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**International
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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

**Joint Response by the Common Legal Representative of the Former Child Soldiers
and the Common Legal Representative of the Victims of the Attacks to the
“Defence List of Expert Witnesses”**

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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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representative of the Victims of the Attacks (jointly the “Legal Representatives”) hereby submit a joint response to the “Defence List of Expert Witnesses”.¹

2. The Defence intends to call five expert witnesses: (i) D-0600, Mr Camil Doucet, Military Expert; (ii) D-0601, Dr Kathryn Jean Barr, Forensic Document Examiner; (iii) D-0602, Neal A. St-Denis, Communications Expert; (iv) D-0146, Kisembo Bitarama, Historical and Political Context Expert; and (v) D-0603, Dr. Phil Clark, Human Rights Reporting Expert.

3. These observations are based on the very succinct summaries of the said proposed expert testimony and on their respective *curricula vitae*.² The Legal Representatives have not been provided with any reports of said experts which the Defence intends to transmit “as soon as possible” and “in any event not less than 45 days before the proposed expert testifies”.³ Accordingly, the present observations are without prejudice of any further challenge and/or observations once the reports will be available. They, nevertheless, deem it important to raise their concerns at this stage for the Chamber consideration.

4. These proposed experts are expected to share their knowledge on various specific issues which could directly affect the personal interests of the victims. In this regard, the Legal Representatives are entitled to provide the views and concerns of the victims they represent through the following observations.

¹ See the “Defence List of Expert Witnesses”, No. ICC-01/04-02/06-1965, 15 June 2017 (the “Defence List”).

² See DRC-D18-0001-5651 (D-0146); DRC-D18-0001-5639 (D-0600); DRC-D18-0001-5642 (D-0601); DRC-D18-0001-5645 (D-0602) and DRC-D18-0001-5661 (D-0603).

³ See the Defence List, *supra* note 1, para. 6.

II. PROCEDURAL BACKGROUND

5. On 19 October 2016, Trial Chamber VI (the “Chamber”) issued the “Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution” instructing, *inter alia*, the Defence “to provide the Chamber, [by 16 December 2016], on an *ex parte* basis, with a preliminary list of witnesses it intends to call, indicating the time estimates for the examination of the witnesses”.⁴

6. On 16 December 2016, the Defence filed its “Preliminary list of Defence Witnesses”, on an *ex parte*, Chamber only, basis.⁵

7. On 30 January 2017, the Chamber issued directions and a schedule which instructed the Defence to provide a further provisional list of witnesses by 31 March 2017.⁶

8. On 31 March 2017, the Defence filed its “Further Provisional List of Defence Witnesses and Summaries” with one *ex parte* version to the Chamber only.⁷

9. On 26 April 2017, the Defence filed its final list of witnesses and evidence, and the related Summaries in which the Defence submitted that it intended to rely on four expert witnesses, two of whom remained to be identified.⁸

⁴ See the “Order setting certain deadlines related to the end of the presentation of evidence by the Prosecution” (Trial Chamber VI), No. ICC-01/04-02/06-1588, 19 October 2016, para. 11.

⁵ See the “Preliminary list of Defence Witnesses”, No. ICC-01/04-02/06-1690-Conf-Exp, 16 December 2016.

⁶ See the “Decision supplementing the Decision on the Conduct of Proceedings (ICC-01/04-02/06-619) and providing directions related to presentation of evidence by the Defence” (Trial Chamber VI), No. ICC-01/04-02/06-1757, 30 January 2017.

⁷ See the “Further Provisional List of Defence Witnesses and Summaries”, No. ICC-01/04-02/06-1843-Conf-Red, 31 March 2017.

⁸ See the “Corrected version of ‘Defence Final Lists of Witnesses and Evidence’”, No. ICC-01/04-02-1881-Conf, 26 April 2017 (the corrected version was filed on 2 May 2017); Annex to the Corrected version of “Defence Final Lists of Witnesses and Evidence”, No. ICC-01/04-02/06-1881-Conf-Corr-Anx, 26 April 2017 (the corrected version was filed on 2 May 2017); “Annex A to the Defence Final Lists of Witnesses and Evidence”, No. ICC-01/04-02/06-1881-Conf-AnxA, 26 April 2017; “Annex B to the Defence Final Lists of Witnesses and Evidence”, No. ICC-01/04-02/06-1881-Conf-AnxB; “Annex C to

10. On 11 May 2017, the Chamber issued a decision providing further directions on *inter alia* (i) notice of any proposed expert witnesses to be provided by 15 June 2017; and (ii) accompanying reports to be transmitted to the Chamber, Prosecution, and participants as soon as possible but no later than 45 days before the proposed expert testifies.⁹

11. On 15 June 2017, the Defence submitted its list of expert witnesses.¹⁰

III. JOINT SUBMISSIONS

A. Preliminary observations on the interests of the victims

12. The Legal Representatives posit that the personal interests of the victims, as mentioned in Article 68(3) of the Rome Statute, are affected by the list of experts to be called by the Defence.

13. Firstly, the victims are personally concerned by their respective "expert" testimony. For instance, it is the case for D-0600, a military expert, who will provide his opinion on the operations conducted by the *Forces Patriotiques pour la Libération du Congo* (FPLC).¹¹ This testimony affects the former child soldiers participating in the case. It will also likely concern other aspects of the military campaign and structure of the units directly participating in the attacks.

the Corrected version of 'Defence Final Lists of Witnesses and Evidence', No. ICC-01/04-02/06-1881-Conf, 26 April 2017 (the corrected version was filed on 2 May 2017).

⁹ See the "Decision on further matters related to the presentation of evidence by the Defence" (Trial Chamber VI), No. ICC-01/04-02/06-1900, 11 May 2017.

¹⁰ See the Defence List, *supra* note 1.

¹¹ *Idem*, paras. 8-13.

14. In the same vein, D-0603's testimony,¹² can directly impact the victims who were interviewed by the United Nations or by NGOs for investigative and/or reporting purposes.

15. As a former political leader in Ituri, D-0146's testimony is intended to provide information¹³ that directly concerns the victims as a whole, and particularly, the former child soldiers who were members of the UPC/FPLC.

16. Moreover, the participatory rights of the victims during the Defence case are not restricted only to the right to question the Defendant or the witnesses as provided by Rule 91(3) of Rules of Procedure and Evidence. As pointed out by Trial Chamber I in the *Lubanga* case: *"the general interests of the victims are very wide-ranging and include [...] an interest in being allowed to express their views and concerns, an interest in verifying particular facts and establishing the truth, [...]"*.¹⁴ The same Chamber added,

"[t]he participation by victims should encompass their personal interests in an appropriately broad sense, and, [...], whenever necessary they should be entitled to express their views and concerns through statements, examination of witnesses or by filing written submissions".¹⁵

17. As for the Chamber, it ruled that, because Regulation 44(2) of the Regulations of the Court, which concerns the procedure applicable to the calling of expert witnesses refers to "participants" rather than "parties", the victims' participation in the instruction of experts is possible as long as the personal interests of the victims are concerned.¹⁶ The same applies *a fortiori* when merely providing views and concerns on witnesses to be called by a party.

¹² *Ibid.*, paras. 24-25.

¹³ *Ibid.*, paras. 21-23.

¹⁴ See the "Decision on victims' participation" (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, para. 97.

¹⁵ *Idem*, para. 98 (emphasis added).

¹⁶ See the "Decision on the Legal Representatives of Victims regarding joint instruction of experts" (Trial Chamber VI), No. ICC-01/04-02/06-554, 13 April 2015, paras. 6-7. In the present instance, the

18. Moreover, the possibility to give the victims' views and concerns on the Defence's list of experts is based on the possibility to challenge the relevance or admissibility of evidence. As stated by Trial Chamber IV in the *Banda* case, it extends from *"the combined effect of: (i) the obligation to give effect to the spirit and meaning of Article 68(3) of the Statute; and (ii) the Chamber's power to make rulings on the relevance or admissibility of evidence under Articles 64(9) and 69(4) of the Statute"*.¹⁷ This possibility is, in fact, an efficient mean to assist the Chamber in its truth-seeking mission, as it *"prevent[s] the Chamber from being misled by relying on inadmissible or irrelevant evidence [...] in order to establish the facts"*.¹⁸

B. Observations and challenges to the Defence's List of Expert Witnesses

19. The Legal Representatives recall that the Chamber encouraged the Defence to focus its presentation of the case on *"those topics of greatest relevance to the proceedings and on truly contentious issues, relating to the charges of the accused, in order to avoid the presentation of evidence that may be irrelevant to the Chamber's final determination of the case and to minimise cumulative evidence"*.¹⁹ Accordingly, they scrutinised the proposed list bearing in mind the criteria set out by the Chamber, namely the relevance and the added value of the expertise.

Legal Representatives were allowed to make observations on any proposed joint instructions of experts.

¹⁷ See the "Decision on the participation of victims in the trial proceedings" (Trial Chamber IV), No. ICC-02/05-03/09-545, 20 March 2014, paras. 29-30. See also 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, 11 July 2008, para. 101.

¹⁸ See the "Decision on the Modalities of Victims' Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788, 22 January 2010, para. 104.

¹⁹ See the "Decision on further matters related to the presentation of evidence by the Defence", *supra* note 9, para. 32.

1. D-0600 Camil Doucet, Military Expert

20. This expert is called to provide his expertise on the structure, organization and principles applicable to western armies, African armies and non-state armed groups. He will also provide his expert opinion on the conduct of operations by the FPLC based on evidence adduced in the case.²⁰

21. The Legal Representatives submit that the expert's knowledge of western armies, and particularly the Canadian Armed Forces, and the comparative analysis of western and African armies ²¹ are of no relevance to the case. Such an analysis seems too broad as it does not focus on the specific context of the case. Indeed, the present case deals with a militia in DRC. Although it may stem from the summary of the Defence as well as from his *curriculum vitae* that the military expert has an experience in Angola, Liberia and Sierra Leone – without this experience to be specified – the fact that said experience be extended to the FPLC is merely presumed and very far reached. It thus brings no added value to the case.

22. Furthermore, the opinion he intends to provide on the FPLC's operations should not be allowed. As the Chamber stated, "*the content of the proposed expert report or testimony must not usurp the functions of the Chamber as the ultimate arbiter of fact and law*".²² Indeed, the Chamber bears the responsibility to ultimately assess the operations conducted by the FPLC based on the evidence adduced in the present case.

²⁰ See the Defence List, *supra* note 1, paras. 9-13.

²¹ *Idem*, paras. 9 and 11.

²² See the "Decision on Defence preliminary challenges to Prosecution's expert witnesses" (Trial Chamber VI), No. ICC-01/04-02/06-1159, 9 February 2016, para. 8. See also the "Decision on Sang defence Application to exclude Expert Report of Mr Hervé Maupeu" (Trial Chamber V(a)), No. ICC-01/09-01/11-844, 7 August 2013, para. 12.

23. Thus, the Legal Representatives consider that even if the general expertise provided by this expert could be of assistance to the Chamber, the specific issues discussed *supra* are not relevant and should not be entertained during the testimony.

2. D-0601 Dr Kathryn Jean Barr, Forensic document examiner

24. The Legal Representatives have no particular observations with respect to D-0601 and reserve their rights to provide additional comments following the disclosure of her expert report. They note however that witnesses in the present case already provided explanations on the different authors of the logbooks' entries.²³

3. D-0602 Neal A. St-Denis, Communications Expert

25. This expert will provide his expertise on, *inter alia*, "*the communication capabilities of armed groups deployed in Ituri based on practical tests conducted personally in certain areas relevant to the Updated Document Containing the Charges (UDCC)*".²⁴

26. The Legal Representatives understand the relevance of this expertise. However, they posit that the information to be provided on communication capabilities of armed groups in Ituri can only be useful in the present case if the practical tests conducted are done in the exact same conditions as during the period covered by the charges, in terms of weather or vegetation, for instance. Absent of these specificities, the proposed expert testimony will have no added value.

4. D-0146 Kisémbé Bitarama, Historical and Political Context Expert

27. As a political leader in Ituri, and as the spokesperson for the PUSIC delegation, this witness is expected to provide information on "*the specific context of*

²³ See for instance the respective testimony of witnesses P-0290, P-0055 and P-0245.

²⁴ See the Defence List, *supra* note 1, para. 19.

the formation of the Unions des Patriotes Congolais-Réconciliation et Paix (UPC-RP)", its structure, goal and ideology.²⁵ He has also been put forward as a fact witness.²⁶

28. The Legal Representatives posit that this witness should not be allowed to testify as an expert. The Defence clearly fails to demonstrate that he can be legitimately considered an expert. Indeed, as the Chamber explained, an expert witness is "*a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of technical nature that is in dispute*".²⁷

29. The fact that this person has been a political leader in Ituri, and affiliated to the PUSIC and to the RCD-Kis, does not provide him with a specialised knowledge, skill or training in the areas he intends to cover. Indeed, it is not enough to be active in a political party to be considered an expert on the ideology and structure of another political group.

30. Moreover, his political affiliation and his anticipated testimony as a fact witness combined with the fact that, at the time relevant to the charges at stake he was the Chief of the Bahema Sud collectivity in Kasenyi clearly preclude him from giving a testimony with "*the utmost neutrality and objectivity*", as requested by the Chamber.²⁸

31. Finally, the Defence cannot rely on the *Nahimana* case to draw the conclusion that this witness can be both a fact and an expert witness. In the latter, the expert witness was in fact a highly qualified historian with specific knowledge on the Great Lakes region, therefore her testimony was deemed appropriate in this case. The

²⁵ *Idem*, para. 21.

²⁶ *Ibid.*, para. 23.

²⁷ See the "Decision on Defence preliminary challenges to Prosecution's expert witnesses", *supra* note 22, para. 7.

²⁸ *Idem*, para. 9.

Appeals Chamber did not consider that her findings made her a fact witness.²⁹ Even if the Appeals Chamber considered *in abstracto* the possibility of having an expert witness also testifying as a fact witness, it can only be admitted if given by a neutral witness with a specific knowledge, skill or training, which is not the case here.

5. D-0603 Dr. Phil Clark, Human Rights Reporting Expert

32. This expert is a reader in Comparative and International Politics; he is expected to provide information on the methodology of human rights reporting.³⁰

33. The Legal Representatives submit that the expertise of this witness on the said topics has not been demonstrated by the Defence, nor is demonstrated by the *curriculum vitae* provided. Given his profile, it is not clear what specific knowledge this person has regarding human rights reporting. The fact that D-0603 already provided expertise in the *Mbarushimana* case does not necessarily mean that he is qualified to testify on this specific issue. Indeed, in the *Mbarushimana* case, he only provided a report on Byniarwanda groups and Kinyarwanda-speakers within armed groups in the Kivus.³¹

34. In addition, this testimony is not relevant in assisting the Chamber, since several witnesses have already provided information on this issue.³² It will result in presenting cumulative evidence.

²⁹ See ICTR, *The Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Appeals Chamber, Judgement, 28 November 2007, paras. 212-214. The Judgement is available at the following address: <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-99-52/appeals-chamber-judgements/en/071128.pdf>. In this case, the expert Alison Des Forges was allowed to testify as an expert witness on certain facts related to her expertise in the social and political history of Rwanda.

³⁰ See the Defence List, *supra* note 1, paras. 24-25.

³¹ See the "Defence Written Submissions pursuant to the Oral order of Pre-Trial Chamber I of 16 September 2011", No. ICC-01/04-01/10-450, 21 October 2011, paras. 54-55.

³² See for instance the respective testimony of witnesses P-0317, P-0046, and P-0315.

FOR THE FOREGOING REASONS the Legal Representatives respectfully request that the Chamber take into consideration the views and concerns set out above; and bar the testimony of D-0146.



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Dated this 27th Day of June 2017

At The Hague, The Netherlands