

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 17 February 2017

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

**Prosecution's response to the "Request on behalf of Mr Ntaganda seeking the
conduct of a judicial site visit before the presentation of the case for the
Defence", ICC-01/04-02/06-1777**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section **Other**

INTRODUCTION

1. The Prosecution does not oppose a judicial site visit, provided it does not delay the start of the Defence case, since this would assist the Chamber in its evaluation of the evidence. The Prosecution disagrees, however, with the grounds advanced in the Defence Request,¹ as they are founded on the faulty premise that the Prosecution has not adduced sufficient evidence to aid the Chamber's understanding of locations referred to by Prosecution witnesses during their testimony. The Prosecution elicited and submitted probative and reliable evidence concerning the locations in which the crimes charged in the Updated Document Containing the Charges² are alleged to have taken place.

2. The Defence actually *opposed* the Prosecution's last request for a site visit and submitted that such a visit should not take place until the end of the case, so as to avoid a differentiation in treatment between witnesses.³ The Defence's recent claim that a site visit is "essential"⁴ *before* the Defence presentation of evidence, and that it constitutes a "fundamental right of the Accused",⁵ must be assessed and weighed against the Defence's past opposition to a site visit and in light of the Chamber's recent decision setting Defence disclosure deadlines and the start of the Defence case.

BACKGROUND

3. On 28 November 2014, the Prosecution filed its submissions on conducting part of the trial *in situ* in which it suggested a judicial site visit to the Ituri district of the Democratic Republic of the Congo ("DRC") before the commencement of

¹ ICC-01/04-02/06-1777 ("Defence Request").

² ICC-01/04-02/06-458-AnxA ("UDCC").

³ ICC-01/04-02/06-1056, paras.4, 12, 14: Defence opposed a site visit during the Prosecution case "*with only forthcoming witnesses being asked 'effective and better informed questions' by the Judges further to their visit to the Ituri district*".

⁴ Defence Request, para.30.

⁵ Defence Request, para.32.

the trial.⁶ The Legal Representatives' submissions on the same date also suggested such a visit.⁷

4. During the 2 December 2014 Status Conference, the Prosecution and Legal Representatives reiterated their support for a judicial site visit,⁸ and the Defence supported this proposal.⁹

5. During the 22 April 2015 Status Conference, the Presiding Judge stated that:

“[t]he Chamber does not intend to undertake a judicial site visit prior to the commencement of trial. It considers that the judicial site visit should be conducted only where it would serve a specific purpose in relation to facts in issue. Thus the parties should, in making any application for a site visit, keep in mind this guidance. The need for a site visit may be reassessed, either *proprio motu* or upon application, at the end of the presentation of evidence by the Prosecution, and again after the closing of the Defence case.”¹⁰

6. On 24 November 2015, the Prosecution renewed its request for the Chamber to conduct a judicial site visit to relevant locations in the Ituri district of the DRC at the earliest possible opportunity during the initial phase of trial and before the end of the Prosecution's case.¹¹ The Legal Representatives supported this request¹² while the Defence opposed it, stating that “*the interests of justice would be best served by the conduct of a judicial site visit at the end of the case*”¹³ and that it would result in a differentiation in treatment between witnesses who already testified and those who are yet to testify.¹⁴

⁶ ICC-01/04-02/06-409-Red2, paras.3, 44, 46.

⁷ ICC-01/04-02/06-407-Conf, para.13.

⁸ ICC-01/04-02/06-T-17-CONF-ENG p.23, ln.14- p.24, ln.13 (open session); p.26, ln.16 – p.27, ln.11 (private session).

⁹ ICC-01/04-02/06-T-17-CONF-ENG p.27, ln.22 – p.28, ln.17 (private session).

¹⁰ ICC-01/04-02/06-T-19-ENG, p.9, lns.1-8 (open session).

¹¹ ICC-01/04-02/06-1033.

¹² ICC-01/04-02/06-1055.

¹³ ICC-01/04-02/06-1056, para.3.

¹⁴ ICC-01/04-02/06-1056, para.12.

7. On 20 January 2016, the Chamber rejected the Prosecution's 24 November 2015 request, noting that it remains open to conducting a site visit at a later stage of proceedings.¹⁵
8. On 30 January 2017, the Chamber decided that the Defence's disclosure obligations start as of the end of the Prosecution's case, with a final disclosure deadline of 26 April 2017 and the start of the Defence case one month thereafter.¹⁶
9. On 9 February 2017, the Defence filed the Defence Request.

SUBMISSIONS

10. The Chamber may decide to conduct a judicial site visit despite the flawed basis for the Defence Request. A judicial site visit would provide the Chamber with a more complete appreciation of the evidence. However, any such visit should not delay the proceedings and should not delay the start of the Defence case.

I. The Prosecution has elicited probative and reliable evidence about locations in which the charged crimes allegedly occurred

11. When possible, relevant, and appropriate, the Prosecution has provided the Chamber with information about Ituri and, in particular, about the locations relevant to the charges.

12. The Prosecution's panoramic reconstructions of Sayo and Kobu-Wadza are effective alternative ways for the Chamber to become familiar with these areas that are central to the charges against the Accused. Given the time-consuming nature of this exercise and the time constraints on the Prosecution examinations,

¹⁵ ICC-01/04-02/06-1096.

¹⁶ ICC-01/04-02/06-1757.

the Prosecution chose to admit, and use, the panoramic reconstructions with appropriate witnesses, including the expert who prepared them and crime base witnesses.¹⁷

13. Contrary to the Defence assertion, these two panoramic presentations do not constitute “the only concrete evidence” that the Prosecution presented in relation to the locations in which the charged crimes are alleged to have taken place.¹⁸ The Prosecution elicited evidence from witnesses concerning various features of locations in which the charged crimes are alleged to have taken place, including through the use of maps and sketches.¹⁹ By way of example, Witness P-0790 provided detailed information concerning the geographic features and administrative breakdown of the Walendu-Djatsi collectivity.²⁰ Further, a number of maps and sketches have been admitted into evidence,²¹ and the Prosecution is seeking admission through the bar table of another map showing the locations of various villages and geographic landmarks mentioned by Prosecution witnesses during their testimony.²²

14. The Mongbwalu, Rwampara and Mandro videos – as well as other videos – also depict the landscape and topography of areas central to the charges as they were in 2002-2003, including the location of the Mongbwalu *Appartements*,

¹⁷ See, e.g. ICC-01/04-02/06-T-38-CONF-ENG ET, p.48, ln.4 – p.54, ln.19 (private session); ICC-01/04-02/06-T-68-CONF-ENG ET, p.83, ln.3 – p.87, ln.8 (private session); ICC-01/04-02/06-T-77-CONF-ENG ET, p.3, ln.13 – p.13, ln.2 (private session); ICC-01/04-02/06-T-123-CONF-ENG ET, p.60, ln.13 – p.70, ln.3 (open session).

¹⁸ Defence Request, para. 24.

¹⁹ See, e.g. ICC-01/04-02/06-T-25Bis-CONF-ENG ET, p.1, ln.22 – p.5, ln.13 (open session), p.29, ln.5 – p.32, ln.24 (private session); ICC-01/04-02/06-T-28-CONF-ENG ET, p.47, ln.14 – p.52, ln.21 (open session); ICC-01/04-02/06-T-33-CONF-ENG ET, p.38, ln.7- p.40, ln.12 (private session); ICC-01/04-02/06-T-34-CONF-ENG ET, p.3, ln.25 – p.6, ln.3 (private session); ICC-01/04-02/06-T-38-CONF-ENG ET, p.35, ln.12 – p.39, ln.3 (open session); ICC-01/04-02/06-T-45-CONF-ENG ET, p.6, ln.8 – p.14, ln.3 (open session); ICC-01/04-02/06-T-53-CONF-ENG ET, p.14, ln.20 – p.19, ln.15 (private session), p.57, ln.6 – p.60, ln.9 (private session); ICC-01/04-02/06-T-54-CONF-ENG ET, p.29, ln.4 – p.30, ln.11 (open session). The Chamber has also asked questions regarding geographical issues to certain witnesses, see, e.g. ICC-01/04-02/06-T-113-CONF-ENG ET, p.20, ln.13 – p.21, ln.9 (private session).

²⁰ See ICC-01/04-02/06-T-53-CONF-ENG ET.

²¹ See, e.g., DRC-OTP-2080-0239 and DRC-OTP-2087-1820.

²² DRC-OTP-0003-0028, see ICC-01/04-02/06-1770-Conf-AnxA, document number 1.

Mongbwalu airport, the Kilo-Moto mining factory and a number of vantage points.²³

15. The use of maps and other resources may be appropriate with certain witnesses, but the Presiding Judge advised against the use of maps with witnesses who are not particularly familiar with them, and that such witnesses should be asked to describe, without reference to a map, locations close to the area at issue.²⁴
16. The Prosecution also called Witness P-0810, a satellite imagery analyst, for very specific purposes – the verification of locations of coordinates, the acquisition of relevant satellite images using the verified coordinates for locations of interest, and the analysis of the images and documentation of any potential destruction, burning, or damage to structures.²⁵ It should be borne in mind that the charged crimes are alleged to have taken place approximately fourteen years ago and that it is the topography and geographic features at *that* time which are of relevance to this case.
17. Despite the Defence's characterisation of the agreed facts as "limited,"²⁶ the Prosecution and Defence have agreed that the villages where crimes have been charged fall within the geographic scope of the charges.²⁷
18. The majority of the specific facts that the Defence claim are in issue in the Defence Request are not concretely material to the charges. Nothing, for instance, turns on the location of "[t]he residence of Governor Loponde and the *sous-region*" or the "location of the residence of Mr Lubanga at various times."²⁸

²³ See DRC-OTP-0120-0293; DRC-OTP-2058-0251; DRC-OTP-0082-0016.

²⁴ See, e.g. ICC-01/04-02/06-T-131-CONF-ENG ET, p.64, ln.2 – p.65, ln.3 (private session).

²⁵ See Defence Request, para.27.

²⁶ Defence Request, para.28.

²⁷ The only location on which there has not yet been agreement in this regard is Mbidjo. See ICC-01/04-02/06-633-Conf-AnxA, nos.1-37.

²⁸ Defence Request, para.33.

Moreover, the “road conditions from Mongbwalu to Bunia”²⁹ have changed considerably over time, including through the recent introduction of paved roads over a large section of the road between Kilo and Mongbwalu.

II. A judicial site visit would be beneficial

19. Visiting a number of the locations in which the crimes charged in the UDCC are alleged to have taken place will provide the Chamber with a better understanding of this terrain, as previously set out by the Prosecution.³⁰ The Chamber would obtain a greater understanding of the context of the evidence and this will likely assist the Chamber in assessing it.

20. Should the Chamber decide not to conduct a judicial site visit at this time, however, such a decision would not prejudice the Accused, as the Defence now suggests.³¹ If this were so, the Defence would not have opposed the Prosecution’s last request for a judicial site visit. While it may assist the Chamber to gain a more complete understanding of the locations in which the crimes charged in the UDCC are alleged to have taken place, a judicial site visit is not a *sine qua non* for the Chamber to be able to fairly evaluate the evidence in this case.

III. The locations and modalities of the site visit should be agreed upon in advance

21. The Defence lists a number of locations and related features that it considers to be facts in issue between the Parties.³² Not all the points raised by the Defence are material issues in dispute, and a judicial site visit will not realistically be able to address every one of them in any event. The Chamber is already in possession of evidence regarding many of the issues listed by the Defence.

²⁹ Defence Request, para.33.

³⁰ See ICC-01/04-02/06-1033.

³¹ Defence Request, paras.4, 32, 39, 46.

³² Defence Request, para.33.

While potentially beneficial, a site visit is not the only means for the Chamber to evaluate the reliability or credibility of this evidence.

22. The Prosecution supports the Defence's request for a protocol to regulate all relevant aspects of a judicial site visit, should one be ordered.³³

IV. Any judicial site visit should not delay the start of the Defence case

23. The Defence posits that it is "vital" for the judicial site visit to be carried out before the presentation of the Defence case.³⁴ This is in stark contrast to its earlier submissions that a site visit should only be contemplated at the end of the case.³⁵ The Defence Request and the characterisation of a site visit as an immediate necessity comes very shortly after the Chamber's decision setting deadlines for the start of the Defence case, intended to begin in May 2017.

24. In view of the consultations, logistics and other preparations that would need to be finalised prior to the conduct of a judicial site visit, and considering the schedule that the Chamber has set for the presentation of evidence by the Legal Representative of the Victims of the Attacks and for the start of the Defence case,³⁶ it may not be possible to conduct such a visit on such short notice.

25. Any judicial site visit should not delay the start of the Defence case.

³³ Defence Request, paras.5, 42-45.

³⁴ Defence Request, para.31.

³⁵ ICC-01/04-02/06-1056, para.14.

³⁶ See ICC-01/04-02/06-1757; ICC-01/04-02/06-1780-Conf.

CONCLUSION

26. Despite the premise on which the Defence Request is based, the Prosecution supports a judicial site visit. Such a visit should be scheduled at a time that would cause the least possible delay to the proceedings and should not delay the start of the Defence case.



Fatou Bensouda
Prosecutor

Dated this 17th day of February 2017
At The Hague, The Netherlands