

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **15 March 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

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

Source: Office of the Prosecutor

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Introduction

1. Trial Chamber VI (“Chamber”) should reject the Defence request for the Chamber to reconsider its “Decision on Defence preliminary challenges to Prosecution’s expert witnesses”¹ to the extent that it allows the Prosecution to call Witness P-0932 to testify as an expert witness in *Ntaganda* and to tender his reports into evidence.²
2. Contrary to the Defence’s submission,³ the Prosecution’s request to exclude Dr Kambayi Bwatshia as an expert on “*la solidarité africaine*” in *Bemba et al.* is not a new position in relation to his expertise on the distinct subject matters in relation to which the Chamber has found him qualified as an expert in the *Ntaganda* case: registration of civil status, naming conventions, family structures, and dates of birth in the Democratic Republic of the Congo (“DRC”).⁴
3. The Defence fails to present a new fact and argument warranting reconsideration because the Prosecution has not adopted a new position in relation to Witness P-0932’s expertise in *Ntaganda*. There was no clear error of reasoning in the Chamber’s 9 February 2016 Decision, and allowing Witness P-0932 to testify would not amount to an injustice.

Background

4. On 16 April 2015, the Prosecution provided a list of the expert witnesses it intended to call at trial.⁵ This list included Dr Kambayi Bwatshia, P-0932, a

¹ ICC-01/04-02/06-1159 (“9 February 2016 Decision”).

² ICC-01/04-02/06-1186 (“Defence Request”).

³ Defence Request, para. 6, referring to “[t]he Prosecution’s **new** position” (emphasis added).

⁴ 9 February 2016 Decision; Trial Chamber I accepted the same witness as an expert on the same subject matter in *Lubanga*, see ICC-01/04-01/06-1934.

⁵ ICC-01/04-02/06-560.

historian, who the Prosecution intends to call as an expert witness on naming conventions and civil status/registration in the DRC.⁶

5. On 15 September 2015, the Defence objected to Witness P-0932 being called to provide evidence as an expert witness.⁷ The Defence challenged his qualifications to provide expert evidence on the topics outlined by the Prosecution and noted the lack of methodology in his reports.⁸
6. On 10 November 2015, the Chamber requested the Parties to file supplementary submissions on the expert witnesses contested by the Defence, including P-0932.⁹
7. On 23 November 2015, the Defence made supplementary submissions in relation to Witness P-0932,¹⁰ elaborating on its challenge to his qualifications and expertise¹¹ and its argument that his reports reflect a lack of structure and methodology.¹²
8. On 2 December 2015, the Prosecution responded to the Defence's supplementary submissions.¹³
9. On 8 December 2015, the Defence replied to the Prosecution's response.¹⁴
10. On 21 January 2016, the Defence team for Mr Fidèle Babala Wandu proposed Dr Kambayi Bwatshia as an expert in *Bemba et al.*,¹⁵ and set out the area of his

⁶ ICC-01/04-02/06-560, para.10(ii).

⁷ ICC-01/04-02/06-826-Red, para.9.

⁸ ICC-01/04-02/06-826-Red, para.8.

⁹ ICC-01/04-02/06-994.

¹⁰ ICC-01/04-02/06-1032-Red ("Defence Supplementary Submissions").

¹¹ Defence Supplementary Submissions, paras.7-10, 12.

¹² Defence Supplementary Submissions, para.17.

¹³ ICC-01/04-02/06-1044-Conf.

¹⁴ ICC-01/04-02/06-1046-Red ("Defence Reply").

¹⁵ ICC-01/05-01/13-1558.

proposed testimony - “*la solidarité africaine*”.¹⁶ The witness is referred to as Witness D22-0004 in the *Bemba et al.* case.

11. On 3 February 2016, the Prosecution requested Trial Chamber VII in *Bemba et al.* to exclude Witness D22-0004 and his report from those proceedings.¹⁷
12. On 9 February 2016, the Chamber issued a decision in which it found that P-0932 may be called to testify as an expert witness on “matters related, *inter alia*, to registration of civil status, naming conventions, family structures, and dates of birth.”¹⁸
13. On 15 February 2016, the Prosecution provided formal notice that it challenges Witness D22-0004’s qualifications as an expert and the relevance of his report in *Bemba et al.*¹⁹
14. On 18 February 2016, the Prosecution filed its challenge to D22-0004’s qualifications in *Bemba et al.*²⁰
15. On 23 February 2016, the Defence filed the Defence Request.
16. On 24 February 2016, the Single Judge of Trial Chamber VII rejected the Prosecution’s request in *Bemba et al.* and accepted D22-0004’s qualifications as an expert witness in that case.²¹
17. On 15 March 2016, D22-0004 started his testimony in *Bemba et al.*

¹⁶ That Defence team noted that “Par le biais de l’expertise apportée par le professeur Kambayi, la Défense de M. Babala souhaite démontrer comment la solidarité africaine opère et agit lorsqu’un des membres de la société est en difficulté, quelle est l’étendue de cette solidarité et quelles en sont les limites. Par les prestations de cet expert, la Défense expliquera que la solidarité affichée par M. Babala est plutôt une saine solidarité. Elle n’est pas une solidarité criminogène. Dans le cas d’espèce, cela permettra à la Chambre de mieux comprendre les traditions africaines en général, et congolaises en particulier et d’apprécier à sa juste valeur le comportement de M. Babala dans ses rapports avec M. Bemba. Ce qui lui permettra de juger M. Babala en tenant notamment compte du contexte socioculturel dans lequel il évolue”, ICC-01/05-01/13-1558-AnxA, p.2.

¹⁷ ICC-01/05-01/13-1594 (“Prosecution 3 February 2016 submissions in *Bemba et al.*”).

¹⁸ 9 February 2016 Decision, para.15.

¹⁹ ICC-01/05-01/13-1628.

²⁰ ICC-01/05-01/13-1636 (“18 February 2016 Prosecution submissions in *Bemba et al.*”).

²¹ ICC-01/05-01/13-1653 (“*Bemba et al.* Decision”).

Prosecution's Submissions

18. As previously stated by the Chamber, “[r]econsideration is exceptional, 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. New facts and arguments arising since the decision was rendered may be relevant to this assessment.”²² The Defence Request fails to meet this standard.
19. The Prosecution has not adopted a new position in relation to Witness P-0932’s expertise in *Ntaganda*. As such, there is no new fact and argument warranting reconsideration. The Defence fails to demonstrate that there was a clear error of reasoning in the Chamber’s 9 February 2016 Decision, or that allowing Witness P-0932 to testify would amount to an injustice.
20. The Prosecution does not dispute that, as the Defence notes, there are similarities between the Defence’s arguments about the methodology of P-0932’s report in *Ntaganda* and some of the Prosecution’s arguments on the methodology of a different report by the same author in *Bemba et al.*, namely that the respective reports do not outline the methodology used, and that their referencing and bibliography is inadequate.²³ The Defence uses these similarities as an opportunity to repeat arguments which it already presented to the Chamber,²⁴ and which the Chamber specifically considered²⁵ and rejected.²⁶ There is no reason why the Chamber should entertain these arguments again.

²² ICC-01/04-02/06-483, para.13 (footnotes omitted).

²³ Defence Request, paras.13-15; *See also* Defence Supplementary Submissions, para.17; Defence Reply, paras.10-12; 18 February 2016 Prosecution submissions in *Bemba et al.*, paras.2-4.

²⁴ Compare Defence Request, para.15 to Defence Supplementary Submissions, para.17 and Defence Reply, para.12.

²⁵ 9 February 2016 Decision, paras.13-14.

²⁶ 9 February 2016 Decision, para.16 (“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”). Similarly, in his decision on the Prosecution’s challenge to this witness in *Bemba et al.*, the Single Judge of Trial Chamber VII stated that “any further issue pertaining to the material used relates rather to the probative value and therefore goes to the

21. The Defence also proposes that a number of *other* arguments made by the Prosecution in *Bemba et al.*²⁷ also apply to Witness P-0932's reports in *Ntaganda*. However, the Defence did not raise these particular arguments in any of its submissions in *Ntaganda* even though nothing precluded it from doing so. The Defence's attempt to supplement its earlier submissions through this application for reconsideration is impermissible. There can be no error of reasoning or injustice where a party fails to put an argument to the Chamber for its consideration. The principle of expeditious proceedings would be frustrated if parties were permitted to re-litigate an issue every time counsel conceived a new argument.
22. The Prosecution has not disavowed Witness P-0932's aptitude to testify as an expert witness in *Ntaganda*²⁸ since the proposed areas for Dr Kambayi Bwatshia's testimony in *Ntaganda* and *Bemba et al.* are clearly distinct.²⁹ As such, the Prosecution's objections in *Bemba et al.* have no impact on the proceedings in *Ntaganda*.
23. Neither has the Prosecution shifted its position with regard to the *qualifications* of the Witness for the purposes of the proceedings in *Ntaganda*.³⁰ Indeed, in *Bemba et al.* the Prosecution noted that this Witness's "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

ultimate evaluation of the evidence at the end of the trial. The same holds true for the methodology of how the Report was compiled", *Bemba et al.* Decision, para.16.

²⁷ Defence Request, para.16: "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."

²⁸ *Contra* Defence Response, paras.5, 18, 20.

²⁹ See paras.2, 10, 12, fn.16, above.

³⁰ *Contra* Defence Response, paras.5, 18, 20.

Republic of the Congo”³¹ - the area on which P-0932 is scheduled to testify in *Ntaganda*.

24. This view is further supported by the statement by the Single Judge of Trial Chamber VII 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.”³²

25. Therefore, there is no new fact and argument warranting reconsideration because the Prosecution has not adopted a new position in relation to this Witness’s expertise in *Ntaganda*. The Defence fails to demonstrate a clear error of reasoning in the Chamber’s 9 February 2016 Decision, or that allowing Witness P-0932 to testify would amount to an injustice.

Conclusion

26. Based on the foregoing, the Prosecution requests that the Chamber reject the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 15th day of March 2016
At The Hague, The Netherlands

³¹ 18 February 2016 Prosecution submissions in *Bemba et al.*, para.8.

³² *Bemba et al.* Decision, para.12.