

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **15 May 2015**

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera-Carbuccia
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 Document

**Observations of the Defence for Mr Fidèle Babala on the “Prosecution’s
Application for Notice to be given under Regulation 55(2) on the Accused’s
Individual Criminal Responsibility”
(ICC-01/05-01/13-922)**

Source: Defence for Mr Fidèle Babala Wandu

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
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**Victims Participation and Reparations
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Other

I. BRIEF PROCEDURAL BACKGROUND

1. On 20 November 2013, Pre-Trial Chamber II of the International Criminal Court (“the Pre-Trial Chamber” and “the Court” or “ICC”) issued a warrant of arrest under seal for Mr Fidèle Babala Wandu (“Mr Babala”), and for Mr Jean-Pierre Bemba Gombo, Mr Jean-Jacques Mangenda Kabongo, Mr Aimé Kilolo Musamba and Mr Narcisse Arido.¹
2. On 30 June 2014, the Office of the Prosecutor (“the Prosecution”) confidentially filed the Document Containing the Charges (“DCC”)² against the above-mentioned persons. The redacted version of this document was communicated on 3 July 2015.³
3. The Prosecution alleges that Mr Babala is responsible for the “offences intentionally committed against the administration of justice in violation of Article 70”⁴ within the meaning of article 25(3)(a), (c) and (e).
4. On 11 November 2014, the Pre-Trial Chamber confirmed in part the charges against Mr Babala, pursuant to article 61(7)(a) and (b) of the Rome Statute.
5. The Pre-Trial Chamber confirmed the charges against Mr Babala of having:
pursuant to article 70(1)(a) and article 25(3)(c) of the Statute, for the purpose of facilitating the commission of the offence aided, abetted or otherwise assisted in the commission by witnesses D-2, D-3, D-4, D-6, D-13, D-15, D-23, D-25, D-26, D-29, D-54, D-55, D-57 and D-64, of the offence of giving false testimony when under an obligation pursuant to article 69, paragraph 1 of the Statute, to tell the truth, by way of managing and dispensing as necessary and appropriate to this effect the finances at Mr Bemba’s disposal.⁵

¹ ICC-01/05-01/13-1-Red2-tENG.

² ICC-01/05-01/13-526-Conf-AnxB1.

³ ICC-01/05-01/13-526-AnxB1-Red.

⁴ *Ibid.*, para. 147 *et seq.*

⁵ ICC-01/05-01/13-749, pp. 52-53.

6. On 30 January 2015, following the confirmation of charges the Presidency of the Court constituted Trial Chamber VII (“the Chamber”) to be responsible for the conduct of the trial.
7. On 23 April 2015,⁶ the Prosecution submitted a request to the Chamber “to provide notice of the possibility that the facts described in the charges may be subject to re-characterisation to accord with the participation of Babala and Arido under article 25(3)(a) and of all Accused under article 25(3)(d), pursuant to regulation 55(2)”.⁷
8. During the status conference of 24 April 2015, the Chamber gave instructions to the parties for submitting their observations on the modes of responsibility and their applicability by 30 May 2015.⁷
9. In their joint submission of 1 May 2015,⁸ the Defence teams requested the Chamber

to suspend the deadline for their response to the “Prosecution Application for Notice to be given under Regulation 55(2) on the Accused’s Individual Criminal Responsibility”, until:

 - i. The Prosecution has filed an updated Document Containing the Charges; and
 - ii. The Trial Chamber has ruled on the parties’ submissions concerning the modes of liability and elements of the offence.⁹
10. On 11 May 2015, the Chamber dismissed the Defence teams’ joint request.

⁶ ICC-01/05-01/13-922.

⁷ ICC-01/05-01/13-T-8-Eng-RT, p. 7, lines 18-23.

⁸ ICC-01/05-01/13-926.

⁹ *Idem.*, operative part of the submission.

11. The Defence for Fidèle Babala Wandu ("the Defence") accordingly submits the present observations on the Prosecution's submission of 23 April 2015 (ICC-01/05-01/13-922).

II. DEFENCE OBSERVATIONS

12. The Defence respectfully submits that the Prosecution's request is both (A) unlawful and (B) inappropriate.

A. Unlawful request

13. Under article 61(8) of the Rome Statute: "Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence."

14. In the instant case, the Prosecution did not substantiate its request to modify the characterisation of the modes of responsibility with any additional evidence. It merely rehashed the evidence already presented to the Pre-Trial Chamber and which led to the partial confirmation of charges against Mr Babala on the sole basis of article 25(3)(c).

15. Following an evaluation of the evidence produced by the Prosecution and that presented by the Defence in support of its rebuttal, the Pre-Trial Chamber concluded in its decision on the confirmation of charges that:

Mr Babala bears criminal responsibility as an accessory under article 25(3)(c) of the Statute for aiding, abetting or otherwise assisting in the commission of the offences of corruptly influencing the Witnesses in accordance with article 70(1)(c) of the Statute and presenting false evidence as set out in article 70(1)(b) of the Statute with regard to the Witnesses. Moreover, he bears criminal responsibility as an accessory under article 25(3)(c) of the Statute for aiding, abetting or otherwise assisting in the commission of the offence by the Witnesses of giving false testimony in accordance with article 70(1)(a) of the Statute.

16. The Prosecution's request – which lacks the additional evidence required by article 61(8) – amounts to nothing other than belated bargaining following the decision confirming the charges issued by the Pre-Trial Chamber, which examined the evidence presented by the parties and decided on the mode of responsibility of the accused. Modification of this decision before the start of the trial before the Chamber is subject to the presentation of additional evidence. However there is none.

17. The Chamber cannot, therefore, admit this request because it violates the first major condition attached to the opportunity the Prosecution had to modify the characterisation of the charges confirmed by the Pre-Trial Chamber. The same holds true of the second condition.

18. Article 61(9) of the Statute provides that:

After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

19. Article 61(11) adds:

Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

20. The second condition that has not been met in the instant case is the request to hold a hearing before the trial for the parties to discuss the different aspects of the confirmation of new, more serious charges. This is a requirement for a fair trial. Before such a hearing, if such a hearing were to be held, the Defence should be

entitled to conduct investigations to refute the additional evidence presented in support of amending the characterisation of the confirmed charges. This would be a trial before the trial.

21. The Chamber – as the guarantor of the lawfulness and fairness of the trial – cannot grant the Prosecution’s request. The Defence does not even find it appropriate to discuss the constituent elements of the modes of responsibility requested so long as the Prosecution’s request violates the conditions of its implementation. The Defence, therefore, fully reiterates and resubmits the arguments put forward in its Response to the DCC,¹⁰ which is consistent with the present observations.

22. Furthermore, the basis on which the Prosecution submitted its request for modifying the characterisation of the modes of responsibility is inapplicable.

Regulation 55 of the Regulations of the Court provides:

If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.

23. It can be concluded from this regulatory provision that the initiative and acknowledgement of the need to change the characterisation of the facts belongs to the Chamber *proprio motu*, and not to the Prosecution. There is nothing to indicate, therefore, that the Chamber, which has not yet completed its consideration of the facts insofar as the Prosecution has not entirely met its obligation to disclose the evidence in its possession, should proceed with such a modification.

¹⁰

B. Inappropriate request

24. The Prosecution's request is also inappropriate.

25. The Defence has yet to receive the amended DCC, and the Prosecution is submitting a request for modification of the modes of responsibility of the accused by replacing the modes confirmed by the Chamber with new, more serious modes.

26. In the interest of saving both time and energy and of respecting the statutory provisions, the Prosecution should have submitted the revised DCC and only then submitted its request to modify the modes of responsibility, specifying the additional evidence justifying the re-characterisation of the modes of responsibility confirmed by the Pre-Trial Chamber.

27. The way of proceeding is both illogical and inconsistent, which renders the submission of the Prosecution's request, as well as its review by the Chamber, inappropriate.

FOR THESE REASONS

MAY IT PLEASE THE CHAMBER

To ADMIT the said observations and to DECLARE them to be well founded;

To DISMISS the Prosecution's request (ICC-01/05-01/13-922) of 23 April 2015 because it violates article 61(8) and (9) of the Rome Statute and regulation 55 of the Regulations of the Court, and inappropriately forestalls receipt of the revised DCC by the Defence teams as requested.

AND JUSTICE SHALL BE DONE

RESPECTFULLY SUBMITTED.

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Fidèle Babala Wandu

[signed]

Dated this 15 May 2015

At Brussels, Belgium