

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **13 April 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**

**Decision on the request of the Legal Representatives of Victims regarding joint  
instruction of experts**

Decision 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 Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Luc Boutin

**Legal Representatives of Victims**

Ms Sarah Pellet  
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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64 and 68(3) of the Rome Statute ('Statute') and Regulation 44 of the Regulations of the Court ('Regulations'), issues the following 'Decision on the request of the Legal Representatives of Victims regarding joint instruction of experts'.

## **I. Background and submissions**

1. On 9 October 2014, the Chamber ordered that the disclosure of reports of any expert witnesses who are subject to joint instruction pursuant to Regulation 44(2) of the Regulations, or who will be called by the Office of the Prosecutor ('Prosecution'), must be completed by 17 April 2015.<sup>1</sup>

### *i. Legal Representatives of Victims*

2. At the status conference on 17 February 2015, the Legal Representatives of Victims ('LRVs') requested to participate in the joint instruction of experts, or 'at least to be informed of the results of the consultations between the [Prosecution] and the [defence team for Mr Ntaganda ('Defence')]' in this regard.<sup>2</sup> Having been directed to do so by the Chamber,<sup>3</sup> on 5 March 2015, the LRVs made further submissions on this issue, stating their request to participate in the selection as well as the joint instruction of experts ('Request').<sup>4</sup> The LRVs noted that, at this stage, they have not yet been involved in consultations with the parties on the

<sup>1</sup> Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382-Corr, para. 9(e).

<sup>2</sup> Transcript of hearing on 17 February 2015, ICC-01/04-02/06-T-18-CONF-ENG ET, page 22, lines 15-24. The Chamber notes that on 14 August 2014, in response to an order from the Chamber ('Order Scheduling a Status Conference and Setting a Provisional Agenda', 21 July 2014, ICC-01/04-02/06-339), the LRVs had previously made submissions on this issue, averring 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' (See 'Joint submissions in accordance with the "Order Scheduling a Status Conference and Setting a Provisional Agenda" issued on 21 July 2014', ICC-01/04-02/06-351, para. 44).

<sup>3</sup> ICC-01/04-02/06-T-18-CONF-ENG ET, page 23, lines 4-9.

<sup>4</sup> Victims' written submissions on the issues raised during the Status Conference held on 17 February 2015, ICC-01/04-02/06-498, paras 4-12.

possibility of the joint instruction of expert witnesses, but wished to do so 'to the extent that the interests of the participating victims are affected' ('Request').<sup>5</sup>

3. In support of the Request, the LRVs argue, *inter alia*, that: (i) Regulation 44 of the Regulations establishes that the instruction and selection of expert witnesses is not limited to parties as it refers to 'all "participants in the proceedings, including victims"', an interpretation that is supported by, *inter alia*, the Court's jurisprudence;<sup>6</sup> (ii) the interpretation of Regulation 44 of the Regulations advanced by the LRVs accords with meaningful participation of victims in criminal proceedings, 'which includes the right to assist the judges in determining the truth';<sup>7</sup> (iii) in the present proceedings, the substantive issues that may require expert evidence are of direct relevance to the interests of victims;<sup>8</sup> and (iv) the involvement of the LRVs in the joint instruction of expert witnesses will promote efficiency as it will assist both the joint instruction process and in identifying any areas of disagreement.<sup>9</sup>

#### *ii. Defence*

4. On 20 March 2015, the Defence filed its response to the Request ('Defence Response'),<sup>10</sup> arguing that it should be rejected on the basis that, while all participants in proceedings may be involved in the instruction of experts, 'the determination of the areas of expertise and the selection of the experts are the

<sup>5</sup> Request, ICC-01/04-02/06-498, para. 5.

<sup>6</sup> Request, ICC-01/04-02/06-498, para. 6, referring to, *inter alia*, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, footnote 29, and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440, footnote 9, in which it was 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'; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the procedures to be adopted for instructing expert witnesses, 12 February 2010, ICC-01/05-01/08-695, in which the legal representatives of victims had the opportunity to contribute to the selection and instruction of expert witnesses.

<sup>7</sup> Request, ICC-01/04-02/06-498, para. 7. *See also* paras 8-10.

<sup>8</sup> Request, ICC-01/04-02/06-498, para. 11.

<sup>9</sup> Request, ICC-01/04-02/06-498, para. 12.

<sup>10</sup> Response on behalf of Mr Ntaganda to LRVs submissions on the issues raised during the 17 February 2015 Status Conference, ICC-01/04-02/06-528.

prerogative of the [p]arties'.<sup>11</sup> The Defence avers that the Request is premature as the victims' personal interests may only be affected within the meaning of Article 68(3) of the Statute once the parties have determined the exact areas on which experts are to provide their expertise, which has not yet occurred.<sup>12</sup> The Defence submit, however, that 'in the event the instructions given by the [p]arties to the experts appear incomplete to the LRVs, the Defence would not oppose a request for leave to submit further instructions to the experts selected by the [p]arties'.<sup>13</sup>

### *iii. Prosecution*

5. On 27 March 2015, the Prosecution filed its response to the Request ('Prosecution Response'),<sup>14</sup> also arguing that it should be rejected. The Prosecution submits that it would be willing to receive the LRVs' views on any experts the Prosecution and Defence intend to jointly instruct, insofar as their personal interests are affected by the subject area of expertise, 'as long as it is the [p]arties that ultimately jointly select and instruct these experts'.<sup>15</sup> It avers that Regulation 44(2) of the Regulations provides for joint instruction of experts by participants at the *direction* of the Chamber, which has not occurred in the present proceedings, and in any event, participation of victims by virtue of this provision is not a matter of right but one within the Chamber's discretion.<sup>16</sup> The Prosecution argues that it is consistent with the model of victim participation at the Court that, rather than participate in the selection and instruction of experts, the LRVs ought more

<sup>11</sup> Defence Response, ICC-01/04-02/06-528, para. 4.

<sup>12</sup> Defence Response, ICC-01/04-02/06-528, paras 4 and 8.

<sup>13</sup> Defence Response, ICC-01/04-02/06-528, para. 8.

<sup>14</sup> Prosecution's Response to the "Victims' written submissions on the issues raised during the Status Conference held on 17 February 2015", ICC-01/04-02/06-534. The Chamber notes that the Prosecution had previously made submissions in relation to the LRVs' participation in the joint instruction of expert witnesses during the status conference of 11 September 2014, submitting that 'the parties are the entities that jointly instruct experts. Nonetheless, the legal representatives can also submit views on what those instructions should be... but the joint instruction would be done through the parties' (Transcript of hearing on 11 September 2014, ICC-01/04-02/06-T-13-ENG ET, page 41, lines 12-20).

<sup>15</sup> Prosecution Response, ICC-01/04-02/06-534, para. 4.

<sup>16</sup> Prosecution Response, ICC-01/04-02/06-534, paras 10-11.

appropriately receive ‘all relevant material from such experts’ and then seek leave of the Chamber to question the experts ‘to the extent that the interests of the participating victims are affected by a given expert’s research and/or testimony’.<sup>17</sup>

## II. Analysis and conclusions

6. The Chamber notes that Regulation 44(2), as well as (1) and (3) of the Regulations, refers to ‘participants’ rather than ‘parties’ with respect to the joint instruction of experts. The Chamber therefore considers that the Court’s legal framework envisages the possibility of victims’ participation in the instruction of experts. However, as submitted by the Prosecution, Regulation 44(2) of the Regulations clearly refers to such instruction occurring at the specific direction of the Chamber, which is not applicable at this stage of proceedings. To date, the Chamber has merely ordered that disclosure of the reports of any expert witnesses who are subject to joint instruction pursuant to Regulation 44(2) of the Regulations, or who will be called by the Prosecution, must be completed by 17 April 2015.<sup>18</sup>
7. Moreover, within the regime of victim participation established by Article 68(3) of the Statute at this Court, in order to participate in proceedings, the victims must first demonstrate that their personal interests are affected.<sup>19</sup> The Chamber notes in this regard that the LRVs submit that the ‘majority of the issues’ that ‘may require expert evidence’, which may *possibly* include experience in the fields of child soldiers, sexual violence, gender-based crimes and psychological trauma, would be of relevance to the interests of victims.<sup>20</sup> It is premature at this stage to

<sup>17</sup> Prosecution Response, ICC-01/04-02/06-534, paras 11-20.

<sup>18</sup> Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382-Corr, para. 9(e).

<sup>19</sup> See, in the context of leading evidence, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 (OA9 OA10), para. 99.

<sup>20</sup> Request, ICC-01/04-02/06-498, para. 11 (emphasis added).

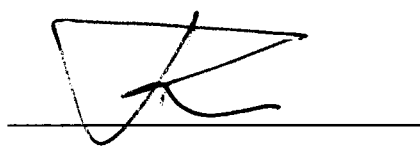
speculate whether or not the personal interests of the victims may be affected by subject areas that have not yet been agreed upon.

8. The Chamber therefore considers that it is appropriate for the parties to select and instruct any joint experts in the present proceedings, based on agreed subject areas. To the extent possible in the period remaining before 17 April 2015, the parties shall also allow the LRVs to make observations on any proposed joint instructions. The parties are to ensure that the LRVs remain informed of the ultimate outcome of the process, and receive the resulting reports and any other relevant material stemming from the selection and instruction of joint experts. Once the joint instruction process is completed, the LRVs may apply to the Chamber for leave under Regulation 44(3) of the Regulations to instruct a further expert, should this be considered necessary.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.

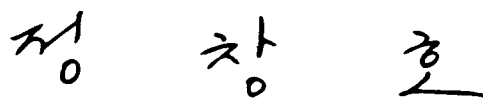
Done in both English and French, the English version being authoritative.



**Judge Robert Fremr, Presiding Judge**



**Judge Kuniko Ozaki**



**Judge Chang-ho Chung**

Dated 13 April 2015

At The Hague, The Netherlands