

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: **19 June 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  
With a confidential annex**

**Observations of the Defence for Mr Fidèle Babala pursuant to the  
“Order requesting the parties’ observations under Article 60 of the Statute”  
(ICC-01/05-01/13-980)**

**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. PROCEDURAL BACKGROUND

1. On 24 November 2013, Mr Fidèle Babala Wandu (“Mr Babala”) was transferred to the Scheveningen Detention Centre in accordance with the warrant of arrest<sup>1</sup> issued for him on 20 November 2013 by Pre-Trial Chamber II of the International Criminal Court (“the Court” or “the ICC”). The warrant of arrest was also issued for Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo and Mr Narcisse Arido.
2. Mr Babala’s detention has been the subject of several investigations by Pre-Trial Chamber II – either on its own motion or at the request of Mr Babala’s Defence Team (“the Defence”)<sup>2</sup> – and by the Appeals Chamber.<sup>3</sup> The Defence notes that the requests and observations<sup>4</sup> that it has presented on Mr Babala’s detention are considered to be a part of the present Observations and should be considered to be reproduced here in full.
3. On 21 October 2014, the Single Judge of Pre-Trial Chamber II ordered the immediate interim release of Mr Babala and of three of his co-accused<sup>5</sup> (“the Decision ordering release”).
4. On 22 October 2014, the Office of the Prosecutor (“the Prosecution”) filed a motion for Pre-Trial Chamber II to grant an interim stay of the Decision ordering

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<sup>1</sup> ICC-01/05-01/13-1-Red2-tENG.

<sup>2</sup> ICC-01/05/13-258; ICC-01/05-01/13-538; ICC-01/05-01/13-703.

<sup>3</sup> ICC-01/05-01/13-559; ICC-01/05-01/13-969.

<sup>4</sup> ICC-01/05-01/13-38-Corr-tENG; ICC-01/05-01/13-276-tENG; ICC-01/05-01/13-414; ICC-01/05-01/13-547-tENG; ICC-01/05-01/13-524; ICC-01/05-01/13-684.

<sup>5</sup> ICC-01/05-01/13-703.

release,<sup>6</sup> as well as a notice of appeal accompanied by an urgent request that the appeal have a suspensive effect.<sup>7</sup>

5. On the same day, Pre-Trial Chamber II dismissed the Prosecution's motion as being "without merit".<sup>8</sup> Following this dismissal, the Prosecution requested the Appeals Chamber to rule that same day on its request for suspensive effect.<sup>9</sup> After having ordered the Defence teams to submit their observations,<sup>10</sup> the Appeals Chamber also rejected the Prosecution's request for suspensive effect.<sup>11</sup>
6. In its brief<sup>12</sup> submitted on 29 October 2014, the Prosecution appealed Pre-Trial Chamber II's Decision ordering release. The Defence responded to this on 4 November 2014.<sup>13</sup>
7. On 29 May 2015, the Appeals Chamber issued its judgment on the appeals lodged by the parties against Pre-Trial Chamber II's decisions regarding the interim release of the accused persons.<sup>14</sup> In regard to the Prosecution's request, the Appeals Chamber reversed the Decision ordering release and remanded the question of the detention of the accused persons to Trial Chamber VII ("the Chamber").

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<sup>6</sup> ICC-01/05-01/13-705.

<sup>7</sup> ICC-01/05-01/13-706 (OA 9).

<sup>8</sup> ICC-01/05-01/13-711.

<sup>9</sup> ICC-01/05-01/13-717.

<sup>10</sup> ICC-01/05-01/13-709. In accordance with this order, the Defence for Mr Babala filed its response ICC-01/05-01/13-715-Corr.

<sup>11</sup> ICC-01/05-01/13-718.

<sup>12</sup> ICC-01/05-01/13-727 (OA 9).

<sup>13</sup> ICC-01/05-01/13-738-Conf-tENG.

<sup>14</sup> ICC-01/05-01/13-969 (OA5, OA6, OA7, OA8, OA9).

8. On 2 June 2015, the Chamber ordered the Defence teams to submit to it their observations on detention or release by 19 June 2015.<sup>15</sup> Accordingly, the Defence submits the present observations in favour of Mr Babala's continued release in accordance with articles 58 and 60 of the Rome Statute ("the Statute").
9. After (A) making preliminary remarks that it considers of the utmost importance, and (B) addressing the applicable law on which its arguments are founded, the Defence (C) will argue first and foremost that – in the light of the relevant articles of the Statute, the internationally recognised fundamental rights of the accused and the interest of justice – placing Mr Babala back in detention would be a disproportionate and inappropriate measure.

## II. SUBMISSIONS

### A. Preliminary remarks

10. The existence of international criminal jurisdiction is owed in large part to the desire to curb crimes of such gravity that they are considered to have bearing on the international community as a whole. Consequently, the crimes set out in article 5 of the Statute and over which the Court has jurisdiction are of another order than the offences under article 70.<sup>16</sup>
11. In the analysis of whether or not it is necessary to place Mr Babala back in detention, it would be against the interest of justice not to draw a distinction

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<sup>15</sup> ICC-01/05-01/13-980.

<sup>16</sup> ICC-01/05-01/13-559: "The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, cannot be considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes, and the crime of aggression, which are described in that provision to be 'the most serious crimes of concern to the international community as a whole'."

when considering article 60 between the crimes set out in article 5 and the offences under article 70. The Appeals Chamber has therefore pointed out that the maximum penalty incurred by the Accused because of the charges against him is a factor to be considered when deciding whether the individual should be placed in detention for the duration of the trial.<sup>17</sup>

12. The Appeals Chamber also found that any change in circumstances that could justify the release of a detainee must be analysed for each of the accused persons individually, and not collectively as it was by the Pre-Trial Chamber in its Decision ordering release. The Defence maintains that, when reviewing a ruling on release or detention as set out in article 60(3), it is incumbent upon the reviewing Chamber to consider *in concreto* and not *in abstracto* the situation and the conduct of the accused.<sup>18</sup>

13. The Defence notes that the Appeals Chamber observed in its judgment of 29 May 2015 that the redetainment of the Accused would, at this point, be against the interest of justice:

However, given the specific situation of the suspects in this case, i.e. that they were ordered to be released on 21 October 2014, to which suspensive effect was not granted by the Appeals Chamber, and the length of time that has passed since their release, the Appeals Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the Impugned Decision.<sup>19</sup>

14. The Defence recalls that the Appeals Chamber reversed the Decision ordering release because of: (1) the Single Judge's misinterpretation of article 60(4) of the Statute; (2) the lack of consideration given to the risks foreseen under article 58 when analysing the duration of detention; and (3) the absence of an

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<sup>17</sup> ICC-01/05-01/13-969, 29 May 2015, para. 45.

<sup>18</sup> *Ibid.*, pp. 22–25.

<sup>19</sup> *Ibid.*, para. 57 (emphasis added).

in-depth analysis of these risks. The Appeals Chamber did not, therefore, criticise the disposition of the decision or issue observations on the aptness of release, but found the process by which the Single Judge had come to these conclusions erroneous.

15. The following observations, therefore, are to show that Mr Babala's continued release is the only correct implementation of the applicable law.

## **B. Applicable law**

16. The legal bases to be considered when deciding upon the provisional detention of an individual are, in part, established in the combination of articles 58(1) and 60 of the Rome Statute.

### **(1) Articles 60(3) to (5) and 58(1) to (7): requirement of proportionality**

17. Paragraphs (3) and (5) of article 60 respectively state:

The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

And

If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

18. Article 58(1)(b) states:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (b) The arrest of the person appears necessary:
  - (i) To ensure the person's appearance at trial;
  - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

19. Paragraph (7) of article 58 states:

As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law [...]

20. It is evident from the provisions cited above that the detention or release of an accused is subject to an evaluation mechanism to decide if the one or the other is proportional to the intended objectives – especially insofar as (continued) release is concerned – for ensuring the person's appearance at trial, the absence of obstacles to the investigation or the procedure resulting from the charges against that person and the non-continuation of the alleged crime or a related crime.

21. That notwithstanding, article 21(3) of the Statute calls on the Chamber to rule in a way that is consistent with internationally recognised human rights, as noted by the Appeals Chamber in its judgment of 29 May 2015.<sup>20</sup>

22. It is fitting to recall firstly that, in criminal procedures, release is the rule and detention the exception. In the instant case it is therefore a matter of striking a balance between, on the one hand, the hypothetical risks listed in article 58(1)(b) of the Statute if Mr Babala were to be granted continued release and, on the other hand, the violation of his fundamental rights if he were to be redetained. The fundamental question that must be asked is whether there exists sufficient risk in the light of the conditions in article 58(1) to justify a violation of the accused's

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<sup>20</sup> *Ibid.*, para. 2.



fundamental rights, i.e. the application of the exception rather than the rule. The Defence has previously asserted and continues to maintain that this is not the case, and we develop our arguments below.

**(2) Fundamental rights as protected under article 21(3) of the Statute  
at stake in the instant case**

23. The Defence would like to emphasise, as it has done in its previous submissions,<sup>21</sup> the rights of the accused, which must be taken into consideration before making any decision on the basis of article 60 of the Statute.

24. Article 55(1)(d) of the Statute guarantees that a person “[s]hall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.” This provision, read with articles 58, 59 and 60 of the Statute, also establishes that the applicable principle before the Court is one of release – detention being the exception.

25. This principle means that the mere commission of an alleged offence does not justify in and of itself the provisional detention of the accused. Entitled to the presumption of innocence, the accused has the right to request to appear freely before the judge, who alone – after having heard the accused and examined the evidence submitted by the Prosecution in the adversarial proceedings, and having assessed any risk likely to undermine the integrity of the procedure – has the authority to rule on whether the person should remain in detention.

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<sup>21</sup> ICC-01/05-01/13-38-Corr-tENG; ICC-01/05-01/13-414.

Detention is therefore an exceptional measure that is justified only when certain conditions are met.

26. This principle is enshrined in various international instruments, namely: (1) article 9(3) of the International Covenant on Civil and Political Rights, which states that it shall not be the general rule that persons awaiting trial shall be detained in custody; (2) paragraph 6(1) of the United Nations Standard Minimum Rules for Non-Custodial Measures and paragraph 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which state that provisional detention is a means of last resort; and (3) article 6 of the Charter of Fundamental Rights of the European Union and article 5(1) and (3) of the European Convention on Human Rights, which also establish that any person detained for the duration of his or her trial “shall be entitled to trial within a reasonable time or to release pending trial”.

27. The principle of presumed innocence should inform every legal action, and any deprivation of liberty must be predicated on the principles of necessity and proportionality. A measure in international law is proportional only when it is suitable, necessary and when its degree and scope remain in a reasonable relationship to the envisaged target. Furthermore, procedural measures should not be capricious or excessive. If a measure more lenient than detention is sufficient, that measure must be applied.<sup>22</sup>

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<sup>22</sup> *The Prosecutor v. Prlić et al.*, “Order on Provisional Release of Berislav Pušić”, No. IT-04-74-PT, T. Ch. I, 30 July 2004, para. 15; *The Prosecutor v. Limaj et al.*, “Decision on Fatmir Limaj’s Request for Provisional Release”, Case No. IT-03-66-AR65, Bench of the Appeals Chamber, 31 October 2003, para. 13; *The Prosecutor v. Brđanin and Talić*, “Decision on the Motion for Provisional Release of the Accused Momir Talić”, Case No. IT-99-36-T, T. Ch. II, 20 September 2002, para. 23; *The Prosecutor v. Mrđa*, “Decision on Darko Mrđa’s Request for Provisional Release”, Case No. IT-02-59-PT, T. Ch. II, 15 April 2003, para. 31; *The Prosecutor v. Blagojević et al.*, “Decision on Request for Provisional Release of Accused Jokić”, Case No. IT-02-60-PT, T. Ch. II, 28 March 2002, para. 18.

**C. Mr Babala's redetainment is unnecessary and would be a disproportionate violation of his rights**

28. As recalled above, the objectives of provisional detention – an exceptional measure – are merely to ensure that the accused appears at trial, ensure that the person does not obstruct the integrity of the proceedings and, finally, to prevent the person from continuing to commit the alleged crime or a related crime. Beyond these objectives, ordering (continued) provisional detention amounts to an unjust sanction.

29. For the first time in the Court's case law, interim release has been granted and effectuated. Mr Babala has been released for eight months, and during this time the Prosecution has never notified the Chamber of any conduct by Mr Babala or circumstances that would justify his redetention. Despite the Congolese authorities' fallacious allegations about potential disturbances of public order were Mr Babala to return to the DRC, as stated in the observations filed,<sup>23</sup> no such situation has been notified to the Chamber, nor presented in the media. For the Chamber to order Mr Babala's redetention, it must be shown that Mr Babala's conduct over the course of the past eight months indicates *in concreto* that he will not appear at trial, that he will obstruct or endanger the investigation or the court proceedings, or that he will continue with the commission of the offence of which he is accused.<sup>24</sup> In the absence of any specific, identified risks, interim release should continue.<sup>25</sup> Detention without relevant factual and legal merit cannot be decided without disproportionately jeopardising the fundamental rights to which

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<sup>23</sup> 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.

<sup>24</sup> Article 58(1)(b).

<sup>25</sup> ICTY, *The Prosecutor v. Talić*, "Decision on the motion for provisional release of the accused Momir Talić", Case No. IT-99-36-T, 20 September 2002, para. 40.

Mr Babala is fully entitled. In the charge against Mr Babala, nothing indicates, any obstruction of the ongoing court proceedings since his release.

30. In ICTY case law, the fact that a period of release has been without incident is reason itself for the Chamber to again grant interim release.<sup>26</sup>

**(1) Mr Babala's conduct since his arrest to the present day in no way calls for reincarceration**

**a. Mr Babala will appear at his trial (article 58(1)(b)(i))**

31. The Chamber's conclusion on this point should be founded on specific and relevant information.<sup>27</sup> The Human Rights Committee has concluded that the evaluation of the possibility that an accused might abscond cannot be based on mere conjecture.<sup>28</sup>

32. Mr Babala will appear every time that the Court demands his presence. No evidence can or has been able to demonstrate the contrary.

33. Mr Babala has already made commitments on his honour that oblige him to respect all conditions attached to his interim release,<sup>29</sup> including appearing before the Court on the date and at the time set by the Court, and complying with any decision modifying the conditions of his interim release.<sup>30</sup>

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<sup>26</sup> See, for example, *The Prosecutor v. Haradinaj, Balaj, Brahimaj*, IT-04-84bis-PT, "Decision on Ramush Haradinaj's motion for provisional release", 10 September 2010, para. 25.

<sup>27</sup> ECHR, *Iljiko v. Bulgaria*, Application No. 33977/96, 26 July 2001, para. 84.

<sup>28</sup> *Hill and Hill v. Spain* (526/93), Decision of the Human Rights Committee, 2 April 1997, para. 12.3.

<sup>29</sup> ICC-01/05-01/13-222-AnxA.

<sup>30</sup> ICC-01/05-01/13-722-Conf-Anx11.

34. The precarious situation in Kinshasa in January 2015 allowed Mr Babala to show that he is keen to respect the conditions to which he committed following his interim release.<sup>31</sup> Owing to the political riots that took place in Kinshasa, in the Democratic Republic of the Congo (DRC) between 19 and 22 January 2015, telecommunication and Internet networks were temporarily interrupted on the order of the Congolese authorities. Under these circumstances, and concerned about remaining available to the Court and respecting commitments made toward the Court, Mr Babala directly notified his Defence team of the situation so that it could submit the matter to representatives of the Registry. E-mails were therefore exchanged with the Office of the Registrar, which was duly informed of the communication difficulties encountered by Mr Babala and of his Defence team's availability not only to establish contact, but also to inform the Registry once the situation was back to normal.<sup>32</sup>

35. Furthermore, it is known that Mr Babala is a member of parliament in the DRC<sup>33</sup> and is Deputy Secretary-General of the Mouvement de Libération du Congo, the country's main opposition party. Just as Mr Babala has undertaken these heavy responsibilities, he also undertakes to appear at his trial, which commences on 29 September 2015, or to submit to any other injunction by which the Court might order his presence at a given time, in accordance with article 58(1)(b)(i).

36. Mr Babala pleads innocent and hopes for a smooth trial that is consistent with proper procedure and his statutory rights.

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<sup>31</sup> *Ibid.*, "[TRANSLATION] I can be reached by phone at any time or, in the event of a missed call, I will call the Court officer back within two hours".

<sup>32</sup> See attached – E-mail correspondence between representatives of the Registry and the Defence team for Mr Babala.

<sup>33</sup> ICC-01/05-01/13-T-1-ENG, 27 November 2013, p. 5, lines 9-11.

37. With regard to appearing at trial, the Defence recalls that the summons to appear is an accessory measure that allows a balance to be struck between the interests of justice and the rights of the accused when, as in Mr Babala's case, there is little risk that what is described under article 58(1)(b) will come to fruition.

38. In *Ruto and Sang* and *Kenyatta*, this measure was favoured. Mr William Samoei Ruto and Mr Joshua Arap Sang, who were accused of having committed crimes against humanity, appeared freely at the commencement of their trial on 10 September 2013. On 8 March 2011, Pre-Trial Chamber II issued Mr Kenyatta with a summons to appear, which he did freely at the initial hearing on 8 April 2011 as well as at his confirmation of charges hearing on 21 September 2011.

39. If, in cases alleging responsibility for serious crimes established in article 5 of the Statute, the Court considered a summons to appear sufficient to ensure the presence of accused persons at their trial, the same possibility should *a fortiori* be applied in the instant case, which alleges responsibility for an offence against the administration of justice.

**b. Since the day of his arrest, Mr Babala has neither obstructed the Prosecutor's investigation, nor endangered the court proceedings (article 58(1)(b)(ii))**

40. Mr Babala's conduct and behaviour since 23 October 2014 have unfailingly been without reproach as regards the ongoing investigation and the proceedings. Mr Babala is well aware of the importance of the proceedings and participates actively in them. He fully respects his Defence's counsel concerning all steps of the proceedings, as is attested to, in particular, by the travelling he does to meet his team and to prepare his defence.

41. Therefore, on the basis of articles 60 and 58(1) mentioned above and at the current stage in the proceedings, placing Mr Babala Wandu back in provisional detention is unnecessary. The Prosecution indicated during the status conference that 95% of all disclosures had been made;<sup>34</sup> the Chamber recently decided that all Prosecution disclosure must be completed by 30 June 2015 and that the trial should commence on 29 September 2015.<sup>35</sup> In the absence of any proof that Mr Babala directly or indirectly obstructed the Prosecutor's investigations or the proceedings during disclosure, there is no reason to suspect that he would do so in the future.

42. The ICTY ruled that the advanced stage of proceedings is not in and of itself reason for denying suspects their liberty. Interim release following the confirmation of charges was ordered in the cases of *Haraqija and Morina*,<sup>36</sup> *Beqaj*<sup>37</sup> and *Rašić*.<sup>38</sup>

43. While the Prosecution remains unsure of the mode of liability on which to base Mr Babala's alleged guilt (as attested to by its request to modify the modes of liability<sup>39</sup>), it seems contrary to the fundamental rights of the accused for him to be provisionally detained while awaiting completion of his trial without knowing on which mode of liability exactly he is being held. Even if Mr Babala did know the mode of liability envisaged by the Prosecution, there is nothing specific that

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<sup>34</sup> ICC-01/05-01/13-T-8-Red-ENG, p. 9, lines. 8-11.

<sup>35</sup> ICC-01/05-01/13-960, paras. 12-13.

<sup>36</sup> *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, "Decision on defence application for provisional release of the accused Bajrush Morina", 15 September 2008.

<sup>37</sup> *Prosecutor v. Beqaj*, IT-03-66-R/77, "Order for provisional release", 4 March 2005.

<sup>38</sup> *Prosecutor v. Rašić*, IT-98-32/1-R77.2-A, "Decision on Jelena Rašić's urgent motion for provisional release pursuant to Rule 65(I)", 4 April 2012.

<sup>39</sup> ICC-01/05-01/13-922.

justifies placing him back in detention. As the trial nears, placing Mr Babala back in detention would be a violation of article 67 of the Statute.

44. It should also be added that, contrary to the observations of the DRC's Public Prosecutor,<sup>40</sup> the fact that Mr Babala has returned to his country in order to carry out his duties as a member of parliament has in no way disturbed public order, nor has it aggravated the political climate in a post-conflict country. The DRC authorities have not initiated any criminal proceedings against Mr Babala since his release. In other words, none of the negative observations deliberately made by the DRC authorities against Mr Babala in his country has materialised.

45. Finally, it must be taken into consideration that no evidence has been presented by the Prosecution to indicate that Mr Babala directly or indirectly corruptly influenced witnesses, or that he had direct or indirect contacts with witnesses, through which he attempted to obstruct the proceedings in the main case. Mr Babala is accused of having provided funds for an alleged plan to corruptly influence witnesses. Analysis of Mr Babala's request should be done *in concreto*.

46. It is therefore relevant to note that with regard to both the ongoing proceedings before the ICC and the situation in his country of origin, Mr Babala's conduct has been responsible and beyond reproach.

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<sup>40</sup> ICC-01/05-01/13-206-AnxI; ICC-01/05-01/13-78-Anx5; ICC-01/05-01/13-78-Anx6; ICC-01/05-01/13 512-AnxI; ICC-01/05-01/13-694-Anx2; ICC-01/05-01/13-694-Anx3.



**c. At no time did Mr Babala continue nor will he ever continue to commit the offences of which he is accused (article 58(1)(b)(iii))**

47. The case law of ad hoc international tribunals clearly asserts that the assessment of the danger that the Accused could pose to witnesses cannot be made in the abstract; a concrete danger needs to be identified.<sup>41</sup>

48. The Prosecution had nothing against Mr Babala regarding his conduct, and there is nothing concrete to indicate that Mr Babala's conduct will change. Given that Mr Babala was never part of the Mr Bemba's Defence in the main case and that he therefore does not know any of the witnesses or any content of testimony, the risk that Mr Babala will continue to commit the offences alleged against him in the instant proceedings is non-existent.

49. On the contrary, the Accused – as has been stated above – is working intensely with his Defence team to prove his innocence, and he is doing so in compliance with the procedures provided for in the Rome Statute and the related rules and regulations.

50. The mere fact that Mr Babala knows the names of potential Prosecution witnesses does not in and of itself, without any proof of an existing risk, justify placing him back in detention. Otherwise, the Accused will be forced to choose between his right to the disclosure of evidence against him and his right to freedom.<sup>42</sup>

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<sup>41</sup> *Prosecutor v. Haradinaj et al.*, "Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release", 20 July 2007, para. 17; "Decision on Ramush Haradinaj's motion for provisional release", 10 September 2010, para. 29; "Decision on application for temporary provisional release filed by the accused Lahi Brahima", 8 December 2010, para. 24; "Decision on Ramush Haradinaj's motion for provisional release", 6 June 2005, para. 22.

<sup>42</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), p. 725.

#### d. The gravity of the offences and the duration of detention

51. The gravity of the crimes was taken into consideration by the various Chambers of the Court in their rulings on the detention of the accused persons.<sup>43</sup> In *Lubanga*, the Appeals Chamber concluded that the more serious the crime the longer the sentence and, therefore, the greater the risk of absconding.<sup>44</sup>

52. In the instant case, the Appeals Chamber confirmed the following regarding the gravity of the offences: “The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, cannot be considered to be as grave as the core crimes under article 5 of the Statute”.<sup>45</sup> The same comments were made before the Chamber at the commencement of the first status conference.<sup>46</sup>

53. If the gravity of the crimes is seen as presenting a risk of absconding and, by extension, grounds for detention, the offences against the administration of justice under article 70 of the Statute – the least serious offences over which the Court has jurisdiction – should logically present less of a risk of absconding and, as a result, trivial grounds for continued detention.

54. According to the Appeals Chamber, the duration of time in detention, the gravity of the offences charged and the maximum sentence that the accused could

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<sup>43</sup> See, for example, *Lubanga*, ICC-01/04-01/06-824, para. 136; *Bemba*, ICC-01/05-01/08-1565-Red, para. 55;

<sup>44</sup> *Lubanga*, ICC-01/04-01/06-824, para. 136: “If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond.”

<sup>45</sup> ICC-01/05-01/13-559 (OA3).

<sup>46</sup> ICC-01/05-01/13-969, p. 62, lines 26-27.

receive may be taken into consideration when reaching a decision about the detention of the accused.<sup>47</sup>

55. The Defence has already underlined the unreasonableness of the duration of Mr Babala's detention. Having been accused of committing offences less serious than those established in articles 5 to 8 *bis*, with which all the other accused persons before the Court have been charged, Mr Babala spent 11 months in pre-trial detention, nearly *the same amount of time* as that spent by Mr Bemba,<sup>48</sup> Mr Lubanga,<sup>49</sup> Mr Katanga<sup>50</sup> and Mr Mbarushimana<sup>51</sup> before the confirmation of charges.

56. The Defence recalls that Mr Babala has already spent in pre-trial detention nearly one fifth (1/5) of the maximum sentence that he could receive if he were found guilty.<sup>52</sup>

## **(2) Placing Mr Babala back in detention would run counter to his rights**

57. The Defence has pointed out above the importance of taking Mr Babala's fundamental right to liberty into consideration.<sup>53</sup>

58. Furthermore, putting Mr Babala back into detention at this time, although his conduct since his interim release has in every way been exemplary and respectful

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<sup>47</sup> *Ibid.*, paras. 2-4.

<sup>48</sup> ICC-01/05-01/08-424.

<sup>49</sup> ICC-01/04-01/06-824.

<sup>50</sup> ICC-01/04-01/07-717.

<sup>51</sup> ICC-01/04-01/10-465.

<sup>52</sup> Mr Babala was arrested on 23 November 2013, sent to the Scheveningen Detention Centre on 26 November 2013, and was provisionally released on 21 October 2014; under article 70(3) of the Rome Statute the Court "may impose a term of imprisonment not exceeding five years".

<sup>53</sup> See paras. 24-26, below.

towards the Court, would be counter to the spirit of justice and could have very serious psychological consequences for him. Separating him again from his family, including his very young sons, and from his work would cause him too much damage.

59. The Defence has already revealed in its previous submissions the traumatic conditions under which Mr Babala was arrested at home in the middle of the night.<sup>54</sup> Mr Babala and his children's right to family life, as provided for under international standards,<sup>55</sup> must be respected and taken into consideration.

### III. Conclusions

60. In the light of the arguments presented above, the Defence concludes that there is no probative evidence to establish the slightest risk of Mr Babala's voluntary non-appearance at trial, or any desire or attempt to obstruct the investigation or the trial, or to continue to commit the offences of which he is accused. Although the Chamber may have identified risks *in abstracto*, the Defence maintains that the extent to which placing Mr Babala back in detention would infringe upon his rights cannot be justified.

61. Mr Babala is committed to participating in the determination of the truth in this case. More than once he has shown his commitment, reiterated in these observations, to appear every time that he is called to do so by the Court and to

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<sup>54</sup> See, for example, ICC-01/05-01/13-T-1-ENG, p. 12, lines 19-26, p. 13, lines 1-2, p. 19, lines 22-26, p. 20, lines 1-26, p. 21, lines 1-7; ICC-01/05-01/13-38-Corr-tENG, paras. 22-46; ICC-01/05-01/13-696, para. 4.

<sup>55</sup> Article 8, European Convention on Human Rights; article 17, International Covenant on Civil and Political Rights.

respect the conditions already attached to his interim release as well as those which the Chamber may want to attach if it grants him interim release.

**FOR THESE REASONS,**

**MAY IT PLEASE THE CHAMBER to:**

DECLARE that the conditions stipulated under article 58 of the Statute have not been met regarding Mr Babala; and

ORDER, as a result, that Mr Babala remain at liberty.

AND JUSTICE SHALL BE DONE.

RESPECTFULLY SUBMITTED.

[signed]

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**Mr Jean-Pierre Kilenda Kakengi Basila**  
**Counsel for Mr Fidèle Babala Wandu**

Dated this 19 June 2015

At Denderleeuw, East Flanders, Belgium