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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public redacted version

Prosecution submissions on conducting part of the trial *in situ*

Source: The Office of the Prosecutor

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I. Introduction

1. The Office of the Prosecutor (“Prosecution”) submits its observations on the potential for part of the trial against Bosco NTAGANDA (“Accused”) to be conducted *in situ* within the Democratic Republic of the Congo (“DRC”) or in a neighbouring country.¹
2. As a general principle, the Prosecution supports holding trials, in whole or in part, close to affected victim communities where this is feasible and where the Court can ensure the protection of victims, witnesses, Court staff and the Accused. In this case, only one location – Bunia – is sufficiently proximate to the victims and the crimes to achieve this objective, but the substantial protection issues for this location, coupled with serious logistical concerns including lack of appropriate accommodation, intermittent internet connectivity, lack of a suitable trial venue and inability to bring the Accused in person to his own trial, means that it is not currently feasible to conduct part of the trial against the Accused in Bunia. Other locations in the DRC or in nearby locations such as Arusha, Tanzania² are either too far from affected communities or present important security implications that make them equally unacceptable.
3. The trial proceedings will be accessible to the victims and to the public even if the proceedings remain in The Hague, including through outreach, in the media and the broadcasts of the Court’s proceedings. In addition, subject to adequate logistical and security arrangements for participants, the Prosecution submits that a judicial site visit to the Ituri district of the DRC before the commencement of the trial would be extremely beneficial to the Chamber for a full appreciation of the evidence to be adduced at trial.

¹ ICC-01/04-02/06-T-15-ENG, p. 19, lines 3-15.

² ICC-01/04-02/06-T-15-ENG, p. 19, lines 3-15.

II. Confidentiality

4. This filing is classified as “Confidential *EX PARTE* – only available to the Prosecution and VWU”, as it contains highly sensitive information that could impact upon the security of Prosecution witnesses and their family members and refers to other confidential information.

III. Submissions

5. Articles 3 and 62 of the Rome Statute (“Statute”) provide that trials are ordinarily to be held at the seat of the Court, in The Hague, unless otherwise decided. The Chamber may recommend that the trial be held elsewhere, pursuant to articles 3(3), 4(2) and 62 of the Statute, Rule 100 of the Rules of Procedure and Evidence and Regulation 48 of the Regulations of the Registry. In particular, the Prosecution recognises that it may be in the interests of justice to provide more direct access to the trial process to victims and the public by conducting trials where the crimes occurred.
6. This policy consideration cannot, however, outweigh the statutory obligation to protect victims and witnesses under Article 68, or the need to ensure the safety of Court staff and the Accused. Moreover, it must be a realistic alternative to proceeding in The Hague, in terms of operational courtroom needs and cost.

A. Security concerns with holding trials *in situ* in the DRC

7. The Prosecution considers that the protection and security concerns, on their own, outweigh any of the potential benefits of holding part of the trial *in situ* and does not make it a feasible option in this case. The Prosecution considers that there may be risks to victims and witnesses even if none are called to testify in the proceedings held *in situ*.

(i) *General security concerns raised in the Lubanga case*

8. First, the Prosecution recalls the security concerns that were raised when views were sought in the case against Thomas LUBANGA (“Lubanga case”) about conducting a trial *in situ* in the DRC: (a) the DRC Minister of Justice stated that conducting a trial at a location within the DRC identified by Trial Chamber I (Lubumbashi) could lead to ethnic tensions in an area still considered potentially unstable;³ (b) [REDACTED].⁴ These views, obtained in 2007, remain relevant to the Chamber’s consideration in this case. For instance, as detailed below, former UPC/FPLC members, including supporters of the Accused, are still integrated within the FARDC. Moreover, [REDACTED], in certain locations within the DRC [REDACTED], rebel groups are still active.⁵ The Prosecution observes that Rule 100(3) requires the Presidency again to consult the State where the Chamber intends to sit.

(ii) *Security concerns if the Accused is physically present in situ*

9. Second, there are potential security concerns arising from the possibility that the Accused, including through his supporters, may be able to influence, threaten or intimidate witnesses, victims, and/or their family members. The Prosecution submits that these risks are exacerbated if the Accused is brought to the DRC for the purposes of his trial because it will increase the Accused’s direct access to his network of supporters, as well as potentially to victims, witnesses, and/or their family members.

10. For instance, the Prosecution refers to the Chamber’s recent decision on interim release, in which it held that no changed circumstances were identified by the parties and participants that would warrant the Accused’s

³ ICC-01/04-01/06-T-78-ENG, p. 3, line 18 to p.4 line 15.

⁴ ICC-01/04-01/06-1037-Conf, para. 7.

⁵ [REDACTED].

release.⁶ The Chamber referred to prior findings of the Single Judge of Pre-Trial Chamber II including the risks of tampering with witnesses arising from the following factors: (i) the Accused has a ‘documented history of violence’; (ii) the identity of a large number of witnesses have been disclosed to him; (iii) the gravity of the charges and concomitant potential lengthy sentence; and (iv) the fact that the Accused maintains some influence in the DRC due to the contacts he retained with a considerable number of his former soldiers.⁷ The Single Judge of Pre-Trial Chamber II referred in particular to the Accused’s network of former soldiers from within the *Mouvement du 23 mars* (“M23”),⁸ *Forces Patriotiques pour la Libération du Congo* (“FPLC”),⁹ *Congrès National pour la Défense du Peuple* (“CNDP”)¹⁰, and those integrated within the FARDC special battalions.¹¹ [REDACTED].¹²

11. Holding a trial *in situ* would also necessitate increased measures to keep the Accused secure because of the greater access to his supporters as well as opponents. The Registry proposes that the Accused might instead participate by way of video-link from The Hague.¹³
12. The Prosecution submits that this alternative of video-link from The Hague for the Accused should not be accepted for the following reasons: (a) first, the Accused must as a general rule be physically present during his trial. The Chamber should avoid conducting proceedings, including the opening of his trial - a critical junction when charges are read to the Accused and the Chamber must ensure that their nature is understood by him -¹⁴, when he is

⁶ ICC-01/04-02/06-391, paras.16-17.

⁷ ICC-01/04-02/06-391, para. 10.

⁸ ICC-01/04-02/06-284, para.37; ICC-01/04-02/06-335, para. 36.

⁹ ICC-01/04-02/06-284, para.37; ICC-01/04-02/06-335, para. 36.

¹⁰ ICC-01/04-02/06-335, para. 36.

¹¹ ICC-01/04-02/06-147, para. 58.

¹² ICC-01/04-02/06-396-Conf-Anx1, pp.9-11.

¹³ ICC-01/04-02/06-404-Conf-Anx-Red, p. 8.

¹⁴ Article 64(8)(a).

not physically present; and (b) second, even if the Accused himself is not physically present *in situ*, this would not remove the potential risks to victims, witnesses or Court staff as described herein.

(iii) Security risks posed by the Accused's supporters

13. The proximity of the Accused's network of supporters, [REDACTED], may further impact upon the security of victims and witnesses, as well as Court staff, if proceedings are conducted in the DRC or nearby in the region.

14. [REDACTED].¹⁵

15. [REDACTED] [REDACTED]. The Prosecution submits that [REDACTED] the risk of holding a trial in the region, as the closer proximity of the Accused's associates to those who will be testifying during the trial [REDACTED].

16. [REDACTED].¹⁶ [REDACTED].¹⁷ [REDACTED].¹⁸ [REDACTED].

17. [REDACTED].¹⁹

18. [REDACTED].²⁰

19. [REDACTED].²¹ [REDACTED].²²

(iv) Security risks to Court staff

20. With regard to potential risks to the security of Court staff in the DRC, the Prosecution refers to [REDACTED]²³ [REDACTED].²⁴

¹⁵ [REDACTED].

¹⁶ ICC-01/04-02/06-349-Conf-Exp, paras. 27-36.

¹⁷ ICC-01/04-02/06-349-Conf-Exp, paras. 27-36.

¹⁸ ICC-01/04-02/06-349-Conf-Exp, paras. 30-31, 34; ICC-01/04-02/06-349-Conf-Exp-AnxC; ICC-01/04-02/06-349-Conf-Exp-AnxD.

¹⁹ ICC-01/04-02/06-349-Conf-Exp, paras. 15-26.

²⁰ ICC-01/04-02/06-349-Conf-Exp, paras. 37-41.

²¹ [REDACTED].

²²

21. [REDACTED].²⁵

22. [REDACTED].²⁶ [REDACTED].²⁷

(v) Risks arising in specific locations within the DRC

23. Finally, the Prosecution refers to specific security concerns within the locations [REDACTED].

Bunia

24. [REDACTED], Bunia has the potential for political and military instability.²⁸

The Prosecution refers for instance to demonstrations led by former UPC fighters in Bunia in November 2012, when demonstrators targeted the international community and UN entities – UN vehicles were attacked, houses of UN staff were looted and burnt.²⁹ Many former UPC fighters are still living in Bunia.³⁰ [REDACTED].³¹ [REDACTED].³² [REDACTED].

25. Moreover, in the Prosecution's assessment there is limited capacity in Bunia to implement in-court protective measures for witnesses and to ensure that these are fully respected.

²³ ICC-01/04-02/06-383-Conf-Anx-Red.

²⁴ ICC-01/04-02/06-396-Conf-Anx1.

²⁵ ICC-01/04-02/06-383-Conf-Anx-Red, para.8.

²⁶ ICC-01/04-02/06-383-Conf-Anx-Red, para.8.

²⁷ ICC-01/04-02/06-383-Conf-Anx-Red, paras. 8-12; ICC-01/04-02/06-396-Conf-Anx1, pp. -7-8.

²⁸ [REDACTED].

²⁹ See e.g. <http://radiokapi.net/actualite/2012/11/21/rdc-manifestations-contre-la-chute-de-goma-3-morts-kisangani/> ;

<http://www.congoplanet.com/2012/11/21/news/2011/thousands-protest-m23-capture-of-goma-turn-against-government-un-mission-monusco.jsp>;

http://www.rtb.be/info/monde/detail_rdc-manifestations-violentes-d-etudiants-en-colere-apres-la-prise-de-goma?id=7878383;

<http://congonewsagency.com/2012/11/22/protests-against-m23-rebels-government-and-un-spread/>;

<http://www.rfi.fr/afrique/5min/20121121-rdc-vivez-evenements-goma-nord-kivu-kabila-fardc-m23-bukavu/>.

³⁰ http://www.bartklemresearch.nl/files/publications/tsac_report3.pdf p.36.

³¹ ICC-01/04-02/06-404-Conf-Anx-Red, p.16.

³² ICC-01/04-02/06-404-Conf-Anx-Red, p.29.

Kinshasa

26. [REDACTED].³³ [REDACTED]"³⁴ The Prosecution observes that there have been reports of regular demonstrations in Kinshasa that have been violently dispersed by security forces.³⁵

Kisangani

27. [REDACTED].³⁶ The Prosecution observes that the stability in Kisangani is uncertain due to ongoing efforts to encourage the disarmament and demobilisation of elements from the *Forces Démocratiques de la Libération du Rwanda* ("FDLR") and their relocation to Kisangani, as well as recent surrender and negotiations between Cobra Matata of the *Front de Resistance Patriotique d'Ituri* ("FRPI") and DRC authorities.³⁷ There has also been civil unrest in Kisangani. On 18 November 2012, there were demonstrations by students who set fire and destroyed several buildings in their protest against the re-taking by the M23 of Goma city.³⁸ The Prosecution assesses that there would be a high risk of violent demonstrations in Kisangani if the Accused was physically present.

³³ ICC-01/04-02/06-404-Conf-Anx-Red, p.15.

³⁴ ICC-01/04-02/06-404-Conf-Anx-Red, p.31.

³⁵ See e.g. <http://news.yahoo.com/20-drcongo-opposition-supporters-held-over-banned-protest-184608570.html>;

<http://allafrica.com/stories/201409180811.html>;

<http://www.reuters.com/article/2014/09/13/us-congodemocratic-protests-idUSKBN0H80L420140913>.

See also <http://radiookapi.net/actualite/2014/11/03/kinshasa-la-police-etouffe-sit-de-lopposition/>.

³⁶ ICC-01/04-02/06-404-Conf-Anx-Red, p.16.

³⁷ See e.g. 12 November 2014 "Congo's immobilised demobilisation programme"; <http://christophvogel.net/2014/11/12/congos-immobilised-demobilisation-programme/>

³⁸ See e.g. 24 sur 24, 21 November; « Deux morts lors de manifestations à Kisangani » ; <http://www.7sur7.be/7s7/fr/1505/Monde/article/detail/1537480/2012/11/21/Deux-morts-lors-de-manifestations-a-Kisangani.dhtml>. See also RTBF Info, 21 November 2012; http://www.rtbef.be/info/monde/detail_rdc-manifestations-violentes-d-etudiants-en-colere-apres-la-prise-de-goma?id=7878383.

Goma

28. [REDACTED].³⁹ [REDACTED]."⁴⁰ The Prosecution assesses that the security situation in Goma remains too volatile for any potential *in situ* trial with ongoing military operations and substantial risk of civil unrest and high crime rates. The Prosecution considers that there is a risk that a trial would lead to tensions between the civilian population and MONUSCO elements as well as retaliatory measures by the various rebel groups in Goma that can turn violent. There are currently ongoing joint FARDC and MONUSCO operations against the main groups operating in North Kivu including the *Allied Democratic Forces* ("ADF") and *National Army for the Liberation of Uganda* ("NALU").⁴¹ MONUSCO forces have also been subjected to attacks including one by the local population and another an armed attack on a MONUSCO convoy.⁴² Even within the UN security perimeter within North Kivu there are security concerns including armed robberies and civil unrest with demonstrations from various groups including students and political opponents.⁴³ The Accused, who was based in Goma, was a member of various armed groups operating there including the CNDP and M23 that have allegedly committed grave human rights violations in North Kivu.⁴⁴ [REDACTED], armed groups close to the Accused are still operating in North Kivu, including former M23 officers and elements from the *Forces de Défense*

³⁹ ICC-01/04-02/06-404-Conf-Anx-Red, p.16.

⁴⁰ ICC-01/04-02/06-404-Conf-Anx-Red, p.32.

⁴¹ See e.g. Radio Okapi « Beni: les présumés ADF ont tué 4 personnes à Butemba » 15 November 2014 : <http://radiookapi.net/actualite/2014/11/15/beni-les-presumes-adf-ont-tue-4-personnes-butemba/>.

⁴² See e.g. Radio Okapi « Nord-Kivu : un convoi de la Monusco attaqué à Beni » 20 November 2014 : <http://radiookapi.net/actualite/2014/11/20/nord-kivu-convoi-de-la-monusco-attaque-beni/>.

⁴³ See e.g. RTBF Info, 21 November 2014 : http://www.rtb.be/info/monde/detail_rdc-manifestations-violentes-d-etudiants-en-colere-apres-la-prise-de-goma?id=7878383.

⁴⁴ See e.g. ICC-01/04-02/06-103-Conf, paras.13,20-21, 27-28, 35. See also e.g. ICC-01/04-02/06-147, para.58.

Congolaise (“FDC”) and *Forces d’Auto-défense Congolaises* (“FAC”).⁴⁵ Accordingly, holding proceedings in Goma may cause unrest.

Lubumbashi

29. [REDACTED].⁴⁶ [REDACTED].⁴⁷ In particular, the Prosecution observes that there have been reports of regular clashes around Lubumbashi airport,⁴⁸ the city centre⁴⁹ and surrounding areas between the regular forces and Bakata Katanga militias.⁵⁰

30. [REDACTED].⁵¹ [REDACTED].⁵²

31. [REDACTED];⁵³ [REDACTED].

32. In conclusion, the assessment of the current activities of the main threat actors imply that there would be an increased risk to victims, witnesses and court staff if the trial were to be held in the region including in the DRC or nearby Arusha, Tanzania, rather than in The Hague.

⁴⁵ See e.g. Congo Siasa, 09 November 2014: <http://congosiasa.blogspot.nl/2014/11/a-year-after-its-defeat-could-m23-make.html>.

⁴⁶ ICC-01/04-02/06-404-Conf-Anx-Red, p.16.

⁴⁷ ICC-01/04-02/06-404-Conf-Anx-Red, p.31.

⁴⁸ See e.g. <http://www.jeuneafrique.com/Article/ARTJAWEB20140711172803/>.

⁴⁹ See e.g. <http://www.jeuneafrique.com/Article/ARTJAWEB20131029165410/>;

<http://www.digitalcongo.net/article/90664>;

<http://www.lapresse.ca/international/afrique/201401/07/01-4726298-rdc-violents-combats-pres-de-lubumbashi.php> .

⁵⁰ <http://www.mediacongo.net/show.asp?doc=57282#.VHcKgNKG9vk> ;

<http://radiokapi.net/actualite/2013/06/16/des-affrontements-entre-fardc-miliciens-bakata-katanga-signalés-pres-de-lubumbashi/> ;

<http://www.7sur7.be/7s7/fr/1505/Monde/article/detail/1770398/2014/01/08/Nouveaux-affrontements-entre-armee-et-rebelles-pres-de-Lubumbashi.dhtml> ;

<http://www.orange.cd/news/actualites-afrique/rdc-au-moins-5-morts-dans-des-affrontements-a-lubumbashi.html>.

⁵¹ ICC-01/04-02/06-404-Conf-Anx-Red, p.9.

⁵² ICC-01/04-02/06-404-Conf-Anx-Red, p.9.

⁵³ ICC-01/04-02/06-404-Conf-Anx-Red, pp.9-10.

B. Logistical issues

33. The Prosecution also observes that there are logistical aspects that will impact upon the feasibility of holding a trial within the DRC.
34. First, [REDACTED].⁵⁴ [REDACTED], as the Registry observed in the case against Germain Katanga and Mathieu Ngudjolo, *in situ* proceedings in the DRC require “a lot of logistical cooperation between the parties, between the State also, and the MONUC or any other organisation able to help us”. The Registry further indicated in relation to that case that “support we will receive from external agents will depend on the security situation of the country, because they can be redirected to other places in the country which they believe require more security and are more important”.⁵⁵
35. Second, [REDACTED], the Prosecution observes that in the case against Germain Katanga and Mathieu Ngudjolo, the Registry estimated in 2008, that costs of a trial *in situ* in the DRC for just two and half weeks would be approximately 600,000 euros.⁵⁶ [REDACTED].⁵⁷ [REDACTED].⁵⁸ [REDACTED].
36. Third, [REDACTED], Lubumbashi, Goma, Kisangani and Arusha, are further away from the affected communities in any event.⁵⁹ The Prosecution observes that moving the trial to these locations does not provide greater access to the proceedings for victims in Ituri, the DRC, because of the distance from the affected communities. Realistically, most would remain unable to travel to these alternative locations, especially Arusha, due to limited financial means. Accordingly, the Prosecution submits that holding trials in these locations

⁵⁴ ICC-01/04-02/06-404-Conf-Anx-Red, pp.9-10.

⁵⁵ ICC-01/04-01/07-T-53, page 27, lines 12-17.

⁵⁶ ICC-01/04-01/07-T-53, page 27, lines 8-11.

⁵⁷ ICC-01/04-02/06-404-Conf-Anx-Red, pp.24-27, 29.

⁵⁸ ICC-01/04-02/06-404-Conf-Anx-Red, p.p.16-16.

⁵⁹ [REDACTED].

would not provide the access to the victims or affected communities to the proceedings, which is the purpose of the proposed move of the trial from The Hague.

37. Fourth, while Bunia is the location closest to victims and many witnesses, a technical infrastructure enabling broadcast and recordings would need to be installed⁶⁰ and the DRC has poor internet connectivity.⁶¹ Lastly, there is a lack of suitably secure accommodation in Bunia.

C. Alternative locations – Arusha, Tanzania

38. The Prosecution considers that Arusha, Tanzania is also not an appropriate or feasible option for the following reasons.

39. First, as stated above, moving the trial to Arusha would not provide greater access to the proceedings for the victims and other affected communities.

40. Second, the Prosecution considers that conducting the trial in Arusha would also give rise to potential security concerns as described above, even if to a lesser extent than in the DRC, because of the greater potential access of the Accused's network of supporters [REDACTED] to victims, witnesses and Court staff as well as to the Accused, and logistical impediments.

41. For instance, [REDACTED].⁶²

42. Third, there is also a risk of civil unrest and/or terrorist attack in Arusha. The Prosecution observes that the current political situation, which is marked by controversy over a constitutional review with a referendum scheduled for April 2015,⁶³ has sparked tensions amongst the opposition parties who are

⁶⁰ [REDACTED].

⁶¹ [REDACTED].

⁶² ICC-01/04-01/06-1037-Conf, paras. 3,6.

⁶³ See e.g. <http://www.lexology.com/library/detail.aspx?g=5ef3c0ec-abdb-491e-b67e-3d501f9dd6f2>.

calling to demonstrate and boycott the referendum.⁶⁴ There have also been reports of small scale attacks from terrorists in the city over the past year, targeting places frequented by foreigners.⁶⁵

43. For all these reasons the Prosecution does not consider locations within the region and near to the DRC, such as Arusha, are viable alternatives.

D. Judicial site visit

44. The Prosecution submits that, subject to adequate logistical and security arrangements for participants, a judicial site visit to the Ituri district of the DRC before the commencement of the hearings would be beneficial to the Chamber to provide a greater appreciation of the evidence adduced at trial. The Prosecution refers to the example of the judicial site visit undertaken in the case against Germain Katanga and Mathieu Ngudjolo. In that case, the Chamber acknowledged the usefulness of such visits, stating that the objective of the site visit was to better understand the context in which the facts occurred, places and geography mentioned by witnesses and the accused, and to provide indispensable verification of specific points arising from the case.⁶⁶ The Prosecution submits that such a site visit should take place prior to the start of trial to give the Chamber greater context of the facts, places and geography that witnesses will describe throughout the trial.

IV. Conclusions

45. The Prosecution submits that in this case, moving part of the trial from The Hague to the DRC or to other nearby alternatives within the region such as

⁶⁴ See e.g. <http://www.voanews.com/content/reu-tanzania-police-arrests-several-people-in-opposition-protests/2464496.html>.

⁶⁵ See e.g. <http://allafrica.com/stories/201407210718.html>;
<http://www.dailynews.co.tz/index.php/local-news/33489-two-arrested-over-arusha-blast>;
<http://www.coastweek.com/3729-latest-news-Tanzania-police-arrest-16-suspected-terror-suspects-in-Arusha-and-Zanzibar.htm>.

⁶⁶ See e.g. ICC-01/04-01/07-3436, paras.108, 168, 224, 278. See also e.g. ICC-01/04-01/07-3234-Anx-Red.

Arusha, Tanzania is not feasible. There would be unacceptable risks posed to victims, witnesses, Court staff and potentially to the Accused. The logistical requirements cannot be met, even in Bunia which is the most suitable location to achieve the interest of bringing the trial close to victims. The other listed locations have the same limitations, and additionally, are too far from affected communities to make them suitable alternatives.

46. The Prosecution observes that outreach to victims and affected communities and transmission of the legal proceedings can be achieved through means used in other cases, including media such as radio, television, the internet, and by enhanced outreach.⁶⁷ The Prosecution submits that, subject to adequate logistical and security arrangements for participants, a judicial site visit to the Ituri district of the DRC before the commencement of the hearings would be beneficial to the Chamber to provide a greater appreciation of the evidence.



Fatou Bensouda
Prosecutor

Dated this 1st day of December 2014

At The Hague, The Netherlands

⁶⁷ [REDACTED].