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

Date: **4 July 2014**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, 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 the first review of Fidèle Babala Wandu's detention pursuant to
article 60(3) of the Statute**

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the 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

Competent authorities of the Democratic Republic of the Congo

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Patrick Craig

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido” issued on 20 November 2013;¹

NOTING the “Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’” dated 14 March 2014 (“14 March 2014 Decision”)², rejecting Mr Babala’s request for interim release pursuant to article 60(2) of the Statute;

NOTING the “Décision sur la ‘Requête de la Défense sollicitant de la Chambre préliminaire II une nouvelle et urgente approche des autorités congolaises compétentes en vue d’obtenir une position précise et non-équivoque relativement à l’accueil de M. Fidèle Babala Wandu en République Démocratique du Congo en cas de son éventuelle mise en liberté provisoire’” dated 5 June 2014³, inviting the relevant authorities of the Democratic Republic of the Congo (“DRC”) to submit their views on Mr Babala’s request to state their position as to his possible return to the DRC in case he were to be released;

NOTING the “Order requesting observations for the purposes of the periodic review of the state of detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118(2) of the Rules of Procedure and Evidence” dated 13 June 2014⁴;

NOTING the “Transmission des observations de la République Démocratique du Congo sur la mise en liberté provisoire de M. Babala” dated 24 June 2014⁵, as well as Annex 1 thereto⁶, containing the DRC’s observations ;

NOTING the “Observations de la Défense de monsieur Fidèle Babala Wandu à ‘Order requesting observations for the purposes of the periodic review of the state of

¹ ICC-01/05-01/13-1-Red2-tENG.

² ICC-01/05-01/13-258.

³ ICC-01/05-01/13-463.

⁴ ICC-01/05-01/13-495.

⁵ ICC-01/05-01/13-512.

⁶ ICC-01/05-01/13-512-AnxI.

the detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118(2) of the Rules of Procedure and Evidence' (ICC-01/05-01/13-495) et aux 'Observations de la République démocratique du Congo sur la mise en liberté provisoire de monsieur Fidèle Babala Wandu (ICC-01/05-01/13-512-Anx)'" dated 30 June 2014⁷;

NOTING the "Prosecution Observations on the review of the detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, and Fidèle Babala Wandu" dated 30 June 2014 ("Prosecutor's Observations")⁸, whereby the Prosecutor submits *inter alia* that "there has been no change in circumstances", "[t]he conditions of article 58(1) of the Statute continue to be met" and that additional evidence collected and made available to the suspects since the 14 March 2014 Decision "militate in favour of ... continued detention";

NOTING the "Demande de réplique à 'Prosecution Observations on the Review of the Detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu' (ICC-01/05-01/13-529)" ("Mr Babala's Request for Leave to Reply"), submitted by the Defence for Mr Babala on 3 July 2014⁹;

NOTING articles 21, 58(1), 60(3) and 67(1) of the Statute, rules 118(1), (2) and (3), 119(1) of the Rules of Procedure and Evidence and regulation 24 of the Regulations of the Court;

HEREBY RENDERS THIS DECISION.

Determinations by the Single Judge

A. General principles

1. The Single Judge will review Mr Babala's detention in light of those principles which are consolidated in the case-law of the Appeals Chamber of the Court, as repeatedly upheld by the Pre-Trial Chambers.

⁷ ICC-01/05-01/13-524 and Annexes A, B and C thereto.

⁸ ICC-01/05-01/13-529.

⁹ ICC-01/05-01/13-534-Conf.

2. Pursuant to article 60(3) of the Statute, in conjunction with rule 118(2) of the Rules, the Chamber is mandated to review its ruling on the release or detention of the person at least every 120 days. Upon such review, the Chamber “may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require”. The Chamber shall make its determinations by “revert[ing] to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58(1) of the Statute”; “should not restrict itself to only considering the arguments raised by the detained person”; “must weigh the Prosecutor’s submissions against the submissions, if any, of the detained person”, as well as “consider any other information which has a bearing on the subject”; a decision on periodic review shall “clearly set out reasons for its findings”¹⁰.

3. The notion of “changed circumstances” within the meaning of article 60(3) of the Statutes “imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”¹¹; “[i]f there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention”; otherwise, the “Chamber is not required to further review the ruling on release or detention”¹²; more recently, the Appeals Chamber has further clarified this principle, by stating that “[i]t is first for the Pre-Trial Chamber to determine whether changed circumstances exist to warrant the disturbing of a previous ruling on detention, rather than addressing each factor underpinning detention in a *de novo* manner to determine whether any of these have changed”¹³.

4. Because of its specific object, “the scope of the review carried out in reaching a decision under article 60(3) is potentially much more limited than that to be carried

¹⁰ ICC-01/05-01/08-1019, para. 52.

¹¹ ICC-01/05-01/08-631-Red, para. 60.

¹² ICC-01/05-01/08-2151-Red, paras 1 and 53.

¹³ ICC-02/11-01/11-548-Red, para.1

out in reaching a decision under article 60(2) of the Statute”¹⁴. Furthermore, “[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention” and does not have to “entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”¹⁵.

B. Whether there are changed circumstances that would require a modification of the previous ruling on detention

5. In the 14 March 2014 Decision, the Single Judge noted that “none of the material contained either in the Prosecutor’s Application or in the Independent Counsel Report is addressed by the Defence for Fidèle Babala”. Accordingly, he was fully persuaded that the information and materials made available to the Chamber by the Prosecutor at the time of her Application under article 58 of the Statute and by Independent Counsel still justified the finding that there were reasonable grounds to believe that Mr Babala committed the crimes alleged by the Prosecutor and that the requirements of article 58(1)(a) of the Statute continued to be satisfied. In the warrant, based on the evidence submitted by the Prosecutor, the Single Judge had found that, as a DRC parliamentarian, Fidèle Babala had “numerous contacts, including at an international level, and is able to travel freely, including to non-States parties”.¹⁶ Weight was given to the fact that transfer of money had been the subject of several telephone calls between Fidèle Babala and Jean-Pierre Bemba¹⁷ and that Mr Babala - referred to as “07” - also emerged as instrumental to the execution of money transfers from the Independent Counsel Report. The 14 March 2014 Decision found that these factors still persuasively supported the existence of a flight risk, which risk might be enhanced by the advanced stage of the process of disclosure, as well as of the other risks listed in article 58(1)(b) of the Statute.

6. The Single Judge takes the view that no change in the circumstances underpinning the ruling has occurred, and that no new circumstances having a

¹⁴ ICC-02/11-01/11-278-Red, para. 24.

¹⁵ ICC-01/05-01/08-1019, para. 53.

¹⁶ ICC-01/05-01/13-1-Red2, para 23.

¹⁷ ICC-01/05-67-Conf -AnxI.1.

bearing on the conditions under article 58 (1) of the Statute have arisen, since the 14 March 2014 Decision. Rather, new elements have been added to the record, all of which strengthen the conclusions reached in the 14 March 2014 Decision.

7. As highlighted by the Prosecutor, a significant amount of additional elements pointing to the role played by Fidèle Babala in the implementation of the alleged scheme aimed at perverting the course of justice, and to initiatives taken by him in that context, have emerged, notably from the “Troisième rapport du Conseil Indépendant” dated 22 May 2014 relating to communications among the suspects intercepted by the Dutch authorities between 16 October 2013 and 23 November 2013 and subsequently reviewed by Independent Counsel (“Independent Counsel’s Third Report”)¹⁸. Several excerpts of these communications provide additional support to the finding that Fidèle Babala played an instrumental role in respect of transfers of money related to the implementation of the scheme aimed at perverting the course of justice alleged by the Prosecutor in this case¹⁹, and that he was aware of the objectives pursued in arranging such transfers²⁰. As regards Mr Babala’s access to financial resources (one of the elements found by the 14 March 2014 Decision as underpinning the risk of flight), Independent Counsel’s Third Report also contains elements apt to show that he is in a position to autonomously act on such resources independently from and irrespective of a specific authorisation by either Jean-Pierre Bemba or any of the other suspects²¹. These elements, considered against the background of the information already available, strengthen the Single Judge’s belief that the position of Mr Babala is such as to make it possible for him, if released, to decide to escape the jurisdiction of the Court and to continue interfering with the Court proceedings.

8. The Single Judge notes that the Defence concedes that it requests Mr Babala’s interim release “pour toutes les raisons déjà évoquées dans sa requête de mise en liberté provisoire et dans son recours encore pendant devant la Chambre d’appel

¹⁸ ICC-01/05-01/13-421-Conf and confidential annex thereto.

¹⁹ ICC-01/05-01/13-421-Conf-Anx, pages 22-23; 31 ; 54-56; 61-70 ;

²⁰ ICC-01/05-01/13-421-Conf-Anx, page 24; 78-80.

²¹ ICC-01/05-01/13-421-Conf-Anx, pages 59; 80.

contre la décision de maintien en détention”. As recalled above, the Appeals Chamber has since long clarified that submissions merely repeating arguments already addressed in previous decisions must not be addressed in the context and for the purposes of a review pursuant to article 60(3) of the Statute. Accordingly, the Single Judge will only address submissions referring to issues and elements which have not been considered for the purposes of the 14 March 2014 Decision.

9. Most of the factors styled by the Defence as “changements substantiels survenus depuis l’arrestation et la mise en détention de Monsieur Babala” were already outstanding at the time of his first request for interim release. This is certainly true for the circumstance that he is “éloigné du dossier de l’affaire principale”; or that “il n’a jamais fait partie de l’équipe de défense de Monsieur Bemba”. Similarly, as stated by the Defence, Aimé Kilolo and Jean-Jacques Mangenda are no longer on the Defense team of Mr Bemba “depuis le 6 décembre 2013”²². Both these factors were established and known to the Single Judge at the time of the issuance of the 14 March 2014 Decision and, accordingly, cannot qualify as “changed circumstances” within the meaning and for the purposes of this review.

10. In the same way, the professional, family and personal circumstances of Mr Babala’s²³ were existing and known to the Single Judge at the time of the issuance of the 14 March 2014 Decision. The purported “minor” or “lesser” gravity of the crimes at stake in these proceedings, as opposed to the other crimes falling within the jurisdiction of the Court²⁴, was also fully addressed, and found as irrelevant for the purposes of the assessment as to the persisting existence of the risks listed in article 58(1)(b) of the Statute. The suspect’s personal commitment not to abscond from the proceedings²⁵, or not to unduly influencing witnesses²⁶, was likewise assessed in the context of the 14 March 2014 Decision and found not *per se* decisive, in isolation of all other relevant factors. Its reiteration cannot certainly qualify as a changed circumstance for the purposes of article 60(3).

²² ICC-01/05-01/13-524, paragraphs 8-10.

²³ ICC-01/05-01/13-524, paragraphs 11-16.

²⁴ ICC-01/05-01/13-524, paras 17-18.

²⁵ ICC-01/05-01/13-524, paras 30-31.

²⁶ ICC-01/05-01/13-524, paras 23-24.

11. As regards the observations based on the purported difference between the normative framework governing pre-trial proceedings before the Court and Congolese procedural law²⁷, the Single Judge notes that they can hardly qualify as “changed circumstances”, even leaving aside the fact (*per se* decisive) that proceedings before the ICC are governed by the Statute and the Rules.

12. The only circumstance identified by the Defence for Mr Babala which, being chronologically subsequent to the issuance of the 14 March 2014 Decision, might potentially qualify as a “changed circumstance” for the purposes of article 60(3) of the Statute is the decision adopted by Trial Chamber III on 7 April 2014 on the closure of evidence in the case *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Main Case”)²⁸. According to the Defence, this closure would determine that there is no longer a possibility “de compromettre le déroulement de cette procédure”.

13. The Single Judge observes that, notwithstanding the adoption of the decision referred to by the Defence, or the fact that the final oral pleadings have now been scheduled for 13 October 2014, today, as on 14 March 2014, there remains that the outcome of the trial of the Main Case is still open and that the impact of these proceedings on that trial is yet to be determined. As already observed in the 14 March 2014 Decision, it cannot be excluded that the Main Case is reopened even following the filing of the parties’ final submissions, or their final oral pleadings (as has occurred in the case of *The Prosecutor v. Germain Katanga*). Second, in spite of the fact that some pieces of evidence relating to these proceedings might at this stage be beyond the suspects’ reach²⁹, it cannot nevertheless be excluded that action be taken in respect of other evidentiary items which might still be outstanding. Accordingly, Trial Chamber III’s decision referred to by the Defence cannot be regarded as a “changed circumstances” suitable to require a variation of the assessments as to the persisting existence of risks within the meaning and for the purposes of article 60(3) of the Statute.

²⁷ ICC-01/05-01/13-524, paras 19-22.

²⁸ ICC-01/05-01/13-524, paragraph 8.

²⁹ ICC-01/05-01/13-38-Corr, paras 53-54.

14. The Single Judge also notes the Defence submission that “la durée de la détention de M. Babala est déraisonnable”, notably in light of the penalties applicable to offences against the administration of justice³⁰. This argument had already been raised within the context of the initial request for interim release and found not *per se* suitable to diminish the risk of a flight, including in light of the fact that it remained to be decided how the statutory limit may apply in case multiple offences. Moreover, the Defence does not specify, in concrete terms, which factual finding(s) of the 14 March 2014 Decision might have become obsolete by mere virtue of the passage of time.

15. In summary, the Defence observations, most of which repeat arguments already raised in the past, notably in the context and for the purposes of Mr Babala’s initial request for interim release, do not go beyond the rehearsal or the reiteration of reasons of disagreement between the Defence and either the determinations made by the Chamber throughout these proceedings, or with the position taken by the DRC authorities in respect of Mr Babala’s possible conditional release on their territory.

16. Based on the foregoing, the Single Judge takes the view that no circumstances have intervened since the 14 March 2014 Decision suitable to weaken or otherwise impact the assessment made therein as to the persisting existence of reasonable grounds to believe that the requirements set forth under article 58(1) of the Statute, and, in particular, the risks listed in paragraph (1)(b) thereof, are still outstanding.

C. Conditional release

17. Release with conditions is one of the possible outcomes of a review of a previous ruling on detention, unless either the “Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it appropriate to release the person subject to conditions”; or “where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition

³⁰ICC-01/05-01/13-524, paras 25-29.

of certain conditions of release³¹. The Pre-Trial Chamber enjoys discretion when deciding on conditional release³².

18. The Single Judge recalls his finding that the nature of the crimes alleged in these proceedings and the alleged modalities of their commission (ie, by way of communications with the other suspects, or with third parties connected to them by reason of personal or professional links) are such as to make it difficult to conceive of measures which might effectively counteract the risks associated with the suspect's communications with the external world and that, accordingly, the detention centre is the only environment providing adequate guarantees for the effective management of those risks. The Defence submission to the effect that "[p]ermettre à M. Babala ... de recouvrer sa liberté serait une occasion, pour la Chambre, de le soumettre à un test, à l'épreuve de respect des conditions qui assortiraient éventuellement sa mise en liberté provisoire"³³ is obviously not adequate to overcome any of those difficulties, or to otherwise affect that conclusion. A decision granting conditional release cannot be regarded as a gamble, whereby a Chamber "tests" whether a suspect is or not worth of the trust reposed in him or her by granting such release. It has to be strictly justified and supported by objective elements enabling a Chamber to estimate that the conditions assisting the release are suitable to effectively neutralise the risks listed in paragraph 58(1)(b) of the Statute.

19. Based on the information available to him, the Single Judge is satisfied that none of these objective conditions exists today. On 23 June 2014, pursuant to the Chamber's invitation granting Mr Babala's request that the relevant authorities provide anew their views as to his possible return to the DRC following his release, the DRC Government stated *inter alia* that (i) "ne saurait garantir à la Cour qu'il saura empêcher l'intéressé, sitôt retourné au pays, d'une part, de suborner astucieusement d'autres témoins... et d'autre part, d'exercer des représailles sur les dénonciateurs des faits à l'origine de son arrestation" ; (ii) "ne peut non plus assurer ni l'observance des mesures liées et accompagnant la liberté provisoire ni le respect

³¹ ICC-01/05-01/08-1626-Red, para. 55.

³² ICC-02/11-01/11-278-Red, para. 87.

³³ ICC-01/05-01/13-524, para. 29.

de la discipline liée au secret de l'instruction préjuridictionnelle" ; and that, accordingly, the DRC "ne se prête pas à être un pays d'accueil".

20. These submissions – and the unequivocal statement of unavailability put forward by the DRC - make conditional release not only not justified in light of all relevant factors, but also practically unfeasible. Accordingly, there is no need for the Single Judge to analyse the reasons underlying Mr Babala's disagreement with the submissions made by the DRC, or the proposal that, in light of the DRC's position, Mr Babala "préfère se mettre à la disposition du point focal de la CPI ou de la MONUSCO"³⁴. He will only note that this disagreement is based to a large extent on considerations related to the ongoing political debate in the DRC (none of which appear in the DRC submissions) and that, as appropriately stated by the Defence for Mr Babala, "[l]a CPI n'est pas l'arène de confrontation entre adversaires politiques congolais"³⁵.

21. Following the above analysis, the Chamber is of the view that there has been no change in the relevant circumstances concerning the necessity of Mr Babala's detention to ensure his appearance before the Court, and to ensure that he does not commit further crimes, or obstruct or endanger the investigation or the court proceedings. The grounds justifying detention under article 58(1)(b)(i) and (ii) of the Statute continue to exist, and interim release cannot be granted.

D. Mr Babala's Request for Leave to Reply

22. The Defence for Mr Babala requests to be authorised to reply to the Prosecutor's Observations on two issues: (i) the meaning attributed by the Prosecutor to a particular expression appearing in Independent Counsel's Third Report and (ii) the Prosecutor's submission that no evidence and information with respect to article 58(1)(a) of the Statute has been submitted by the Defence teams since the 14 March 2014 decision. As regards the issue sub (i), the Single Judge notes that the matter strictly pertains to the merit of the case, rather than to the review as to the continuing existence of the risks warranting detention, and, as such, is better

³⁴ ICC-01/05-01/13-524, paragraph 5.

³⁵ ICC-01/05-01/13-524, paragraph 46.

addressed in the context of the submissions due by the Defence pursuant to the calendar set for the confirmation of the charges. As regards the issue sub (ii), the Single Judge notes that the Defence for Mr Babala already offered a reply to the Prosecutor's submission and that, accordingly, no additional reply is needed.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS Mr Babala's Request for Leave to Reply;

DECIDES that Fidèle Babala Wandu shall remain in detention.

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



Judge Cuno Tarfusser
Single Judge

Dated this Friday, 4 July 2014

At The Hague, The Netherlands