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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

Public redacted version of “Notice on behalf of Mr Ntaganda setting out the position of the Defence on proposed Prosecution expert witnesses”

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the “*Decision on the conduct of proceedings*” issued by Trial Chamber VI (“Chamber”) on 2 June 2015 (“*Decision on the Conduct of Proceedings*”)¹ and the Chamber’s order to extend to 15 September 2015 the time limit mentioned in paragraph 38 of the *Decision on the Conduct of Proceedings*, conveyed by way of e-mail on 13 August 2015, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Notice on behalf of Mr Ntaganda setting out the position of the Defence on proposed Prosecution expert witnesses

“Defence Notice”

INTRODUCTION

1. With a view to litigating any issues related to the admissibility of Prosecution expert witnesses’ reports in advance of submission, the Chamber invited the Defence to submit, by 15 September 2015, a notice indicating, for each expert witness the Prosecution intends to call, whether it:
 - a. Accepts the report as being an expert report;
 - b. Wishes to cross-examine the proposed expert witness; and/or
 - c. Challenges the qualifications of the witness as an expert, or the relevance of all, or parts, of the report.²

2. Having reviewed the material disclosed by the Prosecution in relation to the 13 expert witnesses it intends to call at trial,³ the Defence hereby provides notice of its position on the above-mentioned issues.

¹ ICC-01/04-02/06-619.

² *Decision on the Conduct of Proceedings*, paras.37-38.

³ Namely: Mr Roberto Garretón (P-0931); Dr Kambayi Bwatshia (P-0932); Ms Radhika Coomaraswamy (P-0885); Dr Lynn Lawry (P-0453); Dr John Yuille (P-0933); Ms Maeve Lewis (P-0938); Dr Sophie Grom Monnoyeur (P-0939); Mr Lars Bromley (P-0810); Dr Derek Congram (P-0420); Dr Laurent Martrille (P-0935); Dr Lars Uhlin-Hansen (P-0937); Mr Adrien Sivignon (P-0934); Dr Arnoud Kal (P-0945). Cf. ICC-01/04-02/06-560 (“*Prosecution’s List of Expert Witnesses*”), para.10.

SUBMISSIONS

I. Mr Roberto Garretón (Witness P-0931)

3. Witness P-0931 was called by Trial Chamber I to testify as an expert witness in the *Lubanga* proceedings⁴ on matters related to the background and context of both the situation and conflict in Ituri.⁵ He was also instructed by Trial Chamber I to prepare an expert report on these matters.⁶
4. On 24 August 2015, indicating its intention to rely on Witness P-0931's report admitted in the *Lubanga* trial for the purposes of the present case, the Prosecution sought the admission into evidence of Witness P-0931's report ("Witness P-0931 Report")⁷ pursuant to Rule 68(3), or in the alternative, pursuant to Articles 69(2) and (3).⁸
5. The Defence responded to the Prosecution Request on 8 September 2015, stating that it was not opposed to the admission of Witness P-0931 Report into evidence.⁹
6. The Defence takes this opportunity to acknowledge the relevance of Witness P-0931 Report to the present proceedings. Furthermore, in light of his *curriculum vitae*,¹⁰ the Defence does not challenge Witness P-0931's qualifications as an expert.
7. However, there is a number of issues on which the Defence wishes to cross-examine Witness P-0931.

⁴ ICC-01/04-01/06-2842, fn.29.

⁵ ICC-01/04-01/06-1558.

⁶ ICC-01/04-01/06-1558.

⁷ See ICC-01/04-02/06-793-AnxD; ICC-01/04-02/06-793-AnxE.

⁸ ICC-01/04-02/06-793 ("Prosecution Request"), para.8.

⁹ ICC-01/04-02/06-809.

¹⁰ DRC-OTP-2083-0189.

II. Mr Kambayi Bwatshia (Witness P-0932)

8. The Defence takes the view that the topics addressed in Witness P-0932's reports ("Witness P-0932 Reports")¹¹ are relevant to various issues in dispute in the present case. However, even though Witness P-0932 was requested by Trial Chamber I in the *Lubanga* proceedings to prepare an expert report and to provide expert evidence *viva voce*, the Defence challenges Witness P-0932's qualifications to provide expert evidence on these topics. In particular, Witness P-0932's *curriculum vitae*¹² does not reveal any prior experience which would qualify him as an expert on the administrative, cultural and social life in Ituri in 2002-2003. The concerns of the Defence regarding Witness P-0932's qualifications are exacerbated by the lack of any methodology in his reports, as evidenced by *inter alia* the absence of supporting references.
9. Consequently, the Defence: (i) objects to Witness P-0932 being called to provide evidence as an expert witness, whether orally or in writing; and (ii) seeks the Chamber's guidance as to when and how the Defence should raise its objection formally.
10. If deemed necessary, the Prosecution should endeavour to identify a new expert who possesses the necessary qualifications to replace Witness P-0932. The Defence hereby undertakes to work with the Prosecution to identify and jointly instruct such an expert.

III. Ms Radhika Coomaraswamy (Witness P-0885)

11. Witness P-0885 was involved in the *Lubanga* case first as *amicus curiae* within the meaning of Rule 103 (on her own initiative),¹³ and then as an 'expert' witness.¹⁴ She submitted written *amicus curiae* observations on two specific matters related to child soldiers, namely: (i) the definition of 'conscripting or

¹¹ DRC-OTP-2083-0517; DRC-OTP-2083-0524.

¹² DRC-OTP-2083-0369.

¹³ ICC-01/04-01/06-1105-Anx1; ICC-01/04-01/06-1175.

¹⁴ ICC-01/04-01/06-T-176-Red2-ENG, p.27.

enlisting' children; and (ii) the interpretation of the term 'using them to participate actively in the hostilities'.¹⁵ She later testified on these two issues.¹⁶

12. In the instant case, further to a letter of instruction addressed by the Prosecution on 24 March 2015,¹⁷ Witness P-0885 prepared an 'expert' report answering to 11 child soldier-related questions (which include the two above-mentioned topics) and one question related to sexual violence against civilians ("Witness P-0885 Report").¹⁸
13. The Defence challenges the admissibility into evidence of Witness P-0885's Report in its entirety on the grounds that the witness either: (i) provides a legal opinion, a task which goes beyond the scope of admissible expertise before the Court; (ii) breaches her obligation of impartiality by impermissibly advocating for a particular interpretation of a provision of the Statute; or (iii) submits observations that are clearly not relevant to the charges against Mr Ntaganda.
14. Consequently, the Defence: (i) objects to Witness P-0885 being called to provide evidence as an expert witness, whether orally or in writing; and (ii) seeks the Chamber's guidance as to when and how the Defence should raise its objection formally.

IV. Dr Lynn Lawry (Witness P-0453)

15. Having reviewed Witness P-0453's report ("Witness P-0453 Report"),¹⁹ the Defence challenges its admissibility of into evidence.
16. Witness P-0453 concludes in her Report that, *inter alia*:

[REDACTED].²⁰

¹⁵ DRC-OTP-2084-0018 (*cf.* ICC-01/04-01/06-1229-AnxA).

¹⁶ ICC-01/04-01/06-T-223-ENG, pp.3 (ll.21-23), 6-44.

¹⁷ DRC-OTP-2084-0059.

¹⁸ DRC-OTP-2084-0062.

¹⁹ DRC-OTP-2084-0523.

²⁰ DRC-OTP-2084-0523, p.35.

Evidently, Witness P-0453's conclusions impermissibly impinge on the Chamber's exclusive role to determine whether: (i) the Prosecution's factual allegations are established beyond reasonable doubt; (ii) the evidence satisfies the legal requirements of each of the crimes charged; and (iii) Mr Ntaganda is criminally liable for these crimes. It provides an 'expert' opinion which strikes at the core of, *inter alia*, the contextual element of Article 7 and the 'common plan' requirement under Article 25(3)(a).

17. Consequently, regardless of Witness P-0453's experience and qualifications, Witness P-0453 Report goes beyond the scope of admissible expert evidence before the Court and for this reason, it must not be admitted into evidence.
18. The Defence thus: (i) objects to Witness P-0453 being called to provide evidence as an expert witness, whether orally or in writing; and (ii) seeks the Chamber's guidance as to when and how the Defence should raise its objection formally.

V. Dr John C. Yuille (Witness P-0933)

19. Having reviewed Witness P-0933's report ("Witness P-0933 Report"),²¹ the Defence accepts it as being an expert report. However, the Defence takes issue with the probative value of Witness P-0933's observations and conclusions set out therein.
20. Nonetheless, in light of his *curriculum vitae*,²² the Defence does not challenge Witness P-0933's qualifications as an expert.
21. To the extent that Witness P-0933 Report discusses the impact of traumatic events on an eye-witness's memory and ability to recall and narrate his/her experience in a court setting, the Defence does not challenge the relevance of the report to the trial proceedings against Mr Ntaganda.

²¹ The Defence's position is limited to document DRC-OTP-2085-0221. The Defence does not consider documents DRC-OTP-2085-0094 and DRC-OTP-2085-0221 – to which the Prosecution attributed the label 'Report' in Ringtail – as other Witness P-0933's expert reports.

²² DRC-OTP-2085-0184.

22. However, there is a number of issues on which the Defence wishes to cross-examine Witness P-0933.

VI. Ms Maeve Lewis (Witness P-0938)

23. Having reviewed Witness P-0938's four reports ("Witness P-0938 Four Reports"),²³ the Defence challenges their admissibility into evidence.

24. Firstly, by providing her opinion on the coherence and credibility of the accounts given by Witnesses P-0018,²⁴ P-0019,²⁵ P-0108²⁶ and P-0113²⁷ about their personal experience of the events in Ituri, Witness P-0938 goes beyond the instructions given by the Prosecution, which made no mention of such a mandate.²⁸ In any event, Witness P-0938's conclusions impermissibly impinge on the Chamber's exclusive role to rule on the credibility of the witnesses who will testify before it.

25. Consequently, regardless of Witness P-0938's experience and qualifications, Witness P-0938 Four Reports go beyond the scope of admissible expert evidence before the Court and for this reason, it must not be admitted into evidence.

26. The Defence thus: (i) objects to Witness P-0938 being called to provide evidence as an expert witness, whether orally or in writing; and (ii) seeks the Chamber's guidance as to when and how the Defence should raise its objection formally.

²³ DRC-OTP-2059-0058-R02 (in relation to Witness P-0018); DRC-OTP-2059-0080-R02 (in relation to Witness P-0019); DRC-OTP-2059-0049-R02 (in relation to Witness P-0108); DRC-OTP-2059-0069-R03 (in relation to Witness P-0113).

²⁴ DRC-OTP-2059-0058-R02, p.7 ("[REDACTED]").

²⁵ DRC-OTP-2059-0080-R02, p.6. ("[REDACTED]").

²⁶ DRC-OTP-2059-0049-R02, p.5 ("[REDACTED]").

²⁷ DRC-OTP-2059-0069-R03, p.7 ("[REDACTED]").

²⁸ DRC-OTP-2059-0054, p.2 ("[REDACTED]").

VII. Dr Sophie Gromb Monnoyeur (Witness P-0939)

27. Having reviewed Witness P-0939's four reports ("Witness P-0939 Four Reports"),²⁹ the Defence accepts them as being expert reports, but takes no position at this stage on the probative value of Witness P-0939's observations and conclusions set out therein.
28. Furthermore, in light of her *curriculum vitae*,³⁰ the Defence does not challenge Witness P-0939's qualifications as an expert.
29. To the extent that the Witness P-0939 Four Reports examine the physical harm allegedly suffered by four Prosecution witnesses – P-0018, P-0019, P-0108 and P-0113 – the Defence does not challenge the relevance of the report to the trial proceedings against Mr Ntaganda.
30. However, there is a number of issues on which the Defence wishes to cross-examine Witness P-0939.

VIII. Mr Lars Bromley (Witness P-0810)

31. Having reviewed Witness P-0810's four reports ("Witness P-0810 Reports"),³¹ the Defence accepts them as being expert reports. However, the Defence takes issue with the probative value of Witness P-0810's observations and conclusions set out therein.
32. Nonetheless, in light of his *curriculum vitae*,³² the Defence does not challenge Witness P-0810's qualifications as an expert.
33. To the extent that Witness P-0810 Reports examine satellite images of certain locations listed in the Updated Document containing the Charges at the time

²⁹ DRC-OTP- 2059-0111-R03 (in relation to Witness P-0018); DRC-OTP-2059-0131-R02 (in relation to Witness P-0019); DRC-OTP-2059-0146-R02 (in relation to Witness P-0108); DRC-OTP-2059-0161-R03 (in relation to Witness P-0113).

³⁰ Reproduced at, *inter alia*, DRC-OTP-2059-0161-R03, pp.8-11.

³¹ DRC-OTP-2084-0512 (dated 30 October 2013); DRC-OTP-2059-0177 (dated 1 November 2013); DRC-OTP-2062-0329 (dated 13 December 2013); DRC-OTP-2084-0443 (dated 17 April 2015).

³² DRC-OTP-2084-0518.

relevant to the charges, the Defence does not challenge the relevance of the report to the trial proceedings against Mr Ntaganda.

34. However, there is a number of issues on which the Defence wishes to cross-examine Witness P-0810.

IX. Exhumation-related experts

35. The Prosecution intends to call five experts related to exhumations carried out in Kobu-Wadza, Saio and Tchudja in DRC. Four of the experts worked in these three sites and/or in the field morgue and one worked from the Netherlands Forensic Institute in The Hague, on extracted DNA samples.
36. In this regard, the Defence notes that the team in the field was composed of more than the four experts the Prosecution intends to call. Indeed, nine forensic experts were involved in the field: (i) two forensic pathologists; Lars Uhlin-Hansen (Witness P-0937) and Laurent Martrille (Witness P-0935); (ii) five forensic anthropologists; Derek Congram (Witness P-0420), [REDACTED]; and (iii) two forensic photographers; Adrien Sivignon (Witness P-0934) and [REDACTED].
37. It follows that some of the reports and supporting documents were produced by forensic professionals who will not be called by the Prosecution to testify before the Chamber. Moreover, the expert witnesses who will be called to testify relied on the work of these other forensic professionals in their own reports. Furthermore, some of the reports and supporting documents are co-signed by experts who are expected to testify and others who are not. Consequently, the Defence reserves its right to object to parts or all of the work accomplished by other forensic professionals who will not be called before the Court.
38. In addition, the Defence underscores that the exhumation-related expert reports comprise several documents, including supporting documents, and as

such, cannot be read in isolation but jointly with other materials. Indeed, reports and supporting documents need to be read as a whole for each exhumed body and not independently for each expert. The Defence will refer to the term “expert report” to cover reports and supporting documents but reserves its right to object to any sub-document underlying such “expert report”.

A. Dr Derek Congram (Witness P-0420)

39. Having reviewed the reports and supporting documents (“Witness P-0420 Report”), the Defence notes that Witness P-0420 makes at least one comment which is outside his field of expertise in his Report on archaeological excavation of alleged burials in Kobu-Wadza and Tchudja.³³ Indeed, he [REDACTED].³⁴ This comment leans outside his field of expertise which should be limited to archaeology and anthropology.
40. Should the above comment be ruled out, the Defence accepts Witness P-0420 Report as being an expert report, but takes no position at this stage on the probative value of Witness P-0420’s observations and conclusions set out therein.
41. Furthermore, in light of his *curriculum vitae*,³⁵ the Defence does not challenge Witness P-0420’s qualifications as an expert.
42. To the extent that Witness P-0420 Report only discusses his team’s findings from excavations and exhumations in Kobu-Wadza, Saio and Tchudja in Ituri in DRC, the Defence does not challenge at this stage the relevance of the report to the trial proceedings against Mr Ntaganda.
43. However, there is a number of issues on which the Defence wishes to cross-examine Witness P-0420.

³³ DRC-OTP-2072-0211.

³⁴ DRC-OTP-2072-0211, p.0233.

³⁵ Reproduced at, *inter alia*, DRC-OTP-2072-0211, pp.0244-0252.

B. Dr Laurent Martrille (Witness P-0935)

44. Having reviewed the different reports and supporting documents (“Witness P-0935 Report”), the Defence accepts Witness P-0935 Report as being an expert report, but takes no position at this stage on the probative value of Witness P-0935’s observations and conclusions set out therein.
45. Furthermore, in light of his *curriculum vitae*,³⁶ the Defence does not challenge Witness P-0935’s qualifications as an expert.
46. To the extent that Witness P-0935 Report only discusses his team’s findings on post-mortem examination of exhumed bodies found in Kobu-Wadza and Tchudja in DRC, the Defence does not challenge at this stage the relevance of the report to the trial proceedings against Mr Ntaganda.
47. However, there is a number of issues on which the Defence wishes to cross-examine Witness P-0935.

C. Dr Lars Uhlin-Hansen (Witness P-0937)

48. Having reviewed the different reports and supporting documents (“Witness P-0937 Report”), the Defence accepts Witness P-0937 Report as being an expert report, but takes no position at this stage on the probative value of Witness P-0937’s observations and conclusions set out therein.
49. Furthermore, in light of his *curriculum vitae*,³⁷ the Defence does not challenge Witness P-0937’s qualifications as an expert.
50. To the extent that Witness P-0937 Report only discusses his team’s findings on post-mortem examination of exhumed bodies found in Kobu-Wadza and Saio, the Defence does not challenge at this stage the relevance of the report to the trial proceedings against Mr Ntaganda.

³⁶ DRC-OTP-2081-0674, pp.0726-0767.

³⁷ Reproduced at, *inter alia*, DRC-OTP-2075-0156.

51. However, there is a number of issues on which the Defence wishes to cross examine Witness P-0937.

D. Mr Adrien Sivignon (Witness P-0934)

52. Having reviewed the report, photographs and panoramic 360-degree presentation of Saio (“Witness P-0934 Report and Panoramic”), the Defence accepts Witness P-0934 Report and Panoramic as being an expert report, but takes no position at this stage on the probative value of Witness P-0934’s observations and conclusions set out therein.

53. Furthermore, in light of his *curriculum vitae*,³⁸ the Defence does not challenge Witness P-0934’s qualifications as an expert.

54. To the extent that Witness P-0934 Report and Panoramic deal with exhumations and post mortem examinations in Kobu-Wadza, Saio and Tchudja in DRC, the Defence does not challenge at this stage the relevance of the report to the trial proceedings against Mr Ntaganda.

55. However, there is a number of issues on which the Defence wishes to cross-examine Witness P-0934.

E. Dr Arnoud Kal (Witness P-0945)

56. The Defence does not have in its possession Witness P-0945’s *curriculum vitae*, nor any relevant information on his background and qualifications.

57. Consequently, the Defence is not able to either (i) accept his reports as being expert reports, (ii) posit on the opportunity to cross-examine the proposed expert witness; and/or (iii) challenge the qualifications of the witness as an expert, or the relevance of all, or parts, of the report.

³⁸ DRC-OTP-2083-0011, pp.0080-0081.

CONFIDENTIALITY

58. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Notice is filed as confidential as it refers to excerpts of documents bearing the same classification. A public redacted version will be filed separately.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

TAKE INTO CONSIDERATION the Defence position set out above when ruling on the admissibility of Prosecution expert witnesses' reports; and

PROVIDE GUIDANCE as to when and how the Defence should raise its objections formally

RESPECTFULLY SUBMITTED ON THIS 15TH DAY OF SEPTEMBER 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands