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**International
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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

**Public Redacted Version of Prosecution's Additional Observations in Preparation
for the Status Conference, dated 8 September 2014**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Prosecution submits the following further observations on its proposed trial commencement date pursuant to the order of Trial Chamber VI (“Chamber”) of 15 August 2014 (“Revised Scheduling Order”).¹

II. Confidentiality

2. Pursuant to regulation 23*bis*(1), this document is classified as Confidential *ex parte*, only available to the Prosecution and the Victims and Witnesses Unit (“VWU”), as it contains information relating to the identity of a witness and possible witness protection measures.
3. A public redacted version of this document will also be filed.

III. Procedural History

4. On 21 July 2014, the Chamber scheduled a status conference for 20 August 2014 and invited the parties to submit written submissions on the Chamber’s provisional agenda (“Initial Scheduling Order”).²
5. On 13 August 2014, the Defence requested an extension of its deadline to file submissions,³ which was granted by the Chamber that same day.⁴
6. On 14 August 2014, the Prosecution provided its written submissions on the provisional agenda (“Prosecution’s Initial Filing”),⁵ as did the Common Legal Representatives for the Victims,⁶ and the Registrar.⁷

¹ ICC-01/04-02/06-354.

² ICC-01/04-02/06-339, para. 7.

³ See ICC-01/04-02/06-354, para. 2.

⁴ See ICC-01/04-02/06-354, para. 2.

⁵ ICC-01/04-02/06-352.

⁶ ICC-01/04-02/06-351.

⁷ ICC-01/04-02/06-350.

7. On 15 August 2014, Mr Bourgon was officially appointed as the Accused's new lead counsel.⁸ That same day, the Chamber issued an order postponing the status conference to 18 September 2014, and requesting further submissions from the Prosecution on its proposed trial commencement date by 12 September 2014.⁹
8. On 26 August 2014, due to the Defence's scheduling conflicts, the Chamber rescheduled the status conference to 11 September 2014, and ordered that the parties' relevant submissions be provided by 8 September 2014.¹⁰

IV. Prosecution's Observations

9. In the Revised Scheduling Order, the Chamber noted that "[a]s a preliminary indication and subject to further consideration the Chamber considers it desirable for the timeline suggested by the Prosecution to be streamlined."¹¹ The Chamber noted that the Prosecution's "disclosure of evidence and identities of witnesses is at an advanced stage"¹² and that its proposed date is, "in part, based on presently ongoing assessments of evidence and disclosure, as well as the ongoing transcription and translation of material."¹³ Having highlighted these factors, the Chamber requested that the Prosecution provide "an updated assessment" of its proposed commencement date.¹⁴

10. The Prosecution is conscious of the Accused's right under article 67 of the Statute to have his trial commence as promptly as possible, as well as the

⁸ ICC-01/04-02/06-353.

⁹ ICC-01/04-02/06-354, paras. 5 & 7.

¹⁰ ICC-01/04-02/06-358. This was initially communicated to the parties and participants by email on 22 August 2014.

¹¹ ICC-01/04-02/06-354, para. 7.

¹² ICC-01/04-02/06-354, para. 7.

¹³ ICC-01/04-02/06-354, para. 7.

¹⁴ ICC-01/04-02/06-354, para. 7.

Chamber's obligation under article 64 of the Statute to ensure that this occurs. However, the Prosecution seeks to balance this right with the need to provide a realistic date for the start of trial that will not necessitate a subsequent request for postponement to ensure that all necessary steps are taken. Such steps include the review of evidence and disclosure of all appropriate evidence to the Defence, applications for necessary redactions or other protective measures, reasonable translation of rule 76 statements, finalising further and ongoing investigations, transcription of interviews conducted under article 55(2), resolution of witness protection issues, and commission of expert reports. The Prosecution acknowledges the Chamber's instructions, but bearing in mind all of the steps that must be undertaken prior to the start of trial, the Prosecution submits that it is left with no choice but to maintain June 2015 as a realistic and necessary date for the commencement of trial.

11. Pursuant to the Chamber's request at paragraph 7 of the Revised Scheduling Order to provide additional observations in support of its proposed commencement date, in these submissions the Prosecution focuses specifically on: (i) ongoing assessment of evidence and disclosure; (ii) ongoing investigations; and (iii) ongoing transcription and translation of materials.
12. The Prosecution also provides an update concerning anticipated protective measures for a Prosecution witness, pursuant to paragraph 5(b) of the Chamber's Initial Scheduling Order.

A. Additional observations concerning the Prosecution's ongoing assessment of evidence and disclosure

i. Pre-confirmation hearing review

13. The Prosecution has been diligent in its ongoing assessment and disclosure of the evidence in its possession. However, the quantity of evidence in the present case is extensive, and an appropriate amount of time is required to complete the ongoing review of the collection of evidence and prepare any necessary disclosure.
14. At the time of the Accused's surrender to the Court, the Prosecution had collected 43,276 documents totalling 153,381 pages in its investigations into crimes committed in the Ituri region of the DRC. In April 2013, the Prosecutor created a set of case-specific search terms designed to retrieve all potentially relevant documents from this initial group ("First Search Terms"). The searches based on these specific First Search Terms identified 9,602 documents ("April 2013 Search").¹⁵
15. Such searches alone are not definitive determinants of relevance (for instance, they may include references to similarly named individuals or places that are ultimately not relevant to the case), and they do not determine the character of the relevance (as incriminating, potentially exonerating or rule 77 materials). Accordingly, each identified document must be reviewed closely by the Prosecution. Likewise, as noted in the Prosecution's Initial Filing, such close review is necessary to assess whether the document raises any security concerns necessitating redactions or other protective measures.

¹⁵ See ICC-01/04-02/06-65, para. 16.

16. The Prosecution has reviewed all of the documents from amongst those identified by the April 2013 Search, and disclosed all relevant documents from those reviewed, other than the limited number of documents referred to in the Prosecution's Initial Filing for which requests to lift conditions article 54(3)(e) are pending as well as approximately three documents pursuant to rule 77.¹⁶

17. In addition, subsequent to the April 2013 Search, the Prosecution collected a further 1219 documents prior to the deadline for disclosure for the confirmation hearing on 1 November 2013. Of these, 1141 documents were reviewed for the purpose of disclosure and 377 disclosed (i.e disclosure classification, any necessary redactions or other protective measures), with a further 78 remaining to be reviewed for relevance and, if necessary, processed for disclosure, including a review for any necessary redactions or protective measures.

ii. Post-confirmation hearing review

18. Between the 1 November 2013 deadline for disclosure in the confirmation hearing and the present date, the Prosecution has collected a further 10604 items, of which 1069 have been reviewed for disclosure, with a further 9535 remaining for full disclosure review. Of those items still to be reviewed, 8874 items relate to the forensic exhumations.

19. As noted in the Prosecution's Initial Filing, the Prosecution has disclosed a total of 6,934 documents to date.

20. Moreover, as explained in the Initial Filing, in addition to the documents reviewed resulting from searches using the First Search Terms, there are a further 7333 documents totalling 22185 pages from the Prosecution's

¹⁶ See ICC-01/04-02/06-352, para. 31.

evidence collection related to crimes committed in the Ituri region categorised as unsearchable. Each document falling into this category must be reviewed manually in its entirety for relevance (as incriminating, potentially exonerating or rule 77 material). This is a time-intensive undertaking as the documents contain handwritten script that may be difficult to read and typeface that is at times obscured. The Prosecution has endeavoured to review these documents as promptly as possible, prioritising any documents received under article 54(3)(e) to facilitate timely requests for lifting of restrictions. In the Prosecution's Initial Filing it estimated that this review would be completed within a month. To date the Prosecution has reviewed 4503 of the documents characterised as unsearchable, with a further 2830 documents remaining to be reviewed.

21. In addition to this ongoing review, following the Confirmation Decision the Prosecution created an additional set of search terms. This additional set of terms is informed by both the content of the Confirmation Decision itself (including the specific localities confirmed by the Pre-Trial Chamber), and the lines of defence of which the Prosecution was notified just prior to the confirmation hearing ("New Search Terms"). The search based on these New Search Terms identified as potentially relevant 3724 documents from the Prosecution's evidence collection concerning crimes committed in the Ituri region that were not previously reviewed because they did not respond to the First Search Terms. In addition, a search based on the New Search Terms identified 7629 documents that had been reviewed previously on the basis of the April 2013 Search, but which now need to be reviewed again to determine whether any further disclosure is required or if previously disclosed material must be reclassified (as either incriminating, potentially exonerating, or rule 77). These 7629 documents had not previously been reviewed for the topics arising in the New Search

Terms, because those new terms were only devised after the confirmation hearing.

22. In addition, there are 7813 documents collected in relation to the investigations in Ituri that are not responsive to either the First Search Terms or the New Search Terms. It is unlikely that there are any relevant documents in this group of documents that will require disclosure. However, out of an abundance of caution the Prosecution proposes to review each document in this collection.
23. Again, each identified document from amongst those collected to date will need to be reviewed individually by the Prosecution to determine if it is, in fact, relevant, and if any redactions or other protective measures are necessary prior to its disclosure. The Prosecution anticipates that the remaining review of documents collected to date will require an additional approximately six months given the other work that the Prosecution trial team will need to simultaneously complete. This estimate does not include time that will be necessary to review any newly collected evidence.
24. The current evidence collection also includes several multimedia sources that must be thoroughly examined in preparation for trial. This pool of evidence includes a total of approximately 89 hours of video footage.
25. This footage has been reviewed for relevance and disclosure purposes and have been disclosed; however, those videos disclosed as incriminatory now must be closely reviewed for preparation prior to trial (with simultaneous reference to transcripts). This process involves identifying specific video clips within a given video that contain relevant information. From these, the clips to be shown at trial must be selected and prepared. All 89 hours of video previously found to be relevant now require close

review. The Prosecution anticipates that this process will require approximately two to three months to complete.

26. Finally, approximately 322 hours of video were summarily reviewed for disclosure purposes by September 2013. The Prosecution subsequently undertook a closer review of the majority of these videos to confirm whether any excerpts required further disclosure or reclassification as incriminating, potentially exonerating, or rule 77. However, only approximately 4 hours of video remain for close review.

27. The Prosecution submits that it would be realistic to ensure that all evidence will be reviewed and ready for disclosure to the Defence by March 2015.

B. Additional observations concerning the Prosecution's ongoing limited investigations

28. The Prosecution takes seriously its obligation under article 54 of the Statute to establish the truth with respect to both incriminating and exonerating circumstances. Accordingly, the Prosecution has continued to act diligently throughout and subsequent to the confirmation process to supplement the evidence which was relied upon at the confirmation hearing.¹⁷ These necessary focussed investigative efforts have been hampered by a number of factors set out below, necessitating sufficient time for such investigations to be completed.

29. First, the Prosecution has faced challenges in tracking down certain crime-base and insider witnesses 12 to 13 years after the relevant events. Locating affected individuals within Ituri is a challenging undertaking due

¹⁷ See ICC-01/04-01/10-514, para. 44 (noting that investigations "should largely be completed" by the confirmation hearing); ICC-01/04-02/06-73, para. 31 (noting that the "largely completed" standard does not prohibit further limited investigations).

to the state of the transportation and communication infrastructure, and the fact that the witnesses either do not have telephones or have changed their contact details or moved since the Prosecution's last contact with them.

30. Second, investigations have also been affected by the difficulty in identifying survivors of sexual and gender-based crimes ("SGBC"). Such survivors can be reluctant to come forward for a variety of reasons.¹⁸ Consequently, the effort to locate SGBC victims willing to cooperate with the Court, requires continuous investigative efforts – a challenge that is compounded by the number of years that have passed since the alleged crimes.

31. Moreover, further limited investigations are necessary to expand the pool of existing witnesses for trial, as set out by the Prosecution in the Prosecution's Initial Filing.¹⁹ Prospective additional witnesses include both crime-base and insider witnesses.

32. The Prosecution is further awaiting information from the DRC authorities and other third parties on the location of certain witnesses who the Prosecution seeks to meet. The Prosecution has been working actively to follow-up on the assistance provided. However, further time will be required to pursue the resulting leads.

33. The Prosecution will also require sufficient time to identify and interview appropriate expert witnesses, including potential joint expert witnesses, for trial.

¹⁸ See Clinical Assessments of witness P-0018 (DRC-OTP-2059-0058 at 0062), witness P-0019 (DRC-OTP-2059-0080 at 0083-84) and witness P-0113 (DRC-OTP-2059-0069 at 0072-73).

¹⁹ ICC-01/04-02/06-352, para.10.

34. In addition, further time may be required to undertake additional limited investigative [REDACTED].

35. Finally, as noted in the Prosecution's Initial Filing, the Prosecution is engaged in limited investigations necessitated by the Confirmation Decision itself, and the lines of defence that came to light at the confirmation hearing. By way of example, in the Confirmation Decision, the Pre-Trial Chamber confirmed charges on the basis of specific localities, rather than in the two *collectivités* as initially set out in the Document Containing the Charges ("DCC"). Further evidence is necessary, *inter alia*, to support the charges in the specific configuration in which they were confirmed.

36. For these reasons, the Prosecution must devote resources to additional investigations which it anticipates will be completed by January 2015, concurrent with various other necessary pre-trial steps discussed throughout this submission and the Prosecution's Initial Filing.

C. Additional observations concerning the Prosecution's ongoing transcription and translation of materials

i. Transcription

37. As the Prosecution noted in its Initial Filing, it is in the process of conducting a limited number of article 55(2) interviews, requiring audio recordings. The Prosecution prepares and discloses corresponding transcripts to assist the Defence in reviewing the material. Such transcription is a time-intensive undertaking, the specific details of which were discussed at paragraph 47 of the Prosecution's Initial Filing.²⁰

²⁰ ICC-01/04-02/06-352, para. 47.

38. Since the confirmation hearing, the Prosecution has collected additional audio recordings of interviews pursuant to article 55(2). To date, transcription and the necessary quality control has been completed for approximately two-thirds of these recordings.

39. In addition, the Prosecution intends to complete additional interviews falling under article 55(2) within the next several months. The Prosecution expects that these interviews will result in additional audio recordings requiring transcription. Transcription and quality control of one hour of audio recording of a bilingual interview require approximately five days to complete.

ii. Translation

40. The Prosecution noted in its Initial Filing that the obligation to translate material into Kinyarwanda pursuant to rule 76(3) is an extremely time-intensive undertaking.²¹

41. The precise time demands of the obligation to translate depend largely on what requests are made by the Defence.²² In advance of the confirmation hearing, the Defence requested only limited Kinyarwanda translations in the interest of expediency.²³ While the Prosecution does not consider that there is a legal obligation to provide translation of all material in its possession,²⁴ it still awaits the views of new Defence counsel as to how extensive its requests for translation will be. If extensive requests for translation of statements into Kinyarwanda are made and granted, this

²¹ ICC-01/04-02/06-352, para. 48.

²² ICC-01/04-02/06-352, para. 48.

²³ See discussion at ICC-01/04-02/06-352, para. 48.

²⁴ As noted at note 42 of the Prosecution's Initial Filing, the right of the Accused to have prior statements made available in a language he understands is not unlimited. Rather, it requires that the Chamber weigh the right to translation against the fairness and expeditiousness of the proceedings. See ICC-01/04-01/06-268, pp. 4-8.

will significantly impact the timetable, necessitating many months to complete.

D. Additional observations on the Prosecution's proposed date for the commencement of trial

42. For the reasons set out above, and those contained in the Prosecution's Initial Filing, the Prosecution maintains that the beginning of June 2015 is an appropriate and realistic commencement date for trial.

43. Below the Prosecution endeavours to provide a more comprehensive timeline of steps to be completed prior to trial. The proposed timeline is strictly provisional and subject, in particular, to unforeseen developments and the views of the Defence and determination by the Chamber. Moreover, the timing of certain steps, including discussions on topics such as agreed facts and joint instruction of experts will be dependent upon the time required by new Defence Counsel to familiarise with the case. From past experience, these types of discussions require a significant amount of time. Substantive discussions regarding agreed facts and joint experts will only be possible once Defence Counsel is reasonably familiar with the case. A degree of flexibility is required when considering the proposed timeline. However, the Prosecution believes that this timeline constitutes a realistic estimate of the steps and time required for the parties to prepare for trial over the coming months. The steps outlined do not comprise the entirety of the work undertaken by the Prosecution at any given time, but only the key steps.

44. The following steps are proposed for **September 2014**:

- a. The Status Conference is held;
- b. The parties have *preliminary* discussions about matters of potential cooperation, including: a statement of agreed facts pursuant to rule 69,

the existing draft Protocol governing treatment of confidential information;²⁵ the Prosecution's proposed protocol on redactions;²⁶ joint instruction of expert witnesses; and documents to be translated into Kinyarwanda;

- c. Prosecution completes review of unsearchable documents and prepares them for disclosure to the Defence on a rolling basis;
- d. Prosecution undertakes an initial review of witnesses to be relied upon for trial, as well as an initial review of documents based on individual witness-related searches for disclosure and/or trial purposes; and
- e. Prosecution's limited investigations, video preparation, transcription of article 55(2) interviews, and review of existing evidence under post-confirmation search terms are ongoing.

45. The following steps are proposed for **October 2014**:

- a. Time allocated for Defence Counsel to familiarise himself with the record; preliminary discussions on matters of cooperation continues (including Protocols, statement of agreed facts, and joint instructions to experts);
- b. The parties and participants endeavour to finalise the substantially complete draft Protocol governing treatment of confidential information and submit it to the Chamber for approval;
- c. Prosecution completes its review of existing evidence under post-confirmation search terms, and prepares documents for disclosure to the Defence on a rolling basis; and
- d. Prosecution's limited investigations, video preparation, and transcription of article 55(2) interviews are ongoing.

46. The following steps are proposed for **November 2014**:

- a. The parties engage in substantive discussion on matters of cooperation (including statement of agreed facts, and joint instructions to experts), and finalise the Protocol on redactions for Chamber's approval; and
- b. Prosecution's limited investigations, video preparation, and transcription of article 55(2) interviews, and translation pursuant to rule 76(3) (as necessary) are ongoing.

²⁵ See ICC-01/04-02/06-352, paras. 23-25.

²⁶ See ICC-01/04-02/06-352, paras. 20-22.

47. The following steps are proposed for **December 2014**:

- a. The parties complete discussions on matters of cooperation and finalise agreed statement of facts, and the preparation of joint instructions to experts if any;
- b. Prosecution's supplementary investigations near completion;
- c. Prosecution's video preparation is completed; and
- d. Prosecution's transcription of article 55(2) interviews, and translation pursuant to rule 76(3) (as necessary) are ongoing.

48. The following steps are proposed for **January 2015**:

- a. Prosecution completes investigations, and works to prepare final body of investigation-based evidence for disclosure;
- b. Prosecution's transcription of article 55(2) interviews, and translation pursuant to rule 76(3) (as necessary) are ongoing; and
- c. Having concluded consultation between the parties regarding instruction of experts in December, instruction of experts takes place (jointly if appropriate). Such instruction cannot take place until the parties have sufficient time to engage in thorough discussion on the possibility (and manner) of joint instruction. Subsequent to instruction of experts, sufficient time is necessary for the experts to prepare expert reports.

49. The following steps are proposed for **February 2015**:

- a. Prosecution's translation pursuant to rule 76(3) (as necessary) are ongoing;
- b. Prosecution makes a final internal determination of witnesses to be relied upon. This can only take place once thorough discussion on possible agreements on facts under rule 69 takes place, and the Prosecution's further investigations come to a close. Once the final determination of witnesses to be relied upon is made, the Prosecution must complete witness preparation: reviewing witness binders and completing searches for all material related to the witnesses selected, which will result in potential further disclosure of evidence and the

need for the implementation of redactions where appropriate. The Prosecution estimates that preparation for each trial witness will require approximately two months; and

- c. Experts continue their preparation, including review of the relevant evidence.

50. The following steps are proposed for **March 2015**:

- a. Prosecution completes disclosure of all material upon which it intends to rely for trial, with the exception of authorised cases of delayed disclosure;
- b. Prosecution provides its list of witnesses and final list of evidence to be relied upon to Defence and final disclosure of all evidence, allowing sufficient time to complete any necessary review and investigations prior to trial;
- c. Prosecution continues to complete witness preparation process, implementing redactions and disclosing material where appropriate;
- d. Prosecution discloses to the Defence the identities of any witnesses, whose identities remain undisclosed and for whom the Prosecution has not sought authorisation of the Chamber to delay disclosure;
- e. Prosecution finalises ongoing work on its Amended DCC and provides it to the Defence; and
- f. Experts continue their preparation, including review of the relevant evidence.

51. The following steps are proposed for **April 2015**:

- a. Prosecution finalises ongoing work on the Pre-Trial Brief;
- b. Prosecution continues its preparation for presentation of evidence at trial; and
- c. Experts finalise their reports.

52. The following steps are proposed for **May 2015**:

- a. Prosecution provides the Pre-Trial Brief to Defence;

- b. Prosecution discloses to the Defence the identity of all witnesses for whom it has sought and received authorisation from the Chamber to delay disclosure;
- c. Prosecution continues its preparation for presentation of evidence at trial; and
- d. Parties and participants provide submissions on the conduct of proceedings.

53. The following steps are proposed for **June 2015**:

- a. Trial commences.

54. In proposing a June 2015 commencement date, the Prosecution has sought to identify as realistic a date for the start of trial as possible, bearing in mind all of its obligations including those pursuant to articles 54, 64, and 67. In this regard, the Prosecution is informed by past experience. The Prosecution notes that, in *all* other cases before the Court to date, a postponement was required after an initial trial date was set. The schedule proposed is realistic to ensure that there is a firm trial start date. Establishing a firm start date is beneficial for all stakeholders as it ensures that time and resources can be managed appropriately.

E. Additional observations on anticipated protective measures for Prosecution witnesses

55. In addition to providing the preceding observations pursuant to the Chamber's Revised Scheduling order, the Prosecution wishes to also update the Chamber pursuant to paragraph 5(b) of the Chamber's Initial Scheduling Order on anticipated protective measures for Prosecution witnesses.²⁷

56. In the Prosecution's Initial Filing, it indicated that, at that time, it did not foresee any additional requests for measures related to the protection of

²⁷ ICC-01/04-02/06-339, para. 5(b).

witnesses, but would update the Chamber on new developments as appropriate. The Prosecution wishes to update the Chamber that it has now met with a witness, [REDACTED], for whom it anticipates applying for protective measures. [REDACTED]. The Prosecution is endeavouring to coordinate with both VWU and the witness personally to confirm precisely what measures are necessary. [REDACTED],²⁸ [REDACTED].

57. The Prosecution will endeavour to provide further information on this matter as soon as it is available.

V. Conclusion

58. The Prosecution respectfully submits these further observations as requested in the Chamber's Revised Scheduling Order, with a view to facilitating further discussions at the upcoming Status Conference.



Fatou Bensouda
Prosecutor

Dated this 8th day of September 2014

At The Hague, The Netherlands

²⁸ [REDACTED].