

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/05-01/13  
Date: **16 September 2015**

**TRIAL CHAMBER VII**

**Before: Judge Bertram Schmitt, Single Judge**

**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 the Decision Related to the  
Timing of Opening Statements**

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

Mr Kweku Vanderpuye

**Counsel for Jean-Pierre Bemba Gombo**

Ms Melinda Taylor

**Counsel for Aimé Kilolo Musamba**

Mr Paul Djunga Mudimbi

**Counsel for Jean-Jacques Mangenda Kabongo**

Mr Christopher Gosnell

**Counsel for Fidèle Babala Wandu**

Mr Jean-Pierre Kilenda Kakengi Basila

**Counsel for Narcisse Arido**

Mr Charles Achaleke Taku

**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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Others**

**Judge Bertram Schmitt** ('Single Judge' or 'Presiding Judge') 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 ('Statute') and Rule 155 of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on Babala Defence Request for Leave to Appeal the Decision Related to the Timing of Opening Statements'.

## **I. Procedural History**

1. On 2 September 2015, the Presiding Judge issued directions on the conduct of the proceedings.<sup>1</sup> As regards opening statements of the five defence teams, the direction was given that 'the defence teams may make their opening statements prior to the presentation of evidence, if any by the Defence. However, this decision must be made collectively – the Chamber does not wish to hear openings from the defence teams at multiple points during the trial. The Defence is to inform the Chamber as to when it intends to present these statements within five days of notification of the (...) decision'.<sup>2</sup>
2. On 7 September 2015, the defence team for Mr Fidèle Babala Wandu ('Babala Defence') requested reconsideration of this direction.<sup>3</sup> Noting that the defence teams could not reach a common position, the Babala Defence requested that it be allowed to present its opening statement after the opening statements of the Office of the Prosecutor ('Prosecution'), regardless of the wishes of the other defence teams.

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<sup>1</sup> Directions on the conduct of the proceedings, ICC-01/05-01/13-1209.

<sup>2</sup> Directions on the conduct of the proceedings, ICC-01/05-01/13-1209, para. 5.

<sup>3</sup> Demande en reconsidération de la disposition concernant les déclarations lumineuses de « Directions on the conduct of the proceedings » (ICC-01/05-01/13-1209) fondée sur pied de la règle 136(2) RPP, 7 September 2015, ICC-01/05-01/13-1218.

3. On 10 September 2015, the Single Judge issued the ‘Decision on Requests Related to Timing of Defence Opening Statements’ (‘10 September 2015 Decision’)<sup>4</sup> rejecting the Babala Defence request for reconsideration. As a common position of all five defence teams could not be reached, the Single Judge ordered the five defence teams ‘to give any opening statements prior to the presentation of evidence by the defence, rather than prior to the presentation of evidence by the Prosecution’.<sup>5</sup>
4. On 14 September 2015, the Babala Defence submitted the ‘Demande d’autorisation d’interjeter appel contre la « Decision on Requests Related to Timing of Defence Opening Statements » de la Défense de M. Fidèle Babala Wandu en vertu de l’article 82(1)(d) du Statut de Rome et de la règle 155(1) du Règlement de procédure et de preuve (ICC-01/05-01/13-1231)’ (‘Application’)<sup>6</sup> requesting leave to appeal the 10 September 2015 Decision.

## II. Submissions of the Babala Defence

5. The Babala Defence submits that the Single Judge erred in law *‘en imposant une position commune aux cinq équipes de Défense quant au stade de la procédure au cours duquel elles pourront présenter leurs déclarations liminaires’*.<sup>7</sup>
6. The Babala Defence alleges that the 10 September 2015 Decision is contrary to Rule 136(2) of the Rules and infringes the fairness of the proceedings.<sup>8</sup> The Defence maintains that, had Mr Babala been prosecuted alone, the Defence could have made its opening statements after those of the Prosecution.<sup>9</sup> In its view, it is the Defence’s right to choose the timing of opening statements.<sup>10</sup>

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<sup>4</sup> Decision on Requests Related to the Timing of Defence Opening Statements, ICC-01/05-01/13-1231.

<sup>5</sup> Decision on Requests Related to the Timing of Defence Opening Statements, ICC-01/05-01/13-1231, p. 4.

<sup>6</sup> ICC-01/05-01/13-1238.

<sup>7</sup> Application, ICC-01/05-01/13-1238, para. 16.

<sup>8</sup> Application, ICC-01/05-01/13-1238, paras 13 and 16.

<sup>9</sup> Application, ICC-01/05-01/13-1238, para. 18.

<sup>10</sup> Application, ICC-01/05-01/13-1238, para. 19.

7. As regards the requirement that the 10 September 2015 Decision significantly affects the fairness of the proceedings, the Babala Defence contends that at the opening of the trial, the (inter-)national press and media would only hear the statements of the Prosecution without Mr Babala having the opportunity to respond.<sup>11</sup> Such arrangement violates the principles of fairness and equality of arms as the effect of giving opening statements prior to the presentation of evidence by the Defence is not the same as giving them at the opening of trial, considering the '*dispositif publicitaire*' deployed at the opening of a trial.<sup>12</sup> Moreover, allowing only the Prosecution to make a statement could potentially prejudice the professional life of Mr Babala's.<sup>13</sup> The Babala Defence also purports that the immediate resolution of this matter would advance the proceedings.

### III. Analysis

8. The Single Judge recalls the leave to appeal criteria as set out in the Chamber's 'Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800'.<sup>14</sup> In particular, the Single Judge emphasises that, for the purposes of the first prong of this test, the Appeals Chamber defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.<sup>15</sup>

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<sup>11</sup> Application, ICC-01/05-01/13-1238, paras 20-21 and 26.

<sup>12</sup> Application, ICC-01/05-01/13-1238, paras 21 and 23.

<sup>13</sup> Application, ICC-01/05-01/13-1238, para. 22.

<sup>14</sup> Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800, 27 March 2015, ICC-01/05-01/13-877, paras 5-7.

<sup>15</sup> 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.

9. The Babala Defence failed to demonstrate that the 10 September 2015 Decision affects - let alone *significantly* affects - the fairness and expeditiousness of the proceedings. An infringement of Rule 136(2) of the Rules has not been convincingly substantiated. It appears that the Babala Defence simply disagrees with the manner in which the Single Judge, in his capacity as Presiding Judge, organised the proceedings. The 10 September 2015 Decision did not preclude Mr Babala from making an opening statement; it merely indicated *when* he would be given an opportunity to make such statement. Failure to accommodate personal preferences of an accused in a multi-accused case, such as the timing of making opening statements, however, does not affect significantly the fair and expeditious conduct of the proceedings or the outcome of the trial.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Application.

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

A handwritten signature in black ink, appearing to be 'BS', written over a horizontal line.

**Judge Bertram Schmitt,  
Single Judge**

Dated 16 September 2015

At The Hague, The Netherlands