



Original English

No.: ICC-01/04-02/06

Date: 15 June 2015

THE PRESIDENCY

Before: Judge Silvia Fernández de Gurmendi, President
Judge Joyce Aluoch, First Vice-President
Judge Christine Van Den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public Redacted

**Decision on the recommendation to the Presidency on holding part of
the trial in the State concerned**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court***to:****The Office of the Prosecutor**

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Trial Chamber VI

The Presidency of the International Criminal Court (“Court”) has before it the “Recommendation to the Presidency on holding part of the trial in the state concerned” (“recommendation”) of Trial Chamber VI (“Chamber”) in the case of *The Prosecutor v Bosco Ntaganda* (“case”).¹

The opening statements in the case shall be held at the seat of the Court at The Hague for the reasons set forth below.

I. COMPOSITION OF THE PRESIDENCY

1. On 20 March 2015, Judge Kuniko Ozaki, member of the Chamber and Second Vice-President, filed a request before the remaining members of the Presidency wherein she asked to be excused from deliberating on the recommendation.² On 24 March 2015, the remaining members of the Presidency granted this request.³ On the same date, Judge Sanji Mmasenono Monageng assumed responsibilities as a member of the Presidency in accordance with regulations 10 and 11(2) of the Regulations of the Court for the purpose of deliberating on the recommendation.⁴
2. On 29 May 2015, Judge Monageng was replaced by Judge Christine Van Den Wyngaert. This replacement resulted from the inability of Judge Monageng to be present at the briefing to the Presidency from the Registrar and participate in subsequent deliberations on the recommendation on 3 June 2015. This inability had the effect of rendering Judge Monageng “unavailable” pursuant to regulation 11(2) of the Regulations of the Court and as of 29 May 2015 “her responsibilities as a member of the Presidency [were] carried out by” Judge Van Den Wyngaert in accordance with regulation 10.

¹ 19 March 2015, ICC-01/04-02/06-526 (“Recommendation”).

² Request to be excused from the Presidency for the purposes of its decision on Trial Chamber VI’s “Recommendation to the Presidency on holding part of the trial in the State concerned”, ICC-01/04-02/06-526, 2015/PRES/00114.

³ Decision replacing a member of the Presidency for the purpose of deliberating on the recommendation submitted to the Presidency by Trial Chamber VI, 23 April 2015, ICC-01/04-02/06-569, Annex I.

⁴ *Id.*

II. RECOMMENDATION BY THE CHAMBER AND SUPPLEMENTAL SUBMISSIONS BY PARTIES AND PARTICIPANTS AFTER THE RECOMMENDATION

3. On 19 March 2015, after receiving reports from the Registry and written and oral submissions from the parties and participants,⁵ the Chamber recommended to the Presidency, pursuant to rule 100(2) of the Rules of Procedure and Evidence (“Rules”), that the Court hold part of the trial in the case in Bunia, in the Democratic Republic of the Congo (“DRC”).⁶
4. The Chamber emphasised that its recommendation was made “with the intention of bringing the work of the Court closer to the most affected communities”.⁷ The Chamber considered that a combination of measures served to do so. These measures included: (i) enabling attendance at the hearings; (ii) facilitating local and international media coverage of the hearings (possibly by live feed for radio or audio-video broadcast); (iii) producing and disseminating a summary of the hearings (including in video format); and (iv) the physical proximity of the hearings to the locations of the alleged crimes.⁸
5. However, the Chamber was concerned with and sought to address certain issues raised by the Prosecution. The Chamber emphasised its awareness of the “changeable security environment” in the region around Bunia and the need to monitor this continually in making any ultimate decision on whether part of the proceedings in the

⁵ Registry Report pursuant to oral order of 17 October 2014, 21 November 2014, ICC-01/04-02/06-404; Prosecution submissions on conducting part of the trial *in situ*, 28 November 2014, ICC-01/04-02/06-409-Conf-Exp; Observations on behalf of Mr Ntaganda on the Possibility of Holding Part of the Trial in the DRC or Some Nearby Location, 28 November 2014, ICC-01/04-02/06-408-Conf; Joint submissions of the Common Legal Representatives on the possibility to hold a part of trial proceedings *in situ*, 28 November 2014, ICC-01/04-02/06-407-Conf; Transcript of hearing of 2 December 2014, 2 December 2014, ICC-01/04-02/06-T-17-Conf-ENG, p. 20, line 15 to p. 29, line 11; Order scheduling a status conference on 17 February 2015 and setting the agenda, 22 January 2015, ICC-01/04-02/06-429, para. 2; Registry revised feasibility report on trial *in situ*, 2 February 2015, ICC-01/04-02/06-438, with Annex A; Prosecution supplementary submissions on conducting part of the trial *in situ*, 13 February 2015, ICC-01/04-02/06-457-Conf-Exp; Transcript of hearing of 17 February 2015, ICC-01/04-02/06-T-18-Conf-ENG, p. 23, line 14 to p. 34, line 24; Addendum to “Registry revised feasibility report on trial *in situ*” (ICC-01/04-02/06-438), dated 2 February 2015, 12 March 2015, ICC-01/04-02/06-505-Conf; E-mail from Legal Officer of the Chamber to the parties and participants on 12 March 2015 at 15:42; Victims’ observations on the Addendum to “Registry revised feasibility report on trial *in situ*” (ICC-01/04-02/06-438), dated 2 February 2015, 16 March 2015, ICC-01/04-02/06-512-Conf; Prosecution additional observations on conducting part of the trial *in situ*, 16 March 2015, ICC-01/04-02/06-516-Conf.

⁶ Recommendation, *supra* note 1, p. 14.

⁷ *Id.* para. 21.

⁸ *Id.* paras. 22-23.

case ought to be held in Bunia.⁹

6. Finally, the Chamber recalled that it is for the Presidency to engage in further cooperation consultations with the United Nations Organization Stabilization Mission in the DRC (“MONUSCO”) and the DRC.¹⁰ It noted that cooperation arrangements had not yet been finalised with those authorities but that the Registry had indicated that the proposal to hold part of the proceedings in the DRC had been met, in principle, with “agreement, [and] a positive reaction” from both the DRC and MONUSCO.¹¹
7. On the basis of the above analysis, the Chamber found that it was in the interests of justice to recommend to the Presidency, pursuant to rule 100(2) of the Rules, that the opening statements of the trial in the case be held in Bunia, DRC.¹²
8. On 21 April 2015, the Prosecution filed further submissions with the Presidency.¹³ The Prosecution submitted that holding the proceedings in Bunia [REDACTED].¹⁴ The Prosecution further submitted that [REDACTED]¹⁵ [REDACTED].¹⁶
9. On 29 May 2015, the Prosecution reiterated the concerns above and pointed to the volatile security situation, [REDACTED].¹⁷ The Prosecution further submitted that [REDACTED].¹⁸ It was also submitted that [REDACTED].¹⁹
10. On 10 June 2015, the Prosecution reiterated these concerns.²⁰
11. At the Status Conference held on 2 June 2015, the legal representatives of victims submitted to the Chamber that based on a survey of victims living in various villages

⁹ *Id.* para. 24.

¹⁰ *Id.* paras. 14, 26 (citing Prosecution Supplementary Submissions, ICC-01/04-02/06-457-Conf, *supra* note 5, para. 16).

¹¹ Recommendation, *supra* note 1, para. 26 (citing Second Report, ICC-01/04-02/06-438-Conf-Exp-AnxA, *supra* note 5, paras. 5-8).

¹² Recommendation, *supra* note 1, para. 23 and p. 14.

¹³ [REDACTED] ICC-01/04-02/06-565-Conf-Exp.

¹⁴ *Id.* para. 14.

¹⁵ *Id.* para. 18.

¹⁶ *Id.* paras. 18-19.

¹⁷ [REDACTED] ICC-01/04-02/06-618-Conf-Exp, paras. 15, 17-20, 24, 26-28.

¹⁸ *Id.* paras. 18-19.

¹⁹ *Id.* paras. 17, 26.

²⁰ [REDACTED] ICC-01/04-02/06-636-Conf-Exp. paras. 3-6, 9.

in the area, victims had expressed fear for their own security,²¹ fear of heightened ethnic tension²² and concern that the accused's return would remind them of the suffering and trauma experienced during the events in the case.²³

III. REPORTS BY THE REGISTRY

12. On 1 June 2015, during a joint meeting of the Presidency, the Chamber and the Registrar, the Registrar reported orally on the operational aspects of holding the proceedings in Bunia ("Report of 1 June"). The Registrar reported that the perception of the Court and its profile would benefit greatly from holding the opening statements in Bunia. He also reported that while an agreement with the DRC had not been finalised, the DRC remained supportive of holding part of the proceedings in Bunia. He reported further that a memorandum of understanding with the DRC and MONUSCO was in the process of being finalised. The Registrar indicated that certain logistical arrangements had been put in place, pending the final decision of the Presidency. He also stressed the importance of effective outreach to those affected by proceedings in Bunia. The Registrar reported that general security issues, particularly the security of victims and witnesses, remained a concern. The Registrar was asked by the Presidency to prepare a further report addressing these issues.

13. On 9 June 2015, upon request by the Presidency, the Registrar submitted a written report to the Presidency ("Report of 9 June").²⁴ The Registrar highlighted the willingness of MONUSCO and the DRC to cooperate and assist the Court in holding the proceedings in Bunia.²⁵ In addition, he reported that the Court was prepared from a logistical perspective to move the proceedings to Bunia and confirmed that suitable arrangements had been made for the detention location of the accused and the accommodation of the Court's elected officials and staff.²⁶

14. In contrast, the Registrar reported concerns by participating victims as to the increased instability and risk to their and their families' security as well as the

²¹ Status Conference held on 2 June 2015, ICC-01/04-02/06-T-20-CONF-ENG, p. 15, lines 4-15.

²² *Id.* p. 15 lines 22-25, p. 16, lines 8-13

²³ *Id.* p. 15 lines 17-21, p. 16, lines 1-2.

²⁴ Registry report on in situ, 2015/PRES/00189.

²⁵ *Id.* p. 8.

²⁶ *Id.* p. 5.

heightened risk for witnesses in Bunia.²⁷ The Registrar submitted that [REDACTED].²⁸ The Registrar reported that a number of the victims had expressed concerns to the legal representatives of victims that the probability of tensions between supporters and opponents of the accused would increase if proceedings were held in Bunia.²⁹ Moreover, the Registrar reported additional challenges regarding the risk of an unexpected increase in costs and a very narrow timeframe within which the outreach strategy would need to be implemented.³⁰

15. The Registrar noted the co-operative attitude of MONUSCO and the willingness of the DRC to assist with holding the proceedings in Bunia.³¹ However, in light of certain risks and challenges, such as the instability and risk to the victims, their families and witnesses, uncertainty over the final cost and the difficulties in implementing an outreach strategy, the Registrar submitted that the success of holding the hearings in situ could not be guaranteed.³²

IV. APPLICABLE LAW AND DETERMINATION BY THE PRESIDENCY

16. The Presidency notes paragraphs 1 and 3 of Article 3 and Article 62 of the Rome Statute (“Statute”) as well as Rule 100 of the Rules.

17. In deciding whether to move the place of the proceedings, the Presidency shall consider whether the interests of justice would be served by such a move, giving careful consideration to the following:

- a. the recommendation of the Chamber;
- b. the arguments of the parties, participants and Registry for and against holding proceedings away from the seat of the Court; and
- c. the correspondence between the Court and any State or international organisation in relation to moving the proceedings away from the seat of

²⁷ *Id.* p. 6-7.

²⁸ *Id.* p. 6.

²⁹ *Id.* p. 8.

³⁰ *Id.* p. 9.

³¹ *Id.* p. 8.

³² *Id.* p. 8-9.

the Court.³³

18. The Presidency shall also consider the following factors:

- a. security issues;
- b. the costs of holding proceedings outside The Hague;
- c. the potential impact upon victims and witnesses;
- d. the length and purpose of the proceedings to be held away from the seat of the Court;
- e. the potential impact on the perception of the Court; and
- f. the potential impact on other proceedings before the Court.³⁴

19. It is recalled that this decision of the Presidency, taken in consultation with the Chamber, concerns whether it is desirable and in the interests of justice to sit in Bunia.

20. With respect to security, the Presidency has considered the potential risks and whether those risks were acceptable or manageable, taking into account the paramount importance of ensuring the safety of victims and witnesses and Court's officials as well as the security of the local communities involved.³⁵ In assessing those risks, the Presidency took into account the concerns contained in the Chamber's recommendation,³⁶ the Prosecution's submissions,³⁷ the legal representatives of victims³⁸ and the Registrar's Reports of 1 and 9 June 2015, respectively. Moreover, as the Chamber has noted, the security situation in Bunia is "changeable" and may worsen.³⁹

21. On the issue of costs, the Presidency has considered whether the estimated costs of holding proceedings in Bunia were so unreasonable as to outweigh any potential

³³ See also Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, 26 August 2013, ICC-01/09-01/11-875-Anx, para. 11.

³⁴ *Id.* para. 12.

³⁵ *Id.* para. 13.

³⁶ Recommendation, *supra* note 1, para. 24.

³⁷ *Id.* para. 14 (citing Prosecution Supplementary Submissions, ICC-01/04-02/06-457-Conf, *supra* note 5, para. 13); ICC-01/04-02/06-565-Conf-Exp, *supra* note 13; ICC-01/04-02/06-618-Conf-Exp, *supra* note 17.

³⁸ Status Conference, *supra* note 21, ICC-01/04-02/06-T-20-CONF-ENG, pp. 15-16.

³⁹ Recommendation, *supra* note 1, para. 24, ICC-01/04-02/06-T-20-CONF-ENG, *supra* note 21, p. 15, lines 4-16.

benefits,⁴⁰ taking into account the overall budgetary resources of the Court as well as the difficulties in ascertaining the final costs of the operation.⁴¹ In this regard, the Presidency has noted the increasing costs associated with the change of place of the proceedings, which at the time of the Registry's submission of his Report of 9 June 2015 amounted to more than €600 000.⁴² The Registrar reported that "the final cost can only be calculated when the MONUSCO provides their final confirmation of costing",⁴³ further adding that this figure could rise unexpectedly.⁴⁴

22. The Presidency has considered whether the holding of the opening statements in Bunia would have an impact upon victims and witnesses and, if so, the nature and extent thereof.⁴⁵ The Presidency recalls that many victims were concerned that holding the proceedings in Bunia may compromise their security.⁴⁶ In particular, the Presidency has noted the Registrar's Report of 9 June 2015 that [REDACTED].⁴⁷ The Presidency has also considered the prospect that the accused's return would remind victims of their suffering and trauma, as expressed through the legal representatives of victims.⁴⁸

23. The Presidency also has considered whether the length and purpose of holding the opening statements in Bunia were in line with the Chamber's recommendation and commensurate with the projected costs and objective of the operation namely, bringing the proceedings of the Court closer to the affected communities and to where the alleged events occurred.⁴⁹ In particular, the Presidency has noted the Chamber's recommendation that the holding of opening statements in Bunia is very effective in achieving the purpose of bringing the work of the Court to those most affected by the events in the case. The Presidency has noted the Registry's report of 1 June 2015 that the logistics of holding the proceedings in Bunia safely may result in the affected communities having limited access to them. Moreover, the Presidency has noted the victims' concerns regarding the probability of tension between supporters and

⁴⁰ ICC-01/09-01/11-875-Anx, *supra* note 33, para. 13.

⁴¹ *Id.*

⁴² Registry report on in situ, *supra* note 24, Annex 6.

⁴³ Registry report on in situ, *supra* note 24, p. 6.

⁴⁴ *Id.* p. 9.

⁴⁵ ICC-01/09-01/11-875-Anx, *supra* note 33, para. 13.

⁴⁶ Status Conference, *supra* note 21, ICC-01/04-02/06-T-20-CONF-ENG p. 15, lines 4-15; ICC-01/04-02/06-618-Conf-Exp, *supra* note 17, para. 18, Registry report on in situ, *supra* note 24, p. 6.

⁴⁷ Registry report on in situ, *supra* note 24, p. 6.

⁴⁸ Status Conference, *supra* note 21, ICC-01/04-02/06-T-20-CONF-ENG, p. 15 lines 17-21, p. 16, lines 1-2.

⁴⁹ ICC-01/09-01/11-875-Anx, *supra* note 33, para. 13.

opponents of the accused, as reflected in the Registrar's report of 9 June;⁵⁰ and further concerns that holding proceedings in Bunia could increase the likelihood of reprisals against people in Bunia and would increase ethnic tension.⁵¹

24. On the potential impact on the perception of the Court, the question is whether public understanding of the Court and its profile would benefit from holding proceedings in Bunia.⁵² The Presidency has noted the Registrar's view, expressed in his Report of 1 June 2015, that in this respect, holding the opening statements in Bunia would be beneficial. However, the Presidency has also noted the Registrar's Report of 9 June 2015 in which he has expressed his concern that should holding the proceedings in Bunia result in victims and witnesses withdrawing from the proceedings, the public image of the Court would be negatively affected.⁵³
25. Due to the short length of the proceedings contemplated in Bunia, the Presidency has not deemed it necessary to consider the potential impact on other proceedings currently before the Court.⁵⁴
26. Before weighing the abovementioned factors, the Presidency notes that holding proceedings away from the seat of the Court may, in principle, contribute to a better perception of the Court and bring the proceedings closer to the affected communities. The Presidency also notes the excellent co-operation and willingness of both the DRC and MONUSCO to facilitate the holding of the proceedings in Bunia. However, the Presidency notes that the benefits of holding such proceedings in situ must be appropriately weighed against all abovementioned factors. In the particular circumstances at hand, the Presidency notes the increased cost of holding the proceedings in Bunia and the possibility that this may increase even further. Additionally, the Presidency notes that the affected communities will have limited access to the proceedings, given their length and nature. Most importantly, the

⁵⁰ Registry report on in situ, *supra* note 24, p. 8.

⁵¹ ICC-01/04-02/06-618-Conf-Exp, *supra* note 17, para. 18; ICC-01/04-02/06-T-20-CONF-ENG, *supra* note 21, p. 15 lines 22-25, p. 16 lines 8-13.

⁵² ICC-01/09-01/11-875-Anx, *supra* note 33, para. 13.

⁵³ Registry report on in situ, *supra* note 24, p. 6.

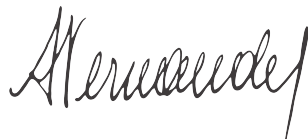
⁵⁴ ICC-01/09-01/11-875-Anx, *supra* note 33, para. 13. Depending on the envisaged length of the proceedings, the Presidency may consider the extent to which the Court could conduct and support proceedings taking place simultaneously at the seat of the Court in The Hague, the extent of any potential disruption to those proceedings caused by holding proceedings away from The Hague and the extent to which such disruption was acceptable or manageable.

overriding concern for the Presidency remains the security of the victims and their families, the witnesses and the broader affected communities. The factual circumstances, as they appear at this stage, exhibit a volatile and to a large extent unpredictable situation in Bunia. Despite the security measures that are envisaged to be put in place, concerns remain as to whether they would be sufficient to counter security risks, including risks of reprisals and the ignition of ethnic tension. Furthermore, the Presidency is mindful of concerns expressed by the victims that the accused's return would remind them of the suffering and trauma. The potential benefits of holding proceedings in Bunia are, in view of the Presidency, outweighed by these risks.

V. CONCLUSION

27. In light of the foregoing, the opening statements in the case shall be held at the seat of the Court at The Hague.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
President

Dated this 15 June 2015

At The Hague, The Netherlands