

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **18 April 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**

**Decision on Defence's request seeking partial reconsideration of 'Decision on Defence preliminary challenges to Prosecution's expert witnesses and request for leave to reply'**

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 Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Luc Boutin

**Legal Representatives of Victims**

Ms Sarah Pellet  
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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber VI** ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Bosco Ntaganda* ('Ntaganda case'), having regard to Articles 64, 69 and 74 of the Rome Statute ('Statute'), issues the following 'Decision on Defence's request seeking partial reconsideration of "Decision on Defence preliminary challenges to Prosecution's expert witnesses and request for leave to reply"'.<sup>1</sup>

### **I. Procedural history**

1. On 16 April 2015, the Office of the Prosecutor ('Prosecution') filed a list of proposed expert witnesses it intends to call to testify, which included Witness P-0932, in relation to '[n]aming conventions and civil status/registration in the [Democratic Republic of Congo ('DRC')]'.<sup>1</sup>
2. On 15 September 2015, upon invitation of the Chamber,<sup>2</sup> the defence team for Mr Ntaganda ('Defence') filed a notice setting out its position in respect of the Prosecution's thirteen proposed expert witnesses.<sup>3</sup> The Defence indicated that, *inter alia*, it objected to Witness P-0932 being called to provide evidence as an expert witness.<sup>4</sup> In its further submissions, on 23 November<sup>5</sup> and 8 December 2015,<sup>6</sup> the Defence provided additional arguments concerning mainly Witness P-0932's alleged lack of scientific knowledge and expertise relevant to the administrative, cultural and social aspects of life in Ituri, and Witness P-0932's reports' alleged lack of structure and methodology.

<sup>1</sup> 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, ICC-01/04-02/06-560.

<sup>2</sup> Decision on the conduct of the proceedings, ICC-01/04-02/06-619, para. 38. The Chamber granted an extension of time to file the Defence's notice by e-mail to the parties on 13 August 2015 at 8:52.

<sup>3</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 ('Defence Notice'). A public redacted version (ICC-01/04-02/06-826-Red) was filed on the same day.

<sup>4</sup> Defence Notice, ICC-01/04-02/06-826-Red, paras 8-10.

<sup>5</sup> Supplementary submission on behalf of Mr Ntaganda in relation to proposed Expert witnesses, ICC-01/04-02/06-1032-Conf.

<sup>6</sup> 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", ICC-01/04-02/06-1046-Conf.

3. On 9 February 2016, the Chamber decided that certain of the Prosecution's proposed expert witnesses, including Witness P-0932, may testify as expert witnesses ('Impugned Decision').<sup>7</sup>
4. On 23 February 2016, the Defence filed a request seeking partial reconsideration of the Impugned Decision, to the extent that it allows Witness P-0932 to testify in the present case as an expert witness ('Request').<sup>8</sup>
5. On 15 March 2016, the Prosecution filed its response, in which it objected to the Request ('Response').<sup>9</sup>
6. On 18 March 2016, the Defence filed a request for leave to reply ('Request for leave to Reply'),<sup>10</sup> to which the Prosecution responded on 24 March 2016 ('Prosecution Response to Request for leave to Reply').<sup>11</sup>

## II. Submissions

7. The Defence submits that the Prosecution's challenges to Witness P-0932's qualifications in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('*Bemba et al.* case'), where Witness P-0932 was called as expert witness by one of the defence teams in that case, are of such nature that 'they amount to a disavowal of the witness's aptitude to testify in the instant case'.<sup>12</sup> In particular the Defence stresses that the Prosecution in the *Bemba et al.* case sought the *in limine* exclusion of Witness P-0932's report on the basis that *inter alia* it 'fails to

<sup>7</sup> Decision on Defence preliminary challenges to Prosecution's expert witnesses, ICC-01/04-02/06-1159.

<sup>8</sup> Request on behalf of Mr Ntaganda seeking partial reconsideration of Decision on Defence preliminary challenges to Prosecution's expert witnesses, ICC-01/04-02/06-1186.

<sup>9</sup> Prosecution's response to "Request on behalf of Mr Ntaganda seeking partial reconsideration of Decision on Defence preliminary challenges to Prosecution's expert witnesses", ICC-01/04-02/06-1186, ICC-01/04-02/06-1211.

<sup>10</sup> Request on behalf of Mr Ntaganda seeking leave to reply to 'Prosecution's response to the "Request on behalf of Mr Ntaganda seeking partial reconsideration of Decision on Defence preliminary challenges to Prosecution's expert witnesses"', ICC-01/04-02/06-1186', ICC-01/04-02/06-1220.

<sup>11</sup> Response to the Defence request for leave to reply to the 'Prosecution's response to the "Request on behalf of Mr Ntaganda seeking partial reconsideration of Decision on Defence preliminary challenges to Prosecution's expert witnesses"', ICC-01/04-02/06-1186', ICC-01/04-02/06-1220, ICC-01/04-02/06-1234.

<sup>12</sup> Request, ICC-01/04-02/06-1186, paras 2-5.

meet the minimum standards of reliability'. Such challenges, it is submitted, are similar to those raised by the Defence in relation to the witness's aptitude to testify in the present case as an expert witness.<sup>13</sup> The Defence argues that the Prosecution's position on Witness P-0932's qualifications in the *Bemba et al.* case constitutes a novel fact, unknown to the Chamber when it issued the Impugned Decision, and that reconsideration is therefore necessary in the interests of justice to avoid having a witness now regarded as unqualified by his own calling party coming to testify as an expert witness in the present case.<sup>14</sup>

8. The Prosecution submits that the proposed areas of Witness P-0932's testimony in the two cases are clearly distinct,<sup>15</sup> and therefore its position in the *Bemba et al.* case regarding Witness P-0932's expertise on '*la solidarité africaine*' does not reflect a new position in relation to his expertise on registration of civil status, naming conventions, family structures and dates of birth in the DRC for the purposes of the *Ntaganda* case.<sup>16</sup> The Prosecution stresses that the Defence uses certain similarities between the challenges made in the two cases as an opportunity to repeat arguments already presented and considered by the Chamber in the present case, and to present new arguments, mentioned by the Prosecution in the *Bemba et al.* case, which had not been raised earlier before this Chamber.<sup>17</sup> The Prosecution therefore submits that the Defence fails to present new facts and arguments warranting reconsideration, that there was no clear error of reasoning in the Impugned Decision, and allowing Witness P-0932 to testify as an expert in this case would not amount to an injustice.<sup>18</sup>
9. The Defence seeks leave to reply on three discrete issues, namely: (i) the Prosecution's misrepresentation of the arguments put forward by the Defence

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<sup>13</sup> Request, ICC-01/04-02/06-1186, paras 11-17.

<sup>14</sup> Request, ICC-01/04-02/06-1186, paras 6, 18 and 20.

<sup>15</sup> Response, ICC-01/04-02/06-1211, para. 22.

<sup>16</sup> Response, ICC-01/04-02/06-1211, paras 2, 19.

<sup>17</sup> Response, ICC-01/04-02/06-1211, paras 20-21.

<sup>18</sup> Response, ICC-01/04-02/06-1211, paras 3, 19, 25

in paragraphs 15 and 16 of the Request, which according to the Defence are not new arguments, but rather new facts; (ii) the impact, if any, of Trial Chamber VII's decision, dated 24 February 2016, rejecting the Prosecution's challenges to the witness's expertise; and (iii) the impact of Prosecution's cross-examination of Witness P-0932 in the *Bemba et al.* case on the Prosecution's submission that it 'has not disavowed Witness P-0932's aptitude to testify as an expert witness in *Ntaganda*'. Reference is made in particular to the fact that, during the cross-examination of the witness in the *Bemba et al.* case, the Prosecution suggested, *inter alia*, that the witness committed plagiarism and that such a challenge to the 'methodological integrity' of the witness in the *Bemba et al.* case further shows the Prosecution's disavowal of the witness's aptitude to testify in the present proceedings.<sup>19</sup>

10. The Prosecution requests that the Chamber dismiss the Request for leave to Reply, arguing, *inter alia*, that the three points on which the Defence proposes to reply exceed the permissible scope of a reply.<sup>20</sup>

### III. Analysis

11. The Chamber does not consider that it would be assisted by further submissions on any of the issues identified by the Defence in the Request for leave to Reply.
12. As the Chamber has previously noted,<sup>21</sup> the Statute does not provide guidance on reconsideration of interlocutory decisions. However, the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, whether prompted by one of the parties or *proprio motu*. Reconsideration is exceptional,

<sup>19</sup> Request for leave to reply, ICC-01/04-02/06-1220, paras 1-6.

<sup>20</sup> Prosecution Response to Request for leave to Reply, ICC-01/04-02/06-1234, paras 3, 8-15.

<sup>21</sup> Decision on Defence request for reconsideration, ICC-01/04-02/06-611, para. 12 (and footnotes referred to therein).

and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.

13. The Chamber considers that the Request does not meet this standard. In the Impugned Decision, the Chamber decided, *inter alia*, that '[i]n light of his qualifications, in particular as reflected in his *curriculum vitae*, [...] P-0932 appears to possess some specialised knowledge on the proposed area of testimony', and could be 'accepted as an expert, who can assist the Chamber on matters related, *inter alia*, to registration of civil status, naming conventions, family structures, and dates of birth'. It added that 'any issues surrounding the sources used, or the referencing, structure or methodology of the report, are matters that can be addressed during cross-examination and taken into consideration in evaluating the weight of the report, should it be admitted'.<sup>22</sup>
14. The Chamber notes that, although the Prosecution's challenges to Witness P-0932's expertise in the *Bemba et al.* case are similar to those presented by the Defence in the present case, the reports and proposed areas of testimony in the two cases are distinct. The Chamber also finds that the Prosecution's challenges to the reliability and methodology of a different report, filed before another Chamber in a separate case, do not warrant reconsideration of the Chamber's determination in the present case. As indicated in the Impugned Decision, the Defence will have an opportunity to raise any matter related to the reliability of Witness P-0932's reports, including any issues concerning his alleged lack of methodology and professionalism, during the examination of the witness.
15. As the Defence has not substantiated any error of reasoning or the existence of an injustice, the Chamber will not reconsider the Impugned Decision.
16. Nonetheless, should the Prosecution ultimately call Witness P-0932 to testify, the Chamber will, in light of its obligation to ensure the fairness and

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<sup>22</sup> Impugned Decision, ICC-01/04-02/06-1159, paras 15-16.

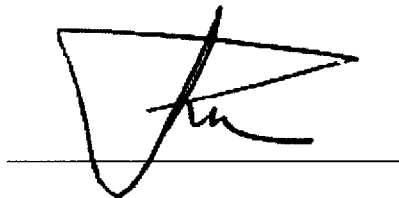
expeditiousness of the proceedings, require that any such testimony is strictly confined to what is relevant for this case and falls within the authorised area of expertise.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request for leave to Reply; and

**REJECTS** the Request.

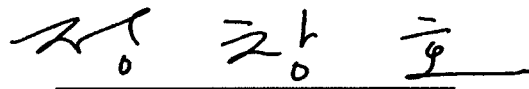
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**Judge Robert Fremr, Presiding Judge**

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**Judge Kuniko Ozaki**

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**Judge Chang-ho Chung**

Dated this 18 April 2016

At The Hague, The Netherlands