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Date: **24 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

Public redacted version of "Prosecution's response to the 'Submissions on behalf of Mr Ntaganda on certain matters related to the conduct of proceedings', ICC-01/04-02/06-1217-Conf", 23 March 2016, ICC-01/04-02/06-1227-Conf

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

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Introduction

1. Pursuant to Trial Chamber VI's ("Chamber") order,¹ the Prosecution responds to the "Submissions on behalf of Mr Ntaganda on certain matters related to the conduct of proceedings" ("Defence Submissions").²
2. Contrary to the Defence proposals: (i) witness preparation sessions have assisted in focusing a witness's examination-in-chief and should be maintained with no alteration to their scope or duration; (ii) in-court protective measures do not unduly impact on the publicity of proceedings and have been granted based on witnesses' individual circumstances; and (iii) arbitrary limits on the scope of applications pursuant to rule 68(3) of the Rules of Procedure and Evidence ("Rules") and on the duration of supplementary questioning in such instances would not be conducive to the expeditiousness and fairness of the proceedings.
3. The Prosecution also responds to the Defence's observations in relation to the length of evidentiary blocks, contact with witnesses of the opposing Party, permissible questions in relation to narratives provided by witnesses during their examination-in-chief, problems with interpretation and transcription, the lifting of standard redactions, and disclosure.

Confidentiality

4. This filing is classified as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court ("Regulations") in line with the classification of the Defence Submissions. The Prosecution will file a public redacted version of this filing.

¹ ICC-01/04-02/06-1198, p.6 ("Order").

² ICC-01/04-02/06-1217-Conf with public redacted version at ICC-01/04-02/06-1217-Red. The Prosecution notes that it has no specific response to the submissions of the Legal Representatives (ICC-01/04-02/06-1215 and ICC-01/04-02/06-1216). The Prosecution has not received the Registry's views which the Chamber ordered to be filed by the filing deadline on 17 March 2016 (*see* Order, p.6) and, as such, reserves its right to respond thereto should they subsequently be made available to it.

Prosecution's Submissions

A. Issue I: The Length of Evidentiary Blocks

5. The Parties agree, in principle, about the need for a break between evidentiary blocks.³ The Prosecution, however, corrects the Defence submission that the material disclosed in relation to all “insider witnesses” referred to by the Defence,⁴ often comprises thousands of pages.⁵ It is correct that the materials of four military insider witnesses who testified in *Lubanga*⁶ comprise between 1,200 to 2,000 pages each. The materials of witnesses who were interviewed under article 55(2) of the Rome Statute but who did not previously testify comprise approximately 500 pages.⁷ Witnesses who are former child soldiers⁸ provided relatively short signed statements of less than 50 pages, as did political insiders.⁹

B. Issue III: Witness Preparation Sessions

6. The Chamber did not request written observations on whether witness preparation should take place at all in the proceedings against the Accused.¹⁰ Although the Defence states that “recent experience” necessitates amendment to the “Witness Preparation Protocol”¹¹ in order not to impede the rights of the Accused,¹² it fails to refer to any valid reason warranting amendment and fails to explain how any of the Accused’s rights have been impeded by this exercise. The Defence also conflates the provisions of the Witness Preparation Protocol with

³ The Defence states that there is a need for breaks of a minimum of three weeks while the Prosecution requested two to three weeks, see Defence Submissions, para.2 and ICC-01/04-02/06-1214, para.4 (“Prosecution Submissions”).

⁴ See Defence Submissions, fn.3.

⁵ Defence Submissions, para.3.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ See Defence Submissions, paras.9, 16. The Chamber requested written observations on “Witness preparation sessions, in particular, the appropriate scope of paragraph 24 of the Protocol”, Order, para.3(iii). For the Prosecution’s views on some ways in which witness preparation sessions have proven useful to date see Prosecution Submissions, paras.9, 15.

¹¹ ICC-01/04-02/06-652-Anx (“Witness Preparation Protocol”).

¹² Defence Submissions, para.8.

those of a separate Protocol regulating contact with witnesses of the opposing Party, as set out in greater detail below.

No arbitrary time limits should be set for witness preparation

7. The Defence's proposal to limit the temporal scope of witness preparation sessions to five days, with witnesses not being required to travel to The Hague more than seven to eight days prior to their testimony,¹³ is arbitrary and unrealistic for certain witnesses. The determination concerning when a witness needs to arrive at the seat of the Court for the purposes of witness preparation and familiarisation depends, primarily, on the amount of material which the witness needs to review.
8. By way of example, a witness, such as [REDACTED], whose material amounts to over two thousand pages cannot reasonably be expected to read through that material in five days, provide any necessary clarifications, meet with rule 74 counsel, attend courtesy meetings with the Parties and participants and attend the standard familiarisation and assessments conducted by the Victims and Witnesses Unit ("VWU") during this timeframe. Witnesses also read at different speeds and require breaks during and between preparation sessions. Additionally, witnesses must have at least one free day before testimony.
9. Further, the date when witnesses travel to the seat of the Court is not the sole factor which needs to be taken into account in relation to any necessary modification of the hearing schedule.¹⁴ Witnesses have families, jobs, and other commitments. They do their best to appear when requested and they cannot be expected to change the date of their testimony at short notice absent valid reason.

¹³ Defence Submissions, para.12.

¹⁴ See Defence Submissions, para.10.

Further, when unexpected circumstances have arisen thus far, witnesses have cooperated and extended their stay at the seat of the Court.¹⁵

10. Finally, and as developed further below, it is not the witness preparation schedule that impacts on Defence requests to meet with witnesses; rather, it is the untimely nature of the latest two Defence requests when these could, and should, have been made much earlier.

The scope and conduct of witness preparation need not be altered

11. There is no need to modify the Witness Preparation Protocol¹⁶ since it already contains clear provisions on the general principles of witness preparation and on the specific conduct which is and is not allowed.¹⁷ The Defence fails to refer to any incident warranting any such modification.
12. Limiting witness preparation to the witness's reading of his or her material and provision of corrections thereto¹⁸ would unduly restrict the very purpose of witness preparation. It would not help to ensure that a witness will give "relevant, accurate and structured testimony",¹⁹ and it would not enable the calling Party to "assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings."²⁰ Reviewing the statements together with the witness,²¹ questioning him or her on any inconsistencies therein,²² and showing the witness potential

¹⁵ [REDACTED].

¹⁶ *Contra* Defence Submissions, paras.14-15.

¹⁷ The Protocol also obliges witness preparation to be carried out "in good faith and in keeping with the applicable standards of professional conduct and ethics", Witness Preparation Protocol, para.4.

¹⁸ Defence Submissions, para.14.

¹⁹ Witness Preparation Protocol, para.1(a)(i).

²⁰ Witness Preparation Protocol, para.1(b).

²¹ Witness Preparation Protocol, para.20.

²² Witness Preparation Protocol, para.20.

exhibits for the purpose of determining the utility of using them in court,²³ are important tools to achieve these goals.

13. The presence of the opposite Party during witness preparation sessions where witnesses are asked to clarify certain aspects of their prior statement or are engaged in any way concerning the contents of such statement²⁴ would not “help ensure the well-being of the witness”.²⁵ The Defence fails to provide adequate reason for introducing such a requirement, and does not explain how such presence would favour the conduct of focused examinations.²⁶ Such a requirement would be more likely to unnecessarily lengthen the duration of preparation sessions and add to the witnesses’ anxiety even before setting foot in court. Further, the Witness Preparation Protocol already caters for the opposing Party to be informed of any relevant information emanating from witness preparation sessions.²⁷

*Contact with witnesses of the opposite Party is clearly regulated*²⁸

14. The process of witness preparation and/or the time when witnesses travel to the seat of the Court has no bearing on the Defence’s ability to request to meet with Prosecution witnesses.²⁹

15. The Defence can request to meet Prosecution witnesses months or weeks before they travel to the seat of the Court. The Defence should be able to determine

²³ Witness Preparation Protocol, para.24.

²⁴ Defence Submissions, para.15.

²⁵ Witness Preparation Protocol, para.1(a)(ii).

²⁶ Defence Submissions, para.15.

²⁷ This takes place by means of the note provided by the calling Party before the witness begins his or her examination-in-chief, see Witness Preparation Protocol, paras.31-32.

²⁸ The Defence makes submissions regarding its contact with Prosecution witnesses under the heading of “Witness Preparation Sessions” (Defence Submissions, paras.10-12.). However, such contact is specifically regulated by the “Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant” (ICC-01/04-02/06-412-AnxA, “Protocol on Contact”), not the Witness Preparation Protocol (See ICC-01/04-02/06-T-26-CONF-ENG ET, p.45, ln.24 – p.46, ln.16, open session). The Chamber did not invite written observations on the Protocol on Contact. Nevertheless, the Prosecution responds to the Defence’s submissions on this issue should the Chamber be minded to consider it as a related matter (See Order, para.3(viii)).

²⁹ *Contra* Defence Submissions, para.10.

whether or not it would like to meet with a Prosecution witness sufficiently in advance of his or her testimony, yet the last two such requests were made one or two working days before the witnesses' scheduled start of testimony.³⁰ The obstacle to such meetings is not the witness preparation session but the Defence's inability to make timely requests to meet Prosecution witnesses.

16. The Defence also fails to adequately explain why it did not raise any of its challenges in relation to contact with witnesses of the opposing Party at the appropriate time. It is unclear whether the Defence now states that it had previously misunderstood the provisions of the Witness Preparation Protocol on the recording of preparation sessions or those of the Protocol on Contact with regard to the recording of meetings with witnesses of the opposing Party.³¹ Nevertheless, as noted by the Chamber, it is incumbent on a Party to provide all information it considers relevant to the Chamber's determination on a certain issue in its initial request - subsequent filings are not appropriate avenues to correct oversights or mistakes made in an initial request.³²

17. The Defence has never previously contested³³ the requirement that any meetings with witnesses of the opposing Party should be recorded³⁴ or that such witnesses are entitled to have a representative attend the interview.³⁵ The Defence did not seek reconsideration of, or leave to appeal from, the Chamber's decision³⁶ adopting the Protocol on Contact in relation to these specific issues.³⁷ If, for

³⁰ On 26 January 2016 at 12:13 p.m., the Defence made a request, *via* email, to meet with Witness P-0017 who was scheduled to start his testimony on 27 January 2016, *see also* ICC-01/04-02/06-T-58-CONF-ENG CT p.2, ln.24 – p.4, ln.9 (open session). On Thursday 4 February 2016 at 14:51, the Defence made a request, *via* email, to meet with Witness P-0290 who was scheduled to start his testimony on Monday 8 February 2016.

³¹ Defence Submissions, para.13.

³² ICC-01/04-02/06-1143-Conf, paras.10, 12.

³³ *See* ICC-01/04-02/06-400; ICC-01/04-02/06-412; Defence Submissions, para.12.

³⁴ Protocol on Contact, para.45: "A video or audio record of the entire interview will be provided to the party or participant calling the witness or relying on his or her statement as soon as practicable after the conclusion of the interview."

³⁵ Protocol on Contact, para.40: "The witness is entitled to have a representative attend the interview. This is the choice of the witness; the calling party or participant shall not influence the witness's decision on whether to have a representative present during the interview."

³⁶ ICC-01/04-02/06-412.

³⁷ *See* ICC-01/04-02/06-191.

whatever reason, the Defence had misunderstood this Protocol's requirements before,³⁸ the Chamber clearly set them out in September 2015 when the Defence failed to provide an audio recording of its meeting with Prosecution Witness [REDACTED] and was then ordered to do so.³⁹

18. The Defence was also fully aware of the conditions under which the audio-visual recording of witness preparation sessions would be disclosed. Prior to the adoption of the Witness Preparation Protocol, the Defence opposed the video-recording of all witness preparation sessions,⁴⁰ and made submissions regarding the procedure to be followed and the standard to be met for the opposing Party to be ordered to provide such a recording.⁴¹ The Defence did not seek reconsideration of, or leave to appeal from, the Chamber's decision adopting the Witness Preparation Protocol.⁴²

19. The Defence provides no valid reason to amend the Witness Preparation Protocol and/or the Protocol on Contact.

C. Issue IV: The Implementation of In-Court Protective Measures

In-court protective measures do not unduly impact on the publicity of proceedings

20. The concept of a public hearing does not mean that the public must necessarily be able to see the face of the witness or to hear his or her voice. Instead, the purpose of this right is to ensure that the administration of justice is not carried out in secret and without public scrutiny, so that the public maintains confidence in the Court and so that the rights of the accused person are protected.⁴³ The Accused's

³⁸ See Defence Submissions, para.13.

³⁹ See ICC-01/04-02/06-T-26-CONF-ENG ET, p46, ln.17 –p.47, ln.12 (open session).

⁴⁰ The Defence argued that this should be limited to specific cases in which it has the potential "to make a difference", ICC-01/04-02/06-484, paras.2, 7-13. The Chamber considered and rejected this argument, see ICC-01/04-02/06-652, paras. 21-27.

⁴¹ ICC-01/04-02/06-484, paras.3, 14-20. In light of this argument, the Chamber decided to add a provision to the Witness Preparation Protocol in this regard, see ICC-01/04-02/06-652, paras. 28-32.

⁴² ICC-01/04-02/06-652.

⁴³ See e.g. ECtHR, *Axen v Germany*, Appl. no. 8273/78, Judgment, 8 December 1983, para.25.

right to a public hearing is not absolute as it is subject, *inter alia*, to the interests of justice.⁴⁴ The granting of in-court protective measures does not exclude the public from the proceedings. When the Chamber grants such measures, any non-identifying testimony provided by a witness will be given in open session and made publicly available. Although recourse to private session is at times required even in relation to witnesses who have been granted in-court protective measures, this is necessary in view of the Chamber's paramount obligation to protect victims and witnesses.

In-court protective measures are requested and granted based on witnesses' individual circumstances

21. The Defence concedes that in-court protective measure requests are adjudicated on an individual basis.⁴⁵ The Prosecution has not requested and, consequently, the Chamber has not granted, any such measure on the basis that a witness would "feel uncomfortable when testifying before the Court".⁴⁶ The Defence minimises the possible repercussions of an armed conflict in affected communities.⁴⁷ A witness's cooperation in proceedings before a court in such communities could lead other members of those communities to inflict serious harm on such witnesses. It is the Prosecution and the Chamber's duty to avoid any such instances. In-court protective measures are vital in this regard.

22. The Chamber has granted in-court protective measures based on the individual circumstances of each witness; it created no expectation that such measures will be granted each time a request is made.⁴⁸ The Chamber considers reports of threats to other witnesses as a result of their involvement with the Court as a

⁴⁴ See e.g. ECtHR, *Guisset v. France*, Appl. no. 33933/96, Judgment, 26 September 2000, para.73; ECtHR, *B and P v. UK*, Appl. nos. 36337/97 and 35974/97, Judgment, 24 April 2001, paras.36-37.

⁴⁵ Defence Submissions, para.18.

⁴⁶ See Defence Submissions, para.19.

⁴⁷ Defence Submissions, para.19.

⁴⁸ *Contra* Defence Submissions, para.20.

factor in determining whether witnesses face an objectively justifiable risk.⁴⁹ This is a legitimate factor to consider, in particular in view of the Chamber's previous finding that the Accused, through an interlocutor, intended to engage in a serious form of witness interference when he spoke of "silencing" certain persons.⁵⁰

In-court protective measures allow a witness to testify without fear of retaliation

23. The Defence presents no relevant basis for its speculative assertion that making a witness's identity known and/or his or her testimony public increases the witness's commitment to tell the truth and his or her feeling of public accountability.⁵¹ The Chamber and the opposing Party are able to question a witness and test the veracity of his or her testimony regardless of whether the testimony was elicited in private session and/or from a witness who was granted protective measures. What will more likely lead a witness to tell the truth is the ability to testify without concerns for his or her security or that of his or her family.

The need for private session must be assessed on a case-by-case basis

24. No fixed set of criteria can be used to determine whether or not recourse to private session is required.⁵² The examining Party needs to make this assessment in view of the witness's specific circumstances and the context in which the evidence arises.

⁴⁹ Defence Submissions, para.20, fn.10 citing ICC-01/04-02/06-1160, para.7.

⁵⁰ See ICC-01/04-02/06-785-Red, paras.50-57.

⁵¹ *Contra* Defence Submissions, para.22. The Defence's previous submission in regard to this contention is "unchallenged" (Defence Submissions, para.11) only because it was made in a response, to which the Prosecution does not have an automatic right to reply (See regulation 24(5) of the Regulations). Indeed, the Defence's reliance on page 45 of the manual by the United Nations Office on Drugs and Crime in support of its contention (Defence Submissions, para.22, fn.11 citing from ICC-01/04-02/06-801-Conf-Exp, for which the Defence filed a public redacted version at ICC-01/04-02/06-801-Red2, at para.10, fn.13) is inapposite. This page simply notes the views of some countries concerning the operational aspects of witness protection programmes and their possible repercussions without providing support therefor, see https://www.unodc.org/documents/southeastasiaandpacific/Publications/Projects/indonesia/Good_practices_for_the_protection_of_witnesses_in_criminal_proceedings_involving_organized_crime.pdf

⁵² *Contra* Defence Submissions, para.24.

25. The viewership statistics of the live-streaming of certain court sessions in the Democratic Republic of the Congo (“DRC”) do not provide an adequate basis for the determination as to whether or not recourse to private session is warranted.⁵³ Regardless of the number of persons following the proceedings in this case, in the DRC or elsewhere, neither the Chamber nor the Parties or participants have any way of knowing *who* these people are. Even if one person is following proceedings in an open session during which potentially identifying information is revealed, this person could be in a position to identify the witness and/or make any information obtained therefrom available to an infinite amount of people through the internet or other means. Critically, there is a large Congolese community in other parts of the world, including Belgium and France, where viewership may be higher. It only takes one viewer to disseminate information for malicious purposes. Importantly, these images can be downloaded and disseminated widely and remain available for a long period of time.

Extra caution is warranted in relation to witnesses in the ICCPP

26. The Defence suggestion that “no extra caution is warranted when determining whether a given question may lead to identifying” a witness who is in the ICC Protection Programme (“ICCP”) ⁵⁴ is of great concern.

27. Witnesses enter the ICCPP based on an objective risk assessment by the VWU. The sole fact that they have been relocated, whether within their country of origin or to a third country, does not mean that they are no longer at risk of being identified. Revealing identifying information of a witness who is in the ICCPP would undermine the protection afforded to the witness in the place of relocation, and may lead to further relocation for the witness and any family relocated with

⁵³ *Contra* Defence Submissions, para.24, fn.12.

⁵⁴ Defence Submissions, para.26.

him or her.⁵⁵ Uprooting a witness, at times without his or her family, is not a measure which is taken lightly given the serious repercussions it has on the witness's life. In this light, *extra* caution should be exercised in relation to such witnesses in order to avoid the need to move them again. Importantly, many family members are not relocated with the witness and the risks to them are equally important upon public disclosure.

28. The Defence's statement that insider witnesses testify publicly in some national jurisdictions⁵⁶ is unhelpful. The Defence supports this claim with a single reference to an August 2015 newspaper article reporting the names of two prospective insider witnesses in a domestic case.⁵⁷ Two months later, the same newspaper carried an article in which it was reported that extraordinary security measures had to be put in place during the same case because it was believed that there were credible threats against the life of one of the two insiders whose photo had been posted in different locations accompanied by statements suggesting he be eliminated.⁵⁸ The Prosecution would be hard pressed to find a better example to demonstrate the reason why protective measures could be required.

29. Further, the manner in which a national jurisdiction chooses to protect its witnesses is irrelevant to the Chamber's determination as to whether protective measures and/or recourse to private session are warranted in relation to a particular witness testifying at the ICC, in particular when the witness is from a

⁵⁵ The Chamber's Decision on the Conduct of Proceedings provides that "if protective measures are in place for a witness, the parties, and where appropriate the LRVs, shall at all times be cautious and ensure that questions asked during public sessions do not compromise the protective measures.", ICC-01/04-02/06-619, para.58.

⁵⁶ Defence Submissions, para.26.

⁵⁷ Defence Submissions, para.26, fn.13 citing "Montreal Gazette, "Examining the seven killings at the heart of SharQc trial", 16 August 2015, online: <http://montrealgazette.com/news/examining-the-seven-killings-at-the-heart-of-sharqc-trial>".

⁵⁸ See Montreal Gazette, "Ex-Hells Angel had a price on his head, putting SharQc courthouse security on high alert", published on 15 October 2015, available at <http://montrealgazette.com/news/local-news/hells-angel-had-a-price-on-his-head-putting-sharqc-courthouse-security-on-high-alert>. Further, there may be particular reasons why witnesses, including insiders, testify publicly in certain cases. According to another newspaper report, Dayle Fredette, the second insider referred to in the newspaper article cited by the Defence, was in prison and had struck a deal to co-operate with the Prosecution. See LAPRESSE.CA, "Un ex-Hells Angels devient officiellement délateur", published on 16 February 2012 available at <http://www.lapresse.ca/actualites/justice-et-affaires-criminelles/201202/16/01-4496692-un-ex-hells-angels-devient-officiellement-delateur.php>.

conflict region with limited police resources. This determination should be centred on the witness's specific circumstances.

D. Issue V: The Modalities of Witnesses' Testimony

No arbitrary limits should be set in relation to rule 68(3) witnesses

30. The Defence's submissions on the limits to be placed on the calling Party's supplementary examination when it seeks to admit a witness's prior testimony pursuant to rule 68(3) of the Rules are unclear and seem to be unfounded.⁵⁹ The Prosecution provided the Chamber, Defence and participants with summaries of the main facts on which each witness is expected to testify ("will-say").⁶⁰ In its two applications to admit parts of the prior testimony of insider witnesses pursuant to rule 68(3), the Prosecution clearly noted which specific points of the witnesses' will-says it was seeking to ask supplementary questions on and those on which it would have no or limited questions.⁶¹

31. No arbitrary time limits should be imposed on the necessary supplementary questions pursuant to a successful rule 68(3) application⁶² since the required time would necessarily vary according to numerous factors. Such factors include the extent to which the prior testimony relates to the charges against the Accused in the current proceedings and the extent to which the evidence is the best evidence or corroborating evidence. Even if a successful rule 68(3) application results in four to five hours of the calling Party's initial ten-hour estimation for examination-in-chief no longer being necessary, this would save one full Court day.

⁵⁹ See Defence Submissions, para.31.

⁶⁰ ICC-01/04-02/06-491-Conf-AnxB-Red.

⁶¹ See ICC-01/04-02/06-884-Conf, paras.15-16, fns.12-13 with public redacted version at ICC-01/04-02/06-884-Red, paras.15-16, fns.12-13; ICC-01/04-02/06-890-RConf, paras.15-16, fns.19-20 with public redacted version at ICC-01/04-02/06-890-Red, paras.15-16, fns.19-20.

⁶² *Contra* Defence Submissions, para.31.

32. The time required for the opposite Party's cross-examination would also vary depending on a number of factors. However, in general, the time required to cross-examine a witness whose prior statement/s, or part/s thereof, have been admitted into evidence is significantly less than that required to cross-examine a witness whose testimony is elicited entirely *viva voce*.⁶³ This is because in the former case the opposing Party is able to prepare for the cross-examination in advance. For this same reason, although the preparation for cross-examination in such cases differs,⁶⁴ it is significantly less cumbersome.
33. The Prosecution shares the Defence's view that the Chamber's rendering of a decision on a rule 68(3) application only a few days in advance of the witness's scheduled start of testimony significantly increases the workload of both Parties since this forces them to cater for the possibility that the Chamber may grant such application as well as that it may not.⁶⁵ The earlier the Chamber renders its decision, the better. The Prosecution submits that shortening the current fourteen-day deadline for responses to such requests⁶⁶ to seven days would assist the Chamber in issuing its decision earlier. However, no deadline should be set for the submission of *all* applications under rule 68(3)⁶⁷ as it is best to make such applications when the calling Party has set the order of appearance of forthcoming witnesses.
34. Nevertheless, the Prosecution will endeavour to make any requests pursuant to rule 68(3) at the earliest possible opportunity, in line with the Chamber's Decision on the Conduct of Proceedings.⁶⁸

⁶³ *Contra* Defence Submissions, para.32.

⁶⁴ Defence Submissions, para.34.

⁶⁵ Defence Submissions, para.34.

⁶⁶ ICC-01/04-02/06-619, para.42.

⁶⁷ *Contra* Defence Submissions, para.34.

⁶⁸ The Chamber's Decision on the Conduct of Proceedings establishes that "the calling party shall, when appropriate, file any application seeking the introduction of previously recorded testimony of a witness present before the Chamber, in accordance with Rule 68(3) of the Rules, at the earliest opportunity, but no later than four

E. Issue VI: The Mode of Questioning

Background information should be elicited through leading questions

35. The Prosecution does not contest the Defence's definition of what constitutes background information in relation to a witness's personal background.⁶⁹ However, the Decision on the Conduct of Proceedings does not solely refer to the possibility of using leading questions during a witness's examination-in-chief to elicit information regarding a witness's personal background. Rather, it refers to such questions being allowed in relation to "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".⁷⁰

The Defence misstates the Chamber's definition of leading questions

36. The Prosecution, in principle, agrees with the Defence that the calling Party should not use questions of a clarifying nature after a witness provides a narrative as an excuse to lead the witness.⁷¹ However, questions that can only be answered by a "yes" or "no" are not leading when the questions do not also suggest the answer.⁷² Further, when the calling Party's questions are primarily based on information which the witness already provided during his or her examination-in-chief, they are not leading.⁷³

weeks before the relevant witness is scheduled to testify ('Rule 68(3) Application')", ICC-01/04-02/06-619, para.41.

⁶⁹ Defence submissions, para.36.

⁷⁰ ICC-01/04-02/06-619, para.26.

⁷¹ Defence Submissions, para.38.

⁷² *Contra* Defence Submissions, para.38; see ICC-01/04-02/06-T-59-CONF-ENG ET, p.29, lns.12-14 (open session) where the Presiding Judge stated that "A leading question is a question that suggests the answer to the person being interrogated that may be answered by a mere yes or no."

⁷³ See ICC-01/04-02/06-T-59-CONF-ENG ET, p.27, lns.1-8 (private session); ICC-01/04-02/06-1184, para.11.

The calling Party need not provide a list of questions it will use to elicit a narrative

37. There is no requirement, in the current proceedings, for the calling Party to provide the Chamber, the opposite Party or participants with specific information regarding the questions which it intends to put to the witness during his or her examination-in-chief. As such, the calling Party should not be required to provide, in advance, a list of the questions it will use in order to elicit a narrative.⁷⁴ Requiring the calling Party to be limited to questions provided in advance would be unrealistic and unduly restrictive since counsel need to adapt their questioning to the manner in which the witness responds while he or she is on the stand. Should the opposing Party disagree with the questions being put to the witness in court, it can object when the time arises. Such minor objections can be considered swiftly by the Chamber.

F. Issue VII: Interpretation and Transcription

38. The Prosecution supports the Defence's proposal to amend the Registry's "Procedure to be used for corrections and redactions of Transcripts of Hearings"⁷⁵ in order to require the moving Party to notify the Chamber, the opposite Party and participants of any requests for corrections to transcripts.⁷⁶

39. The Prosecution also supports the Defence's proposal to require the Registry to inform the Chamber, Parties and participants of the results of its review of the transcripts.⁷⁷ In this regard, the Prosecution notes that there have been certain instances in which corrections have not been implemented in the edited versions

⁷⁴ *Contra* Defence Submissions, para.39.

⁷⁵ ICC-01/04-02/06-549-Conf-Anx1.

⁷⁶ Defence Submissions, para.41.

⁷⁷ Defence Submissions, para.41.

of the transcripts even after a Party and/or the Presiding Judge made such a request during the course of a hearing.⁷⁸

40. Finally, the Prosecution supports the Defence proposal to amend the Procedure for Corrections to allow the Parties and participants to make requests for corrections based on the audio recordings thereof, including the Swahili recording.⁷⁹ Although the Procedure for Corrections does not provide for requests to access the audio-recordings of hearings, regulations 16(3) and 17 of the Regulations of the Registry seem to allow such requests.

G. Issue VIII. Any other related matter

The Prosecution abides by the Protocol on Redactions

41. The “Protocol Establishing a Redaction Regime”⁸⁰ does not oblige the Party which applied *standard* redactions to review *all* such redactions on a continuous basis.⁸¹ Instead, the Protocol on Redactions sets out timelines in relation to certain types of standard redactions establishing the duration for which such redactions may be maintained. For example, redactions to recent contact information of witnesses (Category A.1), the location of ICCPP witnesses (Category A.2), and contact information of witness’s family members (Category B), “shall be ongoing”.⁸² This does not mean that the Party which applied the redaction needs to review it on a continuous basis. On the other hand, by way of example, redactions to identifying information of investigators (Category D.6) are not ongoing and shall be lifted when the identity of the last witness interviewed or contacted by that investigator

⁷⁸ [REDACTED].

⁷⁹ Defence Submissions, para.42.

⁸⁰ ICC-01/04-02/06-411-AnxA (“Protocol on Redactions”).

⁸¹ *Contra* Defence Submissions, para.44.

⁸² Protocol on Redactions, paras.17,19, 22.

is disclosed.⁸³ Therefore, the latter categories of standard redactions are those which need to be reviewed by the Party which applied them.⁸⁴

42. Moreover, the Protocol on Redactions makes it incumbent on the receiving party to request the Party which applied redactions to lift information which the receiving party considers should be lifted “as quickly as possible” on an *inter partes* basis.⁸⁵ As such, the Defence need not wait until the Prosecution provides its list of forthcoming witnesses to request the lifting of redactions which it deems are no longer necessary,⁸⁶ especially when the relevant material has been its possession for several months and, at times, years.

43. Nevertheless, the Prosecution reviews all redactions to the material related to forthcoming witnesses in advance of the witnesses’ testimony as part of its trial preparations. It does not do so solely when the Defence makes its requests. Since the Defence is able to see why certain redactions have been applied through the category code provided for each redaction, its requests could be tailored as necessary. Regardless, the Prosecution responds promptly to such Defence requests.

44. The redactions to witness materials at this stage of the proceedings are very limited since the Prosecution conducted an extensive review of all redactions in March 2015. Indeed, the redactions which have been lifted after that date have generally been minimal. They have certainly not been such as to significantly impact on the Defence’s preparation for cross-examination.⁸⁷

⁸³ Protocol on Redactions, para.43.

⁸⁴ At fn.24 of the Defence Submissions, the Defence cites para.21 of the Decision on the Protocol establishing a redaction regime (ICC-01/04-02/06-411) which states, *inter alia*, that “the disclosing party is required...to review and lift redactions applied should circumstances change.” This statement needs to be read together with the specific provisions set out in the Protocol on Redactions.

⁸⁵ Protocol on Redactions, para.5.

⁸⁶ See Defence Submissions, para.45.

⁸⁷ *Contra* Defence Submissions, para.46.

45. The Chamber's intervention is not required to clarify or recall any obligations set out in the Protocol on Redactions.⁸⁸

The Defence is free to raise any allegations concerning disclosure with the Chamber

46. The Defence's general complaint about disclosure, with no reference to specific instances of late disclosure and how this prejudiced the Defence,⁸⁹ is of no assistance. The Defence has raised specific issues in the past and has recently made further specific requests. The Prosecution will respond to these specific requests and the Chamber will issue its decisions thereon. The Chamber need not, *in abstracto*, recall the Prosecution's obligations in this regard.⁹⁰

Conclusion

47. The Prosecution requests that the Chamber consider the Prosecution Submissions together with this response. The Prosecution remains at the Chamber's disposal should it require any clarification or information in relation to any of its submissions.



Fatou Bensouda
Prosecutor

Dated this 24th day of March 2016
At The Hague, the Netherlands

⁸⁸ *Contra* Defence Submissions, para.47.

⁸⁹ Defence Submissions, paras.48-50.

⁹⁰ *Contra* Defence Submissions, para.50.