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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Request on behalf of Mr Ntaganda seeking the conduct of a
judicial site visit before the presentation of the case for the Defence**

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to: (i) Trial Chamber VI's ("Chamber") oral ruling dated 22 April 2015¹ ("Oral Ruling"); and (ii) the Chamber's "Decision on Prosecution's request to conduct a site visit" dated 20 January 2016² ("Decision"), Counsel representing Mr Ntaganda ("Defence") hereby submit this:

**Request on behalf of Mr Ntaganda seeking the conduct of a
judicial site visit before the presentation of the case for the Defence**

"Defence Request"

INTRODUCTION

1. Bearing in mind the Prosecution's burden to prove its case beyond reasonable doubt, it was incumbent on the Prosecution to lead sufficient evidence to allow the Chamber to familiarize itself and gain a minimum understanding of the areas where the crimes alleged in the UDCC would have been committed.
2. The Prosecution's failure to adduce sufficiently detailed evidence to achieve this purpose renders the conduct of a judicial site visit necessary after the Prosecution's case and before the presentation of the case for the Defence.
3. Indeed, conducting a judicial site visit at this time 'would serve a specific purpose in relation to facts in issue'³ as it would allow the Chamber to gain the required minimum knowledge of certain locations Prosecution witnesses referred to during their testimony but which remain vague and unfamiliar given that no concrete evidence was adduced in respect of these locations.
4. Such minimum knowledge on the part of the Chamber is essential to its understanding of the evidence that will be presented as part of the case for the Defence, thereby ensuring full respect for the right of the Accused to full answer and Defence.

¹ ICC-01/04-02/06-T-19-ENG ET, p.9, l.1-1.

² ICC-01/04-02/06-1096.

³ ICC-01/04-02/06-T-19-ENG ET, p.9, l.2-4.

5. The organization of a judicial site visit at this time requires the elaboration of a protocol involving the Chamber, the parties and the participants to ensure that it is conducted in full respect with the rights of the Accused to a fair trial.

PROCEDURAL BACKGROUND

6. On or about 1 December 2014, by way of electronic correspondence, the Prosecution raised the issue ‘whether the Chamber is contemplating a judicial site visit to Ituri’ (“Prosecution First Request”).⁴
7. On 2 December 2014, the Common Legal Representatives (“LRVs”) underlined the fact that a judicial site visit ‘would bring the proceedings closer to the people that are mainly concerned; that is the victims.’⁵
8. On the same date, the Defence: (i) indicated that ‘such a site visit might very well be necessary in order [...] for the Trial Chamber to see the area where the alleged crimes were committed’; and (ii) added that it ‘can be beneficial [...] for all parties involved’.⁶
9. On 22 April 2015, the Chamber ruled that it did ‘not intend to undertake a judicial site visit prior to the commencement of trial.’⁷ The Chamber added that it ‘considers that the judicial site visit should be conducted only where it would serve a specific purpose in relation to facts in issue’⁸ and that ‘[t]he need for a site visit may be reassessed [...] upon application, at the end of the presentation of evidence by the Prosecution’.⁹
10. On 24 November 2015, the Prosecution filed its ‘Prosecution’s request for the Chamber to conduct a judicial site visit’ (“Prosecution Second Request”).¹⁰

⁴ ICC-01/04-02/06-T-19-ENG ET, p.8, l.24-25.

⁵ ICC-01/04-02/06-T-17-CONF-ENG, p.26, l.24-25.

⁶ ICC-01/04-02/06-T-17-CONF-ENG, p.27, l.22-25.

⁷ ICC-01/04-02/06-T-19-ENG ET, p.9, l.1-1.

⁸ ICC-01/04-02/06-T-19-ENG ET, p.9, l.2-4.

⁹ ICC-01/04-02/06-T-19-ENG ET, p.9, l.5-7.

¹⁰ ICC-01/04-02/06-1033.

11. On 15 December 2015, the LRVs submitted their joint response, supporting the Prosecution Second Request.¹¹
12. On 16 December 2015, the Defence responded to the Prosecution Second Request, opposing the conduct of a site visit during the Prosecution's case in so far as it did not raise any new argument.¹² The Defence nonetheless highlighted the necessary conditions to be met in the event such a judicial site visit was organized.¹³
13. On 20 January 2016, the Chamber issued its Decision, reiterating the considerations expressed in its earlier Oral Ruling, noting in particular that:¹⁴
 - a. '[J]udicial site visit should be conducted only where it would serve a specific purpose in relation to facts in issue';
 - b. '[T]he parties should, in making any application for a site visit, keep in mind this guidance'; and
 - c. '[T]he need for a site visit may be reassessed [...] at the end of the presentation of evidence by the Prosecution and again after the closing of the Defence case'.
14. On 19 October 2016, the Chamber issued the 'Order setting certain deadline related to the end of the presentation of evidence by the Prosecution' in which it held that the last evidentiary block of the Prosecution's case would end on 3 March 2017.¹⁵
15. On or about 24 January 2017, the Defence contacted the Prosecution for the purpose of inquiring whether the Prosecution intended to submit a request for the holding of a judicial site visit at the end of its case, given that the

¹¹ ICC-01/04-02/06-1055.

¹² ICC-01/04-02/06-1056.

¹³ ICC-01/04-02/06-1056, para.16.

¹⁴ ICC-01/04-02/06-1096, para.2.

¹⁵ ICC-01/04-02/06-1588, para.16.

Defence was considering submitting such a request. The parties agreed to meet the following week to discuss the issue.

16. On 30 January 2017, the Chamber issued its 'Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to preparations for the presentation of evidence by the Defence'.¹⁶
17. On 1 February 2017, the Defence met with the Prosecution, which indicated that it did not intend to submit a request for a judicial site visit at this time.

APPLICABLE LAW

18. Pursuant to articles 64, 69 and 74 of the Rome Statute of the International Criminal Court ("Statute"), the Chamber has the power to order the conduct of a judicial site visit to locations in Ituri, Democratic Republic of Congo ("DRC"), which are relevant to the charges laid against the Accused in the Updated Document Containing the Charges ("UDCC").¹⁷

ARGUMENT

I. The organization of a judicial site visit is required at this time

19. The adjudication of charges laid against a person accused in any criminal proceedings requires the trier of facts to gain minimum knowledge and understanding of the areas where the alleged crimes would have been committed.
20. Such minimum knowledge and understanding requires the trier of fact to become familiar with, *inter alia*:

- a. The geography of the region;

¹⁶ ICC-01/04-02/06-1757.

¹⁷ ICC-01/04-02/06-458-AnxA.

- b. The layout of villages, towns, municipalities and cities relevant to the UDCC and their surroundings;
 - c. The distances between various locations, infrastructure and alleged crimes scenes within villages, towns, municipalities and cities relevant to the UDCC;
 - d. The topography of areas relevant to the UDCC including mountains, rivers, forests, high grounds and other vantage points; as well as
 - e. The possibility to hear the use of weapons and gunshots in particular between various locations relevant to the UDCC.
21. Such knowledge and understanding is necessary to allow the trier of fact to assess the evidence adduced by the parties in the proper context, including in particular, evaluating the plausibility of witness testimony, which goes to the reliability and credibility of their narrative. It is also needed with a view to allowing the trier of fact to compare the evidence provided by different witnesses in relation to the same event or location.
22. There are many ways for the trier of fact to gain such minimum knowledge and understanding of relevant locations during the presentation of evidence by the parties. Nonetheless, it is first and foremost the duty of the Prosecution to adduce sufficiently detailed evidence to allow the trier of fact to gain the minimum knowledge and understanding required.
23. In this case, the Prosecution failed to adduce sufficiently detailed evidence allowing the Chamber to gain the required minimum knowledge and understanding of locations referred to by Prosecution witnesses during their testimony.
24. First, the only concrete evidence presented by the Prosecution on the locations where the crimes alleged in the UDCC would have been committed,

consists of two panoramic reconstructions,¹⁸ which were seldom used by the Prosecution when examining its witnesses.

25. Second, when eliciting evidence from its witnesses, the Prosecution made almost no use of reliable maps (including distance scales for example) representing villages, towns, municipalities and cities relevant to the UDCC. To use but a few examples, the Prosecution questioned witnesses in relation to events which would have taken place in Bunia and Mongbwalu without the use of reliable maps (including a distance scale) making it possible to identify relevant features in these municipalities.
26. Third, the Prosecution did not call any witness, expert or other, able to provide the minimum necessary information allowing the Chamber to familiarize itself with the areas relevant to the UDCC.
27. Fourth, the satellite imagery expert¹⁹ called as a Prosecution witness, despite the admission of satellite images in evidence, was not in a position to either provide the type of information required or to assist the Chamber in gaining the minimum required information on the locations relevant to the UDCC.
28. Fifth, the limited agreed facts admitted in evidence before the beginning of the Prosecution's case are insufficient to assist the Chamber in gaining the minimum required knowledge and understanding of the areas relevant to the UDCC.²⁰
29. Lastly, it is noteworthy that the Defence did attempt on many occasions to make use of and adduce reliable maps during cross-examination of Prosecution witnesses. However, due to the generality of the evidence elicited by the Prosecution from its witnesses – including very few references to geographical features – and the limited time available for cross-examination,

¹⁸ See panoramas of: (i) Kobu-Watza (DRC-OTP-2075-0094) ; and (ii) Saio (DRC-OTP-2083-0083).

¹⁹ DRC-OTP-P-0810: ICC-01/04-02/06-T-175 to T-176.

²⁰ ICC-01/04-02/06-633-AnxA, dated 8 June 2015.

the evidence on the record is not sufficiently detailed to allow the Chamber to have the required minimum knowledge and understanding.

30. In these circumstances, to achieve the aim stated above, it is essential for the Chamber to order the conduct of a judicial site visit for the specific purpose of gaining the minimum knowledge and understanding of the locations relevant to the UDCC.
31. More importantly, it is vital to do so at this time – before the presentation of the case for the Defence – to ensure that the Chamber is able to compare the evidence that will be presented during the case for the Defence with that adduced by Prosecution through the testimony of its witnesses. It is also crucial for the Chamber to be in a position to properly evaluate the evidence which will be presented by Defence witnesses in the proper context, without the Defence having the burden to simultaneously submit the required minimum evidence related to relevant locations in the UDCC.
32. The fundamental right of the Accused to full answer and Defence militates strongly in favour of the Chamber obtaining the minimum knowledge and understanding locations relevant in the UDCC before the commencement of the presentation of the case for the Defence. This would necessarily allow for the presentation of a more focus and possibly shorter case for the Defence, which is certainly in the interest of justice.

II. The conduct of a judicial site visit at this time would serve a specific purpose in relation to facts in issue

33. Specific ‘facts in issue’ between the parties include, *inter alia*:
 - a. The layout and topography of the municipality of Bunia as well as the location of specific features and the distances between them, such as:
 - i. The residence of Governor Lopondo and the *sous-region*;

- ii. The location of the residence of Mr Lubanga at various times;
 - iii. The location of the residence of the FPLC Chief of Staff at various times;
 - iv. The location of the FPLC *État Major Général* at various times; and
 - v. The location of the residence of Mr Ntaganda at various times;
- b. The layout and topography of the locality of Mudzipela, including the roads leading to and from this location;
- c. The layout and topography of the locality of Mandro as well as the location of various relevant features in the vicinity of Mandro, including *inter alia*:
- i. The location of Chef Kahwa's residence;
 - ii. The area where weapons were airdropped; and
 - iii. Locations where recruits and other FPLC members were trained at various times;
- d. The distances between Aru and Bunia as well as between Aru and Mongbwalu;
- e. The road conditions from Mongbwalu to Bunia as well as the specific features on the following routes between Mongbwalu and Bunia, namely:
- i. From Bunia to Soleniama, Iga-Barrière, Nizi, Mabanga, Dala to Mongbwalu;
 - ii. From Bunia to Soleniama, Iga-Barrière, Nizi, Bambu, Kobu, Kilo to Mongbwalu; and

- iii. From Bunia to Nyangaray, Kabakaba, Kilo to Mongbwalu;
- f. The layout and topography of the locality of Mongbwalu and its surroundings as well as the relevant features therein, including *inter alia*:
- i. The location of the *Appartements* and the vantage points from this location;
 - ii. The location of the airport;
 - iii. The route from Mongbwalu to Sayo;
 - iv. The mining factory in Mongbwalu; and
 - v. The northern region of Mongbwalu from where the Aru Sector forces arrived;
- g. The layout and topography of the localities of Kobu, Bambu and Lipri as well as the distances between them and other relevant features:
- i. Between Kobu, Bambu and Lipri;
 - ii. In Kobu and its surroundings villages;
 - iii. In Bambu and its surroundings villages; and
 - iv. In Lipri and their surroundings villages;
- h. The Mahagi region, including the border between DRC and Uganda; as well as
- i. The region of the Lac Albert where FPLC forces were located at various times, in particular in 2003.
34. Evidently, the evidence adduced during the Prosecution's case did not allow the Chamber to gain the required minimum knowledge and understanding of

the above-mentioned locations, which are directly related to facts and issues in dispute.

35. It follows that organizing a judicial site visit at this stage would indeed serve a specific purpose in relation to facts in issue, the Chamber's test to be met to justify the organization of such a visit.

III. The conduct of a judicial site visit at this time is in the interest of justice

36. The truth-seeking function of the Chamber supports the conduct of a judicial site visit at this stage as it would allow the Chamber to appreciate the plausibility and the reliability or lack thereof of the evidence adduced during the Prosecution's case, which in turn will assist the Chamber in assessing the evidence presented during the case for the Defence in the proper context.
37. Indeed, the Chamber's ability to fully appreciate the evidence that will be adduced during the presentation of the case for the Defence would be greatly enhanced if it already possesses the required minimum knowledge and understanding of the relevant locations in the UDCC.
38. Such minimum knowledge and understanding is also essential to allow the Chamber to compare the evidence that will be presented during the case for the Defence with that adduced by Prosecution through the testimony of its witnesses.
39. Pursuant to Article 64(2), the Chamber shall ensure that 'a trial is fair [...] and is conducted with full respect for the rights of the accused'. In the case at hand, the fairness of the trial supports the conduct of a judicial site visit at this stage if only to avoid imposing a burden on the Defence to simultaneously present the case for the Defence and lead evidence which should have been adduced by the Prosecution concerning relevant locations in the UDCC.

40. Ordering the conduct of a judicial site visit at this time would also allow for the presentation of a more focussed and possibly shorter case for the Defence, which is beneficial to both parties and the participants, favours the expeditious conduct of the proceedings, brings the proceedings closer to the victims at an earlier stage, while being consistent with the right of the Accused to full answer and Defence.
41. Holding a judicial site visit at this time is thus certainly in the interest of justice.

IV. Adoption of a judicial site visit protocol

42. Should the Chamber be inclined to grant the Defence Request and order the conduct of a judicial site visit at this time, it would be necessary to adopt a judicial site visit protocol to ensure that it is conducted in full respect for the rights of the Accused and due regard for the protection of victims and witnesses.
43. The modalities of a judicial site visit should thus be adopted by the Chamber following consultations involving the Prosecution, the Defence and the LRVs.
44. At a minimum, the judicial site visit protocol should address, *inter alia*: (i) the relevant locations to be visited; (ii) the procedure to be followed upon arriving at each location; (iii) the persons present and their specific functions; (iv) the information that can be provided to the Chamber, by whom and in what format at each locations; (v) the procedure for maintaining a record of the locations viewed and/or visited, the date and time at which the locations were viewed and/or visited, as well any questions and answers involving the parties; and (vi) the procedure for any photographs to be taken or videos to be recorded.

45. Lastly, considering the purpose of a judicial site visit²¹ and with a view to facilitating the organization of such a judicial site visit, the Defence would not request the Accused to be present.

CONCLUSION

46. In light of the above submission, the Defence respectfully submits that the assessment of the facts in issue in their proper context – further to the presentation of the Prosecution’s case – as well as the right of the Accused to full answer and Defence and the exigencies of a fair trial require that a judicial site visit be conducted at this time.
47. Organizing a judicial site visit at this time is also in the interest of justice as it would, *inter alia*, provide the Chamber with:
- a. ‘[A] more concrete appreciation of the evidence, which is being presented during the course of the trial’;²²
 - b. [A]n appreciation of the terrain – such as distances and views from various observations points - on which the events allegedly took place’;²³
 - c. A view of ‘the area where the alleged crimes were committed’;²⁴ as well as
 - d. The possibility to ‘bring the proceedings closer to the people that are mainly concerned; that is the victims’²⁵ at an earlier stage.

²¹ ICC-01/04-02/06-1056, para.17: ‘the purpose of a judicial site visit is limited to providing the Judges with an opportunity to acquire a first-hand impression of some geographical landmarks and locations referred to in the Updated Document Containing the Charges, and not to gather evidence’.

²² ICC-01/04-02/06-1757.

²³ Prosecution’s Second Response, para.3.

²⁴ ICC-01/04-02/06-T-17-CONF-ENG, p.27, l.22-25.

²⁵ ICC-01/04-02/06-T-17-CONF-ENG, p.26, l.24-25.

RELIEF SOUGHT

48. The Defence respectfully request the Chamber to:

1. **GRANT** the Defence Request;
2. **ORDER** the conduct of a judicial site visit before the presentation of the case for the Defence; and
3. **ISSUE** guidelines inviting the parties and participants to consult and provide submissions on the modalities of the judicial site visit to be organized.

RESPECTFULLY SUBMITTED ON THIS 8TH DAY OF FEBRUARY 2017



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands