

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/05-01/13  
Date: 1 December 2014

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Cuno Tarfusser  
Judge Christine Van den Wyngaert

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF**  
***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO***  
***MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU***  
***AND NARCISSE ARIDO***

**Public**

**Prosecution Response to Fidèle Babala Wandu's Application for Leave to Appeal  
the Confirmation Decision**

**Source:** The Office of the Prosecutor

**Document to be notified in accordance with Regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**

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## I. Introduction

1. The Defence's application for leave to appeal<sup>1</sup> the Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute ("Statute")<sup>2</sup> should be dismissed. Neither of the two issues ("Issues") alleged in the Application<sup>3</sup> are appealable issues within the terms of Article 82(1)(d) of the Statute. Instead, they amount to mere disagreements with the Chamber's conclusions and inappropriately repeat Babala's unsuccessful pre-confirmation submissions.

2. In addition, neither Issue meets the criteria for granting leave to appeal under Article 82(1)(d). The Application fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* that the Appeals Chamber's immediate resolution may materially advance the proceedings. Indeed, the Application makes no effort to satisfy Article 82(1)(d), apart from reciting some relevant case law<sup>4</sup> and perfunctorily asserting that the criteria are met.<sup>5</sup>

## II. Submissions

3. The Appeals Chamber has ruled that "only an issue may form the subject-matter of an appealable decision. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".<sup>6</sup> Moreover, according to the consistent case law of the Appeals Chamber, mere disagreements or conflicting opinions fall short of

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<sup>1</sup> ICC-01/05-01/13-769 ("Application").

<sup>2</sup> ICC-01/05-01/13-749 ("Confirmation Decision" or "Decision").

<sup>3</sup> Application, paras.21-46.

<sup>4</sup> Application, paras.13-20.

<sup>5</sup> Application, paras.48-49.

<sup>6</sup> ICC-01/04-168 OA3, para.9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7; *see also* ICC-01/04-01/06-1433 OA11 (Partly Dissenting Opinion of Judge Song), para.4 (specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made").

constituting appealable issues.<sup>7</sup> The Issues in the Application are not appealable because they are mere disagreements with the Confirmation Decision, and should be dismissed.

**A. The First Issue is not appealable and does not meet the criteria for leave to appeal**

4. The First Issue – that the Decision violates Article 30 of the Statute<sup>8</sup> – is not appealable because it amounts to a mere disagreement with the Chamber’s findings on Babala’s intent and knowledge under Article 30, which are well supported by the evidence referred to in the Decision.

5. The Defence denies that the Confirmation Decision was based on any evidence showing Babala’s knowledge of the strategy and actions put in place by the other suspects, and his intention to participate in them.<sup>9</sup> However, the Chamber devoted nine detailed footnoted paragraphs to its assessment of Babala’s criminal responsibility, including his intent and knowledge.<sup>10</sup> Based on its comprehensive assessment, the Chamber found that the evidence was sufficient to confirm the charges, and that, *inter alia*, Babala:

- “personally transferred money to some of the Witnesses” and then “called [one of them] to confirm that he had sent him the money”,<sup>11</sup> transferred, or was requested to transfer, [money] on Mr Bemba’s behalf”,<sup>12</sup> made “several transfers of money [...] to Mr Kilolo and Mr Mangenda, [and] also transferred

<sup>7</sup> See, e.g., ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

<sup>8</sup> Application, paras.22-28.

<sup>9</sup> Application, para.27.

<sup>10</sup> Confirmation Decision, paras.77-85.

<sup>11</sup> Confirmation Decision, para.77.

<sup>12</sup> Confirmation Decision, para.80.

USD 4,744 to Mr Arido on 25 May 2012”,<sup>13</sup> and “was also in direct contact with Mr Kilolo [...] with whom he arranged payments”;<sup>14</sup>

- “throughout the period relevant to the charges, [...] conversed [with Mr Bemba] on a regular basis [...]. In many of these conversations there is recurrent reference to other suspects of the present case, as well as to transfers of various amounts of money that were made (or that had to be made) to their benefit, in most instances in connection with the use of specific expressions, or ‘codes’”;<sup>15</sup>
- in a 17 October 2013 conversation with Kilolo, “notes with regret that [the suspects] failed to ensure ‘*le service après-vente*’, which resulted in ‘them’ (i.e., the Witnesses) being vulnerable and therefore ‘*à la merci de ... tous les vautours*’”;<sup>16</sup>
- in a 22 October 2013 conversation with Kilolo, “states [...] that ‘*en tant que financier, c’est moi qui prends des risques*’”;<sup>17</sup> and “encouraged Mr Kilolo to take care of ‘*le service après-vente*’”;<sup>18</sup> and
- “was assisting the other suspects in handling the financial aspects of the witness corruption alleged by the Prosecutor, pursuant to and in furtherance of Mr Bemba’s instructions”.<sup>19</sup>

6. The Chamber thus found that Babala knew about the steps taken for the commission of the charged offences, *inter alia*, on the basis of conversations held regularly with Bemba about the payments to be made to witnesses,<sup>20</sup> and that Babala intended to contribute to the charged offences and did so by transferring money throughout the period relevant to the charges to witnesses, Kilolo, Mangenda, and

<sup>13</sup> Confirmation Decision, para.81 (citations omitted).

<sup>14</sup> Confirmation Decision, para.82.

<sup>15</sup> Confirmation Decision, para.79.

<sup>16</sup> Confirmation Decision, para.82.

<sup>17</sup> Confirmation Decision, para.82.

<sup>18</sup> Confirmation Decision, para.82.

<sup>19</sup> Confirmation Decision, para.83.

<sup>20</sup> Confirmation Decision, para.84.

Arido.<sup>21</sup> The Chamber reasonably found that Babala's words and conduct demonstrated both the *actus reus* and *mens rea* of the crimes charged, satisfying the elements of knowledge and intent under Article 30. For this reason, Babala's assertion that "[a]ucun élément de preuve, aucun lien démonstratif de l'élément psychologique n'est apporté et soutenu dans la Décision"<sup>22</sup> only disagrees with the Pre-Trial Chamber's findings, but does not identify an appealable issue.

7. Further, the Application inappropriately attempts to re-litigate the merits of the Decision, claiming that "[n]i l'usage des codes [...] ni le terme « service après-vente » [...] ne peuvent constituer l'élément psychologique des atteintes à l'administration de la justice à l'encontre de M. Babala".<sup>23</sup> It is well established that an application for leave to appeal must be confined to the statutorily defined criteria. The Application also incorrectly claims that the Chamber did not consider Babala's confirmation submissions, or those of the other Defence teams.<sup>24</sup> However, the Appeals Chamber has held that a reasoned decision need not recite and summarise every factor and submission before a Chamber.<sup>25</sup>

8. Finally, the Application fails to demonstrate that Article 82(1)(d)'s two-limb requirement is met. No justification is given for why this Issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which the Appeals Chamber's immediate resolution may materially advance the proceedings. For the reasons noted, the First Issue fails and should be dismissed.

**B. The Second Issue is not appealable and does not meet the criteria for leave to appeal**

<sup>21</sup> Confirmation Decision, para.84.

<sup>22</sup> Application, para.28; *see also* para.42.

<sup>23</sup> Application, para.25.

<sup>24</sup> Application, para.28.

<sup>25</sup> ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

9. The Second Issue – that the Decision violates the principle of fairness of the proceedings because of a purported lack of reasoning and a failure to consider the Defence submissions<sup>26</sup> – is also not an appealable issue. It is premised on mere disagreements with the Chamber’s conclusions and alleged flaws in the Decision that are objectively unsustainable.

10. First, although styled as a ‘lack of reasoning’ issue, the Defence claims that the Chamber “*n’en a pas pris compte*”<sup>27</sup> or “*n’a pas rencontré*”<sup>28</sup> its confirmation submissions amount to mere disagreements with the Decision’s factual conclusions. The Decision is properly reasoned and easily meets the threshold requirement that a Chamber must indicate with sufficient clarity the basis of its decisions, i.e., the facts relevant to its conclusion.<sup>29</sup> Here, the basis of the Decision is clear and the Chamber’s reasoning, scrupulous.<sup>30</sup>

11. Given that a Chamber is required only to state the facts relevant to its conclusion and not to canvass explicitly every Defence argument,<sup>31</sup> the Application’s claim that the Decision lacks reasoning because it contains “[a]ucune évocation, aucune discussion [...] concernant les argument de la Défense”<sup>32</sup> is devoid of merit. More so, such claims are demonstrably false. For example, paragraph 83 of the Decision specifically refers to one of Babala’s arguments in the context of its assessment of the 16 October 2013 conversation. As a result, the Second Issue is only a disagreement with the Chamber’s approach and conclusions.

12. Second, Babala’s contention that “*le Procureur n’a fourni aucun élément concret démonstratif de l’existence d’un concert indispensable. Rien sur la date, l’heure, le lieu, les*

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<sup>26</sup> Application, paras.29-46.

<sup>27</sup> Application, para.31; *see also* paras.36-46.

<sup>28</sup> Application, para.32; *see also* paras.36-46.

<sup>29</sup> ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

<sup>30</sup> Confirmation Decision, paras.77-85.

<sup>31</sup> ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

<sup>32</sup> Application, para.30; *see also* para.29.

*acteurs, le contenu exact du plan criminel et le rôle joué par chacun*”<sup>33</sup> is another attempt to re-litigate the Decision, and arises from the Defence’s disagreement with the evidence accepted by the Chamber and its conclusion. As demonstrated above, the Chamber considered in detail both the evidence and submissions to ground its conclusions.<sup>34</sup>

13. Third, the Defence’s characterisation of the Independent Counsel’s role as being an “*interpretation par analogie et partant abusive*”<sup>35</sup> is both inaccurate and immaterial. The Decision states that “[t]he Suspects have raised a series of procedural objections in relation to [...] the appointment and role of Independent Counsel” and the Chamber found that it “cannot review previous decisions issued by the Single Judge or by other organs of the Court”.<sup>36</sup> Thus, this aspect of the Issue does not arise from the Decision. Babala has litigated—or had the opportunity to litigate—this issue on multiple previous occasions, in which context the Single Judge found that no evidence existed to question the independence or professionalism of Independent Counsel.<sup>37</sup> The Application is not the appropriate avenue to re-litigate settled issues.

14. Fourth, the claim that the Chamber cannot rely on Babala’s words or conduct that pre-<sup>38</sup> or post-date<sup>39</sup> the alleged commission of crimes is legally and logically incorrect. Clearly, words or conduct beyond those immediately temporally proximate to the commission of a crime may be relevant to material issues and bear on the fair evaluation of evidence, such as of intent, opportunity, motive, preparation, plan, knowledge, identity, mistake, or consciousness of guilt. The Defence argument, if accepted, would require a Chamber to look at the evidence through a pinhole, never fully grasping the entire context of a crime charged. This cannot be. In any

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<sup>33</sup> Application, para.31.

<sup>34</sup> Confirmation Decision, paras.77-85.

<sup>35</sup> Application, para.33.

<sup>36</sup> Confirmation Decision, paras.9-10.

<sup>37</sup> See, e.g., ICC-01/05-01/13-50; ICC-01/05-01/13-51; ICC-01/05-01/13-362-Red; ICC-01/05-01/13-511-Anx.

<sup>38</sup> Application, para.34.

<sup>39</sup> Application, para.33.

event, these are issues pertaining to the merits of the case and are more appropriately decided at trial. As a result, the Appeals Chamber's immediate resolution of this matter is not necessary at this stage.

15. Finally, the Application fails to address Article 82(1)(d)'s two-limb test to this Issue, except for two conclusory paragraphs at the end of the Application.<sup>40</sup> The Defence fails to show how fairness is affected and why the Appeals Chamber's intervention is necessary. For the reasons noted, the Second Issue fails and should be dismissed.

### III. Requested Relief

16. For the foregoing reasons, the Application does not identify any appealable issues or justify the criteria for leave to appeal under Article 82(1)(d). It should be dismissed.




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Fatou Bensouda, Prosecutor

Dated this 1<sup>st</sup> Day of December 2014  
At The Hague, The Netherlands

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<sup>40</sup> Application, paras.48-49.