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**International
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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

**Public Document
with
Public Annex A**

**Prosecution's Motion Challenging the Qualifications of Witness D22-0004
as an Expert**

Source: The Office of the Prosecutor

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

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I. Introduction

1. Babala Defence Witness D22-0004's testimony and his report should be excluded¹ *in limine*.² The Witness' proffered evidence fails to meet the minimum standards of reliability required for admission, such as explicit or detailed referencing, a description of the methodology used, identification of a recognised area of expertise to which it would belong, or even falling within the Witness' field of expertise.

II. Submissions

A. Witness D22-0004's Report is *Prima Facie* Unreliable

2. Witness D22-0004's report fails to meet the minimum standards of reliability. *First*, the report lacks any explicit or detailed referencing of sources for any given proposition. A basic tenant concerning expert reports is that "[t]he sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions."³ It is not the role of the Parties or the Chamber to reconstruct the Witness' analysis to determine how and from where he or she draws their conclusion.

3. Witness D22-0004's report is not footnoted, and the appended two-page bibliography provides no guidance to the Parties or the Chamber. It is unclear which

¹ This motion is filed in response to the Chamber's 16 February 2016 e-mail order instructing the Prosecution to file its reasons for challenging the Witness D22-0004's qualifications as an expert. The Prosecution also maintains its position that the Witness' evidence should be excluded for the reasons outlined in its *Motion to Exclude the Testimony of Witness D22-0004 and the Submission of his Report*. See generally ICC-01/05-01/13-1594.

² See ICC-01/05-01/13-1622, para. 9 ("Expert witnesses may be struck from the witness list prior to testifying if, for example, their anticipated testimony is irrelevant or goes solely to factual and/or legal matters which usurp the functions of the Chamber."); ICC-01/04-02/06-1159, paras. 8, ("The Chamber may entertain certain objections to the admissibility of expert evidence prior to formal submission when doing so would ensure a fair and expeditious trial."), 9 ("It is [...] for the Chamber to assess whether the witness has sufficient expertise in a relevant subject area such that the Chamber may benefit from hearing his or her opinion."); ICC-01/09-01/11-844, para. 15 ("the Chamber considers that it may entertain certain objections to the admissibility of evidence prior to formal submission when doing so would ensure a fair and expeditious trial.").

³ *Prosecutor v. Milošević*, Decision on Admission of Expert Report of Robert Donia, Case No. IT-98-29/1-T, 15 February 2007, para. 8.

reference support which propositions in the report, if at all. For instance, in his bibliography Witness D22-0004 references a conference paper he presented on naming conventions in the Democratic Republic of the Congo and a journal article on the concepts of man and death among the indigenous population in the Kasai region.⁴ Neither document seems to relate to the notion of “African solidarity”, and the report fails to demonstrate how either supports any proposition discussed in his report. This issue is compounded by the fact that many of the authorities referenced in Witness D22-0004’s bibliography are not readily accessible.⁵ For instance, despite all reasonable efforts by the Prosecution, it is unable to procure a copy of the 1973 book titled “*La Solidarité africaine*” cited in Witness D22-0004’s bibliography – arguably the only relevant source referenced therein. The combination of these issues renders the foundation for the assertions made in the report and its overall validity untestable.

4. *Second*, the report fails to outline the methodology used by Witness D22-0004 in its preparation. His assertions are thus unverifiable, a factor obviously key to assessing the reliability of an expert report.⁶ An expert witness “is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience, or skills to form his or her expert opinion.”⁷ Here, the report provides no guidance as to the Witness’ methods. For example, the reports fails to indicate the Witness’ criteria for selecting documents, what instructions he received from the Defence, what sources the Witness had access to, what evidence or information was at the Witness’ disposal, whether his analysis was subject to peer review, or even something as basic as the question or issue sought to be addressed by the Witness. These failures are further compounded by the fact that the Witness fails to define

⁴ See CAR-D22-0004-0007 at 0012.

⁵ The ICC library is unable to obtain 14 of the 33 sources listed in the report’s bibliography.

⁶ *Prosecutor v. Vasiljević*, Judgement, Case No. IT-98-32-T, 29 November 2002, para. 20; *Prosecutor v. Semanza*, Judgement, Case No. ICTR-97-20-A, 20 May 2005, paras. 305-306.

⁷ *Prosecutor v. Gotovina et al.*, Decision on Disclosure of Expert Materials, Case No. IT-06-90-T, 27 August 2009, para. 10.

even the most basic term central to his report, such as who he considers to be an “africain”, whether by virtue of culture, race, ethnicity, language, or geography.

B. The Subject-Matter is not a Recognised Area of Expertise

5. “African solidarity” is not a recognised area of expertise.⁸ There is no field of study on “African solidarity”. It also defies basic common sense to contend that all Africans – if one defines this term as inclusive of all persons hailing from Africa – act the same way, irrespective of ethnicity, race, religion, nationality, education (including legal education), socio-economic standing, or experience, be they from South Africa or Egypt, from the Central African Republic or Morocco. Yet the report engages in precisely these types of generalities in all of five pages of cursory and conclusory reasoning. The following conclusion is paradigmatic of this approach:

Etant donné qu’aucun africain n’aime être détecté ou suspecté par les autres comme étant un être maléfique et porter le lourd fardeau de la «sorcellerie», il aura tendance à secourir son «frère » avec un reflex naturel sans se douter que l’acte qu’il pose pourrait constituer un crime au sens occidental du terme.

C’est la raison pour laquelle lorsqu’un occidental vient expliquer à un africain que l’acte qu’il vient de commettre est un crime, il ne le comprend pas! Car le plus important pour lui c’est d’abord aider son «frère» afin d’éviter que s’abatte sur lui le courroux de sorciers qui vivent dans le monde invisible.⁹

This highly generalised statement is not only without any referenced citation; it also implicitly advances the proposition that all Africans by virtue of culture are incapable of appreciating the criminality of their conduct from a Western point of

⁸ The “field of expertise” requirement is generally accepted as a threshold requirement of evidentiary reliability to ensure the trustworthiness and reliability of the methodology used in the proffered expert evidence. *See e.g. HG v The Queen* (1999) HCA 2 (High Court of Australia), para. 58 (“expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable ‘to form a sound judgment ... without the assistance of [those] possessing special knowledge or experience ... which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience’.”) (citations omitted); *R. v. Mark Dallagher* (2002) EWCA Crim 1903 (England and Wales Supreme Court of Judicature), para. 29 (holding that the field of expertise must at least be “sufficiently well-established to pass the ordinary tests of relevance and reliability”) (citations omitted) *Kumho Tire Co. v. Carmichael* (1999), 119 S.Ct. 1167 (United States Supreme Court), at 1175 (expert evidence is not reliable “where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”).

⁹ CAR-D22-0004-0007, at 0010.

view, even where the same conduct is unlawful or even criminalised in their own countries¹⁰ and irrespective of their individual background and knowledge. Such a sweeping statement is manifestly incorrect, and underscores the absence of any basis for it as part of any recognised field of academic specialisation.

C. The Subject-Matter Falls Outside the Witness' Realm of Expertise

6. Even if the Chamber were to accept that “African solidarity” is a recognized field of study, the subject-matter falls outside the Witness' realm of expertise.¹¹ To qualify as an expert, a witness must possess the relevant specialised knowledge, acquired through education, experience, or training in the proposed field of expertise.¹² And while a witness may have already testified as an expert in other cases, the Chamber retains the discretion to evaluate the proposed expert witness' credentials,¹³ particularly in light of the proffered evidence and the context of the case.¹⁴

7. Witness D22-0004 is listed on the Registry's List of Experts as an expert in European and African contemporary history, including the history of mentalities.¹⁵ There is no indication that the Witness has studied, researched, or trained on “African solidarity”. Indeed, apart from the report published for this case, the Witness has no publications on the subject nor has he been recognised in the matter.

¹⁰ See e.g. Code Pénal Congolais, Arts. 128-132 (legal provisions concerning “*du faux témoignage et du faux serment*”), available at <http://www.hsph.harvard.edu/population/fgm/congo.penalcode.40.pdf>.

¹¹ ICC-01/04-02/06-1159, para. 8 (“When determining the admissibility of an expert report or testimony, the Chamber considers that it must [...] determine that the content of the report and/or anticipated testimony falls within the expertise of the witness.”); ICC-01/09-01/11-844, para. 12 (“When determining whether testimony should be received as expert testimony [...] the Chamber considers that it must [...] determine that the anticipated testimony falls within the expertise of the witness”).

¹² *Prosecutor v. Taylor*, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka or, in the Alternative, to Limit its Scope and on Urgent Prosecution Request for Decision, Case No. SCSL-03-1-T, 19 June 2008, para. 12.

¹³ ICC-01/04-02/06-1159, para. 21 (“At the outset, the Chamber notes that it retains its discretion to evaluate a proposed expert witness's credentials despite the fact that the individual may have already testified as an expert in other cases.”).

¹⁴ ICC-01/09-01/11-844, para. 20 (“the qualification of a witness as an expert witness in a particular case is a judicial determination to be made in the context of the case”).

¹⁵ See <https://www.icc-cpi.int/iccdocs/PIDS/other/180815-List-of-Experts-Eng.pdf>.

8. As reflected in his *curriculum vitae*, the Witness' educational and professional background has principally been on the subject of mentalities, with a specialty on Congolese political history including naming conventions in the Democratic Republic of the Congo. There is no indication that he has any sub-specialty or specific experience in studying or teaching "African solidarity".

9. For instance, the Witness' graduate studies were focused on the "[e]volution des rapports politiques entre le Congo et l'ONU 1960-1963" and "La presse belge francophone face à la crise congolaise 1958-1963".¹⁶ The Witness' "[s]ituation professionnelle" shows that as a consultant his speciality is "sur la signification et l'importance des noms".¹⁷ The Witness' courses at the *Université Pédagogique Nationale* and other universities are equally focused on research methodologies, contemporary European history, "histoire des mentalités", and the "critique et philosophie de l'histoire".¹⁸ It appears that the Witness has neither taught classes nor included in his curriculum the subject to which his report pertains.

10. Unsurprisingly, in line with this history, Witness D22-0004's publications, conference presentations, and *honorifiques* have all principally been on the subject of Congolese history, particularly the history of mentalities in the Democratic Republic of the Congo, and *none* on the subject of African solidarity.¹⁹ It was also on that issue, particularly matters relating to the registration of civil status, naming conventions, family structures, and dates of births used in the Democratic Republic of the Congo, that the Witness was accepted as an expert in the *Lubanga*²⁰ and *Ntaganda*²¹ cases. Indeed, a public search of the Witness' name and the phrase "solidarité africaine" reveals *no* commentary by the Witness on the subject.

¹⁶ CAR-D22-0004-0003, at 0003.

¹⁷ CAR-D22-0004-0003, at 0003.

¹⁸ CAR-D22-0004-0003, at 0004.

¹⁹ See CAR-D22-0004-0003, at 0004-0006.

²⁰ See ICC-01/04-01/06-1934; ICC-01/04-01/06-2025-Anx1-tENG.

²¹ See ICC-01/04-02/06-1159, para. 15.

11. And, although the Witness holds himself out as an expert in contemporary African history, it is clear from his education, research, and background that his expertise is limited to Congolese history. The Witness' graduate research projects were both on Congolese history, and his conference presentations and publications almost all pertain to the Congo.²² There is no indication that the Witness has researched, studied, or published about historical matters relating to the Central African Republic or Cameroon, from which many of the witnesses at issue originate, and particularly on the issue of “*solidarité africaine*”, let alone the rest of Africa to which his purported expertise and report purportedly pertain.

III. Relief Requested

12. For the foregoing reasons, the Motion should be granted. Witness D22-0004's evidence should be excluded *in limine*.



Fatou Bensouda, Prosecutor

Dated this 18th day of February 2016
At The Hague, The Netherlands

²² CAR-D22-0004-0003, at 0003-0005.