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THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

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***

Public Document

***Appeal by the Defence for Mr Fidèle Babala Wandu against the Decision on the
first review of Fidèle Babala Wandu's detention pursuant to article 60(3) of the
Statute (ICC-01/05-01/13-538)***

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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I. BRIEF PROCEDURAL HISTORY

1. On 14 March 2014, Pre-Trial Chamber II (“the present Chamber”, “the Chamber” or “the Single Judge”) issued its decision to continue the pre-trial detention of Mr Fidèle Babala Wandu (“Mr Babala”).¹
2. The basic legal instruments of the International Criminal Court (“the Court” or “the ICC”) mandate that the Single Judge review the expediency of the continued detention of the suspect every 120 days as from the date of the aforesaid decision, in accordance with article 60(3) of the Statute and rule 118(2) of the Rules of Procedure and Evidence. Thereupon and by law, the Single Judge is required to direct observations from the parties to and participants in the proceedings. Accordingly, the Single Judge issued an order on 13 June 2014 enjoining the parties to submit their observations by 30 June 2014.²
3. On 30 June 2014, the Defence team for Mr Babala (“the Defence”) submitted its observations on the continued detention of the suspect.³
4. On the same day, the Office of the Prosecutor (“the Prosecutor” or “the Prosecution”) filed its observations on the detention of Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo and Mr Fidèle Babala Wandu.⁴ On 3 July 2014, the Defence applied for leave to reply to the Prosecutor’s observations.

¹ ICC-01/05-01/13-258.

² ICC-01/05-01/13-495.

³ ICC-01/05-01/13-524.

⁴ ICC-01/05-01/13-529.

5. In its decision of 4 July 2014 (“the Impugned Decision”), the Single Judge rejected both the Defence’s application for leave to reply and the application for the interim release of Mr Babala.⁵
6. As a result, the Defence finds itself duty-bound to apply once again to the Appeals Chamber, pursuant to article 82(1)(b) of the Rome Statute of the International Criminal Court (“the Statute”) and rule 154(1) of the Rules of Procedure and Evidence (“the RPE”) to ensure that the law prevails. The Defence is convinced that the Single Judge will never grant interim release to Mr Babala, even though the requisite conditions have been met. Besides, the grounds for the Single Judge’s rejection of Mr Babala’s application for interim release have no basis in law.

II. ARGUMENTS

7. In the Impugned Decision, the Single Judge states that the Defence did not address the arguments advanced by the Prosecutor or the information furnished by the Independent Counsel and that, accordingly, he is still satisfied that there are grounds to believe that Mr Babala committed the crimes alleged against him, and that there exists a risk that Mr Babala might abscond. The Single Judge further states that the Defence did not establish the existence of changed circumstances within the meaning of article 60.
8. For all the reasons already set forth in Mr Babala’s Observations dated 30 June 2014,⁶ and which form verbatim an integral part of the present appeal, the Defence most respectfully requests the Appeals Chamber to reverse the Decision of the Single Judge, and grant Mr Babala interim release.

⁵ ICC-01/05-01/13-538.

⁶ ICC-01/05-01/13-524.

A. Material changes since the arrest and detention of Mr Babala

9. In rejecting Mr Babala's application for interim release, the Single Judge relies on the submissions of the Prosecutor, which have not changed in the slightest, and are rehashed on every occasion. The Single Judge reproaches the Defence for repeating the same arguments, whereas in each of its requests, the Defence introduced new information establishing the existence of changed circumstances. In its previous request, the Defence underscored, *inter alia*, the change within Mr Jean-Pierre Bemba's defence team and the resting of the Defence case – changes that absolutely precluded continued commission of the crimes alleged against the suspects, due to the removal from the main case of Mr Babala's co-detainees, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo. In the same request, Mr Babala, a trained lawyer, a member of the National Assembly, and a mere suspect who has the right to the presumption of innocence and who is held in good repute, filed a sworn undertaking to appear whenever summoned by the Court, and not to obstruct the investigation and the proceedings.

10. In spite of all these efforts which alleviated the stringency of article 58 of the Statute, the Single Judge dismissed Mr Babala's request on the grounds, *inter alia*, that the Defence did not advance any condition to attach to the suspect's interim release, if granted. However, rule 119 of the RPE empowers the Pre-Trial Chamber to set, amend or even rescind conditions.

11. In its Observations of 30 June 2014, the Defence did propose conditions that were more numerous and restrictive than those prescribed in rule 119 of the RPE, and the Single Judge was still not satisfied, although he is yet to impose any conditions of his own.

12. The Defence cannot understand why all the submissions made in its Observations of 30 June⁷ were characterised as repetitive, considering that in its view, it had introduced new considerations that were disregarded in the Impugned Decision. In fact, the Single Judge barely makes reference to the conditions proposed by the Defence.
13. The Single Judge points out that the Appeals Chamber has long since clarified that submissions repeating previous arguments so as to seek a review of a decision rendered pursuant to article 60(3) would not be entertained. Accordingly, the Pre-Trial Chamber will only address submissions that were not considered in the 14 March decision. Mr Babala's unawareness of developments in the main case, and Mr Aimé Kilolo and Mr Jean-Jacques Mangenda's departure from Jean-Pierre Bemba's Defence team were already known to the Judge at the time of the issuance of his previous decision and, accordingly, cannot qualify as material changes. In the same way, the gravity of the crime was also addressed by the Judge and found irrelevant to the discussion on interim release. The suspect's undertakings not to abscond from the proceedings and not to corruptly influence witnesses were likewise assessed by the Judge in his previous decision and certainly cannot qualify as material changes.
14. That notwithstanding, as stated above, the Single Judge continues to entertain the same arguments from the Prosecutor. Furthermore, the change in circumstances within the meaning of article 60(3) does not refer to change in respect of the previous request, but rather change in terms of the circumstances which gave rise to the issuance of the warrant, as enumerated in article 58. This does not mean that submissions made in a previous application should be permanently cast aside if not accepted, but may instead be taken on board alongside the new arguments if found to be insufficient. The intention of the

⁷ ICC-01/05-01/13-524.

Appeals Chamber was to avoid verbatim repetition of the same, previously-rejected arguments.

15. For example, by rejecting the Defence argument of unreasonable duration of detention on the ground that it had already been raised, the Single Judge fails to consider that the duration is no longer the same as in the previous request, but extends to 120 days. This argument is consistent with the universally accepted principle of the exceptionality, necessity and proportionality of pre-trial detention, which is recognised by the law of the ICC enshrined in article 21 of the Statute.

16. The Single Judge himself acknowledges that the closure of the presentation of evidence in the main case could qualify as a material change in circumstances within the meaning of article 60(3) of the Statute:

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”). According to the Defence, this closure would determine that there is no longer a possibility “de compromettre le déroulement de cette procédure”.⁸

Such closure constitutes a very significant change in circumstances insofar as Mr Babala will not be in a position to exert any influence whatsoever on the proceedings of the main case.

17. That notwithstanding, the Judge rejects Mr Babala’s request for interim release, stating that the proceedings in the main case are still open, and that the case could be reopened at some point in time:

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

⁸ ICC-01/05-01/13-538, para. 12.

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*) (...).⁹

However, the Single Judge does not explain how Mr Babala might influence the trial if he is granted interim release at this time, but merely invokes the fanciful scenario of a reopening of the main case, without expounding on how Mr Babala could exert his influence, whereas the presentation of evidence has already closed.

18. In keeping with his tendency to systematically reject all Defence arguments, the Single Judge refuses to act on the principles to which he himself refers. As he states in his decision: "If 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".¹⁰ This statement implies that changed circumstances are particularly relevant when they have an impact on the reasons for the person's continued pre-trial detention. This holds true for Mr Babala since one of the Single Judge's reasons for his continued pre-trial detention was his potential influence on the main case. Accordingly, Mr Babala should be granted interim release considering that one of the most compelling arguments for his detention became irrelevant once the presentation of evidence in the main case closed.

19. Surprisingly, the Single Judge asserts that the nature of the crimes and the modalities of their commission are such that it is difficult to conceive of measures which might effectively counteract the risks associated with the suspects' communications with the outside world and that the detention centre is the only way to manage those risks. This therefore means that persons suspected of corruptly influencing witnesses anywhere in the world can never

⁹ ICC-01/05-01/13-538, para. 13.

¹⁰ ICC-01/05-01/08-2151-Red, paras. 1 and 53.

be granted interim release. What, then, of the examples from the case law of the ICTY which were cited in the Defence Observations?

20. Regarding the procedural differences between the ICC and national jurisdictions – Congolese, Belgian and French – in respect of pre-trial proceedings, the Single Judge also finds that they cannot qualify as material changes. Furthermore, proceedings before the ICC are governed by the Statute and the Rules. Such reasoning is equally surprising in light of the fact that, by casting a duty on the Prosecutor to investigate incriminating and exonerating circumstances and to question suspects, article 54 of the Statute is no different from the aforementioned national procedure. Besides, the Single Judge appears to restrict himself to a textualist interpretation of the Statute, whereas the applicable law before the ICC, pursuant to article 21 of the Statute, whilst encompassing the Statute, the Elements of Crimes and the RPE, also includes:

[a]pplicable treaties and the principles [...] of international law, including the established principles of the international law of armed conflict; [...] general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime[s]; [...] as well as] internationally recognized human rights [...].

B. The stated unavailability of the DRC to receive Mr Babala

21. The Single Judge notes the unequivocal refusal of the Democratic Republic of Congo (“the DRC”) to receive Mr Babala, adding that the ICC is not a forum for political contest, and that he need not analyse the Observations concerning the submissions made by the DRC.
22. The Defence is of the view that, once again, this is an unfair justification and an erroneous application of the law. That remark should be addressed to the DRC authorities, who are trying to politicise a case at bar. The Defence is asking for nothing more than the application of the law, and specifically the law of the ICC,

pursuant to article 21 of the Statute aforecited. The international instruments for the protection of human rights cited in the Defence Observations of 30 June 2014 and the DRC Constitution cast an obligation on the DRC to accept Mr Babala in the event of interim release, non-confirmation of charges, acquittal or release.

23. The Single Judge states:

19. 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 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.¹¹

Nonetheless, the fact [is] that article 21(1)(c) of the Statute stipulates that the applicable law shall include "the national laws of States that would normally exercise jurisdiction over the crime", and that the DRC Constitution strictly prohibits forcing nationals into exile, as provided in its article 30: "[TRANSLATION] (...) No Congolese national shall be expelled from the territory of the Republic, forced into exile or compelled to live outside his or her habitual place of residence". By refusing to give effect to the application of this constitutional provision, the Single Judge disregards the law applicable before the ICC.

¹¹ ICC-01/05-01/13-538, paras. 19 and 20.

C. The Single Judge's rejection of Mr Babala's application for leave to reply to the Prosecutor's Observations¹²

24. On the one hand, the Single Judge states that the Defence did not furnish any submissions to counter the arguments of the Prosecutor or the Independent Counsel and, accordingly, he continues to have reason to believe that Mr Babala committed the crimes alleged against him. On the other hand, in response to the Defence's argument that the Prosecutor failed to question Mr Babala – thereby precluding the suspect's awareness of the context surrounding the use of a term considered quintessentially incriminating, "*service après-vente*" [after-sales service] – the Single Judge contradicts himself in stating that this matter should be addressed in the Defence's submissions relating to the Document Containing the Charges, rather than to Mr Babala's detention. The question then arises as to when and how the Defence was supposed to counter the arguments of the Prosecutor and the Independent Counsel.
25. Additionally, according to the Single Judge, the Independent Counsel's report shows that Mr Babala has access to resources without the authorisation of Mr Bemba, which makes it possible for him to abscond and escape the jurisdiction of the ICC. This assertion is incorrect, as Mr Babala does not have any resources of his own with which to assist Mr Bemba, but merely transferred funds raised by parliamentarians of Mr Bemba's party to Mr Bemba's Defence team for the purposes of purchasing food and conducting investigations.
26. Lastly, the Single Judge finds that the additional information contained in the Independent Counsel's Third Report incriminates Mr Babala, thereby increasing his flight risk. The Defence points out that this is a dangerous opinion on the part of a judge mandated to rule on the confirmation of charges.

¹² 9 ICC-01/05-01/13-534-Conf.

FOR THESE REASONS

The Defence respectfully requests the Appeals Chamber to reverse the Decision of the Single Judge on the pre-trial detention of Mr Babala¹³ in light of the arguments and considerations presented in this appeal.

AND JUSTICE WILL BE DONE.

RESPECTFULLY SUBMITTED

[signed]

Mr Jean-Pierre Kilenda Kakengi Basila
Counsel for Mr Fidèle BABALA WANDU

Dated this 9 July 2014

At Denderleeuw, East Flanders, Belgium

¹³ ICC-01/05-01/13-538.