

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **24 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

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

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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

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the 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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution opposes the Defence request for leave to reply (“Application to Reply”).¹
2. First, the Application to Reply makes submissions on the issues upon which it seeks to reply, contrary to regulation 24(4) and (5) of the Regulations of the Court (“Regulations”).
3. Second, the Application to Reply is also flawed on its merits, since it seeks to make additional submissions which either do not arise from the Prosecution's response, or relate to any alleged misrepresentation, a new explanation or solution to a problem raised, any new or distinct issue, any arguments not reasonably foreseeable at the time of the request, any arguments in the interests of the completeness of the judicial record, or any novel or particularly important issue. Accordingly, the three points on which the Defence proposes to reply exceed the permissible scope of a reply.

Procedural History²

4. On 9 February 2016, the Chamber held that Witness 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.”³
5. On 23 February 2016, based on the Prosecution submissions filed in the *Bemba et al.* case, the Defence sought reconsideration of the Chamber’s decision on the

¹ ICC-01/04-02/06-1220.

² The Prosecution set out the complete background to this application in its 15 March 2016 response, see ICC-01/04-02/06-1211, paras.4-17 (“Prosecution Response”).

³ ICC-01/04-02/06-1159.

preliminary challenges to the Prosecution's expert witnesses in relation to Witness P-0932.⁴

6. On 15 March 2016, the Prosecution responded to the Defence Reconsideration Request.⁵
7. On 18 March 2016, the Defence filed its Application to Reply.⁶

Prosecution's Submissions

A. Impermissible Substantive Reply

8. The Defence identifies three issues on which it seeks leave to reply: (i) that the Prosecution erroneously argued that the Defence is attempting to supplement its earlier submissions by raising new arguments; (ii) that Trial Chamber VII's decision to allow the expert to testify in that case is irrelevant; and (iii) that the Prosecution's cross-examination of the expert in the *Bemba et al.* case supports his exclusion as an expert in the *Ntaganda* case. The Defence then proceeds to make substantive submissions on the three issues it identifies, without first awaiting the Chamber's leave to do so. Regulation 24(4) and (5) of the Regulations stipulate that participants may only reply to a document, which itself is a response or reply, with the leave of the Chamber. The Defence has clearly not heeded the requirements of regulation 24(4) and (5).

⁴ ICC-01/04-02/06-1186 ("Defence Reconsideration Request").

⁵ ICC-01/04-02/06-1211.

⁶ ICC-01/04-02/06-1220.

B. On the Merits, the Application to Reply Should Fail

9. Furthermore, the Application to Reply should be dismissed because the points on which the Defence seeks to reply do not fall within the allowable grounds for reply, as set out below.

First Issue: Repeated and Supplementary Arguments

10. The Defence's assertion that the Prosecution misrepresented its arguments and that it is not seeking to supplement its Reconsideration Request with additional submissions does not warrant leave to reply.⁷
11. Additional submissions on the issue by way of reply will not assist the Chamber in its determination. All relevant facts were known to the Defence at the time it filed its Reconsideration Request. Moreover, the Prosecution's arguments on a *different* expert report filed in a different case (the *Bemba et al.* case) are irrelevant to a determination of the expert's *qualifications* in this case.⁸

Second Issue: Reliance on Trial Chamber VII's decision

12. The Defence seeks leave to reply on a second issue: that Trial Chamber VII's decision allowing the expert to testify in the *Bemba et al.* case is irrelevant.⁹
13. This issue does not arise from the Prosecution's submissions and misinterprets the Prosecution's reliance on the decision. The Prosecution does not rely on Trial Chamber VII's decision for its finding that the expert was allowed to testify in the *Bemba et al.* case. Rather, the Prosecution relied on the decision to show that it had not shifted its position with regard to the qualifications of the

⁷ Application to Reply, para.3.

⁸ See Prosecution Response, paras.23-24.

⁹ Application to Reply, paras.4-5.

expert witness in *Ntaganda*: Trial Chamber VII's decision confirms that "the Witness's expertise is not put into question by the Prosecution, it challenges that the subject matter, '*la solidarité africaine*', is a viable area of 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".¹⁰ Accordingly, leave to reply should not be permitted on this point.

Third Issue: Witness P-0932's Cross-examination in Another Case

14. The Defence seeks leave to reply on another issue that does not arise from the Prosecution Response: the impact of the Prosecution's cross-examination of the expert witness in the *Bemba et al.* case. Instead, the Defence is attempting to supplement its initial arguments by suggesting that the Prosecution's cross-examination of the expert witness in the *Bemba et al.* case amounts to a disavowal of the expert in the *Ntaganda* case. On this basis alone, leave to reply on the third issue should be rejected.

15. The Witness' area of expertise in the *Bemba et al.* case is distinct from that in the *Ntaganda* case, as is the content of his written expert report and the cross-examination on a different report in a different case is irrelevant to the adjudication of the Defence Reconsideration Request. This issue has been litigated extensively by the Parties in their original submissions on the issue.¹¹ Accordingly, further submissions on this issue will not assist the Chamber in its determination.

¹⁰ Prosecution Response, para.24. The Prosecution also relied on its filing in the *Bemba et al.* case (ICC-01/05-01/13-1636, para.8) stating that the witness is a qualified expert on the areas he is scheduled to testify in *Ntaganda*, see Prosecution Response, para.23, fn.31.

¹¹ See Defence Reconsideration Request, paras.11-19; Prosecution Response, paras.22-25.

Conclusion

16. The Prosecution requests that the Chamber dismiss the Application to Reply.



Fatou Bensouda
Prosecutor

Dated this 24th day of March 2016
At The Hague, The Netherlands