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Date: **5 March 2015**

**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**

**Victims' written submissions on the issues raised during the Status Conference  
held on 17 February 2015**

**Source:** Office of Public Counsel for Victims

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

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**Other**

## I. PROCEDURAL BACKGROUND

1. On 17 February 2015, the Presiding Judge of Trial Chamber VI (the “Chamber”) instructed the Common Legal Representatives (the “Legal Representatives”) to file written submissions addressing three matters raised during the Status Conference,<sup>1</sup> namely: (1) the Legal Representatives’ access to disclosed evidence ; (2) the scope of victims’ involvement in the selection and instruction of expert witnesses at trial, and (3) the possibility for victims to submit observations on *inter partes* agreements regarding facts in accordance with rule 69 of the Rules of Procedure and Evidence (the “Rules”).

2. In accordance with the Chamber’s oral instructions, the Legal Representatives hereby submit these joint observations on said three issues.

## II. SUBMISSIONS

### *Access to evidence disclosed by the Prosecution*

3. During the Status conference held on 17 February 2015, the Legal Representatives raised the issue of access to confidential filings and items of evidence disclosed by the Prosecution *inter partes*.<sup>2</sup> This matter has since been resolved and therefore, there is no need for further action at this stage.<sup>3</sup>

### *Joint instruction to witness experts*

4. During the Status conference held on 17 February 2015, the Prosecution indicated that the parties have “*met to discuss the possibility of jointly instructing*

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<sup>1</sup> See the transcript of the Status Conference held on 17 February 2015, No. ICC-01/04-02/06-T-18-CONF-ENG, p. 23, lines 4 to 9.

<sup>2</sup> *Idem*, p. 17, lines 3 to 24.

<sup>3</sup> See the email addressed to the Chamber on 24 May 2015 by the Legal Representatives.

*experts*", but "*were unable to reach final conclusions*".<sup>4</sup> Both parties have expressed their willingness to conduct further consultations and a meeting has been scheduled for 16 March 2015 to discuss the way forward with the instruction process.

5. The Legal Representatives note that they have not been involved in any of these consultations. The Legal Representatives therefore seek the Chamber's permission to take part in the joint instruction and selection process of experts, to the extent that the interests of the participating victims are affected.

6. In this regard, regulation 44 of the Regulations of the Court clearly establishes that the ability to instruct and select expert witnesses is not limited to the parties. The notion of "joint instructions", as contemplated in regulation 44(2) of the Regulation of the Court, specifically refers to all "participants" in the proceedings, including the victims. This reading of regulation 44 also finds support in the jurisprudence of the Court. For instance, in the two Kenyan cases, Trial Chamber V held that "[t]o the extent that the victims are participating on an issue or as regards evidence which is to be the subject of expert evidence, they are to be given an opportunity to contribute to the expert's instruction".<sup>5</sup> Likewise, in the *Bemba* case, the legal representatives of victims had the opportunity to contribute, jointly with the Office of the Prosecutor, to the selection of three expert witnesses.<sup>6</sup> Joint selection took place after both the Prosecution and the legal representatives of victims undertook a review of the identity and profile of each expert.<sup>7</sup> In the same case, the legal representatives of victims were authorised to provide separate instructions.<sup>8</sup>

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<sup>4</sup> See the transcript of the Status Conference held on 17 February 2015, *supra* note 1, p. 21, lines 2 to 10.

<sup>5</sup> See the "Decision on the schedule leading up to trial" (Trial Chamber V), No. ICC-01/09-02/11-451, 9 July 2012, note 29 and the "Decision on the schedule leading up to trial" (Trial Chamber V), No. ICC-01/09-01/11-440, 9 July 2012, note 9.

<sup>6</sup> See the "Prosecution's Request for Approval of its Proposed Experts and Joint Instructions by the Prosecution and Legal Representatives", No. ICC-01/05-01/08-681, 28 January 2010.

<sup>7</sup> *Idem*.

<sup>8</sup> See the "Decision on the procedures to be adopted for instructing expert witnesses" (Trial Chamber III), No. ICC-01/05-01/08-695, 12 February 2010, p. 8; See also "Decision on the procedures to be adopted for instructing expert witnesses" (Trial Chamber I), No. ICC-01/04-01/06-1069, 10 December 2007.

7. This interpretation of regulation 44 of the Regulations of the Court is also consistent with the role of the victims in criminal proceedings before the Court, which includes the right to assist the judges in determining the truth. Indeed, besides the interest in receiving reparations,<sup>9</sup> one of the core interests of victims in the proceedings is to effectively exercise their right to truth and justice. These rights having been recognised in international human rights law,<sup>10</sup> by the doctrine<sup>11</sup> and by the relevant jurisprudence of the Court.<sup>12</sup>

8. In particular, Trial Chamber II held that

*“[a]s a matter of general principle, [the participation of victims through their legal representative] must have as its main aim the ascertainment of the truth. The victims are not parties to the trial and certainly have no role to support the case of the Prosecution. Nevertheless, their participation may be an important factor in helping the Chamber to*

<sup>9</sup> In this sense, see AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, Tenus, Bogota, 2008, notes 107-112. See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly of the United Nations in its resolution No. 60/147 in the 64<sup>th</sup> plenary meeting, UN Doc. A/RES/60/147, 16 December 2005, para. 21.

<sup>10</sup> See IACHR, *La Cantuta v. Peru*, Judgment of 29 November 2006, Series C, No. 162, para. 222 ; *Vargas-Areco v. Paraguay*, Judgment of 26 September 2006, Series C, No. 155, paras. 153; *Almohacid-Arellano and al v. Chile*, Judgment of 26 September 2006, Series C, No. 154, para. 148; *Comunidad Monviana v. Suriname*, Judgment of 15 June 2005, Series C, No. 124, para. 204 ; and *Velasquez-Rodriguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 7, paras. 162-166 and 174. See also ECHR, *Hugh Jordan v. UK*, Application No. 24746/94, 4 May 2001, paras. 16, 23, 157 and 160; *Selmouni v. France*, Application No. 25803/94, 28 July 1999, para. 79; *Kurt v. Turkey*, Application No. 24276/94, 25 May 1998, para. 140; *Selcuk and Asker v. Turkey*, Application No. 23184/94, 24 April 1998, para. 96; *Aydin v. Turkey*, Application No. 23178/94, 25 September 1997, para. 103; and *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 98.

<sup>11</sup> See DONAT-CATTIN (D.), “Article 68”, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, Nomos, 1999, pp. 876-877; NAQVI (Y.), “The Right to the Truth in International Law Fact or Fiction 9”, in (2006) *ICRC International Review*, No. 88, pp. 267-268; MENDEZ (J.), “The Right to Truth”, in JOYNER (Ch.) (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights’ Proceedings of the Siracuse Conference*, 17-21 September 1998, Eres, Toulouse, 1998, pp. 257; and AMBOS (K.), “El Marco Jurídico de la Justicia de Transición”, *op. cit. supra* note 9, pp. 42-44.

<sup>12</sup> See, for instance, the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, paras. 31-44.

*better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.”<sup>13</sup>*

9. Moreover, “[t]he object and purpose of article 68(3) of the Statute and rules 91 and 92 of the Rules is to provide victims with a meaningful role in the criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings.”<sup>14</sup> Accordingly, the participation of victims in the proceedings before this Court is meant to be “effective and significant as opposed to purely symbolic.”<sup>15</sup>

10. Effective participation of victims at trial is therefore necessary in order to give effect to their right to truth and justice, and their right to obtain reparations.<sup>16</sup> Such participation can only be deemed meaningful, rather than purely symbolic, if victims are entitled to contribute positively to the evidentiary process, which comprises the selection and instruction of expert witnesses.

11. In the context of the present case, there are several substantive aspects which may require expert evidence. The majority of these issues are of direct relevance to the interests of the victims. Possible areas of expertise may include, for instance, experience in the fields of child soldiers, sexual violence, gender-based crimes and psychological trauma. Moreover, the jurisprudence of the Court also recognised the interest of victims to contribute to instructions for an expert on background and context of a case.<sup>17</sup>

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<sup>13</sup> See the “Corrigendum Directions for the conduct of the proceedings and testimony in accordance with rule 140” (Trial Chamber II), No. ICC-01/04-01/07-1665-Corr, 1<sup>st</sup> December 2009, paras. 82-91.

<sup>14</sup> See the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”, *supra* note 12, para. 157.

<sup>15</sup> See the “Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para 97; the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-01/11-460, 3 October 2012, para. 10; the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012, para. 9; the “Decision on common legal representation of victims for the purpose of trial” (Trial Chamber III), No. ICC-01/05-01/08-1005, 1<sup>st</sup> December 2010 (dated 10 November 2010), para. 9(a).

<sup>16</sup> See DONAT-CATTIN (D.), *op. cit. supra* note 11, pp. 1279, 1290 and 1291.

<sup>17</sup> See, for instance, the transcript of the Status Conference held on 25 November 2008, No. ICC-01/04-01/06-T-99-ENG, p. 18, lines 12 to 16.

12. It is therefore essential that victims be involved in these consultations and be informed, as soon as practicable, of the details and profiles of the proposed experts. Such a course of action will save costs and time since it will facilitate agreement on the joint instruction of experts. Even if an agreement cannot be reached, the involvement of the victims at an early stage of the consultations will assist the Chamber in identifying the areas and causes of disagreement.

*Agreements pursuant to rule 69 of the Rules regarding agreed facts*

13. The Legal Representatives seek the Chamber's leave to submit observations on any agreement pursuant to rule 69 of the Rules before a final decision is made by the Chamber in this respect.

14. The need to take into account the interests of the victims when considering agreements between the parties in relation to facts or evidence cannot be overstated. This need is reflected in rule 69 of the Rules, which provides that the "*Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interest of justice, in particular the interests of the victims*".<sup>18</sup> This provision clearly suggests that *inter partes* agreements on facts or evidence should not cause prejudice to the interests of the victims.

15. This reading of rule 69 of the Rules is in line with the jurisprudence of the Court. In the *Lubanga* case, the Trial Chamber ordered the parties to "*prepare a draft schedule of agreed facts*" and indicated that the schedule needed to "*be served on participating victims*".<sup>19</sup> Following the notification of the victims' legal representatives, victims were authorised to provide observations on the agreed facts within a specific

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<sup>18</sup> Emphasis added.

<sup>19</sup> See the "Decision on agreements between the parties" (Trial Chamber I), No. ICC-01/04-01/06-1179, 20 February 2008, para. 11.

timeframe.<sup>20</sup> The Legal Representatives submit that the approach taken by Trial Chamber I is most consistent with the Court's legal framework. First, it enables the victims to understand the scope of the agreement so that they can foresee its impact on their interests and on the case as a whole and therefore enable them to participate meaningfully in the proceedings. Second, the notification of the agreement to the victims prior to any decision on the merits by the Chamber will further enhance the victims' role at trial. Indeed, this procedure allows victims, through their legal representatives, to raise potentially crucial matters regarding the factual allegations put forward before the Court.

16. Therefore, in the event that the parties reach an agreement pursuant rule 69 of the Rules, the Legal Representatives seek the Chamber's leave to file observations before a final decision is reached regarding the agreed facts.

Respectfully submitted,



Dmytro Suprun  
Common Legal Representative of the  
Victims of the Attacks



Sarah Pellet  
Common Legal Representative of the  
Child soldiers

Dated this 5<sup>th</sup> Day of March 2015

At The Hague, The Netherlands

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<sup>20</sup> *Idem*, para. 13.