

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 24 February 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA
WANDU and NARCISSE ARIDO***

Public

Decision on Prosecution Request to Exclude Defence Witness D22-0004

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

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

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

Others

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verril

Detention Section

Victims Participation and Reparations Section

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 67(1)(e) and 69 and Regulation 44 of the Regulations of the Court issues the following 'Decision on Prosecution Request to Exclude Defence Witness D22-0004'.

I. Procedural History and Submissions

1. On 3 February 2016, the Office of the Prosecutor ('Prosecution') filed an application, requesting that witness D22-4 ('Witness'), who the defence for Mr Babala ('Babala Defence') intends to call as an expert witness, and his report be excluded ('Request').¹
2. On 8 February 2016, the Babala Defence provided its response, submitting that the Request should be rejected ('Response').²
3. On 15 February 2016, the Prosecution filed its intention to challenge the Witness's qualifications.³
4. On 18 February 2016, upon instruction of the Chamber,⁴ the Prosecution filed its challenge to the Witness's qualifications ('Challenge of Witness Expertise').⁵

¹ Prosecution's Motion to Exclude the Testimony of Witness D22-0004 and the Submission of his Report, ICC-01/05-01/13-1594.

² Réponse de la Défense de M. Fidèle Babala Wandu à la « Prosecution's Motion to Exclude the Testimony of Witness D22-004 and the Submission of his Report » (ICC-01/05-01/13-1594), ICC-01/05-01/13-1604.

³ Prosecution's Notice of Intention to Challenge Expert Witnesses, pursuant to the Directions on the Conduct of the Proceedings (ICC-01/05-01/13-1209), ICC-01/05-01/13-1628.

⁴ Email from Trial Chamber VII to the parties on 16 February 2016, at 16:13.

⁵ Prosecution's Motion Challenging the Qualifications of Witness D22-0004 as an Expert, ICC-01/05-01/13-1636 with one annex.

5. On 22 February 2016, the Babala Defence submitted its response to the Challenge of Witness Expertise submitting that the challenge should be rejected.⁶
6. The Prosecution submits that the Witness's anticipated testimony improperly encroaches on the role of the Chamber as the trier of fact.⁷ It argues that the anticipated testimony of the Witness relates to how certain acts of Mr Babala are to be interpreted and Mr Babala's behaviour towards Mr Bemba. This, in the eyes of the Prosecution, impermissibly goes to the *mens rea* of Mr Babala.⁸ Further, the Prosecution argues that the testimony of the Witness is an attempt by the Babala Defence to argue its case under the guise of expert testimony⁹ and that it is not for an expert to provide evidence on Mr Babala's intent and motive.¹⁰
7. Further, the Prosecution argues that the proposed testimony of the Witness is *prima facie* irrelevant.¹¹ It submits that nothing in the Witness's report goes to the facts at issue and that the main purpose of the report is to explain that 'all Africans [...] are [...] incapable of appreciating the criminality of their conduct'.¹² The Prosecution argues that the fact that the Babala Defence does not call any other witness to whose testimony the anticipated Witness's testimony could relate to makes it 'particularly irrelevant'.¹³
8. Furthermore, in its Challenge of Witness Expertise, the Prosecution submits that the Report lacks *prima facie* reliability. It argues that the Report has no footnotes, that the indicated sources are 'not readily accessible' and that the Report fails to

⁶ Réponse de la Défense de M. Fidèle Babala Wandu à : « Prosecution's Motion Challenging the Qualifications of Witness D22-0004 as an Expert » (ICC-01/05-01/13-1636), ICC-01/05-01/13-1646.

⁷ Request, ICC-01/05-01/13-1594, paras 1, and 3-8.

⁸ Request, ICC-01/05-01/13-1594, para. 4.

⁹ Request, ICC-01/05-01/13-1594, para. 7.

¹⁰ Request, ICC-01/05-01/13-1594, para. 8.

¹¹ Request, ICC-01/05-01/13-1594, paras 2, and 9-12.

¹² Request, ICC-01/05-01/13-1594, para. 11.

¹³ Request, ICC-01/05-01/13-1594, para. 12.

outline the methodology used in its preparation.¹⁴ Lastly, it averses that the subject matter, '*solidarité africaine*', is not a recognised area of expertise¹⁵ and that the Witness lacks expertise in this subject matter.¹⁶

9. In its Response, the Babala Defence submits that the Witness's anticipated testimony does not go to the constitutive elements of the charges against Mr Babala, since it intends to call the Witness to demonstrate how African solidarity functions in general terms.¹⁷ It argues that the Witness is called to provide information on the socio-cultural context which does not amount to providing evidence as to the guilt or innocence of an accused,¹⁸ and that calling expert witnesses for context and general circumstances is in line with the established jurisprudence of this Court and international tribunals.¹⁹
10. In respect of the assertion that the Witness's anticipated testimony is not relevant to the facts, the Babala Defence submits that expert witnesses on context do not necessarily have to speak to a fact in dispute but can also provide necessary contextual information.²⁰

II. Analysis

11. The Single Judge recalls the prior jurisprudence of this Court in respect of expert witnesses who were called to testify on issues of background and context.²¹ Consequently, it is possible to call an expert on issues that go not

¹⁴ Challenge of Witness Expertise, ICC-01/05-01/13-1636, paras 2-4.

¹⁵ Challenge of Witness Expertise, ICC-01/05-01/13-1636, para. 5.

¹⁶ Challenge of Witness Expertise, ICC-01/05-01/13-1636, paras 6-11.

¹⁷ Response, ICC-01/05-01/13-1604, paras 15 and 17.

¹⁸ Response, ICC-01/05-01/13-1604, paras 16 and 18.

¹⁹ Response, ICC-01/05-01/13-1604, paras 20-23.

²⁰ Response, ICC-01/05-01/13-1604, paras 26-31.

²¹ *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on Defence preliminary challenges to Prosecution's expert witnesses, 9 February 2016, ICC-01/04-02/06-1159 ('*Ntaganda* Decision on expert witnesses'); *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V(A), Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, ICC-01/09-01/11-844 ('*Ruto and Sang* Decision on Expert Witness'); *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on "Prosecution's Motion to Exclude Defence Political-Military Strategy Expert", 21 August 2012, ICC-01/05-01/08-2273.

specifically to the facts *sub judice*, but to necessary contextual information. Accordingly, the Witness and his Report are admissible as expert testimony if (i) the Witness is an expert; (ii) the content of the Report falls within the expertise of the Witness and (iii) the proposed testimony and Report may potentially be of assistance to the Chamber. Finally, the Single Judge will exclude the testimony if it usurps the functions of the Chamber.²²

12. At the outset, the Single Judge notes that the Witness's expertise is not put into question by the Prosecution. Rather, it challenges that the subject matter, '*la solidarité africaine*', is a viable area of expertise and that this subject matter falls within the Witnesses expertise. The Witness is listed as an expert on '*histoire des mentalités*', a sociological field of expertise, and the Prosecution gives no indication that D22-4 is not an expert in this field.²³
13. The Single Judge considers that the subject matter of the Report seems to be a part of this field of expertise. It is not unusual that an expert testifies about a specific aspect of a larger issue which does not require the entire spectrum of his expertise. Any persisting questions the Prosecution has as to the scope, the exact delineation of '*la solidarité africaine*' and its meaning, can be addressed during the examination of the witness.
14. Accordingly, the Single Judge finds that the topic of the Report falls sufficiently within the subject matter of an expert's testimony and that the Witness has the required expertise for this subject matter.
15. In respect of the Prosecution's argument that the Report and anticipated testimony are *prima facie* irrelevant, the Single Judge recalls that the anticipated testimony about '*la solidarité africaine*' includes, for instance, usage and meaning

²² *Ntaganda* Decision on Expert Witnesses, ICC-01/04-02/06-1159, para. 8; *Ruto and Sang* Decision on Expert Witness, ICC-01/09-01/11-844, para. 12.

²³ See Challenge of Witness Expertise, ICC-01/05-01/13-1636, paras 7-8, aend 10.

of the word '*frère*' in specific contexts. Accordingly, the Single Judge is of the view that the Witness's testimony and Report may potentially be of assistance in the Chamber's assessment of the evidence presented, as it provides background information which could be of service to assess evidence, such as intercepted communications.

16. The fact that the Report does not contain any footnotes does not make it *prima facie* unreliable. The bibliography contains the material which the Witness used in the production of the Report and the fact that the Prosecution was not able to find parts of them in the Court's library²⁴ is not indicative of its quality and reliability. In the Single Judge's view, any further issue pertaining to the material used relates rather to the probative value and therefore goes to the ultimate evaluation of the evidence at the end of the trial. The same holds true for the methodology of how the Report was compiled.
17. Accordingly, the Single Judge does not consider the Witness's testimony and/or Report to be so clearly irrelevant as to preclude the Babala Defence from presenting this evidence.
18. Further, the Single Judge does not consider that the anticipated testimony will usurp the Chamber's functions *per se*. The Single Judge does not agree with the Prosecution's argument that the fact that the Babala Defence did not call any other witnesses is indicative of it intending to explain the accused's own conduct with the anticipated testimony or Report. The testimony and Report could equally be used for evidence already put before the Chamber. Nevertheless, the Single Judge stresses that the Chamber will not consider the Witness's testimony which usurps its own functions as the arbiter of fact and law in this case.

²⁴ Challenge of Witness Expertise, ICC-01/05-01/13-1636, para. 3.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY
REJECTS** the Request and the Challenge of Witness Expertise.

Done in both English and French, the English version being authoritative.

A handwritten signature in dark ink, appearing to read 'Schmitt', is written over a horizontal line.

Judge Bertram Schmitt, Single Judge

Dated 24 February 2016

At The Hague, The Netherlands