

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-02/06**  
Date: **21 February 2017**

**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**

**Public redacted version of “Prosecution’s response to the ‘Confidential Redacted Version of Request by the Common Legal Representative of the Victims of the Attacks for leave to present evidence and victims’ views and concerns’ – ICC-01/04-02/06-1739-Conf-Red”, 3 February 2017, ICC-01/04-02/06-1772-Conf**

**Source:** Office of the Prosecutor

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

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## Introduction

1. The Prosecution supports the presentation of the views and concerns of Victims a/01243/13, a/20126/14, a/30169/15, and a/20018/14 *via* video-link, as those victims meet the requirements of article 68(3) of the Rome Statute.<sup>1</sup> The Prosecution notes that the expected views and concerns likely reflect those of a large number of participating victims.

2. The Prosecution recalls the findings of the Appeals Chamber that “[t]he right to lead evidence pertaining to the guilt or innocence of the accused [...] lies primarily with the parties, namely, the Prosecutor and the Defence”.<sup>2</sup> While recognising the possibility for victims to present evidence, the Appeals Chamber found that this was “grounded in the Trial Chamber’s authority to request evidence necessary for the determination of the truth” and therefore delimited by the requirement of articles 68(3) and 69(3) of the Statute.<sup>3</sup> Thus, victims enjoy a right to petition the Chamber to call evidence under the authority afforded to it by article 69 (3). They do not, however, have an entitlement to directly adduce evidence in proceedings before the Court.

3. The Prosecution does not oppose the testimony of Victims a/01635/13 (*via video-link*), a/30012/15, a/30365/15, a/30286/15, and a/00256/13, whose expected evidence could assist the Chamber in its determination of the truth pursuant to article 69(3); and who fulfil the requirements of article 68(3) demanding that their personal interest be affected and the rights of the accused not prejudiced. The non-participating victim (“CLR2-1”) could be called by the Chamber, in accordance with articles 64(6)(b),(d) and 69(3) of the Statute.

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<sup>1</sup> (“Statute”)

<sup>2</sup> ICC-01/04-01/06-1432, paras. 3, 93; ICC-01/04-01/06-2288, para. 47.

<sup>3</sup> ICC-01/04-01/06-2288, para. 3, 40, 48; see also: ICC-01/04-01/06-1432, para. 98.

4. The expected evidence to be provided by Victims a/00045/13, and a/30287/15 does not appear to be of immediate assistance to the Chamber's determination of the truth, as the expected evidence may be cumulative of Prosecution witness evidence.

### **Confidentiality**

5. This filing is classified as "Confidential" pursuant to regulation 23*bis*(2) of the Regulations of the Court, since it responds to a confidential submission.

### **Procedural History**

6. On 2 June 2015, the Chamber indicated that the Legal Representatives of Victims ("LRV") were to "file any request for leave to present evidence no later than two days after the Prosecution concluded its presentation of evidence".<sup>4</sup>

7. On 19 October 2016, the Chamber directed the LRVs to indicate by 16 December 2016 whether "they anticipate bringing a request to present evidence and/or for the views and concerns of victims to be presented to the Chamber, and the likely scope of any such request".<sup>5</sup>

8. On 16 December 2016, the LRV for former child soldiers indicated that she did not anticipate making such a request.<sup>6</sup> The LRV for victims of the attacks notified the Chamber, in an *ex parte* motion, of its intention to request that [REDACTED].<sup>7</sup>

9. On 11 January 2017, the Chamber modified its original deadline and required the LRVs to file any such request no later than 23 January 2017, together with a summary of the expected evidence and/or views and concerns, an estimate of the time necessary for examination and /or presentation, and the modalities of the

<sup>4</sup> ICC-01/04-02/06-619, para. 69.

<sup>5</sup> ICC-01/04-02/06-1588-Corr, para. 9.

<sup>6</sup> E-mail from Legal Representative for former child soldiers to the Chamber, copying the Parties, on 16 December 2016 at 11:05.

<sup>7</sup> ICC-01/04-02/06-1687-Conf-Exp.

witnesses and/or victims appearance, particularly in relation to the use of video-link.<sup>8</sup>

10. On 27 January 2017, the LR for victims of the attacks requested leave to call (i) eight witnesses to present evidence: one witness who is not a participating victim in the present case and seven participating victims; and (ii) four participating victims to present views and concerns.<sup>9</sup>

### **Submissions**

11. The Prosecution emphasises the fundamental distinction between the expression of the views and concerns of victims, and their personal presentation of evidence as witnesses. Trial Chamber I defined the former as “in essence, the equivalent of presenting submissions” which will “not form part of the trial evidence”, whereas noting that: “[i]n order for participating victims to contribute to the evidence in the trial, it is necessary for them to give evidence under oath from the witness box”.<sup>10</sup>

#### ***A. Request for four participating victims to present their views and concerns***

12. Article 68(3) of the Statute provides that the Chamber *shall* permit the presentation of the victims’ “views and concerns” when the following conditions are met: their personal interests are affected, the stage of proceedings is appropriate, and the manner is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. While ordinarily these views and concerns should be presented by the Legal Representative of Victims, the Prosecution acknowledges the importance for victims to speak for themselves about the harm they suffered for the reasons set out below, which includes the personal nature of the harm suffered and

<sup>8</sup> ICC-01/04-02/06-1711, para. 4-5.

<sup>9</sup> ICC-01/04-02/06-1739-Con-Red.

<sup>10</sup> ICC-01/04-01/06-2002-Conf, para. 25, also cited in ICC-01/05-01/08-2138, para. 19.

the limited number of victims who seek to present their views and concerns personally in this case. The harm these victims suffered is covered by the charges against the Accused and is representative of the range of crimes suffered by a large number of participating victims in this case.

13. The personal interests of those victims of UPC attacks are affected, as they suffered harm caused by crimes allegedly committed by the UPC, crimes for which the Accused is charged. It is appropriate to hear these victims after the presentation of evidence by the Prosecution and before the Defence case, as proposed. The presentation of the views and concerns of those participating victims does not prejudice the Accused. Their views will not form part of the evidentiary material considered by the Chamber for the purpose of its determination under article 74 of the Statute.

14. The number of victims concerned is limited and, therefore, hearing their views and concerns will not impact the expeditiousness of the trial. Indeed, the Chamber's earlier indication that it may direct victims allowed to present views and concerns to be heard during the current evidentiary block will ensure that the proceedings are not delayed.<sup>11</sup> The use of video-link will likely enhance the expeditiousness of the process. The Prosecution does not oppose the use of video-link for said the four victims, given the limited scope and envisaged length of presentation (4 hours in total), as well as the logistical constraints and resources involved in appearing at the seat of the Court.

15. Accordingly, the Prosecution supports the presentation of the views and concerns in person *via* video-link of participating victims a/01243/13, a/20126/14, a/30169/15, and a/20018/14, as proposed by the LRV because the requirements of article 68(3) are met.

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<sup>11</sup> ICC-01/04-02/06-1711, para.6.

***B. Request for one non-participating individual and seven participating victims to present evidence***

*i. Legal framework*

16. The Appeals Chamber has consistently held that “[t]he right to lead evidence pertaining to the guilt or innocence of the accused [...] lies primarily with the parties, namely, the Prosecutor and the Defence”.<sup>12</sup> The possibility - not the right -<sup>13</sup> for victims to lead such evidence is “grounded in the Trial Chamber’s authority to request evidence necessary for the determination of the truth” and delimited by the requirement of articles 68(3) and 69(3) of the Statute.<sup>14</sup>

17. The relevant provisions of article 68(3)<sup>15</sup> require the demonstration that the personal interest of the victims is affected, the stage of proceedings is appropriate and the manner of presentation is not prejudicial to, or inconsistent with the rights of the accused and a fair and impartial trial. The second sentence of article 69(3) requires that the evidence be considered “necessary for the determination of the truth” in order for the Chamber to request it.<sup>16</sup>

18. The Appeals Chamber in the *Lubanga* case confirmed the possibility for the Trial Chamber to call victims to testify.<sup>17</sup> In the *Katanga* case, the Appeals Chamber found that a Trial Chamber could request the testimony of a victim - in that case about the conduct of the accused - if it assessed that: (i) the victim's personal interests were affected, (ii) it is relevant to the issues of the case, (iii) it is necessary for the

<sup>12</sup> ICC-01/04-01/06-1432, paras. 3, 93; ICC-01/04-01/06-2288, para. 47.

<sup>13</sup> ICC-01/04-01/06-2288, para. 48.

<sup>14</sup> ICC-01/04-01/06-2288, para. 3, 40, 48; see also: ICC-01/04-01/06-1432, para. 98.

<sup>15</sup> “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

<sup>16</sup> The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

<sup>17</sup> ICC-01/04-01/06-1432, para.4.

determination of the truth, and (iv) the testimony would be consistent with the rights of the accused and a fair and impartial trial.<sup>18</sup>

19. In the *Katanga*, then the *Bemba* case, Trial Chambers II and III respectively, set out further criteria enabling them to select the victims which would be best placed to personally present evidence before the Court by assessing:

a. Whether the proposed testimony relates to matters that were already addressed by the Prosecution in the presentation of its case or would be unnecessarily repetitive of evidence already tendered by the parties.

b. Whether the topic(s) on which the victim proposes to testify is sufficiently closely related to issues which the Chamber must consider in its assessment of the charges brought against the accused.

c. Whether the proposed testimony is typical of a larger group of participating victims, who have had similar experiences as the victim who wishes to testify, or whether the victim is uniquely apt to give evidence about a particular matter.

d. Whether the testimony will likely bring to light substantial new information that is relevant to issues which the Chamber must consider in its assessment of the charges.<sup>19</sup>

20. The Prosecution considers that the first two requirements as set out by the Appeals Chamber in the *Katanga* case are fulfilled for each of the eight persons proposed to present evidence in Court. Their expected evidence affects their personal interests, and is relevant to issues of the case, as they pertained to crimes for

<sup>18</sup> AC: ICC-01/04-01/06-2288, para.3 ; see also TCI, ICC-01/01/01/06-1119, para. 108; TC II: ICC-01/04-01/07-1665-Corr., para. 20-29 ; TC III, ICC-01/05-01/08-2027, para. 17; TC IV: ICC-02/05-03/09-545, para.25; TC V: ICC-01/09-01/11-460, para.77 and ICC-01/09-02/11-498, para.76.

<sup>19</sup> ICC-01/05-01/08-2138, para.25, citing e ICC-01/04-01/07-1665-Conf, para. 30.

which the Accused is charged. The proposed presentation of witness evidence does not unduly prejudice the Accused, but the number of proposed witnesses may impact the expeditiousness of the trial.

*ii. Request to call a non-participating victim to present evidence*

21. For non-participating victims, the Legal Representatives may bring to the Chamber's attention persons who are able to give evidence about issues that concern the victims' interests.<sup>20</sup> If the Chamber considers that the proposed witness may indeed provide the Chamber with important information that was not hitherto included in the evidence called by the Parties, it may decide to call the witness on its own motion, in accordance with articles 64(6)(b),(d) and 69(3) of the Statute.<sup>21</sup>

22. **CLR2-1** is [REDACTED] in Kobu following the pacification meeting of February 2003. [REDACTED]. This individual can testify about seeing bodies of civilian killed in Kobu [REDACTED], pillaging and forced displacement in various villages of the Walendu-Djatsi *collectivité*. His testimony is relevant to the charges brought against the Accused and can assist in the determination of the truth. His account completes the testimony of Prosecution witnesses but does not duplicate it, in particular on the identification of [REDACTED] who was killed.

*iii. Victims whose evidence would assist the Chamber in determining the truth*

23. The Prosecution submits that the five victims listed below could provide evidence of assistance in the determination of the truth and supports their appearance to give testimony. The Prosecution recalls it has called 28 crime base witnesses of the "attacks", including 11 dual status witnesses, who are represented victims.

<sup>20</sup> ICC-01/04-01/07-1665-Corr, para.45 ; ICC-01/04-02/06-547, paras 72-73.

<sup>21</sup> ICC-01/04-01/07-1665-Corr, para. 46.

24. **Victim a/01635/13** can testify to the [REDACTED] perpetrated by the UPC soldiers in the Walendu-Djatsi *collectivité*, during the *Shika na mukono* operation. UPC [REDACTED]. This victim can shed light on the crimes charged by giving evidence on [REDACTED] for an extended period of time. Furthermore, Prosecution Witness [REDACTED].<sup>22</sup> Because of her crime-base perspective, this victim can complete, without duplicating, the evidence provided by [REDACTED] Prosecution witness on a specific event.

25. **Victim a/30012/15** can testify to the circumstances of the arrival of the UPC troops in Kilo, in which crimes have been charged in relation to the attack on the Banyali-Kilo *collectivité*. He can shed light on their identification by providing information on their uniforms and weapons. Because [REDACTED] Bosco Ntaganda [REDACTED], the victim can provide unique information relevant to the Accused's and Kisembo's - a co-perpetrator - conducts, relevant to the modes of liability as charged. He can also speak to the particular persecution of [REDACTED]. He can also testify to [REDACTED]. This victim evidence can assist the Chamber in its determination of the truth as it brings unique information on the conduct of the Accused and a co-perpetrator. The Appeals Chamber has confirmed the possibility for a victim to testify on matters relating to the conduct of the accused.<sup>23</sup>

26. **Victim a/30365/15** can testify to the UPC attack of [REDACTED] and the killing, destruction, persecution of Lendu, pillaging and displacement of the population. She can testify to [REDACTED] perpetrated by UPC soldiers and the murder of [REDACTED], which is a village around Mongbwalu,<sup>24</sup> as well as the presence of [REDACTED]. Her testimony is relevant to the charges brought against the Accused. The Prosecution therefore submits that her testimony can assist in the determination of the truth as her account covers a wide range of charged crimes, and

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<sup>22</sup> [REDACTED].

<sup>23</sup> ICC-01/04-01/06-2288, paras.3, 110-113.

<sup>24</sup> [REDACTED].

as such is representative of a wider victimisation. She provides information on the UPC *modus operandi* in the perpetration of [REDACTED].

27. **Victim a/30286/15** can testify to the UPC attack on her village, [REDACTED] in February 2003, which is charged by the Prosecution, and to [REDACTED].<sup>25</sup> This victim can assist to the determination of the truth as her account is representative of a wider victimisation and UPC *modus operandi* in the perpetration of [REDACTED].

28. **Victim a/00256/13**, can testify to the killing of [REDACTED] by a UPC heavy weapon shot [REDACTED] in February 2003 and that his house was destroyed and his good pillaged. [REDACTED]. This victim can assist to the determination of the truth as his account is not cumulative of Prosecution's evidence and representative of a wider victimisation of Lendu civilians.

29. The Prosecution does not oppose the LRV's request for testimony *via* video-link given the victim's health condition.

*iv. Victims whose evidence does not appear necessary for the determination of the truth*

30. **Victim a/00045/13**, an [REDACTED], can testify to the UPC attacks on various Walendu-Djatsi villages at the beginning of 2003, and their perpetration of destruction and killings. UPC soldiers killed [REDACTED] to Kobu, where he later saw numerous corpses in the banana field. Although his account is relevant to the charges brought against the Accused for the crimes charged and [REDACTED]; it appears cumulative of the evidence that other Prosecution witnesses have provided. His testimony would not substantially assist the Chamber in its determination of the truth and this victim accordingly does not meet the requirements to testify.

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<sup>25</sup> [REDACTED].

31. **Victim a/30287/15** can testify about the UPC attack on [REDACTED] at the end of 2002 or the beginning of 2003, and his displacement to [REDACTED] where he witnessed the UPC killing Lendu civilians. [REDACTED] and his house was destroyed. Although some of his account is relevant to the charges brought against the Accused, it appears cumulative of the evidence that other Prosecution witnesses have provided. His testimony would not substantially assist the Chamber in its determination of the truth and this victim does not meet the requirements to testify.

*v. Victims' presentation of evidence is not per se prejudicial to the rights of the Accused or a fair and impartial trial*

32. In the *Katanga* case, the Appeals Chamber found that:

"It is not incompatible with the Court's legal framework or the accused's right to a fair trial if, during the course of the trial, and after being satisfied that the requirements of article 68 (3) of the Statute are met, the Trial Chamber requests victims to submit evidence that was not previously disclosed to the accused; in such a situation, the Trial Chamber will order disclosure of the evidence to the accused sufficiently in advance of its presentation at the trial, and take any other measures necessary to ensure the accused's right to a fair trial, in particular the right to "have adequate time and facilities for the preparation of the defence"."<sup>26</sup>

33. If the request is granted, the TC will define a disclosure schedule which will ensure that the Defence has adequate notice and time to prepare effectively. The Prosecution notes that the victims who seek to personally present evidence and their views and concerns will relinquish their anonymity *vis-à-vis* the parties. The Defence will conduct cross-examinations of the victims who will give evidence.

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<sup>26</sup> ICC-01/04-01/07-2288, para.1, see also ICC-01/04-01/06-1432, para.100.

34. Although the calling of evidence by the LRV does not *per se* prejudice the rights of the Accused, it may impact the expeditiousness of the proceedings. According to the estimation of the LRV, the total time envisaged to examine the 12 witnesses amounts to 21 hours of examination by the LRV. Factoring in the examination by the Prosecution, and the cross examination by the Defence, granting the request in full would amount to several weeks of hearings.

35. The LRV argues that the number of witnesses to be called is reasonable and proportionate given the 1859 participating victims of the attacks, and the number of Prosecution witnesses.<sup>27</sup> The number of Prosecution witnesses cannot be considered as relevant indicia to justify a higher number of victims called to give evidence. The Prosecution's role and obligations under the Statute cannot be compared to the conduct of other participants who are under no statutory duty to prove its case beyond reasonable doubt.

### **Relief requested**

36. The Prosecution:

- i. supports the presentation in person of the views and concerns of Victims a/01243/13, a/20126/14, a/30169/15, and a/20018/14 *via* video-link;
- ii. does not oppose the presentation of evidence by CLR2-1 who can assist the Chamber in the determination of truth;

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<sup>27</sup> ICC-01/04-02/06-1739-Conf-Red, para.51.

- iii. does not oppose the presentation of evidence by Victims a/01635/13 (*via video-link*), a/30012/15, a/30365/15, a/30286/15, and a/00256/13 who can assist in the determination of truth and leaves it to the Chamber to determine how many of these victims should be called to testify;



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**Fatou Bensouda**  
**Prosecutor**

Dated this 21<sup>st</sup> day of February 2017  
At The Hague, The Netherlands