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

Date: 14 March 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 “Requête urgente de la Défense sollicitant la mise en liberté
provisoire de monsieur Fidèle Babala Wandu”**

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

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Counsel for Jean-Pierre Bemba Gombo

Nicholas Kaufman

Counsel for Aimé Kilolo Musamba

Ghislain Mabanga

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Counsel for Jean-Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

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 Kingdom of the Netherlands

Competent authorities of the Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Harry Tjonk

Victims Participation and Reparations Section

Other

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 “Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu”² (“Fidèle Babala’s Request for Interim Release”) dated 12 December 2013, whereby the Defence for Mr Babala requests the Single Judge to (i) order that he be provisionally released; (ii) “dire pour droit que les conditions exigées par l’article 58 paragraphe 1^{er} ne sont pas réunies à l’encontre de Monsieur Fidèle Babala Wandu”; (iii) “constater que Monsieur Fidèle Babala Wandu présente des garanties incontestables de sa présentation devant la Cour chaque fois qu’il lui en sera requis ”and (iv) “constater que son maintien en détention lui causerait inutilement d’énormes préjudices tant sur le plan personnel, familial, que professionnel”;³

NOTING the “Decision requesting observations on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’” dated 13 December 2013⁴, requesting the Prosecutor, the relevant authorities of the Kingdom of the Netherlands and of the Democratic Republic of the Congo to submit their views on Mr Babala’s Request for Interim Release no later than Friday 3 January 2014;

NOTING the “Prosecution Response to the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’ (ICC-01/05-01/13-88)”⁵ (“Prosecutor’s Response”) filed on 3 January 2014⁶, whereby the Prosecutor opposes the Request for Interim Release on the grounds that “it advances no cogent reasons why provisional release should be granted”;

¹ ICC-01/05-01/13-1-Red2-tENG.

² ICC-01/05-01/13-38-Corr.

³ ICC-01/05-01/13-38-Corr, page 20.

⁴ ICC-01/05-01/13-40.

⁵ ICC-01/05-01/13-67-Conf.

⁶ ICC-01/05-01/13-67-Conf, para. 1.

NOTING the “Report of the Registry on the “Decision requesting observations on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’” dated 10 January 2014⁷, whereby the Registrar transmitted to the Chamber the observations received by the Kingdom of the Netherlands and the Democratic Republic of the Congo (“DRC”);

NOTING the “Second Report of the Registry on the “Decision requesting observations on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’” dated 20 February 2014,⁸ whereby the Registrar transmitted to the Chamber further observations on the Request for Interim Release submitted by the *Parquet Général* of the DRC;

NOTING the “Réponse de la Défense à la lettre référencée N° 580/D.030/166/PGR/MUN/2014 du 17 février 2014 (ICC-01/05-01/13-206-Conf-AnxI) jointe au ‘Second Report of the Registry on the “Decisions requesting observations on the ‘Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’” (ICC-01/05- 01/13-206) et Demande d’application de la Règle 118(3) du Règlement de procédure et de preuve”⁹, dated 24 February 2014, whereby the Defence for Mr Babala requests the Single Judge to either, “à titre principal”, (i) “décréter l’irrecevabilité des observations” contained in the document submitted by the *Parquet Général* of the Democratic Republic of the Congo or, “à titre subsidiaire”, (ii) “rejeter les observations contenues dans la lettre litigieuse après un débat contradictoire entre la Défense et l’auteur de la lettre litigieuse au cours d’une audience publique à laquelle seront conviées toutes les autres parties en la présente cause”;

NOTING the “Transmission de l’Engagement sur l’honneur de Monsieur Fidèle Babala Wandu relativement à sa demande de mise en liberté provisoire” dated 25 February 2014¹⁰, whereby Fidèle Babala s’engage sur l’honneur à respecter toutes

⁷ ICC-01/05-01/13-78, with Confidential Annexes 1-9.

⁸ ICC-01/05-01/13-206, with Confidential Annex 1.

⁹ ICC-01/05-01/13-217-Conf.

¹⁰ ICC-01/05-01/13-222-Conf, with Confidential Annex A.

les conditions dont serait assortie ma mise en liberté provisoire dès mon retour dans mon pays natal”;

NOTING articles 21, 58(1), 60(1) and (2) and 67(1) of the Statute, rules 118(1), (2) and (3), 119(1) of the Rules of Procedure and Evidence and regulation 51 of the Regulations of the Court;

HEREBY RENDERS THIS DECISION.

Determinations by the Single Judge

A. General principles

1. The Single Judge will decide Mr Babala’s request for interim release in light of those principles which are now consolidated in the case-law of the Appeals Chamber of the Court and have constantly been upheld by this Chamber.

2. Pursuant to article 60(2) of the Statute, upon an application for interim release, the Chamber has to determine whether “the conditions set forth in article 58, paragraph 1, are met”. In the affirmative, “the person shall continue to be detained; in the negative, the person shall be released, “with or without conditions”. This assessment requires the Chamber to “inquire anew into the existence of facts justifying detention”¹¹, but can be based on the same materials as those looked at for the purposes of the warrant and on the same factors underpinning it¹².

3. While agreeing that “les raisons justifiant la détention doivent être exhaustives et être interprétées strictement”¹³, the Single Judge highlights that the presumption of innocence does not *per se* prevent detention, provided it is justifiable and justified. Detention is indeed an exception, as stated by the Defence for Mr Babala¹⁴, but one which is necessary, and shall therefore unfailingly apply, when the relevant statutory requirements are satisfied. As stated by the Appeals Chamber, “the decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute, is not of a discretionary nature. Depending upon whether

¹¹ ICC-02/11-01/11-278-Red, para. 23.

¹² ICC-02/11-01/11-278-Red, para. 27.

¹³ ICC-01/05-01/13-38-Corr, para. 47.

¹⁴ ICC-01/05-01/13-38-Corr, paras 8-12.

or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released”¹⁵.

4. The Single Judge is mindful of the recent “recommendation” issued by the Appeals Chamber, by way of criticism to a Pre-Trial Chamber’s decision under article 60(2) of the Statute, to the effect that such decisions must contain a “full reasoning”¹⁶. Whilst believing that more than one doubt could be raised as to the actual existence of such a need, he will nevertheless specifically refer to some of the materials relied upon in issuing the warrant (as well as to their contents), all of which have been reconsidered and assessed *ex novo* for the purposes of this decision.

5. By referring to “article 58, paragraph 1”, article 60(2) of the Statute seems to require the Pre-Trial Chamber to proceed anew to an assessment of both the existence of reasonable grounds to believe that the crimes alleged by the Prosecutor have been committed by the arrested person (article 58(1)(a)), and of the existence of one or more of the risks listed under article 58(1)(b). It is debatable, however, to what extent a Pre-Trial Chamber (namely, the same Pre-Trial Chamber who has issued the warrant of arrest) can be meaningfully called upon reassessing the existence of reasonable grounds to believe that a crime has been committed in the context of an application for interim release. It is also worth noting that the practice developed so far by the Chambers of the Court in their decisions on requests for interim release seems, most appropriately, to have rather focussed on the determination as to whether one or more of the risks listed under letter b of article 58, paragraph 1 still exist. Be it as it may, the Single Judge will also briefly proceed to assess the persisting existence of reasonable grounds to believe that the crimes alleged by the Prosecutor in her application under article 58 have been committed.

B. First limb of the assessment: article 58(1)(a) (whether there are reasonable grounds to believe that the person committed the crimes alleged by the Prosecutor)

¹⁵ICC-01/04-01/06-824, para. 134.

¹⁶ICC-02/11-01/11-278-Red, para. 49. See also ICC-01/04-01/06-824, para.124.

6. On the basis of material attached to the Prosecutor's Application, the Single Judge found that there were reasonable grounds to believe that Fidèle Babala i) "in accordance with Jean-Pierre Bemba's instructions ... directly or indirectly disbursed sums of money to Defence witnesses and/or members of their families", as well as to Aimé Kilolo and Jean-Jacques Mangenda; ii) "frequently called Defence witnesses, specifically at time periods coinciding with money transfers to the same witnesses, and took part in several privileged conference calls with Jean-Pierre Bemba and Aimé Kilolo"; iii) acted "as an intermediary" in the transmission of the Accused's instructions to members of his family; iv) used "a coded language to discuss financial matters with the Accused".¹⁷

7. The material on which the Chamber based its findings in relation to Fidèle Babala – which, together with the Prosecutor's Application, was reclassified as confidential and therefore made available to all the suspects as of 27 November 2013 - included the following: a) translated excerpts of phone calls intercepts between Fidèle Babala and Jean-Pierre Bemba, where Mr Babala asks and receives instructions about money sums¹⁸ and their transfer¹⁹, including from Jean-Pierre Bemba to himself²⁰ and to Aimé Kilolo²¹, in the course of which codes are used and references to testimonies in the Main Case are made²²; b) tables containing amounts of money transferred by Fidèle Babala to persons including Jean-Jacques Mangenda, Aimé Kilolo and Narcisse Arido²³; c) various items showing Fidèle Babala's role within the *Mouvement pour la Libération du Congo* ("MLC")²⁴.

¹⁷ ICC-01/05-01/13-1-Red2, para. 18.

¹⁸ ICC-01/05-01/13-67-Conf-Anx I.1, page 1, 6 February 2013, 2013/000029875; page 14, 12 February 2013, 2013/000029853.

¹⁹ ICC-01/05-67-Conf-Anx I.1, page 11, 20 November 2012, 2013/000035152.

²⁰ ICC-01/05-67-Conf-Anx I.1, page 17, 19 January 2013, 2013/000045783.

²¹ ICC-01/05-67-Conf-Anx I.1, page 7, 28 September 2012, 2013/000034808; page 2, 25 May 2012, 2013/000031430; page 3, 7 September 2012, 2013/000034810; page 4, 13 September 2012, 2013/000034788; page 8, 16 October 2012, 2013/000034984; page 9, 13 November 2012, 2013/000035203; page 10, 14 November 2012, 2013/000035197; page 11, 22 November 2012, 2013/000035136; page 12, 12 December 2012, 2013/000035648.

²² ICC-01/05-67-Conf-Anx I.1, page 6, 15 September 2012, 2013/000034778.

²³ ICC-01/05-67-Conf-Anx C.2.; ICC-01/05-67-Conf-Anx B.2.

²⁴ ICC-01/05-67-Conf-Anx K.6 and ICC-01/05-67-Conf-Anx K.1.

8. The Single Judge was also able to rely on a report submitted by Independent Counsel on 14 November 2013,²⁵ stating that the alleged scheme was implemented through intermediaries, one of whom referred to as “07”, cipher designating Mr Babala²⁶, as well as including transcripts of telephone calls between Mr Bemba, Mr Kilolo and/or Mr Mangenda in the course of which several references to Mr Babala appeared in connection with the ordering or execution of money transfers²⁷.

9. A confidential redacted version of this report was made available to the Defence teams of the suspects on 16 December 2013.²⁸

10. 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, who submits that it “attend recevoir communication des éléments de prévue que détient le Procureur pour les controverser juridiquement et factuellement, et pour faire éclater son innocence”²⁹.

11. The only argument submitted by the Defence for Fidèle Babala pertaining to the merits of the case, and hence to the first limb, relates to Count 2 as formulated by the Prosecutor, alleging Fidèle Babala’s criminal responsibility for “Presenting evidence that the party knows is false or forged under Article 70(1)(b) read with Article 25 (3)(c) by aiding, abetting, or otherwise assisting in the crime of presenting evidence that he knows is false or forged”. In the view of the Defence for Mr Babala, no charge consisting of falsification of documents presented before a Chamber can be formulated in the absence of, or before, a decision of that Chamber determining that such documents were indeed falsified.

12. The Single Judge finds that this argument is based on an undue overlapping of the standards of proof respectively applying at the stage of the issuance of a warrant of arrest under article 58 and at the time of the judgment, and is therefore misplaced. All that is required, at the article 58 stage, for the purposes of issuing a warrant (or summons) for the offence of presenting false evidence under article

²⁵ ICC-01/05-66-Conf.

²⁶ ICC-01/05-66-Conf-Red, paragraph 9.b.iv.

²⁷ ICC-01/05-66-Conf-Anx-Corr, pages 5, 13, 31, 33.

²⁸ ICC-01/05-66-Conf-Red.

²⁹ ICC-01/05-01/13-38-Corr, para. 19.

70(1)(b) of the Statute, is that the Pre-trial Chamber be satisfied that there are reasonable grounds to believe that conducts suitable to amount to the falsification of documents have occurred and that such conducts may be linked to the person whose arrest (or summons) is sought by the Prosecutor. Accordingly, the Single Judge finds that this argument does not detract from his finding that reasonable grounds that the crimes alleged under Count 2 for Fidèle Babala were established.

13. Under these circumstances, the Single Judge is still 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, all of which have been assessed *ex novo* in light of Fidèle Babala's request for interim release, still justify the finding that there are reasonable grounds to believe that he committed the crimes alleged by the Prosecutor and that, therefore, the requirements of article 58(1)(a) of the Statute continue to be satisfied.

C. Second limb of the assessment: article 58(1)(b) (whether the arrest appears necessary for one or more of the reasons listed therein)

14. As regards the requirements set forth under article 58(1)(b), the Single Judge notes that – as clarified by the Appeals Chamber³⁰ and also recently reiterated by this Chamber³¹ – the three conditions listed in the provision are “in the alternative”, thereby making “the fulfilment of one of them sufficient to negate the need to address the remaining conditions”. Nevertheless, the Single Judge deems it appropriate to consider all of them. By the same token, he will also strictly follow the guidance provided by the Appeals Chamber to the effect that, when it comes to determine the existence of one or more of the risks set forth in article 58(1)(b), the “question revolves around the possibility, not the inevitability, of a future occurrence”³², provided only that such risk is established on the basis of specific and concrete elements.

C.1 Appearance at trial

³⁰ ICC-01/04-01/06-824, para. 139.

³¹ ICC-01/04-02/06-147, para. 39.

³² ICC-01/04-01/07-572, para. 21.

15. The Defence for Mr Babala submits that “si le Procureur avait enquêté sur sa personnalité, il n’aurait pas fait délivrer un mandat d’arrêt à son encontre”³³ and that “alors qu’il avait la possibilité de faire un recours auprès des autorités nationales pour examiner la régularité de cette arrestation, il a accepté volontiers de venir s’expliquer rapidement devant la CPI pour la manifestation de la vérité”.

16. The Single Judge notes that the personality of a suspect is not one of the reasons on the basis of which the Chamber can or should determine whether detention is necessary. Rather, it has to determine whether the arrest is necessary “to ensure that the person appears at trial”. Personal circumstances of education, professional or social status – as those referred to by Mr Babala’s Defence³⁴ - are *per se* neutral and inconclusive in respect of the need to assess the existence of flight risks. The Single Judge notes that offences against the administration of justice are of the utmost gravity, even more so when proceedings relating to crimes as grave as those within the jurisdiction of the Court are at stake. They may not only threaten or disrupt the overall fair and efficient functioning of the justice in the specific case to which they refer, but also ultimately undermine the public trust in the administration of justice and the judiciary, most notably when they are committed by highly educated individuals.

17. Similarly, a suspect’s behaviour following his or her arrest pursuant to article 58 is not relevant for the purposes of determining whether one or more of the conditions listed in article 58(1)(b) are met. At the time of the issuance of the warrant, the Single Judge had found that, as a DRC parliamentarian, Fidèle Babala has “numerous contacts, including at an international level, and is able to travel freely, including to non-States parties”.³⁵ This conclusion was based not only on Mr Babala’s role within the *Mouvement pour la Libération du Congo*, but on the numerous references to (also foreign) political contacts contained in the translated excerpts of

³³ ICC-01/05-01/13-38-Corr, paras. 21-24.

³⁴ ICC-01/05-01/13-38-Corr, paras. 21-24.

³⁵ ICC-01/05-01/13-1-Red2, para 23.

phone calls intercepts³⁶, as well as on information contained in the Congolese press³⁷. Moreover, weight had been given to the fact that transfer of money had been the subject of several telephone calls between Fidèle Babala and Jean-Pierre Bemba³⁸ and that Mr Babala - referred to as "07" - also emerged as instrumental to the execution of money transfers from the Independent Counsel Report.

18. Both the Appeals Chamber³⁹ and Pre-Trial Chambers of the Court have previously found the existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight⁴⁰, because it might indeed facilitate absconding; the availability of financial means, "whether directly or indirectly" through a network, has been likewise been found relevant by this Chamber in the case of *The Prosecutor v. Bosco Ntaganda*⁴¹.

19. The Single Judge is persuaded that the submissions brought forward by the Defence for Fidèle Babala are not suitable to weaken the persuasiveness of the factors supporting the existence of a flight risk. Rather, it must be noted that the process of disclosure, which had yet to start at the time of the issuance of the Warrant, has by now reached an advanced stage, a factor that might also be relevant in weighing the likelihood of the personal appearance or of the risk of flight, due to its resulting in enhancing the degree of knowledge of the Prosecutor's case.

20. The Single Judge is not persuaded that these factors can be outweighed by the mere submission of the personal commitment of the suspect not to abscond from the proceedings. Such undertaking, commendable as it might be, is not and cannot be *per se* decisive but should rather be assessed and appreciated in light of all other relevant factors.

21. Neither are of relevance the comparisons made by the Defence for Mr Babala with cases before the Court where summonses to appear were issued: in particular,

³⁶ ICC-01/05-01/13-67-Conf-Anx I.1, page 1, 6 February 2013, 2013/000029875; page 3, 7 September 2012, 2013/000034810; page 4, 13 September 2012, 2013/000034788; page 6, 15 September 2012, 2013/000034778; page 10, 14 November 2012, 2013/000035197.

³⁷ ICC-01/05-01/13-67-Conf-AnxK.7.

³⁸ ICC-01/05-01/13-67-Conf -AnxI.1.

³⁹ ICC-02/11-01/11-278-Red, para. 26

⁴⁰ ICC-02/11-01/11-278-Red, para. 26

⁴¹ ICC-01/04-02/06-147, para. 55 .

the case of *the Prosecutor v. Abu Garda*, *the Prosecutor v. Abdallah Banda* and in the situation in Kenya. Mr Babala's main argument seems to rely on the fact that the present proceedings would relate to "less serious" crimes than those charged in either of those cases: it submits that "si pour des crimes aussi graves, le mode de comparution volontaire a été retenu, a fortiori celui-ci aurait du l'être pour la poursuite de la procédure engagée contre Monsieur Fidèle Babala Wandu".⁴²

22. The Single Judge is aware that chambers of this court - including the Appeals Chamber⁴³ - have found that the gravity of the crime, and the likely duration of ensuing detention in case of conviction, was a relevant factor in assessing the parameters of article 58(1)(b), in particular the likelihood that the person might appear at trial. The Single Judge is likewise aware of the statutory limitation to five years of detention in case of conviction for offences against the administration of justice. However, he observes that none of these factors are *per se* suitable to diminish the risk of a flight. First, it remains yet to be decided how the statutory limit may apply in case multiple offences are found to have been committed, as it might happen in these proceedings. Furthermore, it is worth reminding that – unlike the crimes allegedly committed in the Abu Garda and Banda cases, or in the situation in Kenya, all of which referred to events and scenarios which were concluded - this case is about behaviours allegedly aimed at disrupting the course of justice in respect of a trial the outcome of which is still open; and where the impact of these proceedings on it is yet to be determined and, at this stage, unknown.

23. The prejudices allegedly entailed by Fidèle Babala's protracted detention are not a factor relevant for the purposes of the determination under article 60(2) of the Statute.

C.2 *Obstructing or endangering the investigation of the Court proceedings*

24. The Single Judge subscribes entirely to the submission by the Defence for Fidèle Babala, to the effect that "la question de savoir si une personne demandant sa mise en liberté présente un danger pour le déroulement de la procédure ne peut pas

⁴² ICC-01/05-01/13-38-Corr, para. 34.

⁴³ ICC-01/04-01/07-572, paras. 21, 24. See also ICC-01/04-01/06-824, para. 136

être évaluée seulement in abstracto: un danger précis doit être identifié”. By the same token, he observes that, in this case, the decision to issue a warrant for arrest is based on anything but “craintes hypothétiques”.

25. In particular, the Single Judge recalls that both the material attached to the Prosecutor’s Application and the reports submitted by Independent Counsel reveal not only that Fidèle Babala was the person through which various transfers of money to other suspects in this case (namely, Aimé Kilolo and Jean-Jacques Mangenda) were made upon orders of Jean-Pierre Bemba⁴⁴, but also that such transfers were specifically discussed together with and in the context of comments on developments in the trial of *the Prosecutor v. Jean-Pierre Bemba Gombo*⁴⁵.

26. The Single Judge is satisfied that these objective elements, as gathered by both the Prosecutor and the Independent Counsel, represent as many “preuves tangibles” suitable to ground his assessment of the persisting existence of a risk that obstruction or endangerment of the proceedings does exist, both in respect of this case and of the Main Case. The “engagement public et solennel” of Mr Babala’s, that he will refrain from creating obstacle to the investigation or the prosecution, or endangering them⁴⁶, recently reiterated⁴⁷, cannot by any standard be considered as suitable or *per se* sufficient to annul them. Furthermore, article 58(1)(b)(ii) explicitly states that detention might be necessary with a view to ensuring that the person does not obstruct or endanger not only the investigation, but also the “court proceedings”.

27. The Single Judge is persuaded that the very nature of the crimes at stake makes it obvious that the detention is the only context allowing the effective management of these risks. The more so, when one considers that the crimes alleged in the Prosecutor’s Application, which the Chamber found reasonable grounds to believe were indeed committed, appear to have been at least partly committed in

⁴⁴ See, in particular, the references to materials attached to the Prosecutor’s Application in footnotes 19 to 24 above.

⁴⁵ ICC-01/05-01/13-67-Conf-Anx I.1, pages 4-5, 14 September 2012, 2013/000034780; ICC-01/05-01/13-67-Conf-Anx I.1, page 7, 28 September 2012, 2013/000034808; ICC-01/05-01/13-67-Conf-Anx I.1, page 6, 15 September 2012, 2013/000034778.

⁴⁶ ICC-01/05-01/13-38-Corr, para. 47.

⁴⁷ ICC-01/05-01/13-222-Conf.

spite of the fact that one of the suspects was already in the custody of the detention unit of the Court, and by means of an abuse of the communication system set up within it.

28. Furthermore, it is to be noted that the DRC authorities, requested to submit observations on Fidèle Babala's possible release, stated as follows: "au cas où, sur décision de la Cour, l'intéressé rentrait en République Démocratique du Congo, il ne sera pas aisé pour les autorités de l'empêcher de poursuivre la commission des faits lui imputés, notamment la subornation des témoins, infraction qui peut se réaliser en toute clandestinité". The same authorities also warned of the risk "qu'il exerce des représailles sur les personnes qui l'auraient dénoncé pour les faits ayant donné lieu à son arrestation".

29. The Single Judge takes note of Fidèle Babala's request that the second set of observations sent by the DRC authorities be dismissed as "irrecevable" on grounds relating both to their form and their substance, and takes the view that none of these grounds warrants the requested relief. First, as regards the alleged "tardiness" of the DRC observations, the ongoing nature of the assessment of the persisting existence of the reasons warranting detention makes it possible that a State may wish to supplement, or otherwise amend, its initial response. Second, and more fundamentally, all of the issues raised by the Defence for Fidèle Babala fall beyond the purview of a Chamber's assessment. It is not for a Chamber to decide whether observations sent to the Court in compliance with a request for cooperation emanate from a State entity or body actually vested with the authority to formulate them, even less to inquire into the motives or reasons which might support or explain their content. For these reasons, the Court addresses all its requests for cooperation to the "competent authorities" of the relevant State, who also enjoy full discretion in deciding to what extent they wish to support their position by way of reasoning.

30. Accordingly, the Single Judge will refrain from addressing the arguments developed in Fidèle Babala's response to the DRC observations and reject his request for a hearing bearing on those arguments. He cannot but defer to the assessment

made by the DRC State authorities in respect of the risks entailed by Fidèle Babala's possible release on their territory, and of their wish that such release be prevented.

C.3 *The risk relating to future crimes*

31. Again, the Single Judge will be guided by the Appeals Chamber in making his assessment under this heading. The risk relating to the possible commission of related crimes, by its very nature, is such as to make it impossible to specify in detail what the nature of such crimes might be, or the context in which they might be committed⁴⁸. Furthermore, the nature of the crimes at stake in these proceedings (i.e., offences against the administration of justice) is such as to create a great degree of overlapping between the risk that the investigation be obstructed or endangered and the risk that the commission of the crimes be continued or that related crimes be committed. Accordingly, the observations contained in paragraph C.2 above, to the effect that the risks that the relevant investigation, or these proceedings, be obstructed or endangered is ground in the very conducts carried out by Fidèle Babala prior to his arrest, are also of relevance for the purposes of assessing the third element listed under article 58(1)(b) of the Statute.

32. As an additional remark, the Single Judge notes that it is incorrect to state, as done by Mr Babala's Defence, that it is "materially impossible" for his client to continue to commit the alleged crimes, given that the testimonies of the witnesses in the Main Case have been completed and that final submissions are now due by the parties. First, as regards the Main Case, it cannot be excluded that the case is reopened, as has occurred in the case of *The Prosecutor v. Germain Katanga*. Second, future and related crimes, the risk for which the Single Judge is called to assess, might also be committed by the suspect in respect of these proceedings. If there might be some pieces of evidence which are indeed in the hands of the relevant authorities and as such beyond the suspects' reach⁴⁹, it cannot at this stage be excluded that action be taken in respect of other evidentiary items which might be outstanding and also, as said, in respect of items relating to these proceedings.

⁴⁸ICC-02/11-01/11-278-Red, para. 70.

⁴⁹ ICC-01/05-01/13-38-Corr, paras 53-54.

Furthermore, as recalled above, article 58(1)(b)(ii) explicitly states that detention might be necessary with a view to ensuring that the person does not obstruct or endanger not only the investigation, but also the “court proceedings”.

33. In light of the above, the Single Judge is satisfied that a concrete risk that Fidèle Babala might commit crimes related to, or of the same nature of, those underlying the Prosecutor’s Application and the warrant continues to exist unabated.

D. As to the issue of conditional release as an alternative to detention

34. Finally, the Single Judge notes that Fidèle Babala has not submitted any specific proposal for release subject to conditions, as an alternative to his detention. He simply states that, should his request be granted, “il regagnera son pays, la RDC, et résidera avec sa famille dans sa maison”. Neither does he elaborate on those conditions in his recent “Engagement sur l’honneur”, where he only makes a general reference to his commitment “à respecter toutes les conditions dont serait assortie ma mise en liberté provisoire dès mon retour dans mon pays natal”⁵⁰.

35. The Appeals Chamber has stated that, where no proposals for conditional release have been submitted and none are self-evident, “the Pre-Trial Chamber’s discretion is unfettered”.⁵¹

36. The Single Judge notes that most of the conducts related to the alleged crimes have occurred by way of communications with the other suspects, or with third parties connected to them by reason of personal or professional links. Today, as upon the issuance of the warrant, he remains persuaded that it is 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.

37. Moreover, the Single Judge notes that no availability to accept Fidèle Babala on their territory in the event of his release, with or without conditions, has been

⁵⁰ ICC-01/05-01/13-222-Conf-AnxA.

⁵¹ ICC-02/11-01/11-278-Red, para. 79.

shown by either the Netherlands or the Democratic Republic of the Congo, that is the State to which Fidèle Babala requests to be released.

38. In light of this, there is no need for the Single Judge to address the accuracy of Fidèle Babala's statement to the effect that he is in possession of a diplomatic passport and that therefore he needs the authorisation of the DRC government and a visa to travel. The Single Judge finds that the interim release is not only not justified in light of all relevant factors, but also practically unfeasible.

E. On the request for a hearing under rule 118(3) of the Rules

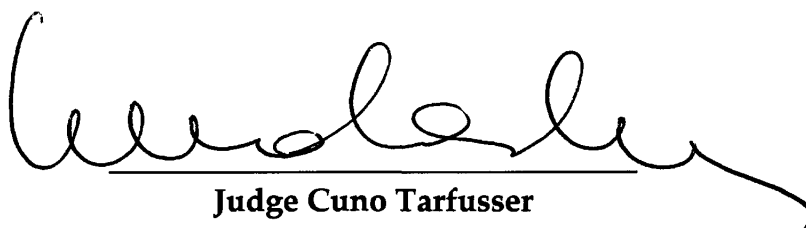
39. The Single Judge takes the view that the abundance of the material available to him, a great amount of which has been referred to in this decision, makes it not necessary or appropriate to hold a hearing at this stage for the purposes of the determination of Fidèle Babala's request for interim release.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS Fidèle Babala Wandu's request for a hearing under rule 118(3) of the Rules;

REJECTS Fidèle Babala Wandu's request for interim release.

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



Judge Cuno Tarfusser
Single Judge

Dated this Friday, 14 March 2014

At The Hague, The Netherlands