

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

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

Date: 24 August 2015

APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Silvia Alejandra Fernández de Gurmendi
Judge Christine Van Den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

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*

Confidential

With a confidential annex

CORRIGENDUM

**Appeal application by the Defence for Mr Fidèle Babala Wandu against the
"Decision on Babala Defence Request for an Interpretation of the 'Decision
Regarding Interim Release'" pursuant to articles 82(1)(b) and 64(6)(f) of the Rome
Statute ("the Statute"), to rule 154(1) of the Rules of Procedure and Evidence
("RPE") and to the fundamental principles of international law
(ICC-01/05-01/13-1167-Conf)**

Source: Defence team 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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I. PURPOSE OF THE APPLICATION

1. This application requests that the Appeals Chamber ("this Chamber") reverse or amend the "Decision on Babala Defence Request for an Interpretation of the 'Decision Regarding Interim Release'" rendered by Trial Chamber VII on 21 August 2015 on the grounds of a miscarriage of justice owing to the aforesaid Chamber's refusal to interpret the following clause at paragraph 28(iv) of its "Decision Regarding Interim Release":¹ "Not contact any Prosecution witness in this case or the Main Case, either directly or indirectly, except through counsel authorised to represent them before this Court [...]".
2. An appeal having the effect of referring all issues of fact and law to the higher court, as a result the application also seeks an amendment of the aforesaid clause, bearing in mind the existence of a professional relationship of 10 years' standing between Mr Fidèle Babala Wandu ("Mr Babala" or "the Accused") and Mr Robert Nginamau, whom the Office of the Prosecutor ("the Prosecution") intends to call as a Prosecution witness.
3. The Defence submits that it is in the interests of justice, a prompt trial and the proper administration of justice that the Appeals Chamber, having previously and immediately suspended the impugned decision on the basis of article 82(3) of the Rome Statute, should itself amend the clause at issue.
4. A brief case history (II) is necessary to determine the applicable law (III).

¹ ICC-01/05-01/13-1151.

II. BRIEF CASE HISTORY

5. On 2 June 2015, Trial Chamber VII (“the Trial Chamber”) directed the parties to submit their respective observations on the detention and/or release of the accused persons.²
6. In compliance with that Order, Mr Babala’s Defence team (“the Defence”) filed its observations on 19 June 2015.³
7. On 29 June 2015, the Office of the Prosecutor (“the Prosecution”) responded to the Defence observations.⁴
8. The Defence replied to those observations on 6 July 2015,⁵ indicating already at that stage in proceedings to the Chamber the contractual relationship between Mr Babala and Mr Nginamau that would have be taken into account were the condition proposed by the Prosecution as to contact between the accused persons and Prosecution witnesses to be applied.⁶
9. On 17 August 2015, the Trial Chamber issued its aforementioned “Decision Regarding Interim Release”, paragraph 28 of which, by dint of ambiguity, presented the Defence with a problem of comprehension in view of the professional relationship of 10 years’ standing between Mr Babala, the applicant, and Mr Nginamau, a potential Prosecution witness. That Chamber did not

² ICC-01/05-01/13-980.

³ ICC-01/05-01/13-1019. For the observations of other teams, see Bemba Defence: ICC-01/05-01/13-1016; Kilolo Defence: ICC-01/05-01/13-1021-Conf; Mangenda Defence: ICC-01/05-01/13-1017; Arido Defence: ICC-01/05-01/13-1022.

⁴ ICC-01/05-01/13-1044-Conf.

⁵ ICC-01/05-01/13-1058-Conf.

⁶ ICC-01/05-01/13-1058-Conf, para. 53.

provide any response whatsoever to the Defence arguments regarding the particular situation of Mr Babala and Mr Nginamau.

10. In its urgent request of 19 August 2015 ("the Defence Request"),⁷ the Defence asked the Trial Chamber for an authentic interpretation of the clause contained in paragraph 28 of the abovementioned Decision. The Defence submitted an Addendum on the same day.⁸
11. In its e-mail of 20 August 2015 received at 11.33 a.m., the Trial Chamber instructed all the parties to file any responses to the Defence Request by noon on 21 August 2015 at latest and, if necessary, to send it a courtesy copy directly by e-mail.
12. On 21 August 2015, just before that deadline expired, the Prosecution filed its Response to the Defence Request, stating that it had no objection to an exception being made in Mr Nginamau's case.
13. The same day, disregarding the view of the Prosecution, which is, nonetheless, better placed to gauge society's mood when public order has been disturbed, the Trial Chamber handed down its "Decision on Babala Defence Request for an Interpretation of the 'Decision Regarding Interim Release'" ("the Impugned Decision") against which the Defence hereby appeals.

⁷ ICC-01/05-01/13-1159-Conf.

⁸ ICC-01/05-01/13-1160-Conf.

III. APPLICABLE LAW

14. The instant application is firstly based on article 82(1)(b) of the Rome Statute (“the Statute”) and rule 154(1) of the Rules of Procedure and Evidence (“RPE”), quoted respectively below:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...]

(b) A decision granting or denying release of the person being investigated or prosecuted; (Rome Statute, article 81(1)(b))

And

An appeal may be filed under article 81, paragraph 3 (c) (ii), or article 82, paragraph 1(a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision. (RPE, article 154(1)).

15. Secondly, it further relies on the provisions of article 64(6)(f), which states:

In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: [...]

Rule on any other relevant matters;

and on the principle of *Ejus est interpretari cuius est condere*,⁹ which is recognised in international law¹⁰ and, under article 21(b) of the Rome Statute, constitutes the applicable law before the International Criminal Court.

IV. ADMISSIBILITY OF THE APPEAL

16. “[TRANSLATION] The interpretative decision cannot be the subject of a separate appeal”¹¹ from the decision interpreted. As the decision interpreted forms an integral part of the interpretative decision, the latter is subject to the same rules on remedies as the decision interpreted.

⁹ “Whoever is authorised to establish the law is authorised to interpret it.”

¹⁰ See SUR, Serge. *L'interprétation en droit international public*. Paris: L.G.D.J., 1974, Bibliothèque de droit international, vol. 75; and the same author in AMSELEK, Paul (ed). *Interprétation et droit*. Brussels: Bruylant, 1995, pp. 11-25.

¹¹ Cass. 3ème Civ., 29 May 1969, Bull. civ. III, No. 247; Hebraud, P. “*De l'appel des jugements interprétatifs*”, J.CP.1937, I 43.

17. The interpretative decision was notified on 21 August 2015. Under the terms of article 154 RPE cited above, the time limit for appeal expires on 26 August 2015. The instant appeal, filed before 26 August 2015, is hence admissible *ratione temporis* and *ratione materiae*.

V. CONFIDENTIALITY

18. As the instant application refers to confidential information such as the identity of Prosecution witnesses and the personal particulars of one of those witnesses, it is filed confidentially in accordance with regulation 23 *bis*(1) of the Regulations of the Court.

VI. SUBMISSIONS

19. It follows from the foregoing that, through its request dated 19 August 2015, the Defence asked Trial Chamber VII to interpret the clause “Not contact any Prosecution witness in this case or the Main Case, either directly or indirectly, except through counsel authorised to represent them before this Court [...]” given its ambiguity.¹²

20. A court decision, being a legal rule, is subject to the principle of legal certainty, which requires what is ordered to be stated clearly and precisely so as to allow the parties in the case to draw the legal inferences. Clarity is an essential element of a fair trial. Thus, the European Court of Human Rights found against France in a case involving telephone tapping ordered by an investigating judge on the grounds that “French law, written and unwritten, does not indicate with

¹² Cass. Com., 19 January 1983, Bull. civ. IV, No. 24.

reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.”¹³

21. The principle of legal certainty implies, according to the French *Conseil d'Etat* [Supreme Administrative Court], that “[TRANSLATION] citizens are able, without excessive effort on their part, to determine what is allowed and what is prohibited under the applicable law.”¹⁴

22. As the Defence was not able to ascertain the exact scope of the prohibition on contact with witnesses in the case regarding offences against the administration of justice, given the legal relationship between Mr Babala and Mr Nginamau the Defence had the right and even the duty to apply to the Trial Chamber that issued the Impugned Decision for an authentic interpretation. This was a question both of respect for the Trial Chamber and of necessity for the Accused's complete and effective defence.

23. Mr Babala needed to know the exact scope of the prohibition to which he is subject so as to plan his conduct towards his chauffeur and in terms of his country's laws. It should be remembered that Mr Babala is at once a national parliamentary deputy, i.e. a legislator, a lawyer by training and formerly a company lawyer by profession. He is therefore bound above all others to respect the laws that he helped to draft, that he knows and that he applied for many years, especially given that breaking those laws could render him liable to heavy financial penalties.

¹³ ECHR, 24 April 1990, *Kruslin and Huvig*, Series A No. 176-A and -B; Dalloz 1990, Jur. p. 353, note J. Pradel; *Gaz. Pal.* 1990, Jur. 249; see also, ECHR, 30 October 1998, *F. E. v. France*, RJD ECHR, p. 3332.

¹⁴ *Conseil d'Etat. Rapport public 2006 - Sécurité juridique et complexité du droit*. La Documentation française, Coll. Etudes et Documents, 400 pages.

24. With a view to facilitating this Chamber's understanding and to aid it in its forthcoming decision, it would seem worth noting that Mr Nginamau has been employed for over ten (10) years by Mr Fidèle Babala as a chauffeur.¹⁵ He holds a permanent contract for this position.

25. According to article 62 of the Congolese Employment Code,¹⁶ "[TRANSLATION] a permanent contract may be terminated by the employer only for a good cause linked to the ability or the conduct of the employee at the workplace in performance of his or her duties or justified by the operational needs of the enterprise, establishment or service." The grounds on which a contract of this type may be terminated are listed exhaustively.

26. The prohibition of contact with Prosecution witnesses to which Mr Babala is subject under paragraph 28 of the Impugned Decision presents, *ipso facto*, a serious problem in terms of the professional relationship between Mr Babala and Mr Nginamau as it might be construed as prohibiting Mr Babala's chauffeur from carrying out his job, although he is only a witness and has not yet incurred any convictions that would justify removing him from his work.

27. More specifically, the Defence approached the aforementioned Chamber for clarification as to whether this prohibition aimed, as the Defence understood it, to protect the integrity of the trial and so concerns only contact for the purpose of discussing the trial and specifically the substance of testimony or whether, on the contrary, it concerns all contact in general, including work-related contact, in which case Mr Babala would be obliged to dismiss Mr Nginamau.

¹⁵ CAR-OTP-0088-0188, p.14, lines 473-475.

¹⁶ Law No. 015/2002 of 16 October 2002 on the Employment Code of the Democratic Republic of the Congo, *Official Journal*, special edition of 25 October 2002.

28. It is not irrelevant that Mr Nginamau's work as a chauffeur for Mr Babala is his only source of paid employment from which he provides for his family.

29. If such is the meaning to be imputed to paragraph 28 of the decision interpreted, Mr Babala could be sentenced by the Employment Tribunal to pay compensation for unfair termination of an employment contract that has bound him to his employee for 10 years, insofar as the first paragraph of article 63 of the Congolese Employment Code provides that:

[TRANSLATION] The termination without good cause of a permanent contract shall entitle the employee to reinstatement. Failing that, the employee shall have the right to compensation established by the Employment Tribunal, calculated in view of, in particular, the nature of the services provided, the employee's seniority within the enterprise, his or her age, and whatever entitlements he or she may have acquired.

30. Almost all national and international legal systems make provision for the interpretation of criminal and civil decisions. The only restrictions in that regard are that the decisions to be interpreted must not be under appeal and that judges may not amend their original decisions under the guise of interpreting them. Scholarly writings also state that a request for interpretation does not constitute an exception to the termination of the judge's authority.¹⁷

31. Nor is it without significance that the International Criminal Court (ICC) has already ruled on similar matters. Such is the case of the decisions rendered by Trial Chamber II following, firstly, an application by the Defence team for Mr Mathieu Ngudjolo¹⁸ and, secondly, by the Defence team for Mr Katanga and Mr Ngudjolo.

¹⁷ See in French law, for example, Art. 461 of the New Code of Civil Procedure; 2e Civ., 18 December 1996: JCP G1997, IV, 332. – 29 April 1997: *Gaz. Pal.* 1997, 2, pan. jurispr. p. 280.

¹⁸ See transcript ICC-01/04-01/07-T-189-FRA ET WT 20-09-2010 pp. 4-6 RM T.

32. Similarly, in *Katanga and Ngudjolo Chui*, Trial Chamber II prohibited all witnesses from sharing the substance of their testimony with anyone.¹⁹ However, three witnesses who were members of two couples had travelled to The Hague with their spouses, with whom they naturally shared bedrooms.²⁰

33. The question was raised as to whether, to ensure compliance with this prohibition, the Chamber needed to forbid all contact between spouses in the couples concerned. Trial Chamber II gave a better interpretation of its decision, clarifying that the prohibition did not forbid all contact between spouses, but rather communication of the content of their testimony.²¹

¹⁹ See, for example: ICC-01/04-01/07-T-137-Red-ENG WT 06-05-2010, p. 91, lines 8-12:

“[TRANSLATION] The Court stresses that everything you have said before it today, yesterday and the day before yesterday since we met must remain confidential. You must not disclose what your testimony was today, with the exception, of course, of anything that was said in open court and, as such, is now public knowledge.”

²⁰ The witnesses in question were P-0160, P-0012 and P-0132.

²¹ ICC-01/04-01/07-T-142-Red-ENG WT dated 17.05.2010, p. 1, line 21-p. 4, line 12:

“Mr KILENDA: [TRANSLATION] Thank you, your Honours. Since the beginning of this trial, the Bench has unfailingly directed the attention of all Prosecution witnesses who have finished being examined and are going back – either to their countries of origin or, I would imagine, to where they have been relocated, if this isn’t their country of origin – the Bench has unfailingly directed their attention to their duty to say nothing to third parties about anything that has happened in court. Last Friday, we learned, following a question put by our learned colleague Mr Hooper, that the husband of Witness 0132 was present in The Hague. We shall not go so far as to request the Court to dissolve the conjugal union between the witness and her husband, but it is our legitimate duty to question whether this husband – who we know, by the way, from proceedings before this Court, was involved in some way or other in obtaining his wife’s identity documents – whether this husband is not therefore in some way involved in a strategy for his wife’s testimony before this Court. Members of our team were concerned about this over the weekend, and we decided to share our thoughts with the Chamber. Would it be wrong for us to put this question? We wish to obtain a response from the Chamber via, of course, the Victims and Witnesses Unit, as to whether the witness, who is appearing before you today, has had any contact, with regard to what is happening here, with her husband. That’s all, your Honours, I do not wish to waste your time. This was a concern that our team had. Thank you.

PRESIDING JUDGE COTTE: [TRANSLATION] Thank you, Mr Kilenda. Mr Kilenda, you have hence expressed a concern, and your team is perfectly entitled to express a concern. Witness 0132 did indeed, in response to a question from Mr Hooper last Friday, state that her husband was in The Hague. The Chamber learned – and you know that before taking measures to protect the witness in court, it always looks into the psychological state of the various witnesses appearing before it. The Chamber learned that the Victims and Witnesses Unit had previously taken the view that this witness’s particular vulnerability justified making it possible for her, if she wished, to be accompanied to The Hague by her husband for a period of time that is still indefinite. It appeared that her husband would be likely to ensure a degree of psychological stability which she needed and

34. The situation faced by Mr Babala and Mr Nginamau is all the more serious in that it conjures the possibility of legal penalties with sizeable financial implications and even political consequences.

35. It has, moreover, been recognised that Mr Babala has at no time obstructed the ongoing proceedings, the proof being that Mr Nginamau, although in an employment relationship with Mr Babala, has been able to comply freely with various invitations from the Prosecution to attend interviews in connection with the present case without his employer's being able to influence him in any manner whatsoever, and that Mr Nginamau has confirmed to Prosecution representatives that he has not discussed the substance of his testimony with Mr Babala;²² it is difficult therefore to imagine why Trial Chamber would defy logic and make the Accused run the risks of almost certainly being ordered to pay compensation and being held up to public mockery as a member of the

which we were able to see she indeed needed. The husband of Witness 0132 is therefore in The Hague. Has Witness 0132 discussed what was said in court with his... with her husband? We do not know and we do not have any means of knowing. Even if witnesses do not have their spouses with them in The Hague, it is obvious that witnesses can, if they so wish, talk to their spouses before they set off, and that on their return they can, despite our instructions to the contrary, talk to their spouses, and during the proceedings, the possibility cannot be excluded of a witness discussing what might have been said in court with his or her spouse by telephone. However, I am keen... However, the Chamber is keen to impose conditions, as you won't have forgotten that on 23 March, in response to a request from Mr Hooper, the Chamber gave the participants some details of the measures taken by the Victims and Witnesses Unit to ensure that the witnesses present in The Hague do not communicate with each other. Of course, this was in response to the question of "communication between witnesses", but when these details were given to us, we all learned, and I had told you, that the Unit reminded all witnesses, before and after testifying... before and after testifying that they must not discuss their testimony or the fact that they were witnesses with anyone. It is, of course, impossible not to discuss the fact that you are a witness with your spouse, but it is possible not to discuss the substance of your testimony with your spouse. This is therefore what the Chamber will do when the witness leaves shortly: it will remind Witness 0132 that she must keep to herself whatever is said and whatever she says in court. This should just be a reminder as the Victims and Witnesses Unit will have already reminded and told her about this. It is obvious that the Court cannot later check up on this, but on the other hand, as it does when a witness is leaving us, it can ensure, through me, and you should remind me if I forget, that it tells the witness, at the start of her testimony, that she should, and we remind her, that she must not discuss what is said in court with anyone whomsoever. We can't be certain whether other witnesses will come before the Court with their spouses, but you never know."

²² CAR-OTP-0090-0098.

opposition, when the Defence recalls the tendency of the Democratic Republic of the Congo always to politicise the instant case on each occasion that it has been called to submit its observations on Mr Babala's interim release in Congolese territory.

36. In its Response to the Defence Request, the Prosecution itself correctly states that:

Nevertheless, to the extent the Request is confined to Babala's and P-0272's professional relationship and substantiates the potentially detrimental impact on the livelihood of the latter as a consequence of the No-contact Directive, the Prosecution considers that the Request may reasonably be characterised as an application for an exception to the condition.

What is more, Mr Nginamau's dismissal could be exploited by Mr Babala's political opponents to ruin him politically.²³

37. In the Impugned Decision, in arguing that

[t]he Chamber notes that the work relationship of P-0272 with Mr Babala was sufficiently argued by the Babala Defence when the aforesaid condition to the accused release was litigated in the context of the Decision.⁷ The Babala Defence present submissions which are therefore a mere repetition of issues that were litigated by the parties and considered by the Chamber when it decided, among other conditions, that the accused shall not contact any Prosecution witness in this case. The Chamber therefore considers that no further interpretation or clarification is warranted

the Trial Chamber in fact refuses to interpret the clause contained in paragraph 28 of its "Decision Regarding Interim Release". It thereby commits a miscarriage of justice.

38. Among its competences, the Chamber has the power to explain "[TRANSLATION] provisions of which the terms give rise to doubt and to establish their meaning."²⁴ Such is the case with regard to paragraph 28 of the decision

²³ See in this regard the DRC's observations on the interim release of Mr Babala, where the DRC writes that Mr Babala's arrest disturbed the political order and his possible return (at the time when the observations were filed) would poison the political climate in a post-conflict country that needed peace to enable its reconstruction: ICC-01/05-01/13-78-Anx5, ICC-01/05-01/13-78-Anx6, ICC-01/05-01/13-206-AnxI, ICC-01/05-01/13-512-AnxI, ICC-01/05-01/13-694-Anx2, ICC-01/05-01/13-694-Anx3.

²⁴ Cass., 1ère Civ., 8 Nov., 1976. Bull. civ. I, No. 332.

interpreted as it is materially impossible to apply to Mr Nginamau, as has been explained in detail above (indivisibility of the dispute).

39. By merely ruling that the arguments raised by the applicant had already been examined in the decision to be interpreted, the Chamber, without explaining the ambiguous clause, simply issued a decision, without ruling on whether it was authorised or even duty-bound to enlighten the applicant.

FOR THESE REASONS,

WITH ALL DUE RESERVATIONS AND WITHOUT PREJUDICE,

MAY IT PLEASE THE APPEALS CHAMBER TO:

FIND THE INSTANT APPLICATION ADMISSIBLE AND FOUNDED;

AND CONSEQUENTLY:

ORDER, *IN LIMINE*, THE SUSPENSION OF THE IMPUGNED DECISION PURSUANT TO ARTICLE 82(3) OF THE STATUTE;

REVERSE the “Decision on Babala Defence Request for an Interpretation of the ‘Decision Regarding Interim Release’”;

AMEND paragraph 28 of the “Decision Regarding Interim Release” given the professional relationship between Mr Babala and Mr Nginamau;

AND, AS TRIAL CHAMBER VII SHOULD HAVE DONE:

DECLARE therefore that the prohibition of contact is confined to protecting the integrity of the trial and hence concerns only contact for the purpose of discussing the trial and, specifically, the content of testimony;

AND JUSTICE SHALL BE DONE.

RESPECTFULLY,

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Mr Fidèle Babala Wandu

[signed]

Done at Denderleeuw, Eastern Flanders, Belgium,
this 24 August 2015.