015, No. ICC-01/04-02/06-T-46-CONF-ENG ET, p. 22, lines 8-9. See also the transcript of the hearing held on 13 November 2016, No. ICC-01/04-02/06-T-40-CONF-ENG ET, pp. 26-27.

⁵ See the transcripts of the hearings held on 23 February 2016, No. ICC-01/04-02/06-T-70-CONF-ENG ET, p. 64, and 26 February 2016, No. ICC-01/04-02/06-T-73-CONF-ENG ET, p. 82.

Preparation Protocol (the “Preparation Protocol”).⁶ As such, the Legal Representative sees no impediment to witnesses being shown potential exhibits during preparation sessions. Such preparation may even be apposite within the limits the Preparation Protocol itself establishes.⁷ The events about which witnesses come to testify in the present case date back 13 years and the showing of potential exhibits may assist them to focus their mind and remember. Some witnesses may not entirely or not at all be literate or have other similar difficulties or impediments; these must always be borne in mind by the calling party when it is proceeding in this way. Equally, the length and duration of preparation sessions must be tailored to these individual needs of the witnesses in question.

10. In the Legal Representative’s view, there is no reason to change the terms of the Preparation Protocol. As the Chamber emphasised in its “Decision on witness preparation” whereby it adopted said Protocol,⁸ the video-recording of witness preparation sessions provides for an important safeguard to prevent and disclose potential abuse by the calling party.⁹ Thus, any inappropriate conduct, whether connected with the showing of potential exhibits or otherwise, would not remain undetected or without remedy, as the opposing party can always request the video-recording to be disclosed¹⁰ where the suspicion arises that preparation session have been conducted in an inappropriate manner.

(iv) Implementation of in-court protective measures

11. It is beyond question that, where the Chamber has identified an objectively justifiable risk to a witness appearing before it and accordingly ordered in-court protective measures, these measures must be implemented without fail. However,

⁶ See the Witness Preparation Protocol adopted by the Chamber in its “Decision on witness preparation”, No. ICC-01/04-2/06-652, 16 June 2015, Annex A (the “Preparation Protocol”).

⁷ See e.g. *Idem*, paras. 1-3.

⁸ See the “Decision on witness preparation” (Trial Chamber VI), No. ICC-01/04-2/06-652, 16 June 2015.

⁹ *Idem*, paras. 24 and 26.

¹⁰ See the Preparation Protocol, *supra* note 6, para. 13. See also the transcript of the hearing held on 16 February 2016, No. ICC-01/04-02/06-T-68-CONF-ENG ET, pp. 3-7 and 95-96.

not only is the publicity of the trial one of the fundamental guarantees of a fair trial, but it is also in the interests of the victims to be able to follow the proceedings as much as possible. As previously pointed out by the Presiding Judge on several occasions,¹¹ parties and participants will have to exercise judgment when the use of private session is necessary so as to avoid that a protected witness could potentially be identified by the information that is revealed in the questions asked or his or her anticipated answers. To this end, parties and participants should again be directed to group questions of a potentially identifying nature so as to avoid moving back and forth between open and private sessions.

12. The very reason of in-court protective measures is to make it possible that the majority of a witness's testimony can be heard in open session. Especially with crime base witnesses, it should be feasible to keep identifying questions to a very minimum and to ask these for instance at the very start of the witness's testimony in private session.

13. It is respectfully submitted that the Chamber should exercise greater vigilance in terms of the necessity to remain in private session for specific lines of questioning. Resort may also more frequently be had to the use of code names to refer to specific information the mention of which could potentially lead to the identification of the witness, as was for instance done in the case of P-805 where colour codes were used to refer to specific villages.¹² This technique effectively allowed most of the witness's testimony to be heard in open session. Admittedly, this approach may not be feasible with all witnesses and the individual capabilities of witnesses must be taken into account on a case-by-case basis when resorting to such techniques.

¹¹ See e.g. the transcript of the hearing held on 11 November 2015, No. ICC-01/04-02/06-T-47-CONF-ENG-ET, p. 24, lines 17-25, p. 25, lines 1-4; transcript of the hearing held on 2 February 2016, No. ICC-01/04-02/06-T-61-CONF-ENG ET, p. 61, lines 17-25.

¹² See the transcript of the hearing held on 15 September 2015, No. ICC-01/04-02/06-T-25Bis-CONF-ENG-ET, p. 14 et seq.

14. In any event, taking a cautious approach in relation to sensitive information should not effectively result in the testimony of a protected witness being heard in closed session;¹³ unless exceptional circumstances warrant this more stringent regime of protective measures it is not appropriate to withhold large parts of the testimony of witnesses appearing in this case from the public.

(v) *The modalities of witnesses' testimony*

15. The Legal Representative takes note of the Chamber's specific instruction addressed to the parties only on whether they would be in a position to (jointly) identify witnesses who could be heard via video-link and/or for which rule 68(3) of the Rules of Procedure and Evidence (the "Rules") could be relied on to tender part of their evidence in this case.¹⁴ Nevertheless, the Legal Representative also wishes to address the Chamber on this issue to the extent that the modalities of witnesses' testimony impact on the expeditiousness of the proceedings and thus on the interests of the victims he represents.

16. The publicity of the trial is one of the most fundamental guarantees of a fair trial. As pointed out *supra*, victims participating in the present proceedings have a vested interest in following the trial. An associated core principle of the Court is that witnesses are to give their evidence orally.¹⁵ This includes that witnesses are

¹³ The Legal Representative refers to his earlier submissions on different regimes and levels of protective in-court measures. See the "Confidential Redacted Response of the Common Legal Representative of the Victims of the Attacks to the 'Confidential redacted version of 'Corrected version of 'Fifth Prosecution request for in-court protective measures', 14 October 2015, ICC-01/04-02/06-900-Conf-Exp-Cor'", No. ICC-01/04-02/06-977-Conf-Red, 4 November 2015, paras. 34-38. Specifically, the Legal Representative reiterates that a distinction must be drawn between protective measures so as to withhold a witness's identity from the public, thus enabling the witness to provide evidence in public session with short periods of private session, and the extraordinary measures of closed session evidence which is warranted if the former regime of protective measures may not be sufficient to protect the identity of witness. See ICTY, *The Prosecutor v. Milan Martić*, Decision on Defence Motion for Protective Measures for Witnesses MM-096, MM-116 and MM-090, Case No. IT-95-11-T, 18 August 2006, pp. 2-3.

¹⁴ See the Order, *supra* note 1, para. 3(v).

¹⁵ See the "Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'" (Appeals Chamber), No. ICC-01/09-01/11-2024, 12 February

ordinarily expected to appear before the Judges in person in the solemn setting of the court room. Testimony given via video-conference link is foreseen as, and – it is respectfully submitted – should remain an exceptional measure, which is warranted only where a witness due to health conditions, or other exceptional circumstances, may not be in a position to appear before the Chamber at the seat of the Court. In the present case, the Chamber has held that the appropriateness of hearing testimony via video-link requires a fact specific assessment and the consideration of a range of different factors, including but not limited to a person's age, vulnerability, state of health, psychological well-being, as well as procedural and logistical considerations.¹⁶ It is respectfully submitted that "procedural and logistical considerations" should never, without more, be the decisive factors tipping the balance in favour of video-link testimony.

17. As an additional factor the Chamber is respectfully asked to take into consideration that particularly in the case of witnesses who are at the same time victims of crimes, as well as those victims who may possibly at a later stage of the proceedings be authorised to appear before the Chamber to present their views and concerns,¹⁷ personally appearing before the Court and Judges is already one of the means of allowing them to effectively realise their right to truth and justice, and in particular their right to tell their story and to have their story heard.

2016, para. 84; see also the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence'" (Appeals Chambers), No. ICC-01/05-01/08-1386, 3 May 2011, para. 76.

¹⁶ See the "Confidential redacted version of Decision on Prosecution's request to hear P-0039's testimony by way of video-link" (Trial Chamber VI), No. ICC-01/04-02/06-897-Conf-Red, para. 12.

¹⁷ See e.g. See the "Order regarding applications by victims to present their views and concerns or to present evidence" (Trial Chamber III), No. ICC-01/05-01/08-1935, 21 November 2011, para. 3: "*a. If the Legal Representatives wish to present evidence on behalf of their clients, or wish individual victims to be permitted to present their views and concerns to the Chamber, the Legal Representatives must file a written application seeking leave from the Chamber; [...] c. If the Legal Representatives wish individual victims to present their views and concerns to the Chamber, by way of, for example, unsworn statements*".

See also the "Order issuing public redacted version of the 'Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial'" (Trial Chamber I), No. ICC-01/04-01/06-2032-Anx, 9 July 2009, paras. 17 and 25-27; See the "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), 22 January 2010, No. ICC-01/04-01/07-1788-tENG, paras. 53-54.

18. For all these reasons, video-conference link should remain an exceptional means for enabling those witnesses to testify before the Chamber who would otherwise be unavailable or for other reasons unable to do so.

19. As regards the Chamber's enquiry about reliance on rule 68(3) of the Rules,¹⁸ it is respectfully submitted that recourse to introducing parts of a witness's testimony pursuant to rule 68(3) of the Rules may positively impact on the expeditiousness of the trial by avoiding that previous, relevant testimony of a witness that does not give rise to dispute would effectively have to be repeated in the present case.¹⁹ However, such practice should be employed within reason, so as to not infringe upon the principle of orality.²⁰

(vi) *Mode of questioning*

20. The Chamber, in its Order, asked the parties and participants to make written submissions on whether or not it would be appropriate for *"some witnesses to first provide a narrative about the events before the calling party starts asking sets of more specific and narrow questions."*²¹ The Legal Representative supports the suggestion that some witnesses could be asked, at the beginning of their testimony, to provide a narrative of the events they have come to testify about, subject to control being exercised by either the calling party or the Presiding Judge so as to keep such narrative focused and contained. Giving witnesses the opportunity to provide a narrative may in fact assist the public, including victims, to better follow the evidence.

21. The Chamber further asked for submissions on whether background information should be elicited by way of leading questions.²² The Legal Representative submits that the calling party should as a general principle not be

¹⁸ See the Order, *supra* note 1, para. 3(v).

¹⁹ The admission of parts of Expert Witness Garretón's testimony is an instructive example on point.

²⁰ See *supra*, para. 16.

²¹ See the Order, *supra* note 1, para. 3(vi).

²² *Idem*.

permitted to ask leading questions. When the personal background information of the witness, such as identity, marital and family status, and educational and professional background is concerned limited leading questions can be appropriate. However, in the Legal Representative's view, background information should not be understood to include background information to the main events the witness is expected to testify about, unless this information is an agreed fact between the parties and therefore undisputed.

22. It is respectfully submitted that it is neither appropriate nor conducive to establishing the truth to lead witnesses through parts of their examination in chief even where it may be argued that the matters discussed form part of the background to certain events. Witnesses are called to provide their testimony so as to assist the Chamber in the ascertainment and determination of the truth. They should therefore be able to provide all the relevant information they possess. Leading them through parts of their testimony by asking closed and leading questions – with the obvious exception of cross-examination where leading questions serve the necessary end of testing the evidence provided in chief – is not appropriate,²³ as it necessarily limits the witnesses in their answers, thus likely keeping relevant information from the Chamber.

23. As a further related matter,²⁴ the Legal Representative submits that instead of authorising parties to lead witnesses – if the aim of the exercise is to focus the testimony – it would be more appropriate for the Bench to take a more pro-active role by asking more intermittent and/or clarifying questions. The occasions on which the Presiding Judge has intervened and done so in response to on-going disputes about the appropriate framing of questions have, in the Legal Representative's respectful submission, demonstrated that intervention from the Judges is a more

²³ A further exception being where a witness has been declared hostile *vis-à-vis* the calling party, as envisaged in the "Decision on the conduct of the proceedings" (Trial Chamber VI), No. ICC-01/04-02/06-619, 2 June 2015, paras. 47-49.

²⁴ See the Order, *supra* note 1, para. 3(viii).

efficient and neutral means of focusing a witness and obtaining a clear answer than allowing the parties to lead the witness.

24. It is further submitted that questions from the Bench need not be limited to either additional questions posed at the end of the testimony of a witness, or the resolution of a dispute arising over objections to the way in which a question was framed by the examining party; in line with the Chamber's inherent power under articles 64(1), 64(2), 64(6)(d), and 69(3) of the Rome Statute as well as rule 140 of the Rules, the Chamber may put questions to witnesses, as appropriate, with the aim of receiving "*all evidence that it considers necessary for the determination of the truth*".²⁵

(vii) *Interpretation and transcription*

25. The Legal Representative respectfully submits that in light of the fact that transcriptions are edited *post factum*, court time should not be utilised to make submissions on discrepancies or inaccuracies in the real time transcriptions of the proceedings. It appears to be preferable for the parties and participants to first await the edited transcriptions and to then, subsequently and in parallel to hearings, make a formal request for the verification and/or correction thereof should an ostensible error be identified. In this regard, the Legal Representative also takes note of the Chamber lifting the five day deadline it previously endorsed, and submits that it would be in the interests of justice for the Chamber to refrain from setting any new deadline in this respect. In fact, important discrepancies may only be noticed at a much later stage of the proceedings, potentially resulting in a situation where parties and participants may end up time-barred from raising issues of significant discrepancies in the transcriptions. It is therefore submitted that, other than requiring the parties and participants to await the edited versions of transcriptions, no other limitations should be imposed on their ability to request the verification and/or correction of said transcriptions.

²⁵ See article 69(3) of the Rome Statute.

(viii) *Any other related matter*

26. At this stage, the Legal Representative has no additional matters to raise in relation to the conduct of the proceedings.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read 'D. Suprun', followed by a period.

Dmytro Suprun
Common Legal Representative of the Victims of the Attacks

Dated this 17th Day of March 2016

At The Hague, The Netherlands