

**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**

**Former child soldiers' submissions on certain matters related to  
the conduct of proceedings**

**Source:** Office of Public Counsel for Victims (CLR1)

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

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**Unrepresented Victims**

**Unrepresented Applicants  
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**The Office of Public Counsel for  
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**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. PROCEDURAL BACKGROUND

1. On 8 March 2016, Trial Chamber VI (the “Chamber”) issued an “Order requesting submissions on certain matters related to the conduct of proceedings”<sup>1</sup> (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.<sup>2</sup>

## II. SUBMISSIONS

2. The Legal Representative of the former child soldiers (the “Legal Representative”) submits that the issues identified in the Chamber’s order have a significant bearing on the expeditious and fair conduct of the proceedings. The Legal Representative also notes that while some of the issues may have been previously litigated and decided upon by the Chamber, the latter may at any time revisit or modify the procedural framework established in order to ensure more cohesiveness in light of the specific circumstances of this case. Therefore, the Legal Representative welcomes the initiative of the Chamber and hereby provides her observations.

### *i. The length of evidentiary blocks*

3. The Legal Representative notes that the decision to divide the presentation of evidence into evidentiary blocks lasting approximately five weeks each and separated by breaks was mainly intended (1) to allow for proceedings in other cases to take place and (2) to allow the Chamber, parties and participants to deal with

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<sup>1</sup> 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”).

<sup>2</sup> *Idem*, para. 3.

pending procedural and substantive matters.<sup>3</sup> The Legal Representative submits that this setting enables the parties and participants to have sufficient time to prepare for the witnesses scheduled to testify in the upcoming evidentiary blocks. The breaks between evidentiary blocks would also enable the Legal Representative to conduct field missions at regular intervals to meet with her clients and accommodate her workload in other proceedings.

4. However, for the Legal Representative to really be able to benefit from the initiative of the Chamber and to effectively be able to prepare and plan for future field missions, it is important that the calendar be announced sufficiently in advance, ideally at least 4 months before the scheduled evidentiary block.<sup>4</sup> Indeed, the planning of missions is crucial to fulfil the Legal Representative's mandate but is complicated by several factors; the main one being that in order to avoid any appearance of conflict of interests, such missions cannot be conducted at the same time as the missions planned by the Legal Representative of the victims of the attacks. Since the latter requires more time to meet with his clients –more numerous – a clear long-term calendar is crucial for both legal representatives to be able to effectively meet with their respective clients and fulfil their obligations under the Code of Conduct.

## *ii. The sitting schedule*

5. The Legal Representative does not object to have, as a general rule, a sitting schedule of 5 hours daily. Depending on the circumstances of each witness, the Chamber may also decide to sit for extended hours in order to avoid unnecessary delays and to keep up with the pre-established schedule for the evidentiary block. Furthermore, the Legal Representative takes the view that the Chamber must

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<sup>3</sup> *Ibid.* See also ICC-01/04-02/06-T-19-ENG ET, p. 10, line 20 – p. 11, line 6.

<sup>4</sup> To date, the Chamber announces the scheduling of upcoming blocks at the earliest opportunity in conformity with the "Decision on the conduct of proceedings", No. ICC-01/04-02/06-619, 2 June 2015, para. 15.

maintain the current approach with respect to the starting and finishing hours in order to ensure some degree of flexibility, and should retain the possibility to modify sitting hours when needed. A flexible approach would enable the Chamber to accommodate the needs of the parties and participants as well as those of the witnesses, interpreters, court reporters and more generally of any staff supporting the hearing.<sup>5</sup>

### iii. *Witness preparation sessions*

6. The Legal Representative submits that the Chamber in the Decision on witness preparations already implemented “*safeguards to mitigate the risk of witness preparation becoming improper rehearsal of in-court testimony, such as clear guidelines establishing permissible and prohibited conduct, and video-recording of preparation sessions*”.<sup>6</sup> However, while the Legal Representative agrees with the Chamber that video-recording of witness preparation sessions “*is an important safeguard to prevent and disclose potential abuse by the calling Party*”<sup>7</sup>, she also posits that the disclosure thereof shall only be effected in the events referred to in the Protocol, *i.e.* “*to identify alleged acts of misconduct, as well as to resolve misunderstandings.*”<sup>8</sup> Indeed, the parties and participants are bound by the Protocol and rendering the disclosure of such video-recordings compulsory at all time will not only cast a constant doubt on the behavior of the calling party but will inevitably delay the proceedings since the other party will need time ahead of the testimony to review said recordings.

7. Moreover, the Legal Representative submits that the possibility for the calling party to “[s]how the witness potential exhibits and ask him or her to comment on them for the purpose of determining the utility of using the exhibits in court” should be

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<sup>5</sup> The extended hours sitting might also explain the issues related to the accuracy of the translation/transcript. See *infra* point vii.

<sup>6</sup> See the “Decision on witness preparation”, No. ICC-01/04-02/06-652, 16 June 2015, para. 24.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Idem.*

maintained.<sup>9</sup> Indeed, for some of the witnesses, their first interviews with the Prosecution took place some 10 years ago and the events concerned some 13 years. It is therefore of paramount importance for the Court to succeed in its mission to establish the truth, that an appropriate preparation of witnesses is carried out. However this possibility should not be used by the calling party to address substantive matters that are not related to the content of the relevant documents. In case the witness provides additional information not contained in the documents shown to him or her, the calling party should not seek to explore or elicit further information from the witness. Rather, such information should be clarified or explored in greater details during the testimony before the Chamber.

*iv. Implementation of in-court protective measures*

8. The Legal Representative submits that the publicity of this trial is an overarching consideration, one that must be upheld and applied in the most consistent manner. The Legal Representative notes that, so far, extensive use of private sessions has made it difficult for the victims and the public to follow the proceedings. The Legal Representative therefore supports the proposal that the questioning party must ensure, during its preparation, that questions likely to elicit confidential information are grouped together.

9. However, bearing in mind the obligation of the Court as a whole to “*take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses [having] regards to all relevant factors, including age [...] and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children*”,<sup>10</sup> the Legal Representative contends that a very cautious approach should be taken in this regard. Accordingly, while the Legal Representative posits that resort to private sessions is at times inevitable,

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<sup>9</sup> See the “Witness preparation protocol”, No. ICC-01/04-02/06-652-Anx, 16 June 2015, para. 24.

<sup>10</sup> See article 68(1) of the Rome Statute.

parties and participants must be ordered to review relevant portions of the transcripts with a view to providing suggestions for lesser redacted versions, where appropriate.

*v. The modalities of witness's testimony*

10. The Legal Representative does not oppose a more frequent reliance on rule 68(3) of the Rules of Procedure and Evidence as a means to adduce evidence. The agreement of both parties should not however be considered as a formal requirement for admission of evidence pursuant to rule 68(3) of the Rules.

11. Several requests for admission of evidence pursuant to Rule 68(3) of the Rules have been unsuccessful.<sup>11</sup> However, the Legal Representative posits that this procedure should be favoured with regard to the witnesses who have already testified in the *Lubanga* case since there is no need to repeat what is already on record in other cases before the Court. Far from restraining the parties, participants and the Chamber, this course of action will enable all actors to focus their questioning on clarification/follow-up questions; while the opposing party will always have the opportunity to cross-examine the witness. Accordingly, this solution undoubtedly contributes to a better use of the court time and resources. It could also in some cases prevent retraumatisation, which should always be favoured in order ensure the protection of the witnesses' safety and well-being as provided for in article 68(1) of the Rome Statute.<sup>12</sup>

12. In principle, the Legal Representative does not oppose greater reliance on video-link testimony in accordance with rule 67 of the Rules of Procedure and evidence with respect to certain witnesses. The Legal Representative however

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<sup>11</sup> See "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010" (Trial Chamber IV), No. ICC-01/04-02/06-988, 6 November 2015; "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055" (Trial Chamber IV), No. ICC-01/04-02/06-961, 19 October 2015.

<sup>12</sup> In this sense see *supra* para. 9.

submits that this way of testifying will generally not be appropriate for dual-status victims and more generally for victim-based witnesses. Indeed, experience tends to prove that it is of the utmost importance for them, as part of the healing process, to testify before the judges in the courtroom and have their story heard. Moreover, physical presence in the courtroom will allow the Chamber to better assess the witnesses' vulnerability and their specific needs for assistance; and enable it to take swift and appropriate actions to mitigate any risk for their safety and well-being. More generally speaking, the crime based witnesses, by nature are more vulnerable, might be at greater risk to be traumatised should they be called to testify remotely, by way of technical means they are not always able to understand. In any event, should the Chamber decide to resort to video-link with regard to dual status witnesses represented by the Legal Representative, she respectfully requests that her field counsel be authorised to assist her clients *in situ*.

*vi. The mode of questioning*

13. The Legal Representative supports the proposal that witnesses be given the choice either (i) to provide a narrative about the events before the calling party starts asking sets of more specific and narrow questions; or (ii) to proceed in a guided way from the outset. Some of the advantages of resorting to the "less-guided" testimony include: minimizing the influence the calling party may have over the witness, accelerating the presentation of evidence by avoiding interruptions from the calling party and minimizing objections from the opposing party. Allowing the witness to provide his or her own account of the events without the intervention of any party or participants also enhances the truth-finding function of the Court.

14. The Legal Representative also takes the view that background information, by their very nature, should be elicited by way of leading questions. Indeed, the prohibition on leading questions is not an absolute one, and does not extend to questions intended to establishing the witness's identity. This allows the Chamber to



determine *prima facie* the general relevance of the testimony to the events described in the charges. On the other hand, limiting the use of leading question to eliciting background information will ensure that the substance of the testimony is not unduly influenced by the calling party.

*vii. Interpretation and transcription*

15. The Legal Representative supports the Chamber's proposal to lift the five-day deadline set in the Registry's *Procedure to be used for corrections and redactions of Transcripts of hearings*.<sup>13</sup> Indeed, although discrepancies are best raised during the relevant hearing, such a course of action may not always be possible and may cause unnecessary disruption of the proceedings. In the event that an objection or issue related to the accuracy of the transcript or translation is made known to the Chamber after the hearing, other parties and participants should be notified and may provide their observations. Moreover, the Chamber may order the Registry to confirm the accuracy of the translation/transcript as appropriate, within a specified timeframe.

*viii. Any other related matter*

16. The Chamber has routinely required legal representatives to submit requests to be excused if engagements arising out of obligations in other cases, or other professional commitments prevent them from attending hearings. The Legal Representative submits that since members of her team are fully acquainted with the case and the interests of the victims she represents, her physical presence in the courtroom, as that of the lead counsel for the Defence or that of the Senior Trial Lawyer for the Prosecution, is not always strictly necessary. Indeed, being privy to the witness list, she should be granted a degree of flexibility in this regard. This would not impact in any way on the proceedings or the fulfilment of her duties in the

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<sup>13</sup> See the "Procedure to be used for corrections and redactions of Transcripts of hearing", No. ICC-01/04-02/06-549-Conf-Anx1, 8 April 2015.

present case and will enable her to perform her duties in the others cases she is simultaneously involved in.

Respectfully submitted,

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

Sarah Pellet  
Common Legal Representative of the  
Former Child Soldiers

Dated this 17<sup>th</sup> Day of March 2016

At The Hague, The Netherlands