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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

Public redacted version of “Response on behalf of Mr Ntaganda to the submissions made by the Prosecution and the participants on certain matters related to the conduct of proceedings”

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) the *“Order requesting submissions on certain matters related to the conduct of proceedings”* issued by Trial Chamber VI (“Chamber”) on 8 March 2016 (“Order”);¹ (ii) the *“Prosecution’s submissions on certain matters related to the conduct of proceedings”* filed by the Office of the Prosecutor (“Prosecution”) on 17 March 2016 (“Prosecution Submissions”);² (iii) the *“Submissions of the Common Legal Representative of the Victims of the Attacks on certain matters related to the conduct of the proceedings”* submitted by the Common Legal Representative of the victims of the attacks (“LRV1”) on 17 March 2016 (“LRV1 Submissions”);³ (iv) the *“Former child soldiers’ submissions on certain matters related to the conduct of proceedings”* filed by the Common Legal Representative of the alleged former child soldiers (“LRV2”) on 17 March 2016 (“LRV2 Submissions”);⁴ and (v) the *“Submissions on behalf of Mr Ntaganda on certain matters related to the conduct of proceedings”* submitted by Counsel representing Mr Ntaganda (“Defence”) on 17 March 2016 (“Defence Submissions”),⁵ the Defence hereby submits this:

**Response on behalf of Mr Ntaganda to the submissions made by the Prosecution
and the participants on certain matters related to the conduct of proceedings**

“Defence Response”

1. As authorised by the Chamber, the Defence hereby responds to certain issues raised in the Prosecution Submissions, as well as in the LRV1 and LRV2 Submissions, with a view to assisting the Chamber in its consideration of the matters identified in the Order.

¹ ICC-01/04-02/06-1198.

² ICC-01/04-02/06-1214.

³ ICC-01/04-02/06-1215.

⁴ ICC-01/04-02/06-1216.

⁵ ICC-01/04-02/06-1217-Conf. A public redacted version of the Defence Submissions was submitted on the same day, notified on the following day: ICC-01/04-02/06-1217-Red.

SUBMISSIONS

I. Issue (i) – The length of evidentiary blocks

2. The Defence notes that both parties, as well the participants, agree on the need to maintain the system of ‘evidentiary blocks’ followed by appropriate adjournments.⁶
3. Should the Chamber consider lengthening the duration of the evidentiary blocks, as submitted by the Prosecution,⁷ the Defence posits that it would be in the interests of justice for evidentiary blocks to last no more than six weeks, followed by a minimum of a three-week break.⁸ The experience of the third evidentiary block – which lasted six weeks, from 18 January to 29 February 2016 – has shown that such a duration puts increased strain on the Chamber, parties and participants, as well as on supporting staff, and that extending further the evidentiary block would be counter-productive.
4. Moreover, while it understands the difficulties associated with long-term scheduling, the Defence supports LRV2’s proposition to announce the calendar sufficiently in advance, ideally at least 4 months before the scheduled evidentiary block,⁹ with a view to enabling the parties and participants to plan *inter alia* field missions as well as to deal with various internal scheduling matters.

II. Issue (iii) – Witness preparation sessions

5. The Defence opposes the Prosecution’s submission that ‘potential exhibits’ that can be shown to a witness during a preparation session “can include

⁶ Prosecution Submissions, para.4; LRV1 Submissions, para.4; LRV2 Submissions, para.3.

⁷ Prosecution Submissions, para.4.

⁸ See Defence Submissions, para.2. In this regard, the Defence notes that the Prosecution proposes two to three-week adjournments between blocks (Prosecution Submissions, para.4), while LRV1 posits the current arrangement, *i.e.* 3 weeks of break between evidentiary blocks, is the ‘most convenient option’, but submits that, in any event, breaks between evidentiary blocks should last for a minimum of two weeks (LRV1 Submissions, para.4).

⁹ LRV2 Submissions, para.4.

items not previously shown to [the] witness provided that there is a connection between the witness and the item”.¹⁰

6. The Prosecution’s submission misapprehends the scope of the existing “*Witness preparation protocol*” (“Witness Preparation Protocol”),¹¹ which, in the Defence’s view, contemplates showing to a witness only exhibits he or she is familiar with.
7. Indeed, the showing of documents not previously discussed with a witness – either during prior witness interviews or as part of a previous preparation session – is bound to result in the Prosecution obtaining new information from the witness and amounts to furthering its investigations, a practice which is prohibited under the Witness Preparation Protocol.¹² Merely making available to the witness documents never shown draws the witness’s attention to issues not covered before and prompts the witness to provide new evidence on such issues during his testimony at trial.¹³
8. Moreover, to the extent that witness preparation sessions take place at a very late stage in the witness’s involvement with the Court, the Defence posits that any benefits to the truth-seeking function of the Chamber of discussing with a witness documents never previously shown must be weighed against the fairness of proceedings, which requires avoiding to provide the Defence with recently obtained evidence shortly before the testimony of a witness.
9. In this regard, the Defence notes that the Chamber has implicitly excluded the possibility for the calling party to provide a witness with documents he has never commented during his prior interviews or testimony.¹⁴

¹⁰ Prosecution Submissions, para.10.

¹¹ 16 June 2015, ICC-01/04-02/06-652-Anx.

¹² Witness Preparation Protocol, para.2.

¹³ Cf. Email from the Defence to the Chamber, Prosecution and participants, 24 February 2016, 07h19.

¹⁴ T-71-CONF-ENG, p. 39, ll.7-12.

10. The Defence further concurs with LRV2's submission that the possibility of showing 'potential exhibits' to a witness during a preparation session "should not be used by the calling party to address substantive matters that are not related to the content of the relevant documents".¹⁵ The Defence also shares LRV2's view that "[i]n 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".¹⁶
11. If the calling party deems it absolutely necessary to question or engage the witness on a document not previously shown, the *inter partes* procedure proposed by the Defence – aimed at ensuring that both parties are informed concurrently of any additional information provided by a witness before his or her testimony, thereby avoiding unnecessary litigation – should apply.¹⁷

III. Issue (iv) – The implementation of in-court protective measures

12. The Defence takes issue with the Prosecution's submission that the need for private session is often 'unavoidable' "when there is only one or a limited number of persons who could testify about a particular event".¹⁸
13. While certain questions may, indeed, invite a witness to provide information that very few people are privy to, the Defence reiterates its submission that the risk of identification must be assessed against *objective* factors, namely:
 - (i) the nature of the information expected to be elicited through the question;
 - (ii) whether the witness is in an *exclusive* position to provide the information;
 - and (iii) the number of individuals being in a position to identify the witness as a result of the answer expected to be given.¹⁹ Applying such a test would

¹⁵ LRV2 Submissions, para.7.

¹⁶ LRV2 Submissions, para.7 (emphasis added).

¹⁷ Defence Submissions, para.15.

¹⁸ Prosecution Submissions, para.18.

¹⁹ Defence Submissions, paras.24-25.

- also avoid the need to conduct a time-consuming post-testimony review of the transcripts with a view to providing suggestions for lesser redacted versions, as suggested by LRV2.²⁰
14. The existence of discrepancies between this case and the *Lubanga* proceedings as regards the use of private sessions to elicit information from a witness common to both cases,²¹ further highlights the need to resort to an objective test to determine whether an answer to a given question may reveal the identity of the witness.
 15. Furthermore, the Defence takes issue with the Prosecution's assertion that "[t]he need for private sessions was further exacerbated by the fact that some of [the insider witnesses called by the Prosecution] have also been the subject of attempted interference regarding their testimony".²² The Defence posits that once in-court protective measures have been ordered in relation to a witness, whether or not this witness has been the subject of alleged attempts of interference should have no bearing on the determination as to whether potentially identifying information should be elicited in open or private session. Rather, the issue is whether a given question can objectively lead to identify the witness, bearing in mind the factors identified above. As rightly submitted by LRV1, "[t]he 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".²³
 16. On a more general note, the Defence is concerned with the Prosecution's overreliance on the Chamber's "*Decision on Prosecution requests to impose restrictions on Mr Ntaganda's contacts*"²⁴ to support any and all of its submissions pertaining to in-court protective measures, regardless of whether

²⁰ LRV2 Submissions, para.9.

²¹ See e.g. [REDACTED].

²² Prosecution Submissions, para.19.

²³ LRV1 Submissions, para.12.

²⁴ 18 August 2015, ICC-01/04-02/06-785-Red.

the witness has been *himself* or *herself* subject of alleged attempts of interference. In the context of in-court protective measures, the Prosecution fails to take into account that as a result of the measures put in place by the Chamber on Mr Ntaganda's contacts, there is virtually no possibility of interference on the part of Mr Ntaganda.

17. As regards LRV1's suggestion to resort more frequently to code names to refer to specific information, the mention of which could lead to the identification of the witness, as was done in the case of Witness P-0805,²⁵ the Defence agrees to explore this avenue, but notes that it may not be a workable solution in all circumstances.

IV. Issue (v) – The modalities of witness's testimony

18. LRV2 contends that admission into evidence of prior recorded testimony under Rule 68(3) of the Rules of Procedure and Evidence ("Rules") should be 'favoured' with respect to 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".²⁶
19. In this regard, the Defence recalls its prior submission that there may be circumstances where it is preferable to hear the testimony of a witness who testified in another case in its entirety *viva voce*, if only because "what is already on record" has been adduced and tested in a different context without any input from Mr Ntaganda as well as in the absence of anyone focusing on his interests.²⁷
20. That said, if the objective criterion referred to by the Defence in its previous submissions are met,²⁸ the Defence agrees that the possibility of admitting the

²⁵ LRV1 Submissions, para.13.

²⁶ LRV2 Submissions, para.11.

²⁷ See "Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit the prior recorded testimony and associated documents of Witness P-0055'", 19 October 2015, ICC-01/04-02/06-908-Conf ("Response to First Rule 68(3) Application"), para.16.

²⁸ Response to First Rule 68(3) Application, para.11.

evidence of a witness who testified in the *Lubanga* case pursuant to Rule 68(3) of the Rules should be explored.

21. The Defence also takes issue with LRV2's suggestion that admission of prior recorded testimony under Rule 68(3) of the Rules could prevent 'retraumatisation' of certain witnesses.²⁹ The Defence stresses that the aim of Rule 68(3) is rather to enhance the expeditiousness of trial proceedings, provided that admitting the prior recorded testimony is not prejudicial or inconsistent with the rights of the Accused.³⁰
22. The Defence shares the Prosecution's concern that "[t]estimony by video link does not [...] generally speed up proceedings to any significant extent".³¹ The Defence stresses that a witness should be allowed to testify *via* video-link only if he or she is unable to travel to The Hague for objectively identifiable reasons.
23. The Defence does not oppose LRV2's request that her field counsel be authorised to assist her clients *in situ* in the event the Chamber decide to resort to video-link with regard to dual status witnesses she represents,³² provided that such 'assistance' remains within the purview of Article 34 of the "Protocol on practices to be used to familiarise witnesses for giving testimony at trial",³³ pursuant to which Legal Representatives should refrain from holding substantive discussions with witnesses about the topics that are to be dealt with in Court during their evidence or the exhibits which may be produced.

²⁹ LRV2 Submissions, para.11.

³⁰ Cf. "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931", 21 September 2015, ICC-01/04-02/06-845, paras.6, 8.

³¹ Prosecution Submissions, para.20.

³² LRV2 Submissions, para.12.

³³ 16 June 2015, ICC-01/04-02/06-656-AnxA.

V. Issue (vi) – The mode of questioning

24. The Defence generally concurs with the Prosecution's submissions in relation to the possibility of inviting some witnesses to first provide a narrative about certain events.
25. However, the Defence posits that when considered appropriate by the calling party, a narrative should only be elicited at the beginning of testimony – to allow the witness to speak freely about events he or she was privy to – or, possibly, at the beginning of major 'themes' or 'sections' of the witness's examination-in-chief.
26. The Defence stresses the importance for introductory questions to be clear and aimed at obtaining from the witness what *he* or *she* did, saw and heard personally and *not* what he or she might have become aware on the basis of rumours. In this regard, the Defence recalls its proposal that introductory questions be communicated to the Chamber, opposing party and participants ahead of testimony with a view to avoiding in-court litigation as to the appropriateness of the same.
27. The Defence further insists on the requirement that narrative of a witness must not be used as a *carte blanche* to put to the witness 'follow-up' questions³⁴ of a leading nature.³⁵ Proceeding otherwise would enable the calling party to testify on behalf of the witness, thus seriously undermining the probative value of the witness's testimony.
28. Furthermore, the Defence concurs with the Prosecution's submissions on the possibility to use leading questions to elicit background information.³⁶ Taking into consideration its own submissions,³⁷ the Defence concurs with LRV1's submission that "background information should not be understood to

³⁴ Prosecution Submissions, para.31.

³⁵ Defence Submissions, para.38.

³⁶ Prosecution Submissions, paras.39-41.

³⁷ Defence Submissions, para.36.

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”.³⁸

29. As regards the possibility to elicit *other* information by way of leading questions,³⁹ the Defence submits that it would be in the interests of justice for the calling party to inform the opposing party, before testimony, of the area(s) it intends to cover by way of leading questions and seek the opposing party’s consent thereon.

VI. Issue (vii) – Interpretation and transcription

30. As expressed in its Submissions, the Defence attaches a very high importance to the accuracy of the French and English transcripts, as well as to the interpretation into French of answers given in Swahili.⁴⁰
31. The Defence is deeply concerned with the Prosecution’s statement that it has been communicating to the Registry suggested edits to the transcripts upon completion of each witness’s testimony⁴¹ with the Defence not having been informed of such suggested edits.⁴² The Defence reiterates its submission that the “*Procedure to be used for corrections and redactions of Transcripts of hearings*”⁴³ should be amended so as to require the moving party to notify the Chamber, the opposing party and the participants of any request for correction, as well as to require the Registry to notify the Chamber, opposing party and participants of the result of its review.⁴⁴ The Defence notes that LRV2 advocates for a similar procedure.⁴⁵

³⁸ LRV1 Submissions, para.21.

³⁹ Prosecution Submissions, para.42.

⁴⁰ Defence Submissions, paras.40, 42.

⁴¹ Prosecution Submissions, para.45.

⁴² See also T-73-CONF-ENG, p.95, l.17 to p.96, l.4.

⁴³ 8 April 2015, ICC-01/04-02/06-549-Conf-Anx1 adopted *per* the “Decision on the conduct of proceedings”, 2 June 2015, ICC-01/04-02/06-619.

⁴⁴ Defence Submissions, para.41.

⁴⁵ LRV2 Submissions, para.15.

32. Given the potentially high number of 'suggested edits' communicated to Registry by the Prosecution as well as their most probable relevance to key aspects of the witnesses' evidence,⁴⁶ the Defence hereby requests that: (i) all 'suggested edits' to the transcripts submitted by the Prosecution since the beginning of trial; as well as (ii) the results of the Registry's review thereon, be communicated to the Chamber, Defence and participants. The Defence takes this opportunity to inform the Chamber that it has submitted two requests for transcript correction since the beginning of trial, which can be communicated to the Chamber, Prosecution and participants if deemed necessary.

VII. Issue (viii) – Other related matters

Prosecution Submissions: The applicability of the Witness Preparation Protocol to expert witnesses

33. The Defence agrees with the Prosecution's new stance⁴⁷ that "the [Witness Preparation Protocol] should not apply to expert witnesses to the extent that it requires meetings with such witnesses to be video-recorded".⁴⁸ Expert witnesses, by virtue of their position, are independent and impartial. As such, preparation sessions of expert witnesses are simply a means to prepare the expert for his testimony by identifying what expert information will be sought from him. In such circumstances, there is virtually no need for a video-recording of the preparation session as a safeguard against potentially improper conduct.⁴⁹
34. However, for the same reasons, the Defence respectfully submits that it should be compulsory for expert witnesses to meet, in the same conditions, both parties ahead of testimony, without the presence of a representative of

⁴⁶ "For example, during the testimony of Witness P-0017, the Prosecution discovered errors in all six transcripts, most notably in one transcript where 91 errors were detected and in another transcript where 66 errors were found. These errors included missing names and missing sentences": Prosecution Submissions, para.45.

⁴⁷ The Defence recalls that the Prosecution had a different view at the beginning of trial: T-25-CONF-ENG, p.10, ll.20, 24.

⁴⁸ Prosecution Submissions, para.51.

⁴⁹ T-25-CONF-ENG, p.10, ll.20-24.

the other party and with the obligation of not discussing the contents of the preparation session with the other party. This would ensure a more focused examination of the expert witness. In addition, with a view to assisting the Chamber in its assessment of expert evidence, such a practice would allow the opposing party to explore any credibility-related matters without revealing to the other party any element of the party's strategy.

CONFIDENTIALITY

35. Pursuant to Regulation 23*bis* (1) of the Regulations of the Court, this Defence Response is submitted as confidential as it refers to information elicited in private session. A public redacted version will be submitted separately.

RESPECTFULLY SUBMITTED ON THIS 23RD DAY OF MARCH 2016

A handwritten signature in dark ink, appearing to read 'StB' with a stylized flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands