

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 31 July 2019

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***

Confidential

**Joint Response of the Common Legal Representatives of Victims to the
“Prosecution’s request for access to the identity of Defence witness D-0308 and
associated submissions and materials” (ICC-01/04-02/06-2370-Conf)**

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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States' Representatives

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Common Legal Representative of the Victims of the Attacks and the Common Legal Representative of the Former Child Soldiers (jointly the “Legal Representatives”) hereby submit a joint response to the “Prosecution’s request for access to the identity of Defence witness D-0308 and associated submissions and materials”¹ (the “Request”).

2. The Legal Representatives support the Request and join the Prosecution’s arguments in their entirety. They submit that, like the Prosecution, they should be granted access to the identity of witness D-0308, to the content of the witness’s expected testimony and to the associated submissions and materials. Absent of said access, they are unable to submit a meaningful and informed response to the Defence Sentencing Request in compliance with the Sentencing Order. Finally, they reserve their right to respond to the Defence Sentencing Request, as far as witness D-0308 is concerned, seven days after having been provided with the relevant information and materials.

II. PROCEDURAL BACKGROUND

3. On 8 July 2019, Trial Chamber VI (the “Chamber”) found Mr Bosco Ntaganda guilty of 18 counts of war crimes and crimes against humanity.²

4. On the same day, the Chamber issued the “Order on the sentencing procedure” (the “Sentencing Order”),³ whereby it directed the parties and legal representatives of victims to file, by 29 July 2019, any requests to submit additional evidence or to call witnesses, and to provide in their requests *inter alia* the identities

¹ See the “Prosecution’s request for access to the identity of Defence witness D-0308 and associated submissions and materials”, No. ICC-01/04-02/06-2370-Conf, 30 July 2019 (the “Request”).

² See the “Judgment” (Trial Chamber VI), No. ICC-01/04-02/06-2359, 8 July 2019.

³ See the “Order on the sentencing procedure” (Trial Chamber VI), No. ICC-01/04-02/06-2360, 8 July 2019.

of any witnesses sought to be called, along with any estimated length of examination, a summary of the anticipated testimony, and any requests for protective measures.⁴ It further ordered that any responses to the sentencing requests shall be filed by 5 August 2019.⁵

5. On 29 July 2019, the Prosecution and the Defence filed their respective sentencing requests to submit additional evidence and to call witnesses.⁶ In its request (the "Defence Sentencing Request"), the Defence redacted the identity of witness D-0308, the content of the witness's proposed testimony,⁷ as well as the relevant witness summary.⁸ A document related to D-0308's expected testimony contained in Annex C was filed on an *Ex-Parte* basis available to the Chamber and the Registry only.

6. On 30 July 2019, the Prosecution filed its Request, seeking access to the identity of witness D-0308, as well as unredacted versions of all submissions and materials related to his or her proposed evidence and reserving its right to respond to the Defence seven days after it has been provided with said information.⁹

7. In accordance with Regulation 24(2) of the Regulations of the Court, the Legal Representatives submit their joint response to the Request.

⁴ *Idem*, pp. 3-4.

⁵ *Ibid.*, p. 4.

⁶ See the "Prosecution's request to submit additional evidence on sentencing", No. ICC-01/04-02/06-2368-Conf, 29 July 2019. See also the "Confidential redacted version of "Defence request for admission of sentencing evidence", 29 July 2019 with Confidential redacted Annexes A and B and Confidential Annex D", No. ICC-01/04-02/06-2369-Conf, 29 July 2019 (the "Defence Sentencing Request").

⁷ See the Defence Sentencing Request, *supra* note 6, paras. 5, 26-30 and 36.

⁸ See Annex A to the Defence Sentencing Request, No. ICC-01/04-02/06-2369-Conf-AnxA-Red, 29 July 2019, p. 10.

⁹ See the Request, *supra* note 1, paras. 14-15.

III. CONFIDENTIALITY

8. Pursuant to Regulations 23*bis*(1) and (2) of the Regulations of the Court, the present response is classified as “confidential” given the original classification of the Prosecution Request.

IV. SUBMISSIONS

9. The Legal Representatives support the Request and join the Prosecution’s arguments in their entirety. In addition to the Prosecution’s submissions, they note that the Sentencing Order does not provide for the possibility for a requesting party or participant to provide the identities of witnesses sought to be called, the content of their testimony and associated materials on an *Ex-Parte* basis, and to withhold said information from either the Prosecution or the Legal Representatives at this stage. Such a course of action would contravene the very goal of the exercise, precluding the Prosecution and the Legal Representatives from making meaningful and informed observations on the evidence sought to be tendered within the established deadline, and the Chamber from critically assessing the relevance of the proposed evidence in light of the submissions of all the parties and participants.

10. The Legal Representatives note that similar arguments were raised by the Babala Defence at the sentencing stage of the *Bemba et al.* proceedings, and rejected by Trial Chamber VII in their entirety. In that case, after the Chamber ordered the parties to disclose any additional materials for sentencing, the Babala Defence submitted three items on an *Ex-Parte* basis arguing that they related to Mr Babala’s private life.¹⁰ The Single Judge rejected this request, holding that “*Mr Babala cannot put such information into evidence for sentencing without exposing it to the scrutiny of the other parties. For reasons of procedural fairness, the Chamber will not consider information*

¹⁰ See the “*Soumission de la Défense de M. Fidèle Babala Wandu de sa liste des éléments de preuves en vue de la fixation de la peine*”, No. ICC-01/05-01/13-2040, 21 November 2016, para. 5.

for sentencing which the other parties cannot access. The Babala Defence must either withdraw these items or make them accessible to the other parties".¹¹

11. In accordance with the Sentencing Order, and in order to be able to present a meaningful and informed response to the Defence Sentencing Request, the Legal Representatives respectfully request that the Chamber instruct the Defence to comply with the Sentencing Order, and to grant them, like the Prosecution, access to the identity of witness D-0308, to the content of the witness's expected testimony and to the associated submissions and materials.

12. Like the Prosecution, the Legal Representatives equally reserve their right to respond to the Defence Sentencing Request, as far as witness D-0308 is concerned, seven days after having been provided with the witness's identifying information and with the associated submissions and materials.

¹¹ See the "Decision on Babala Defence Request for Delayed Disclosure of Document for Sentencing" (Trial Chamber VII, Single Judge), No. ICC-01/05-01-13-2042, 22 November 2016, para. 5 (references omitted).

FOR THE FOREGOING REASONS the Legal Representatives

- **SUPPORT** the Prosecution Request and **JOIN** the Prosecution's arguments in their entirety
- **RESPECTFULLY REQUEST** to be granted access to the identity of witness D-0308, to the content of the witness's expected testimony, and to the associated submissions and materials
- **RESERVE** their right to respond to the Defence Sentencing Request, as far as witness D-0308 is concerned, seven days after having been provided with the relevant information and materials.



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Common Legal Representative of the
Former Child soldiers



Dmytro Suprun
Common Legal Representative of the
Victims of the Attacks

Dated this 31st Day of July 2019

At The Hague, The Netherlands