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

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: (i) the “*Order requesting parties’ submissions on expert witnesses*” issued by Trial Chamber VI (“Chamber”) on 10 November 2015 (“Order”);¹ and (ii) the “*Prosecution’s response to ‘Supplementary submission on behalf of Mr Ntaganda in relation to proposed Expert witnesses’, ICC-01/04-02/06-1032-Conf*” submitted by the Office of the Prosecutor (“Prosecution”) on 2 December 2015 (“Prosecution Response”),² Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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”

“Defence Reply”

INTRODUCTION

1. Pursuant to the Order,³ the Defence hereby replies to Prosecution Response to the Defence Supplementary Submission on Expert Witnesses.⁴
2. In its Response, the Prosecution argues *inter alia* that:
 - a. Witness P-0932 is qualified to provide his anticipated testimony because of his “long experience specialising in *histoire des mentalités*” of social and cultural groups in the Democratic Republic of the Congo and that the Defence will be able to question Witness P-0932 on his credentials during cross-examination;⁵
 - b. Witness P-0932 was not specifically asked to answer each of the questions put to him by the Prosecution individually, but was rather asked to answer the questions “insofar as possible in light of his competence” and that the Defence will have the opportunity to put any

¹ ICC-01/04-02/06-994.

² ICC-01/04-02/06-1044-Conf.

³ Order, p.6.

⁴ “*Supplementary submission on behalf of Mr Ntaganda in relation to proposed Expert witnesses*”, ICC-01/04-02/06-1044-Conf, 23 November 2015 (“Defence Supplementary Submission on Expert Witnesses”).

⁵ Prosecution Response, paras.10-11.

additional questions it deems relevant to either his competence or the substance of his testimony during cross-examination;⁶

- c. The absence of methodology in Witness P-0932's and Witness P-0885's reports may – at most – affect the weight to be accorded to their evidence;⁷
- d. The Defence fails to explain how Witness P-0885's views on specific legal issues demonstrate her lack of impartiality *vis-à-vis* the Accused, "which is the critical issue" and that concerns about Witness P-0885's impartiality should not affect the admissibility of her report and can be properly addressed during cross-examination;⁸ and
- e. Witness P-0453 made no conclusion on the sufficiency of the evidence before the Chamber in the case, but drew conclusions based on the data available to her as a result of the survey and that the jurisprudence of the ICTY allows expert witnesses to offer their opinion on the ultimate issue where the Chamber determines that it will be of assistance.⁹

3. For the reasons explained below, the Prosecution's arguments should be disregarded.

⁶ Prosecution Response, para.12.

⁷ Prosecution Response, paras.14, 21.

⁸ Prosecution Response, para.18.

⁹ Prosecution Response, para.27.

SUBMISSIONS

I. The interests of fairness and judicial efficiency warrant the consideration of the Defence's objections at this stage

4. With respect to the objections raised by the Defence in relation to: (i) Witness P-0932's qualifications as an expert; (ii) Witness P-0932's failure to answer all questions put to him by the Prosecution; and (iii) Witness P-0885's impartiality, the Prosecution argues that the matters thereof can be explored by the Defence in cross-examination.
5. To the contrary, all of the above objections relate to the admissibility of expert evidence. Moreover, considering that delaying consideration of these objections after the testimony of the expert witnesses would defeat the fair and expeditious conduct of the proceedings, the Defence respectfully submits that its objections should be entertained at this stage.

A. Witness P-0932

6. The Prosecution Response does not point out to any elements of Witness P-0932's curriculum vitae which would demonstrate Witness P-0932's *expertise* on the administrative, cultural and social aspects of life in *Ituri*. The Defence respectfully reiterates that the Chamber is not bound by the fact that Witness P-0932 was qualified as an expert by Trial Chamber I in the *Lubanga* case.¹⁰
7. Moreover, the Prosecution's response to the Defence's argument that Witness P-0932 failed to answer all of the questions put to him in the letter of instruction, further shows Witness P-0932's absence of any relevant expertise on the subject-matter of administrative, cultural and social life in *Ituri*.¹¹

¹⁰ "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, 15 September 2015 ("First Defence Notice"), para.8.

¹¹ Prosecution Response, para.12: "Professor Bwatshia was not specifically asked to answer each of the questions individually. He was asked to answer the questions in his report *insofar as possible in light of his competence*, and to be prepared to testify about them. As such, the questions were meant to inform the expertise provided, rather than to elicit specific answers to each of them". (emphasis added)

8. As the calling party, the Prosecution has the burden to establish that its expert witnesses are qualified to assist the Chamber in understanding the evidence adduced before it by providing expert knowledge which is not the realm of the judges. Objections to the qualifications of an expert cannot be ‘explored’ during cross-examination. The very purpose of entertaining *at this stage* objections to the admissibility of expert evidence – including the experts’ qualifications – is to ensure the efficient conduct of the proceedings.¹² Indeed, qualified expert witnesses provide focused and meaningful testimonies. Ensuring that only qualified expert witnesses appear before the Court also serves the fairness of the proceedings, inasmuch as it allows the Defence to prepare its case on a more solid basis.

B. Witness P-0885

9. To the extent that an expert witness must be impartial, whether or not an expert report is ‘impartial’ is a matter of admissibility and, as such, any objection in this regard must be entertained as a preliminary matter. Likewise, the fair and expeditious conduct of the proceedings would not be served if expert witnesses demonstrating bias in any form, which has an impact on the Accused, were allowed to testify.

II. The lack of methodology in an expert report is a ground of inadmissibility, not a matter of probative value

10. The Defence refers to its earlier submissions on the *absence* of any structure and/or methodology in Witness P-0932’s and Witness P-0885’s reports.¹³ The Defence notes that in its Response, the Prosecution does not challenge the Defence’s position, but rather argues that the lack of methodology may – at most – affect the weight to be accorded to Witness P-0932’s and Witness P-0885’s evidence.

¹² “Decision on the conduct of proceedings”, ICC-01/04-02/06-619, 2 June 2015, para.38.

¹³ Defence Supplementary Submission on Expert Witnesses, paras.17 and 36.

11. Expert evidence is aimed at providing the trier of fact with “specialized knowledge” that might assist it in understanding the evidence before it.¹⁴ Whether an individual called by a party as an expert possesses ‘specialized knowledge’ or not, is undoubtedly a question related to the admissibility of his/her evidence. The Defence submits that an expert’s ‘specialized knowledge’ is reflected, among other factors, by the methodology followed by the expert in his/her report, which provides for sufficient indicia of scientific reliability.
12. While the appropriateness of the methodology adopted by an expert in his/her report may be explored in cross-examination, the absence of any methodology thereof strikes at the core of the report’s admissibility. Indeed, the lack of methodology deprives the trier of fact and the parties of the opportunity to assess whether the expert possesses sufficient ‘specialized knowledge’ of the topic on which he/she offers expert evidence. In order to ensure that the expert witnesses expected to testify are qualified experts, it is necessary for the Chamber to exclude, *at this stage*, experts’ reports that do not follow any methodology.
13. For these reasons, the Defence reiterates that Witness P-0932’s and Witness P-0885’s reports should be ruled inadmissible and that these witnesses should not be called to provide evidence as expert witnesses.

III. An expert witness must remain impartial in relation to the proceedings as a whole, not solely vis-à-vis the Accused

14. The Prosecution misconstrues the requirement for an expert witness to provide an ‘impartial’ opinion. An expert witness can only meaningfully assist the trier of fact in its understanding of the evidence if the said expert witness is impartial in relation to the proceedings *as a whole*, and not solely *vis-à-vis* the Accused. Expert witnesses testify on matters that lie outside the

¹⁴ ICTR, *Semanza v. Prosecutor*, ICTR-97-20-A, Judgement, 20 May 2005, para.303.

layperson's ken.¹⁵ In proceedings before the Court, topics on which expert evidence is adduced obviously extend beyond matters related to the acts and conduct of the Accused.¹⁶ In such circumstances, distinguishing between impartiality *vis-à-vis* the Accused and impartiality in relation to the proceedings as whole would be artificial. For the Chamber to properly understand the evidence adduced before it and resolve legal issues in dispute (should expertise on legal issues be deemed admissible), it is of paramount importance that the experts called to testify do not abuse their credibility as experts to promote their personal views.

15. That is not to say that an argumentative report is inadmissible before the Court. Should an individual feel the need to have his or her 'voice' heard as part of proceedings before the Court,¹⁷ he or she is free to request leave to submit *amicus curiae* observations pursuant to Rule 103(1) of the Rules. However, in order for expert evidence to remain meaningful, an individual cannot advocate for a particular opinion under the guise of 'expert' evidence.
16. In this regard, the Defence recalls that Witness P-0885 was involved in the *Lubanga* case first as *amicus curiae* on her own initiative.¹⁸ The reasons why [REDACTED].¹⁹ In any event, considering that the scope of Witness P-0885's expected evidence in this case is different from that of the evidence she provided in the *Lubanga* case, this Chamber should not be bound by Trial Chamber I's ruling on Witness P-0885's status as expert witness.
17. Even if expert's impartiality were to be understood *vis-à-vis* the Accused – which the Defence challenges – the Defence submits that Witness P-0885's report clearly shows a bias in favour of securing a conviction against Mr Ntaganda and, as such, Witness P-0885's report should be ruled

¹⁵ ICTR, *Semanza v. Prosecutor*, ICTR-97-20-A, Judgement, 20 May 2005, para.303.

¹⁶ For instance, Witness P-0931 testified on matters related to the background and context of both the situation and conflict in Ituri.

¹⁷ See Defence Supplementary Submission on Expert Witnesses, fn.35.

¹⁸ First Defence Notice, para.11.

¹⁹ ICC-01/04-01/06-T-176-CONF-ENG, p.27.

inadmissible. Indeed, even though Witness P-0885's report does not directly address aspects related to Mr Ntaganda's individual criminal liability, it does advocate for a broad interpretation of some of the crimes with which Mr Ntaganda is charged.²⁰

IV. Witness P-0453's conclusions impermissibly impinge on the Chamber's fact-finding role

18. The fact that Witness P-0453 has drawn conclusions on data available to her as a result of a survey, instead of analysing the sufficiency of the evidence before the Chamber, does not render her report admissible. As indicated in the First Defence Notice, Witness P-0453's report characterises and attributes criminal acts to the UPC/FPLC, a task which falls squarely within the competence of this Chamber.²¹ Mr Ntaganda cannot be held criminally responsible of crimes committed by others on the basis of mere survey data.

19. Moreover, the situation at hand must be distinguished from the facts of the *Gotovina* decision referred to by the Prosecution.²² The issue dealt with by Witness P-0453 in her report is not technical in nature; as underscored in the First Defence Notice, the issue strikes at the core of the contextual element of Article 7 and the 'common plan' requirement under Article 25(3)(a).

V. Witness P-0933

20. The Defence is informed for the first time that Witness P-0933 can no longer testify as an expert witness in this case. In its Response, the Prosecution further informs the Chamber that it will both seek to admit into evidence Witness P-0933's "expert testimony" under Rule 68 of the Rules *and* apply to add a new expert on trauma, pursuant to Regulation 35 of the Regulations of the Court.

²⁰ See Defence Supplementary Submission on Expert Witnesses, fn.35 and 37.

²¹ First Defence Notice, para.16.

²² Prosecution Response, para.27 and fn.52.

21. Without prejudice to its position on either relief, the Defence takes issue with the Prosecution's intention to have both the admission of Witness P-0933's report into evidence *and* the testimony of an additional expert witness. The Defence will set out its position when responding to the Prosecution's prospective requests.

CONFIDENTIALITY

22. Pursuant to Regulations 23*bis* (1) and (2) of the Regulations of the Court, this Defence Reply is classified as confidential as it replies to a filing bearing the same classification.

RELIEF SOUGHT

23. In light of the above arguments and submissions, the Defence respectfully requests the Chamber to **DISREGARD** the Prosecution Response.

RESPECTFULLY SUBMITTED ON THIS 23RD DAY OF FEBRUARY 2016



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

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