

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 27 March 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuca
Judge Bertram Schmitt

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 Babala Defence request for leave to appeal ICC-01/05-01/13-800

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

The Office of the Prosecutor

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Counsel for Jean-Jacques Mangenda Kabongo

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Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Göran Sluiter

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII (the ‘Chamber’) of the International Criminal 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 Article 82(1)(d) of the Rome Statute (the ‘Statute’), issues the following ‘Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800’.

1. On 22 January 2015, the defence team for Mr Babala (the ‘Babala Defence’) requested Pre-Trial Chamber II to: (i) request the authorities of the Democratic Republic of the Congo (‘DRC’) to submit observations *‘sur la façon dont le mandat d’arrêt décerné par [la Chambre] a été exécuté en ce qui concerne l’arrestation et la saisie des biens’*, in particular as regards items which, it is alleged, would have been seized by those authorities in the context of Mr Babala’s arrest and never transmitted to the Registry; and/or (ii) order the Registry to transmit to the DRC authorities certain correspondence.¹
2. On 23 January 2015, the Single Judge of Pre-Trial Chamber II (the ‘Single Judge’) rejected this relief sought on grounds that the Babala Defence was requesting information extraneous to the proceedings.²
3. On 2 February 2015, the Babala Defence requested that this Chamber grant leave to appeal the Single Judge’s decision (the ‘Request’)³ with respect to two issues:
 - i. *‘Si la Chambre préliminaire a commis une erreur d’interprétation du fondement de la requête de la Défense’* (the ‘First Issue’); and

¹ 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, 22 January 2015, ICC-01/05-01/13-797-Conf (with three annexes).

² 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” submitted by Mr Babala on 22 January 2015, 23 January 2015, ICC-01/05-01/13-800.

³ Requête visant à obtenir l’autorisation d’interjeter appel contre la Décision ICC-01/05-01/13-800 de la Chambre préliminaire II rendue le 23 février 2015, 2 February 2015, ICC-01/05-01/13-807.

- ii. *‘En conséquence, si le Juge unique a commis une erreur de droit en trouvant que la requête de la Défense visant à obtenir les observations de la R.D.C. sur la façon dont ses autorités ont exécuté le mandat d’arrêt ne rentre pas dans l’obligation de coopération entre les États parties et la Cour’* (the ‘Second Issue’).⁴
4. On 6 February 2015, the Office of the Prosecutor (the ‘Prosecution’) submitted that the Request should be rejected on the ground that these two issues are not appealable and fail to meet the leave to appeal criteria.⁵
 5. Article 82(1)(d) of the Statute sets out the following requirements for the granting of a request for leave to appeal:
 - i. whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of the proceedings or
 - (ii) The outcome of the trial; and
 - ii. in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
 6. With respect to the particular question of the meaning of an appealable ‘issue’, the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] 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.⁶
 7. The definition of an appealable issue requires the parties to articulate **discrete** issues for Appeals Chamber resolution – it is generally insufficient to argue

⁴ Request, ICC-01/05-01/13-807, para. 6 (pages 5-6). It is noted that the Request repeats certain paragraph numbers and has missing spaces at various points. The Chamber expects the parties to exercise appropriate diligence when making future filings.

⁵ 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*””, 6 February 2015, ICC-01/05-01/13-811-Red (confidential *ex parte* version notified same day).

⁶ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

that the entirety of the Chamber's reasoning is erroneous when requesting leave to appeal.⁷

8. As a preliminary matter, the chamber issuing the original decision generally rules upon applications for leave to appeal that decision. However, due to when the confirmation phase ended and the trial phase began, the Babala Defence seizes this Chamber with a request related to a Pre-Trial Chamber Single Judge's decision. The Chamber considers that Articles 61(11) and 64(6)(a) of the Statute confer upon it the power to rule on the Request, and that it is not necessary for its effective and fair functioning to refer this matter back to the Pre-Trial Chamber.⁸
9. The Chamber considers that neither issue is discrete enough to qualify as an appealable issue. As the leave to appeal criteria are cumulative, this conclusion means that the relief sought must be rejected.
10. The First Issue asserts that the Impugned Decision makes an error of interpretation, without clearly identifying any specific error. The Chamber cannot grant leave to appeal on grounds that the Pre-Trial Chamber 'misinterpreted the relief sought' without more specificity, no more than it could grant leave on grounds that 'the decision erred' or 'the decision was wrong' without more specificity. The Chamber notes that the Babala Defence does make a series of arguments that the Single Judge misconstrued the original relief sought and based the entirety of his decision on this faulty interpretation,⁹ but such arguments amount to little more than challenging the totality of the Single Judge's reasoning.

⁷ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, para. 11; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on three applications for leave to appeal, 29 November 2012, ICC-02/11-01/11-307, para. 70 (the parties cannot 'seek leave to litigate *ex novo* before the Appeals Chamber the entire decision').

⁸ See Article 64(4) of the Statute.

⁹ Request, ICC-01/05-01/13-807, paras 7-9, 21 (pages 6-9).

11. The Babala Defence inextricably links the Second Issue to the First Issue by arguing that, as a result of this general misinterpretation of the original relief sought, the Pre-Trial Chamber reached the wrong conclusion on the scope of state cooperation obligations.¹⁰ The Second Issue therefore fails to qualify as an appealable issue for the same reasons as the First Issue.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the relief sought in the Request.

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



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuca



Judge Bertram Schmitt

Dated 27 March 2015

At The Hague, The Netherlands

¹⁰ Request, ICC-01/05-01/13-807, paras 10-11 (page 7).