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No.: ICC-01/04-02/06  
Date: **23 February 2016**

**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 “Supplementary submission on behalf of Mr Ntaganda  
in relation to proposed Expert witnesses”, 23 November 2015, ICC-01/04-02/06-  
1032-Conf**

**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 “*Order requesting parties’ submissions on expert witnesses*”<sup>1</sup> (“Chamber’s Order”) issued by Trial Chamber VI (“Chamber”) on 10 November 2015, Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

**Supplementary submission on behalf of Mr Ntaganda in relation to proposed  
Expert witnesses**

**“Supplementary Defence Submission”**

**INTRODUCTION**

1. On 15 September 2015, the Defence filed a notice setting out its position on proposed Prosecution expert witnesses (“Defence Notice”).<sup>2</sup> In its notice, the Defence:
  - a. Acknowledged the relevance of Witness P-0931’s Expert Report and did not challenge Witness P-0931’s qualifications as an expert<sup>3</sup>;
  - b. Objected to proposed expert witnesses P-0932, P-0885, P-0453 and P-0938 (“Contested Experts”) being called to provide evidence as expert witnesses, ‘whether orally or in writing’ and sought the Chamber’s guidance as to when and how to formally raise its objections<sup>4</sup>;
  - c. Did not challenge the qualification of the remaining proposed expert witnesses (P-0933, P-0810, P-0939, P-0420, P-0935, P-0937 and P-0934)<sup>5</sup> and accepted their reports as being expert reports<sup>6</sup>. The Defence did not challenge the relevance of the reports prepared by these experts. However,

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<sup>1</sup> ICC-01/04-02/06-994.

<sup>2</sup> First Defence Notice, ICC-01/04-02/06-826-Conf.

<sup>3</sup> First Defence Notice, ICC-01/04-02/06-826-Conf., para. 3-7.

<sup>4</sup> First Defence Notice, ICC-01/04-02/06-826-Conf, paras 9 (P-0932), 14 (P-0885), 18 (P-0453) and 26 (P-0938).

<sup>5</sup> First Defence Notice, ICC-01/04-02/06-826-Red, paras 20 (P-0933), 28 (P-0939), 32 (P-0810), 41 (P-0420), 45 (P-0935), 49 (P-0937) and 53 (P-0934).

<sup>6</sup> First Defence Notice, ICC-01/04-02/06-826-Conf., paras 19 (P-0933), 27 (P-0939), 31 (P-0810), 40 (P-0420, subject to the reservation in para. 39), 44 (P-0935), 48 (P-0937), 52 (P-0934).

the Defence took issue with the probative value which can be attributed to two of these reports,<sup>7</sup> but took no position on the probative value of the other reports for the time being<sup>8</sup>;

- d. Submitted that it was unable to provide notice of its position on Witness P-0945 as no relevant information on his background and qualifications had been provided.<sup>9</sup>
2. On 7 October 2015, the Prosecution disclosed to the Defence, a *curriculum vitae* of proposed expert Witness P-0945.<sup>10</sup>
  3. On 10 November 2015, the Chamber considered it appropriate to seek the parties' submissions in relation to the Contested Experts and their reports, prior to their appearance before the Court and directed the Defence to supplement its submissions in relation to the Contested Experts (P-0932, P-0885, P-0453 and P-0938) and their reports addressing, in particular:
    - a. The Contested Experts' qualifications and expertise in relation to the relevant subject matter;
    - b. Whether the proposed areas to be addressed properly fall within the scope of expert testimony; and
    - c. The Contested Experts' impartiality and relevance of their proposed testimony.<sup>11</sup>
  4. In addition, taking into consideration the *curriculum vitae* disclosed to the Defence on 7 October 2015,<sup>12</sup> the Chamber requested the Defence to set out its

<sup>7</sup> First Defence Notice, ICC-01/04-02/06-826-Conf., paras 19 (P-0933), 31 (P-0810).

<sup>8</sup> First Defence Notice, ICC-01/04-02/06-826-Conf., paras 27 (P-0939), 40 (P-0420), 44 (P-0935), 48 (P-0937), 52 (P-0934).

<sup>9</sup> First Defence Notice, ICC-01/04-02/06-826-Conf., paras 56 and 57 (P-0945).

<sup>10</sup> Annex to Prosecution's Communication of the Disclosure of Evidence, 8 October 2015, ICC-01/04-02/06-891-Conf-AnX, page 2, item 15.

<sup>11</sup> Chamber's Order, ICC-01/04-02/06-994, para 9.

<sup>12</sup> Annex to Prosecution's Communication of the Disclosure of Evidence, 8 October 2015, ICC-01/04-02/06-

position with regard to Witness P-0945 and to indicate, within the same period, whether it:

- a. Accepts the report produced by P-0945 as being expert report;
  - b. Wishes to cross-examine P-0945; and/or
  - c. Challenges the qualifications of P-0945 as an expert, or the relevance of all, or parts, of his report.<sup>13</sup>
5. On the basis of the material disclosed by the Prosecution in relation to the five referred Expert Witnesses,<sup>14</sup> the Defence hereby submits its position on the above-mentioned issues.

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891-Conf-Anx, page 2, item 15 ; See also DRC-OTP-2088-0448.

<sup>13</sup> Chamber's Order, ICC-01/04-02/06-994, para 10.

<sup>14</sup> Namely: Dr Kambayi Bwatshia (P-0932); Ms Radhika Coomaraswamy (P-0885); Dr Lynn Lawry (P-0453); Ms Maeve Lewis (P-0938); Dr Arnoud Kal (P-0945). Cf. ICC-01/04-02/06-560 ("Prosecution's List of Expert Witnesses"), para.10.

## SUBMISSIONS

### I. SUPPLEMENTARY SUBMISSIONS IN RELATION TO EXPERT WITNESSES P-0932, P-0885, P-0453 AND P-0938

#### A. Mr Kambayi Bwatshia (Witness P-0932)

##### (i) *The Contested Experts' qualifications and expertise in relation to the relevant subject matter*

6. On 24 March 2015, Witness P-0932 was instructed by the Prosecution to submit an expert report providing *“une description fidèle et fiable de certains aspects de la vie administrative, culturelle et sociale de l'Ituri ainsi que toute évolution de ces aspects dans le temps”*.<sup>15</sup>
7. In light of Witness P-0932's *curriculum vitae*,<sup>16</sup> the Defence challenges his qualifications and expertise in relation to the relevant subject matter. Indeed, taking into account his professional experience, the Defence notes that Witness P-0932 does not demonstrate any specific scientific knowledge and expertise to be called to testify as an expert on the administrative, cultural and social aspects of life in Ituri.
8. While Witness P-0932 seems to have published numerous articles about Africa and the Democratic Republic of the Congo (« DRC ») in general, his *curriculum vitae* does not report any publication about Ituri – the relevant region for this case. Yet, the evidence establishes that Ituri presents original cultural and social aspects which are distinct from those of other provinces in DRC.
9. Similarly, the available *curriculum vitae* does not report that Witness P-0932 would have performed any work in Ituri in 2002 and 2003, which is the relevant period for this case.

<sup>15</sup> Lettre d'Instruction à l'Expert concernant les noms et autres conventions sociales en Ituri, DRC-OTP-2083-0507; More precisely, Witness P-0932 was required to answer to 44 questions related to: A) Etat civil et enregistrement auprès des services complétents; B) Noms; C) Famille; D) Date de naissance; E) Décès.

<sup>16</sup> DRC-OTP-2083-0513.

10. Significantly, Witness P-0932 himself stressed in his Report that “*bien sûr vous comprendrez que je l’ai fait dans la mesure de mes compétences*”<sup>17</sup> implying that his qualification and expertise were not relevant enough to provide « *une description fidèle et fiable de certains aspects de la vie administrative, culturelle et sociale de l’Ituri* »<sup>18</sup>.

**(ii) *Whether the proposed areas to be addressed properly fall within the scope of expert testimony***

11. The Defence does not challenge that administrative, cultural and social life in Ituri are relevant areas to various issues in dispute in the present case and as such may be the object of expert evidence in the present proceedings. Therefore, the topics that Witness P-0932 was requested to address in his report fall within the scope of expert testimony.

12. However, taking into consideration Witness P-0932’s apparent lack of specific scientific expertise regarding the relevant subject matter, the Defence submits that such expert evidence, as it pertains to the situation of Ituri, is of marginal probative value.

**(iii) *The Contested Expert’s impartiality and relevance of his proposed testimony***

13. The Defence does not have any information that would allow to question the impartiality of Witness P-0932’s proposed testimony. However, the Defence expresses serious concerns regarding its relevance.

14. Witness P-0932’s Report includes two separate documents: one attempting to address the five topics identified by the Prosecution (civil status and registration with relevant offices, names, family, date of birth and death)<sup>19</sup> and the other focusing on “*les noms circonstanciels*”.<sup>20</sup>

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<sup>17</sup> DRC-OTP-2083-0517, p. 6.

<sup>18</sup> DRC-OTP-2083-0507, p. 1 (emphasis added).

<sup>19</sup> DRC-OTP-2083-0517.

<sup>20</sup> DRC-OTP-2083-0524.

15. Nevertheless, the Defence posits that most of the questions put to Witness P-0932 by the Prosecution in its letter of instructions<sup>21</sup> are left with no answer.
16. This is the case on the subject of names. The Prosecution asked thirteen questions in relation to that topic, including the following: "*En Ituri, l'origine ethnique, tribale ou géographique d'une personne peut-elle être établie sur la base de son nom?*".<sup>22</sup> Whereas this question seems to be highly relevant in the context of Ituri, this question is left unanswered.
17. Moreover, the Defence notes that only the second document<sup>23</sup> is supported by a bibliography and description of methodology. In that respect, the Defence already emphasized in its Notice that Witness P-0932's Report reflects a lack of structure and methodology. His Report also fails to indicate any reference supporting its observations and conclusions,<sup>24</sup> which necessarily impacts the relevance of Witness P-0932's proposed testimony.

**B. Ms Radhika Coomaraswamy (Witness P-0885)**

- (i) *The Contested Expert's qualifications and expertise in relation to the relevant subject matter*
18. On 24 March 2015, Witness P-0885 was instructed by the Prosecution to prepare an 'expert' report addressing questions related to children associated with armed groups and violence against Women, both in the context of an armed conflict.<sup>25</sup>
19. In light of her *curriculum vitae*,<sup>26</sup> the Defence does not challenge Witness P-0885's qualifications and expertise in relation to the subject matters of child

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<sup>21</sup> Lettre d'Instruction à l'Expert concernant les noms et autres conventions sociales en Ituri, DRC-OTP-2083-0507.

<sup>22</sup> DRC-OTP-2083-0509, page 3, question 23.

<sup>23</sup> DRC-OTP-2083-0524.

<sup>24</sup> First Defence Notice, ICC-01/04-02/06-826-Conf, para 8.

<sup>25</sup> DRC-OTP-2084-0075.

<sup>26</sup> DRC-OTP-2084-0073; See also DRC-OTP-2084-0014.



soldiers and sexual violence against women in the context of an armed conflict.<sup>27</sup>

(ii) *Whether the proposed areas to be addressed properly fall within the scope of expert testimony*

20. Although the Defence does not challenge that the above proposed areas to be addressed by Witness P-0885 fall within the scope of expert testimony, the Defence posits that Witness P-0885 improperly addressed these topics, departing significantly from the instructions given by the Prosecution.<sup>28</sup>
21. Indeed, the Defence notes that on several occasions within the framework of her written report – see in particular parts 1, 3, 4, 6 and 10 of Witness P-0885’s Report – Witness P-0885 provided a legal opinion on certain legal elements of the crimes charged under Counts 6, 9, 14, 15 and 16 of the Updated Document containing the Charges (“Updated DCC”). As such, Witness P-0885’s submissions in these parts of her Report go beyond the scope of admissible expertise before the Court.
22. In fact, judges of international criminal jurisdictions are perfectly competent to pronounce on issues of international criminal law without the assistance of a legal expert.<sup>29</sup> This is the very reason why the *ad hoc* tribunals have consistently ruled out the admissibility of ‘expert’ reports on legal issues.<sup>30</sup> There is no justification to depart from the approach followed by the *ad hoc* tribunals in this regard.
23. In any event, should the Chamber be inclined, as a matter of principle, to receive assistance from an ‘expert’ on legal issues, the Defence underscores

<sup>27</sup> See the letter of instruction addressed by the Prosecution on 24 March 2015, DRC-OTP-2084-0075, and Witness P-0885 Report, which answers to 11 child soldier related questions and 1 question related to sexual violence against civilians, DRC-OTP-2084-0062.

<sup>28</sup> DRC-OTP-2084-0075; DRC-OTP-2084-0062.

<sup>29</sup> Cf. *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para.164.

<sup>30</sup> See, e.g., *Nahimana v. The Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, paras.292-294; *Prosecutor v. Popović*, IT-05-88-T, Decision on the admissibility of the expert report and proposed expert testimony of Professor Schabas, 1 July 2008, paras.6-8.

that Parts 1, 3, 4, 6 and 10 of Witness P-0885 Report fail to provide meaningful assistance on specific issues of a technical nature that are outside of the Chamber's experience and knowledge. Indeed, Witness P-0885 merely: (i) reviews decisions issued by Chambers of the Court on the issues at stake<sup>31</sup> – a task which falls squarely within the competence of this Chamber; and (ii) recalls parts of her own testimony in the *Lubanga* case,<sup>32</sup> which have already been taken into account by Trial Chamber I in its trial judgement.

24. Finally, the fact that Witness P-0885 ultimately testified as an 'expert' witness in the *Lubanga* proceedings on the matters discussed in Parts 1 and 6 of her Report, is not be binding on this Chamber when ruling on the admissibility of Witness P-0885 Report and testimony in the present proceedings.

**(iii) *The Contested Expert's impartiality and relevance of her proposed testimony***

25. The Defence challenges both impartiality and the relevance of Witness P-0885's proposed testimony for the following reasons.
26. Firstly, regarding Witness P-0885's impartiality, the Defence recalls that, although Trial Chamber I changed Witness P-0885's status from *amicus curiae* to that of an 'expert' witness,<sup>33</sup> the gist of Witness P-0885's testimony is that of an *amicus curiae*. Thus, far from providing Trial Chamber I with a neutral opinion, Witness P-0885 assumed the posture of an advocate by urging the Chamber to adopt a particular interpretation of the provisions of the Statute related to child soldiers.<sup>34</sup>

<sup>31</sup> See, in particular, DRC-OTP-2084-0062, paras.2, 4, 8, 10, 15 and 16.

<sup>32</sup> See, e.g., DRC-OTP-2084-0062, para. 7, referring to ICC-01/04-01/06-T-223-ENG, p.30.

<sup>33</sup> ICC-01/04-01/06-T-176-Red2-ENG, p.27.

<sup>34</sup> See, e.g., ICC-01/04-01/06-T223-ENG, p.9, ll.17-21: "In this *amicus curiae* our purpose is not to address the elements of this particular case, or the guilt and innocence of particular parties, but to *seek to persuade* the Court to adopt interpretative principles that protect children in light of the reality on the ground. Because this Court is about to undertake an important precedent, *we feel our voice should be heard.*" (emphasis added). In her Report, Witness P-0885 refers to her own testimony by using advocacy terms: DRC-OTP-2084-0062, para.14 ("In my *amicus* brief to the Court in the *Lubanga* case, I *advocated* for the Court to [...]. [...] Further, I *argued* that the 'participate actively' standard requires [...]. [...] Finally, I *advocated* for the Court to [...].") (emphasis added).

27. Witness P-0885's lack of neutrality is apparent in the present proceedings. Witness P-0885's objectivity should both be required and must be provided.<sup>35</sup> More precisely, in the submissions made in Part 6 of her Report, Witness P-0885 adopts language that is at odds with the attitude of neutrality expected from any expert witness.<sup>36</sup>
28. Secondly, the Defence wishes to highlight the irrelevance of Witness P-0885's testimony on various aspects.
29. Concerning parts 2, 5, 7, 8, 9 and 11 of Witness P-0885's Report, the Defence submits that, notwithstanding her unique knowledge of various aspects of the deplorable phenomenon of child soldiers, Witness P-0885's general acquaintance with the situation of, and the difficulties experienced by child soldiers *throughout the world* does not amount to an 'expertise' which would assist the Chamber in understanding or determining any of the issues in dispute *in the instant case*.<sup>37</sup>
30. The judgement the Chamber will render is not aimed at being a sociological study of the phenomenon of child soldiers as it unfolds in the *world*; rather, it is aimed at determining whether: (i) the *specific* factual allegations contained in the Updated DCC in relation to crimes against child soldiers are established beyond reasonable doubt; (ii) these facts support each of the essential elements of the crimes as charged by the Prosecution; and (iii) Mr Ntaganda is guilty or not of these crimes.
31. The Defence does not dispute that there may be situations where an expertise on a criminological phenomenon is warranted to assist a trial chamber in

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<sup>35</sup> See *Cross and Tapper On Evidence*, 12th Edition, Collin Tapper Oxford University Press, 2010, p. 544.

<sup>36</sup> See, in particular, DRC-OTP-2084-0062, paras.17 ("Although I *applaud* the Court for [...] I note *with concern* that [...]") and 18 ("As Judge Benito argued *forcefully* in her dissent [...].") (emphasis added).

<sup>37</sup> Cf. *Prosecutor v. Popović*, IT-05-88-AR73.2, Decision on joint Defence interlocutory appeal concerning the status of Richard Butler as an expert witness, 30 January 2008, para.27; *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution motion to exclude the expert report of Kosta Cavoski, 5 April 2013, para.17.

understanding the evidence adduced before it with a view to determining whether the evidence sufficiently sustains the legal requirements of the crimes charged. The Defence posits, however, that such expertise must be closely related to the allegations brought against the accused.

32. In the present case, Witness P-0885's 'empirical' observations on: (i) the various roles played by child soldiers in armed groups (Part 2); (ii) the factors contributing to the enlistment or conscription of child soldiers (Part 5); (iii) the use of child soldiers for sexual purposes as a consequence of their recruitment (Part 7); (iv) the forms of sexual exploitation which child soldiers may suffer when integrated into armed groups (Part 8); (v) the conditions in which child soldiers live in armed groups (Part 9); and (vi) the difficulties encountered by child soldiers in reintegrating into their communities (Part 11), are too general in scope to assist the Chamber in better understanding the accounts of witnesses who will proffer evidence on the Prosecution's allegations related to the crimes against child soldiers or in ruling on any of the issues in dispute.
33. Consequently, parts of 2, 5, 7, 8 and 9 of Witness P-0885 Report are irrelevant to the present proceedings.
34. The same reasoning can be applied to Part 12 of Witness P-0085's Report, given that the observations set out therein are too general in scope to be relevant to any of the issues in dispute in the present proceedings.<sup>38</sup>
35. Concerning Part 10 of Witness P-0885's report, and more particularly paragraphs 28 and 29 thereof, they relate to a conduct not charged by the Prosecution – the protection under IHL from rape and sexual slavery committed by members of the same armed group which would be afforded to recruits *over* the age of 15 – and, consequently, are irrelevant to the present proceedings.

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<sup>38</sup> The Defence further notes that at paragraph 29 of her Report, Witness P-0885 refers to a publication of an individual expected to testify in the present case as a Prosecution witness of fact.

36. Finally, the Defence points out that, generally, Witness P-0885's Report does not follow any methodology which would allow it to be qualified as an 'expert' report. This is evidenced, *inter alia*, by the *quasi* absence of supporting references. Likewise, in her testimony in the *Lubanga* case – which is extensively referred to throughout her Report – Witness P-0885 provided no explanation as to the methodology upon which she relied to reach her 'findings'.
37. For all these reasons, the Defence posits that the testimony of Witness lacks the necessary relevancy to these proceedings.

**C. Dr Lynn Lawry (Witness P-0453)**

**(i) *The Contested Expert's qualifications and expertise in relation to the relevant subject matter***

38. On 19 March 2015, the Prosecution instructed Witness P-0453 – as an Epidemiology Expert – to prepare a written report on the survey results of alleged human rights violations in Ituri allegedly committed by members of the UPC and/or FPLC, and their consequences, based on her 2010 study conducted in the RDC.<sup>39</sup>

39. In light of her *curriculum vitae*,<sup>40</sup> the Defence does not challenge Witness P-0453's qualifications and expertise in relation to the relevant subject matter of alleged human rights violations committed in Ituri in 2002 and 2003 as long as Witness P-0453 limits her survey from an epidemiologic point of view.

**(ii) *Whether the proposed areas to be addressed properly fall within the scope of expert testimony***

40. The Defence takes the view that the results of alleged human rights violations in Ituri and their consequences fall within the scope of an expert testimony.

<sup>39</sup> DRC-OTP-2084-0523, pp. 54-57.

<sup>40</sup> DRC-OTP-2080-0642.

However, the Defence posits that as a result of being instructed by the Prosecution to conduct an expertise from the angle of alleged human rights violations in Ituri, allegedly committed by members of the UPC and/or its military wing the FPLC, P-0453's Report goes clearly beyond the scope of expert testimony.

41. Witness P-0453's Report is, in part, based on data covering a five-year reference period, which extends from years 2000 to 2005, whereas the temporal scope of the charges is limited to years 2002 and 2003. Witness P-0453 readily admits that she is "[REDACTED]".<sup>41</sup>
42. Moreover, Witness P-0453's specific identification of UPC/FPLC as one of the groups responsible for alleged human rights abuses in Ituri, a conclusion drawn entirely from data from years 2000 to 2005, with no possibility of segregating the date, if any, for the period relevant to the charges, will inevitably lead to distorted and misleading conclusions. In addition, data relied upon in order to identify UPC/FPLC as one of the alleged groups responsible for the commission of human rights abuses within the reference period (2000-2005), whereas the evidence establishes that UPC/FPLC was non-existent before September 2002, can only lead to misleading and erroneous analysis and conclusions.
43. Accordingly, the proposed areas to be addressed by Witness P-0453 do not properly fall within the scope of expert testimony.

*(iii) The Contested Expert's impartiality and relevance of her proposed testimony*

44. Whilst the Defence does not question Witness P-0453's impartiality, it expresses serious concerns regarding the relevance of her Report in at least three respects.

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<sup>41</sup> DRC-OTP-2084-0557, pp. 34 and 35.

45. Firstly, Witness P-0453's Report is, in part, based on a five-year reference period, which extends from years 2000 to 2005 whereas the present trial is exclusively focused on 2002-2003 time period.
46. Secondly, the Defence underscores that Witness P-0453's survey results have been conducted on the basis of sociological and medical concepts as well as on human rights definitions of harms that do not easily match international humanitarian law concepts which the Chamber is bound to apply in this case. In this regard, it is indicative that Witness P-0453 recognizes herself that the definition of "*gender and sexual violence*" used in her 2010 study must be taken "[REDACTED]"<sup>42</sup>.
47. Thirdly, it cannot be easily determined that this complex epidemiologic study bears any logical relevance, let alone legal relevance, to an issue at trial. In addition, Defence points out that the Chamber shall satisfy itself that such evidence is sufficiently probative in light of other evidence in the case, to justify the additional time and difficulties, its admission would entail.<sup>43</sup> The Defence considers that admitting a report with such a wide scope both regarding the reference period and the concepts used – which after a proper analysis will end up being of limited and marginal probative value, if any – would inevitably lead to an abuse of the judicial resources and, consequently, infringe upon the accused's fundamental right to a trial within a reasonable delay.
48. Therefore, the above-mentioned report should be ruled irrelevant to the present case and not be admitted into evidence.

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<sup>42</sup> DRC-OTP-2084-0557, p 35, fn. 63.

<sup>43</sup> See the legal relevance concept in *Criminal Evidence*, Paul Roberts and Adrian Zuckerman, Oxford University Press, p. 98.

49. The Defence also reaffirms its 15<sup>th</sup> September 2015 position<sup>44</sup> that Witness P-0453's conclusions<sup>45</sup> lead her to infringe on the exclusive role of the Chamber by determining *"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"*.<sup>46</sup>
50. Thus, in these circumstances, the Defence objects to the relevance of Witness P-0453's Report and proposed testimony.

**D. Ms Maeve Lewis (Witness P-0938)**

**(i) *The Contested Expert's qualifications and expertise in relation to the relevant subject matter***

51. On 7 October 2013, Witnesses P-0938 and P-0939 were jointly instructed by the Prosecution to conduct a clinical examination of four Prosecution witnesses – [REDACTED] – and to prepare four joint expert reports on the physical and/or psychological harm that these Prosecution witnesses suffered.
52. In light of her curriculum vitae, the Defence does not challenge Witness P-0938's qualifications and expertise in relation to the relevant subject matter of clinical examination of witnesses in order to determine their physical and/or psychological harm.

**(ii) *Whether the proposed areas to be addressed properly fall within the scope of expert testimony***

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<sup>44</sup> Notice on behalf of Mr Ntaganda setting out the position of the Defence on proposed Prosecution expert witnesses, ICC-01/04-02/06-826-Conf, para 16.

<sup>45</sup> See DRC-OTP-2084, p. 35: "[REDACTED]"

<sup>46</sup> In particular, as already pointed out by the Defence in its Notice from 15 September 2015, Witness P-0453's conclusions provide *"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)"*, Notice on behalf of Mr Ntaganda setting out the position of the Defence on proposed Prosecution expert witnesses, ICC-01/04-02/06-826-Conf, para 16.



53. The Defence does not challenge the fact that the proposed areas to be addressed by Witness P-0938 – physical and/or psychological harm suffered by [REDACTED] – fall within the scope of an expert testimony.<sup>47</sup>
54. However, the Defence underscores that the proposed areas to be address by Witness P-0938 exceed the terms of the expertise requested by the Prosecution.
55. Indeed, as already mentioned,<sup>48</sup> Witness P-0938 went beyond the instructions given by the Prosecution by providing her personal assessment of the four aforementioned witnesses' credibility.<sup>49</sup>
56. By doing so, Witness P-0938 adopted an approach which clearly infringes upon the Chamber's role with regard to the ultimate issue of credibility, a clear usurpation of the Chamber's exclusive fact-finding jurisdiction and, therefore, does not fall within the scope of expert testimony.

*(iii) The Contested Expert's impartiality and relevance of her proposed testimony*

57. For the same reasons as mentioned in paragraphs 55-57 of this Supplementary Defence Submission, the Defence challenges both Witness P-0938's impartiality and relevance of proposed testimony.

## **II. SUBMISSION IN RELATION TO EXPERT WITNESS P-0945**

58. Having reviewed the report submitted by Dr Arnoud Kal on 10 April 2015 ("Witness P-0945 Report"),<sup>50</sup> the Defence accepts Witness P-0945 Report as being an expert report.

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<sup>47</sup> DRC-OTP-2059-0054.

<sup>48</sup> First Defence Notice, ICC-01/04-02/06-826-Conf., para 24 and 25.

<sup>49</sup> DRC-OTP-2059-0058-R02, p.7 ([REDACTED]); DRC-OTP-2059-0080-R02, p.6. ([REDACTED]); DRC-OTP-2059-0049-R02, p.5 ([REDACTED]); DRC-OTP-2059-0069-R03, p.7 ([REDACTED]).

<sup>50</sup> DRC-OTP-2084-0002.

59. Furthermore, in light of his *curriculum vitae*,<sup>51</sup> the Defence does not challenge Witness P-0945's qualifications as an expert.
60. To the extent that Witness P-0945 Report only discusses DNA profiles from the human remains and reference samples from the relatives of missing persons, as well as a DNA kinship analysis using the DNA profiles, the Defence does not challenge the relevance of his report. However, there are a number of issues on which the Defence wishes to cross-examine Witness P-0945.

### CONFIDENTIALITY

61. 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:

**CONSIDER** the Defence position set out above;

**TAKE NOTICE** that the Defence opposes the report and testimony of proposed Expert Witnesses P-0932, P-0885, P-0453 and P-0938; and

**TAKE NOTICE** that the Defence wishes to cross-examine Expert Witness P-0945.

**RESPECTFULLY SUBMITTED ON THIS 23<sup>RD</sup> DAY OF FEBRUARY 2016**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

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<sup>51</sup> DRC-OTP-2088-0448.