

**Cour
Pénale
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**International
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Court**

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

Date: **27 March 2015**

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

Prosecution's Response to the "Victims' written submissions on the issues raised during the Status Conference held on 17 February 2015"

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Common Legal Representatives (“Legal Representatives”) seek the permission of Trial Chamber VI (“Chamber”) to (i) take part in the joint instruction and selection process of experts to the extent that the interests of the participating victims are affected (“Legal Representatives’ first request”);¹ and (ii) submit observations on any agreement reached by the Parties pursuant to rule 69 of the Rules of Procedure and Evidence (“Rules”) before the Chamber reaches a final decision in this respect (“Legal Representatives’ second request”).²
2. The Chamber granted the Legal Representatives’ second request in the Chamber’s 13 March 2015 Order which permits the Legal Representatives to make observations on any proposed agreed facts by 11 May 2015.³ Therefore, the Office of the Prosecutor (“Prosecution”) does not respond to the Legal Representatives’ second request.
3. The Prosecution opposes the Legal Representatives’ first request. The Legal Representatives should be informed of the outcome of any joint instruction and selection of experts, and all relevant material emanating from such experts should be provided to them. Such an approach would be in line with the Legal Representatives’ request as previously articulated,⁴ *i.e.* to be informed of the results of consultations between the Prosecution and the Defence.
4. The Prosecution is amenable to receiving the Legal representatives’ views on any experts the Prosecution and the Defence intend to jointly instruct, upon showing that their personal interests are affected by the subject area of expertise, as long as it is the Parties that ultimately jointly select and instruct these experts. Given the

¹ ICC-01/04-02/06-498, para.5 (“Victims’ written submissions”).

² Victims’ written submissions, paras.13, 16.

³ ICC-01/04-02/06-507, para.14(ii).

⁴ See ICC-01/04-02/06-T-18-CONF-ENG, p.21, lns.13-16 (open session).

limited time left before the deadline for disclosure of expert reports, however, it may not be possible to jointly instruct experts at all in this case.

Statement of Facts

5. On 14 August 2014, the Legal Representatives⁵ and the Prosecution⁶ respectively filed submissions on the provisional agenda for the 20 August 2014 Status Conference. With regard to the joint instruction and selection of experts, the Prosecution noted that it “will engage in discussions with new Defence counsel and will inform the Chamber of the outcome.”⁷ The Legal Representatives submitted that “victims should be invited to take part in the consultations leading to the selection of expert witnesses and, accordingly, be informed, as soon as practicable, of the details and the profiles the proposed experts.”⁸
6. During the 11 September 2014 Status Conference, the Prosecution noted that its position in relation to the Legal Representatives’ participation in joint instruction was that “the parties are the entities that jointly instruct experts. Nonetheless, the legal representatives can also submit views on what those instructions should be.”⁹ The Prosecution also noted that “[i]n the Lubanga case, when court witnesses were called, these were the only witnesses that were -- for whom there were any input by the [participants] for instruction. The two parties and the participants were permitted to make observations. The Chamber ultimately decided what the instructions would be [...] the Prosecution is open to getting the views of the legal representatives, but the joint instruction would be done through the parties.”¹⁰

⁵ ICC-01/04-02/06-351 (“Legal Representatives’ 14 August 2014 submissions”).

⁶ ICC-01/04-02/06-352 (“Prosecution’s 14 August 2014 submissions”).

⁷ Prosecution’s 14 August 2014 submissions, para.35.

⁸ Legal Representatives’ 14 August 2014 submissions, paras.41-44.

⁹ ICC-01/04-02/06-T-13-ENG ET, p.41, lns.12-14 (open session).

¹⁰ ICC-01/04-02/06-T-13-ENG ET, p.41, lns.15-20 (open session).

7. During the 17 February 2015 Status Conference, the Prosecution informed the Chamber that the Prosecution and Defence met to discuss the possibility of jointly instructing experts but were unable to reach final conclusions and agreed to meet again on 16 March 2015 with a view to determining whether joint instructions would be possible.¹¹ The Legal Representatives noted that they “were not involved in the process of designating legal witnesses” and that they “however, wish at least to be informed of the results of the consultations between the OTP and the Defence”.¹²
8. The Presiding Judge of the Chamber instructed the Legal Representatives to file written submissions addressing, *inter alia*: (i) the scope of victims’ involvement in the selection and instruction of expert witnesses at trial, and (ii) the possibility for victims to submit observations on *inter partes* agreements regarding facts in accordance with rule 69 of the Rules.¹³
9. On 5 March 2015, the Legal Representatives filed their written submissions¹⁴ pursuant to the Chamber’s order, and on 20 March 2015 the Defence filed their response to these submissions.¹⁵

Prosecution’s Submissions

Legal Representatives’ first request

10. The Prosecution opposes the Legal Representatives’ request as set out in the Victims’ written submissions. The Legal Representatives rely on regulation 44(2) of the Regulations of the Court to claim that “the ability to instruct and select

¹¹ ICC-01/04-02/06-T-18-CONF-ENG, p.21, lns.2-5 (open session). On 17 March 2015, the Prosecution provided the Defence with a list of potential experts according to area of expertise.

¹² ICC-01/04-02/06-T-18-CONF-ENG, p.21, lns.13-16 (open session).

¹³ ICC-01/04-02/06-T-18-CONF-ENG.

¹⁴ ICC-01/04-02/06-498.

¹⁵ ICC-01/04-02/06-528.

expert witnesses is not limited to the parties.”¹⁶ Regulation 44(2) states, “[t]he Chamber may direct the joint instruction of an expert by the participants.” To date, the Chamber has not issued any such direction in the instant case. Therefore, the Parties have carried out their discussions without the Legal Representatives. In view of the 17 April 2015 deadline set by the Chamber for the submission of expert reports,¹⁷ it is unrealistic, at this stage, to allow the Legal Representatives to participate in the selection and instruction of experts on equal footing to the Parties.

11. Further, it is clear that regulation 44(2) does not create a right of expert instruction and selection, as implied by the Legal Representatives. Rather regulation 44(2) provides the Chamber with the discretionary ability to order participants to jointly instruct experts. The Chamber must apply this discretion in light of the relevant statutory provisions limiting victim participation to issues affecting the personal interests of the victims, on the one hand, and those conferring solely to the parties the right to autonomously present evidence, on the other.

12. In this regard, it is important to recall that the Appeals Chamber has stated that “participating victims are not parties to the proceedings”,¹⁸ and that victims do not have an unfettered right to lead or challenge evidence - they are required to demonstrate why their interests are affected by the evidence or issue and it is then up to the Chamber to decide whether or not to allow such participation.¹⁹ Similarly, if the victims wish to have certain evidence produced in the courtroom they must satisfy a Trial Chamber that such evidence is necessary for the determination of the truth within the terms of article 69(3) of the Rome Statute, in which case the *Chamber* will order its submission.²⁰

¹⁶ Victims’ written submissions, para.6.

¹⁷ ICC-01/04-02/06-382-Corr, para.9(e).

¹⁸ ICC-01/04-01/07-2288, para.39.

¹⁹ ICC-01/04-01/06-1432, para.99.

²⁰ ICC-01/04-01/07-1665-Corr, paras.46-47.

13. To grant the Legal Representatives' request at this stage would circumvent the established procedure which victims are required to follow before they are allowed to have evidence presented.
14. With regard to the approach in the two *Kenya* cases, the footnote cited by the Legal Representatives²¹ does state 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".²² However, the corresponding paragraph clearly refers to an agreement on the joint instruction of experts between the Parties: "[t]he prosecution and the defence for both accused are to liaise in order to discuss the joint instruction of experts".²³
15. Therefore, in the *Kenya* cases a distinction was still drawn between the Parties, who were ordered to liaise to discuss the joint instruction of experts, and the victims, who were to be given "an opportunity to contribute to the expert's instruction". The manner in which the victims were to contribute in this regard is not clear.
16. In *Lubanga*, participants were provided with the opportunity of contributing to the joint instructions, or to file separate instructions, "[i]f a participant has been given leave to participate in the trial as regards a particular issue or area of evidence which is to be the subject of expert evidence".²⁴ In the present case, no participant has yet been given leave to participate in the trial as regards any particular issue or area of evidence.

²¹ Victims' written submissions, para.6, fn.5.

²² ICC-01/09-02/11-451, fn.29 ("*Kenyatta* Decision") and ICC-01/09-01/11-440, fn.9 ("*Ruto and Sang* Decision").

²³ *Kenyatta* Decision, para.17 ; *Ruto and Sang* Decision, para.12.

²⁴ *Lubanga*, ICC-01/04-01/06-1069, para.18.

17. Although the Prosecution opposes the Legal Representatives' request to take part in the joint instruction and selection process of experts, the Prosecution does not oppose the Legal Representatives' request as previously articulated, *i.e.* to be informed of the results of consultations between the Prosecution and the Defence.
18. The Legal Representatives should be informed of the outcome of any joint instruction and selection of experts, and all relevant material emanating from such experts should be provided to them. Once this takes place, the Legal Representatives may seek the Chamber's leave to ask the experts questions when they appear as witnesses to the extent that the interests of the participating victims are affected by a given expert's research and/or testimony.
19. In this way, the victims' participation will still be meaningful and they will still be contributing positively to the evidentiary process under the discretion and supervision of the Chamber.
20. As the Prosecution has also previously noted, although it should be for the Parties (or the Chamber) to jointly instruct experts, the Prosecution is amenable to receiving the Legal Representatives' views on joint instructions to the experts.²⁵ In the present case, there is very little time left before the expert reports are due. Without an extension of the time to provide expert reports, it may not be realistic to expect that the joint instruction of experts will be possible.
21. Should the Chamber allow the Legal Representatives to participate in the joint instruction and selection process of experts, the Prosecution submits that the Legal Representatives' contribution to the instructions should not impact upon questions as to the guilt or innocence of the Accused.

²⁵ ICC-01/04-02/06-T-13-ENG ET, p.41, lns.12-20 (open session).

Conclusion

22. Based on the foregoing, the Prosecution asks that the Chamber reject the Legal Representatives' first request.



Fatou Bensouda
Prosecutor

Dated this 27th day of March 2015
At The Hague, The Netherlands