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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

**Request on behalf of Mr Ntaganda seeking partial reconsideration of Decision on
Defence preliminary challenges to Prosecution's 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:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin
Me William St-Michel

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Further to: (i) the “*Decision on Defence preliminary challenges to Prosecution’s expert witnesses*” issued by Trial Chamber VI (“Chamber”) on 9 February 2016 (“Impugned Decision”);¹ (ii) the “*Prosecution’s Notice of Intention to Challenge Expert Witnesses, pursuant to the Directions on the Conduct of Proceedings (ICC-01/05-01/13-1209)*” submitted by the Office of the Prosecutor (“Prosecution”) in the *Bemba et al.* case on 15 February 2016 (“Prosecution Notice of Objection to Witness P-0932”);² and (iii) the “*Prosecution’s Motion Challenging the Qualifications of Witness D22-0004 as an Expert*” submitted by the Prosecution in the *Bemba et al.* case on 18 February 2016 (“Prosecution Challenges to Witness P-0932’s Qualifications”),³ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Request on behalf of Mr Ntaganda seeking partial reconsideration of “Decision on Defence preliminary challenges to Prosecution’s expert witnesses”

“Defence Request”

INTRODUCTION

1. The Defence hereby respectfully requests partial reconsideration of the Impugned Decision, to the extent that it allows Witness P-0932 to testify in the instant case as an expert witness.
2. Witness P-0932 is the only witness appearing on the list of witnesses to be called by the Defence of Mr Fidèle Babala Wandu in the *Bemba et al.* case.⁴
3. On 3 February 2016, the Prosecution moved Trial Chamber VII to exclude the testimony of Witness P-0932 and his report (“Witness P-0932’s *Bemba et al.*”).

¹ ICC-01/04-02/06-1159.

² ICC-01/05-01/13-1628.

³ ICC-01/05-01/13-1636.

⁴ “Notification de l’équipe de Défense de M. Fidèle BABALA WANDU du dépôt de sa liste de témoins, des éléments de preuve et de la divulgation des éléments par l’équipe Babala en application de la ‘*Decision on Defence Presentation of Evidence*’ (ICC-01/05-01/13-1450) et de la ‘*Further Directions on the Conduct of the Proceedings in 2016*’ (ICC-01/05-01/13-1518)”, 21 January 2016, ICC-01/05-01/13-1558. Witness P-0932 is known as Witness D22-0004 in the *Bemba et al.* case.

Report”) on the basis that the witness’s expected evidence: (i) impermissibly infringes Trial Chamber VII’s role as the trier of fact in presenting evidence concerning Mr Babala’s *mens rea* in the guise of expert opinion; and (ii) is *prima facie* irrelevant.⁵

4. On 15 February 2016, the Prosecution provided notice of its intention to challenge Witness P-0932’s qualifications as well as the relevance of his *Bemba et al.* Report in its entirety.⁶ On 18 February 2016, the Prosecution set out the reasons for challenging Witness P-0932’s qualifications, namely: (i) the *prima facie* unreliability of Witness P-0932’s *Bemba et al.* Report; (ii) the subject-matter of Witness P-0932’s *Bemba et al.* Report not being a recognised area of expertise; and (iii) the subject-matter of Witness P-0932’s *Bemba et al.* Report falling outside Witness P-0932’s realm of expertise.⁷
5. Although raised in another case, the Prosecution’s challenges to Witness P-0932’s qualifications as an expert witness are of such nature that they amount to a disavowal of the witness’s aptitude to testify in the instant case.
6. The Prosecution’s new position on Witness P-0932’s qualifications constitutes a novel fact, unknown to the Chamber when it issued the Impugned Decision. Reconsideration of the Impugned Decision is thus necessary in the interests of justice to avoid that a witness now regarded as unqualified by the party calling him to testify as an expert witness in the present case.

⁵ *Bemba et al.* case, “Prosecution’s Motion to Exclude the Testimony of Witness D22-0004 and the Submission of his Report”, 3 February 2016, ICC-01/05-01/13-1594 (“Prosecution Request to Exclude Witness P-0932’s Testimony and Report”).

⁶ Prosecution Notice of Objection to Witness P-0932.

⁷ Prosecution Challenges to Witness P-0932’s Qualifications. As regards the relevance of Witness P-0932’s *Bemba et al.* Report, the Prosecution reiterated its submissions as set out in its Request to Exclude Witness P-0932’s Testimony and Report: Prosecution Challenges to Witness P-0932’s Qualifications, fn.1.

BACKGROUND

7. On 16 April 2015, the Prosecution provided notice of its intention to call in this case Witness P-0932 as an expert witness on 'naming conventions and civil status/registration in the DRC'.⁸
8. On 15 September 2015, the Defence submitted a notice setting out its position in respect of the Prosecution's thirteen proposed expert witnesses.⁹ The Defence indicated that, *inter alia*, it objected to Witness P-0932 being called to provide evidence as an expert witness, whether orally or in writing.¹⁰
9. On 23 November 2015, further to the Chamber's direction,¹¹ the Defence submitted supplementary submissions in relation to Prosecution's proposed expert witnesses,¹² providing further submissions on *inter alia* its objection to Witness P-0932 being called as an expert witness.¹³
10. On 2 December 2015, the Prosecution submitted its response to the Supplementary Submissions,¹⁴ to which the Defence replied on 8 December 2015.¹⁵

⁸ "Prosecution's list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness", 16 April 2015, ICC-01/04-02/06-560, para.10(ii).

⁹ "Notice on behalf of Mr Ntaganda setting out the position of the Defence on proposed Prosecution expert witnesses", 15 September 2015, ICC-01/04-02/06-826-Conf ("Notice of Objection").

¹⁰ Notice of Objection, paras.8-9.

¹¹ "Order requesting parties' submissions on expert witnesses", 11 November 2015, ICC-01/04-02/06-994.

¹² "Supplementary submission on behalf of Mr Ntaganda in relation to proposed Expert witnesses", 23 November 2015, ICC-01/04-02/06-1032-Conf ("Supplementary Submissions").

¹³ Supplementary Submissions, paras.6-17.

¹⁴ "Prosecution's response to 'Supplementary submission on behalf of Mr Ntaganda in relation to proposed Expert witnesses', ICC-01/04-02/06-1032-Conf", 2 December 2015, ICC-01/04-02/06-1044-Conf ("Prosecution Response").

¹⁵ "Reply on behalf of Mr Ntaganda to 'Prosecution's response to 'Supplementary submission on behalf of Mr Ntaganda in relation to proposed Expert witnesses', ICC-01/04-02/06-1032-Conf", 8 December 2015, ICC-01/04-02/06-1046-Conf ("Defence Reply").

SUBMISSIONS

11. While certain of the Prosecution's challenges to Witness P-0932's qualifications are grounded on considerations specific to his expected evidence in the *Bemba et al.* case, other challenges are, strikingly, similar to that raised by the Defence in relation to the witness's aptitude to testify in the instant case as an expert witness.
12. The Prosecution seeks the *in limine* exclusion of Witness P-0932's *Bemba et al.* Report on the basis that *inter alia* it "fails to meet the minimum standards of reliability",¹⁶ in particular because the *Bemba et al.* Report: (i) lacks any explicit or detailed referencing of sources for any given proposition;¹⁷ and (ii) fails to outline the methodology used by the witness in its preparation.¹⁸
13. Although the Defence does not have access to Witness P-0932's *Bemba et al.* Report, the Prosecution's description thereof of its methodological lacunas corresponds, in all relevant respects, to that outlined by the Defence of Witness P-0932's reports for which the Prosecution seeks admission in this case.¹⁹
14. Indeed, in its Supplementary Submissions, the Defence underscored that Witness P-0932's *Ntaganda* Reports reflect a lack of structure and methodology and fail to indicate any reference supporting Witness P-0932's observations.²⁰ It noted that only Witness P-0932's Report on Circumstantial Names – a mere

¹⁶ Prosecution Challenges to Witness P-0932's Qualifications, para.2.

¹⁷ Prosecution Challenges to Witness P-0932's Qualifications, paras.2-3.

¹⁸ Prosecution Challenges to Witness P-0932's Qualifications, para.4.

¹⁹ DRC-OTP-2083-0517 ("Witness P-0932's Report on Social Conventions in Ituri") and DRC-OTP-2083-0524 ("Witness P-0932's Report on Circumstantial Names") (collectively, "Witness P-0932's *Ntaganda* Reports").

²⁰ Supplementary Submissions, para.17. *See also* Defence Reply, paras.10-13.

- ‘annex’ to Witness P-0932’s Report on Social Conventions in Ituri²¹ – is supported by a bibliography and description of methodology.²²
15. Comparatively, in arguing that Witness P-0932’s *Bemba et al.* Report “lacks any explicit or detailed referencing of sources for any given proposition”, the Prosecution highlighted that “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 reference support [sic] which propositions in the report, if at all.”²³ The Defence underscores that is also the case with the Witness P-0932’s *Ntaganda* Reports. In particular, the bibliography appended to Witness P-0932’s Report on Circumstantial Names as well as the very brief description of methodology employed therein provide no guidance to the parties or the Chamber.
 16. Likewise, in challenging the methodology used by Witness P-0932 in his *Bemba et al.* Report, or rather the absence thereof, the Prosecution underscored the *Bemba et al.* Report’s failure indicate *inter alia*: (i) Witness P-0932’s criteria for selecting documents; (ii) what sources Witness P-0932 had access to; (iii) what evidence or information was at Witness P-0932’s disposal; and (iv) whether Witness P-0932’s analysis was subject to peer review.²⁴ The absence of these features is also apparent from Witness P-0932’s *Ntaganda* Reports.
 17. Whereas the Prosecution argued that the Defence’s challenges to Witness P-0932’s *Ntaganda* Reports in relation to the methodology employed therein are matters which “may – at most – affect the weight to be accorded to [Witness P-0932]’s evidence depending on the outcome of his testimony”,²⁵ the Prosecution now submits that such considerations warrant exclusion *in limine* of a similarly methodologically-flawed report.

²¹ See Witness P-0932’s Report on Social Conventions in Ituri, p.4, referring to Witness P-0932’s Report on Circumstantial Names.

²² Supplementary Submissions, para.17.

²³ Prosecution Challenges to Witness P-0932’s Qualifications, para.3.

²⁴ Prosecution Challenges to Witness P-0932’s Qualifications, para.4.

²⁵ Prosecution Response, para.14.

18. To the extent that there appears to be no ostensible differences between Witness P-0932's *Bemba et al.* Report and his *Ntaganda* Reports with respect to methodology (or absence thereof), the Defence submits that the Prosecution's challenges to Witness P-0932's qualifications in the *Bemba et al.* case amount to a disavowal of the witness's aptitude to testify as an expert witness in this case. Such a shift in the Prosecution's position with respect to the qualifications of its *own* witness, which was unknown to the Chamber when it issued the Impugned Decision, is significant.
19. While issues surrounding the sources used, or the referencing, structure or methodology of a report, are matters that can be addressed during cross-examination,²⁶ reports in which no methodology is employed should be excluded *in limine*, as advanced by the Prosecution.²⁷
20. The Defence respectfully submits that reconsideration of the Impugned Decision is necessary in the interests of justice to avoid that a witness now regarded as unqualified by the party calling him to testify as an expert witness in the present case.

RELIEF SOUGHT

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

RECONSIDER the Impugned Decision; and

NOT PERMIT the Prosecution to call Witness P-0932 as an expert witness, nor to tender his *Ntaganda* Reports into evidence.

²⁶ Impugned Decision, para.16.

²⁷ Prosecution Challenges to Witness P-0932's Qualifications, para.1.

RESPECTFULLY SUBMITTED ON THIS 23RD DAY OF FEBRUARY 2016

A handwritten signature in black ink, appearing to read 'StB' with a stylized flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands