

**Cour
Pénale
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**International
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TRIAL CHAMBER VII

Before: Judge Olga Herrera Carbuccion
Judge Robert Fremr
Judge Chile Eboe-Osuji

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 Redacted Document

Public Redacted version of "Prosecution Response to Fidèle Babala Wandu's Application for Leave to Appeal the Decision on the *"Requête de M. Fidèle Babala Wandu visant à obtenir les observations de la République Démocratique du Congo concernant l'exécution du mandat d'arrêt émis par la Cour pénale internationale"*

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

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Introduction

1. The Babala Defence application for leave to appeal¹ the Single Judge's Decision on the "*Requête de M. Fidèle Babala Wandu visant à obtenir les observations de la République Démocratique du Congo concernant l'exécution du mandat d'arrêt émis par la Cour pénale internationale*"² should be dismissed. Neither of the two alleged issues ("Issues") warrant leave to appeal. The Application is a transparent attempt to allege issues where there are none.

2. The two Issues do not arise from the Decision. In addition, the Second Issue is a mere disagreement with the Single Judge's findings, and is not appealable. The Issues also do not meet the article 82(1)(d) of the Rome Statute ("Statute") criteria for granting leave to appeal. Neither Issue alleged significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial. The Appeals Chamber's immediate resolution would not materially advance the proceedings.

Level of Confidentiality

3. The Office of the Prosecutor ("Prosecution") files this response as "Confidential *Ex-Parte*"—available only to the Babala Defence—pursuant to regulation 23bis(2) of the Regulations of the Court, because it refers to confidential *ex parte* material. It will file a public redacted version of its response simultaneously.

Submissions

i. The Pre-Trial Chamber/Single Judge as the decision maker

4. By filing the Application before the newly constituted Trial Chamber, and not before the Single Judge who decided the Initial Request,³ the Babala Defence

¹ ICC-01/05-01/13-807 ("Application").

² ICC-01/05-01/13-800 ("Decision").

³ ICC-01/05-01/13-797-Conf ("Initial Request").

appears to have seised the wrong forum.⁴ The Single Judge acting on behalf of the Pre-Trial Chamber was the decision maker in this instance. For this reason, the Pre-Trial Chamber is best placed to adjudicate this Application.

5. Any application for leave to appeal under article 82(1)(d) is intrinsically linked to the original request and decision. Therefore, rule 155(1) of the Rules of Procedure and Evidence (“Rules”) requires a party seeking leave to appeal pursuant to article 82(1)(d) of the Statute to apply “to the Chamber that gave the decision”.⁵ As the Appeals Chamber has stated, it is the opinion of the [decision maker] that is “the definitive element for the genesis of a right to appeal.”⁶ In other words, the statement of an appealable issue is the sole responsibility of the court that made the decision determining the issue.⁷

6. However, in these particular circumstances, where the Trial Chamber in this case was constituted prior to the expiry of the time limit to apply for leave to appeal,⁸ it would be appropriate for the Trial Chamber to either refer the matter back to the Pre-Trial Chamber or itself decide on the Application.

ii. The Issues do not arise from the Decision and are not appealable

7. 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.”⁹ Moreover, according to the Appeals Chamber’s

⁴ The Application notes “*La Défense a été instruite par la Présidence, via le Court Officer, de soumettre cette décision à la Chambre de première instance.*” Application, fn.11.

⁵ Rule 155(1), Rules.

⁶ ICC-01/04-168 OA3, para.20; ICC-02/04-01/05-371 OA2 (Dissenting Opinion of Judge Pikis), paras.7-8.

⁷ ICC-02/04-01/05-371 OA2 (Dissenting Opinion of Judge Pikis), para.8.

⁸ See ICC-01/05-01/13-805.

⁹ 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.”

consistent case law, mere disagreements or conflicting opinions fall short of constituting appealable issues.¹⁰ Neither Issue meets this test.

(a) The First Issue does not arise from the Decision

8. The First Issue, alleging that the Single Judge erred in interpreting the basis of the Defence request, does not arise from the Decision. The Defence claims that the Single Judge wrongly interpreted its Initial Request as one for the return of Mr Babala's seized assets rather than one requesting observations from the Democratic Republic of the Congo ("DRC") authorities on the manner in which they executed the Court's arrest warrant.¹¹ The Application wrongly reads the Decision and takes findings out of context.¹² The Decision makes clear that the Single Judge was aware of the exact nature and scope of the Defence request. In the Decision, the Single Judge noted the Defence request to "the authorities of the [DRC] to submit observations '*sur la façon dont le mandat d'arrêt décerné par Elle a été exécuté en ce qui concerne l'arrestation et la saisie des biens*'".¹³ The Single Judge was equally aware that the Defence request related to items purportedly seized by the DRC authorities and never transmitted to the Court's Registrar.¹⁴ The Single Judge's understanding thus mirrored the Defence request.

9. The Decision's clarity on the precise nature and scope of the Defence request makes the Defence position meritless. The Defence's erroneous and piecemeal reading of the Decision—reflected in the First Issue—does not arise from the Decision.

10. For this reason, the First Issue should be dismissed.

¹⁰ 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.

¹¹ Application, paras.7-10.

¹² Application, para.7, citing to limited sections of the Single Judge's analysis of the Initial Request.

¹³ Decision, p.3.

¹⁴ Decision, p.3.

(b) The Second Issue does not arise from the Decision and is not appealable

11. In its Second Issue, the Babala Defence claims that the Single Judge erred in finding that the Initial Request did not fall within the scope of the co-operation obligations between the Court and States Parties under articles 86 and 93(l) of the Statute.¹⁵ In this context, it argues that its request concerns the execution of the Court's arrest warrant, which falls within the co-operation obligations *vis-à-vis* the Court.¹⁶ This Second Issue is moot, and therefore does not arise from the Decision. Equally, it is a mere disagreement with the Single Judge's findings. In addition, the Application's misreading of the Decision appears to subsume the Second Issue.¹⁷ To that extent, and for the same reasons advanced for the First Issue,¹⁸ it should be dismissed.

12. The Babala Defence's request for the DRC's observations on the execution of the Court's mandate is moot, following the Single Judge's order allowing the Babala Defence access to the underlying documentation relating to Mr Babala's arrest in the DRC. The Decision grants the Babala Defence access to ICC-01/05-01/13-24-Conf and its supporting annexes.¹⁹ [REDACTED].²⁰ Such documentation should fulfill the Babala Defence's search for information from the DRC. The Babala Defence's access to this documentation therefore renders the Second Issue redundant.

13. In any event, to the extent that the Babala Defence—*via* the Second Issue—challenges the purported failure to access information beyond the documentation now provided to it, any such challenge would be premature at this stage, without a careful review of the documentation provided. The Application does not acknowledge that such documentation was provided. Moreover, the Second Issue

¹⁵ Application, paras.11-16.

¹⁶ Application, paras.12-13.

¹⁷ Application, para.11, stating “[*compte*] tenu de la mauvaise interprétation du fondement de la requête [...]”

¹⁸ See paras.8-10.

¹⁹ Decision, pp.4-5.

²⁰ ICC-01/05-01/13-24-Conf, para.4.

essentially disagrees with the scope of the statutory framework governing co-operation obligations between the Court and States Parties, and hence the underpinning rationale of the Decision.²¹ As the Single Judge found, the subject-matter of Mr Babala's request amounted to a "possible complaint *vis-à-vis* the authorities of the DRC".²² Such "complaints" are at best only collateral to the Court's "investigation and prosecution of crimes within its jurisdiction".²³ The Babala Defence's disagreement with the scope of co-operation obligations does not constitute an appealable issue.

14. For these reasons, the Second Issue should be dismissed.

iii. Article 82(1)(d) criteria are not met

15. The Babala Defence's arguments claiming compliance with the article 82(1)(d) criteria for leave to appeal are cursory.²⁴ They also misread the Decision. In its attempt to demonstrate some impact on the fairness of the proceedings, the Babala Defence wrongly claims that the Single Judge misinterpreted its Initial Request.²⁵ As demonstrated with respect to the First Issue, that is not the case.²⁶ As such, when the purported fairness concerns are grounded in a misunderstanding of the Decision,²⁷ they simply cannot exist.

16. Likewise, the Babala Defence does not demonstrate why the Appeals Chamber must intervene at this stage. While it claims that only appellate intervention could secure the requested DRC observations,²⁸ it fails to acknowledge that it was indeed provided access to certain [REDACTED]. Without a review of

²¹ Application, paras.11-16.

²² Decision, p.4, stating that such complaints are "entirely extraneous not only to the subject and scope and these proceedings, but also, more broadly, to the jurisdiction of the Court". See also Annex 3 to the Initial Request, ICC-01/05-01/13-797-Conf-Anx3, p.2 [REDACTED].

²³ Articles 86, 93(1), Statute.

²⁴ Application, paras.17-27.

²⁵ Application, para.21.

²⁶ See paras.8-10.

²⁷ Application, paras.20-21.

²⁸ Application, paras.22-27.

that documentation, any claim of procedural irregularity requiring appellate intervention²⁹ is premature. As shown above, the Issues result from a misreading of the Decision or are redundant.³⁰ The Appeals Chamber is not required to correct a party's misunderstanding. Neither is the Appeals Chamber an advisory body on purely hypothetical matters,³¹ nor is it required to clarify matters in the abstract.³²

Relief Sought

17. The two Issues are not appealable. Nor do they meet the criteria for leave to appeal under article 82(1)(d) of the Statute. As a result, the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 6th February 2015

At The Hague, The Netherlands

²⁹ Application, para.27.

³⁰ See paras.7-14.

³¹ ICC-01/04-503 OA4 OA5 OA6, para.30.

³² *Contra* Application, para.15.