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No : **ICC-01/05-01/08**

Date: **26/02/2010**

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR
*v. Jean-Pierre Bemba Gombo***

Public Document,

Defence Observations on the Experts Proposed by the Prosecution

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

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**Unrepresented Applicants
 (Participation/Reparation)**

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Defence Support Section

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Detention Section

Victims Participation and Reparations Section **Other**

Procedural Background

1. On 28 January 2010, the Prosecution filed its "*Request for Approval of its Proposed Experts and Joint Instructions by the Prosecution and Legal Representatives*"¹. In this request, the Prosecution proposed the following joint experts:
 - i) Lieutenant-General Daniel Opande as a military expert;
 - ii) Dr Binaifer Nowrojee as an expert on gender crime and sexual violence as a tool of war, and;
 - iii) Dr Adeyinka M. Akinsulure-Smith as an expert on gender crime focussing on post-traumatic stress disorder.

2. On 12 February 2010, Trial Chamber III ordered the Prosecution to notify the Defence with the name and the curriculum vitae of the socio-linguistic expert it proposed to instruct as a joint expert witness. Trial Chamber III also ordered the Defence to submit its observations on all the experts by 26 February 2010.²

3. On 19 February 2010, by way of Email,³ the Prosecution informed the Defence that it had identified Professor William Samarin as a socio-linguistic expert.

Submission

4. At the outset, the Defence respectfully observes that with the possible exception of military expertise, none of the other fields of expertise identified by the Prosecution are, in its opinion, of relevance to the case. For this reason, the Defence submits that the question of jointly instructing experts is, to a large extent, moot.

¹ ICC-01/05-01/08-681

² ICC-01/05-01/08-695

³ Email from Massimo Scaliotti sent at 15:35.

5. Nevertheless, even if the Defence deemed the four proposed experts to be of relevance, it would object to their being provided with joint instructions by virtue of the fact that they do not currently appear on the list of experts maintained by the Registrar pursuant to Regulation 44 of the Regulations of the Court:

“1. The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.

2. The Chamber may direct the joint instruction of an expert by the participants.

3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert.

4. The Chamber may proprio motu instruct an expert.

5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.”

6. In the Defence’s opinion, the correct interpretation of Regulation 44 requires that a “jointly instructed” expert be selected from the objectively constituted list of recognised experts maintained by the Registrar. The purpose of such a list is to provide the Court and the Parties with ready access to corpus of independent experts who are neither partial to the Prosecution nor to the Defence. In other words, the prior uncontested inclusion of an expert on the

Registrar's list ought to be an essential prerequisite for his eligibility to receive joint instructions.⁴

7. The Defence notes, furthermore, that the Registrar retains the discretion to refuse the admission of a candidate to the list approved experts regardless of the Prosecution's desire to have him testify at trial. This discretion is subject to review by the Presidency of the Court at the motion of the expert and not at the instigation of the party desiring to call him. To date, the Defence has not been informed that the Registrar has admitted any of the Prosecution's proposed experts to the said list. Accordingly, a Defence response to the Prosecution's proposed experts, at the present point in time, is premature.

8. Notwithstanding the aforementioned, the Defence opposes the provision of joint instructions to the experts proposed by the Prosecution for the substantive reasons which will be set out below.

(i) *Lieutenant-General Daniel Opande*

9. The Defence registers its strong objection to admitting expert evidence on the issue of command and control such as was allegedly exercised in the MLC. Conclusions on this issue will be drawn from the facts and, as such, are within the exclusive realm of the Trial Chamber as arbiter of fact. Such conclusions cannot be based on the opinion of an expert.⁵

10. In any event, it is not clear to the Defence why the Prosecution believes that Lieutenant-General Daniel Opande, as opposed to any other military official, meets the sought-after expertise.

⁴ The Defence is aware of the decision of Trial Chamber I on the procedures to be adopted for instructing expert witnesses (ICC-01/04-01/06-1069) and its recommendation at para. 25 that all experts seek admission to the list maintained by the Registrar. This does not, however, derogate from the Defence argument that in so far as "joint instructions" are concerned – proposed experts should have obtained prior admission to the list..

⁵ *Prosecutor v. Kordic and Cerkez*, 28 January 2000, Transcripts, at 13289 (ICTY).

11. For both of the above reasons, the Defence respectfully objects to the admissibility of the proposed testimony of Lieutenant-General Daniel Opande.

(ii) *Dr Binaifer Nowrojee*

12. The theory surrounding the use of sexual violence as a tool of war is, with respect, not a recognised expertise and, for this reason alone, the proposed testimony should be deemed inadmissible.

13. Furthermore, to allow “expert” testimony on “the perpetrators’ possible motivations” – as proposed by the Prosecution - would be permitting the introduction of pure speculation of a highly prejudicial nature to the Accused.

14. The Defence is mindful of the similarly speculative evidence which Dr. Binaifer Nowrojee was requested to provide in the *Karemera*⁶ case at the International Criminal Tribunal for Rwanda. In this case, it was held that the question as to whether sexual violence was a foreseeable consequence of war time delinquency is a factual matter appropriately addressed by way of assessing the credibility of the witnesses as to fact. The Prosecution’s application to call Dr. Binaifer Nowrojee in the *Karmera* case was accordingly rejected.

15. In the present case, the Defence submits that to allow Dr. Binaifer Nowrojee to speculate on the consequences of soldiers’ conduct or their motivations for acting as they did – if not inadmissible - would be usurping the role of the Chamber as trier of fact.

⁶ *Prosecutor v. Karemera*, Decision on Prosecution Prospective Experts Alison Des Forges, Andre Guichaoua and Binaifer Nowrojee, 25 October 2007

16. The Defence does not deny that on some occasions Dr. Nowrojee has, indeed, been permitted to testify before the International Criminal Tribunals. Nevertheless, her expertise is, as a rule, associated with a prosecutorial standpoint. As such, even if the Defence was to agree that there exists a genuine need for such testimony – it would still object to the provision of joint instructions given a perceived lack of neutrality. By way of clarification, the Defence refers the learned Trial Chamber to certain remarks attributed to Dr. Binaifer Nowrojee where she advocated for an even more stringent approach to the prosecution of gender crimes than that adopted by the Prosecution:

“Observers say that failing to prosecute sexual crimes, when evidence exists that they have been committed, sends a damaging message.

“This is dangerous, because it leaves out victims who feel unacknowledged for the crimes they suffered, and gives the message that sexual violence crimes are not crimes,” said Binaifer Nowrojee, director of the Open Society Initiative for East Africa.

She accused ICC prosecutors of taking a narrow approach to administering international justice, by focusing on individual crimes in order to secure a conviction, rather than prosecuting a wider range of crimes and establishing a broader narrative of everything that happened.”⁷

17. The Defence respectfully submits that the above-cited passage indicates that Dr. Binaifer Nowrojee has a particular agenda which would render her unsuitable for the task of assisting the Chamber in a neutral and impartial manner.

⁷ <http://www.ictj.org/en/news/coverage/article/2075.html>.

18. For all the above reasons, the Defence respectfully objects to admissibility of the proposed testimony of Dr. Binaifer Nowrojee.

(iii) *Dr. Adeyinka M. Akinsulure Smith*

19. The Defence opposes the Prosecution intention to call expert evidence on the issue of psychological trauma at the evidential stage of the trial - especially for the purpose of showing a link between post-traumatic stress disorder and memory deficiency.⁸ The reasons for a victim-witnesses's faulty recollection of events may be manifold and are best explained by the victim-witness himself on the on the witness-stand. At the end of the day, it is for the Court to decide whether the reasons given for a deficient memory are convincing and not for an expert to provide justification which is not supported by the testimony of the witness.

20. Consequently, the Defence respectfully objects to the admissibility of the proposed testimony of Dr. Adeyinka M. Akinsulure Smith.

(iv) *Professor William Samarin*

21. The Defence acknowledges that Professor Samarin's curriculum vitae speaks to his expertise in the field of linguistics. Nevertheless, with this expert, the Prosecution is attempting to remedy the deficiencies in its case caused by its own weak investigation.

22. For example, the question of whether citizens of the Central African Republic are capable of distinguishing between various languages spoken in the region is surely a matter which differs from individual to individual. To

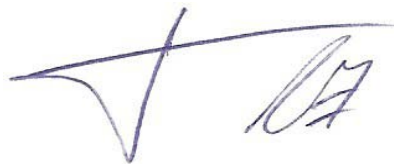
⁸ The Defence notes that there are divergent opinions concerning the impact of PTSD on the reliability of the witness's memory. For example, in *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998 at para 103, the Prosecution expert argued that PTSD could enhance memory whereas the defence expert testified that PTS (and related therapy) could impede memory and give rise to false recollections.

this end, such a question should be put to the witness himself and the value of his answer, thereafter, be assessed by the Chamber. It is not an issue on which an expert ought to be required to speculate – especially when language as an identifying feature of the crime-base perpetrators is, as it is in the present case, such a crucial matter.

23. In light of the aforementioned, the Defence objects to the admissibility of the proposed evidence of Professor William Samarin.

Relief Sought

24. In light of all the aforementioned, the Defence is not able to agree to any of the Prosecution's proposed experts receiving joint instructions and objects to their testifying at trial.

A handwritten signature in blue ink, consisting of a stylized 'A' followed by a series of loops and a final flourish.

Aimé Kilolo Musamba
Associate Counsel

Done at The Hague, the Netherlands

26 February 2010