

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-01/05-01/13

Date: 19 March 2014

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song
 Judge Sanji Mmasenono Monageng
 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 against the *Decision on the “Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu.”*

(ICC-01/05-01/13-258)

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. SUBJECT-MATTER OF THE APPEAL

1. Mr Fidèle Babala Wandu (“the Appellant”), pursuant to article 82(1)(b) and rule 154(1), hereby moves the Appeals Chamber (“the Chamber”) to set aside the 14 March 2014 decision referenced ICC-01/05-01/13-258,¹ whereby Pre-Trial Chamber II (“the Pre-Trial Chamber” or “the Single Judge”) dismissed the two prayers set forth in the “*Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu*”.²
2. To allow the Appeals Chamber to adjudge the merits of the present motion, it is expedient to set out in the arguments hereunder both its factual (B) and legal (C) bases, after turning briefly to the procedural background (A).

II. ARGUMENTS

A. PROCEDURAL BACKGROUND

3. On 20 November 2013, the Pre-Trial Chamber issued a sealed warrant for the Appellant’s arrest, also issued against Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo and Mr Narcisse Arido.³ A public redacted version of the warrant of arrest was notified to all the parties.⁴
4. The Appellant was arrested in Kinshasa during the night of 23 to 24 November 2013 and immediately transferred to The Hague in violation specifically of article 89(1) of the Statute.⁵ He arrived at the detention centre in Scheveningen on 25 November 2013 where he remains in pre-trial detention.

¹ ICC-01/05-01/13-258, *Decision on the “Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu.”*.

² ICC-01/05-01/13-38 “*Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu.*”

³ ICC-01/05-01/13-1-US-Exp-tENG.

⁴ ICC-01/05-01/13-1-Red-tENG, Public redacted version of the *Warrant of Arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido.*

⁵ Article 89(1) of the Statute: “States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.”

5. On 25 November 2013, the Pre-Trial Chamber rendered a decision to convene the first appearance hearing on 27 November 2013 at 3 p.m.⁶ A status conference was subsequently held on 4 December 2013.⁷ Thenceforth the Prosecutor disclosed various documents to the Defence, for example, ad hoc Counsel's interim report;⁸ said Counsel's first report for 15 to 30 August 2013;⁹ that Counsel's second report for 23 August to 16 October 2013,¹⁰ and, lastly, the "Prosecution's Application for Warrant of Arrest of 19 November 2013".¹¹
6. On 12 December 2013, the Defence for the Appellant ("the Defence") submitted to the Single Judge an urgent application for interim release.¹²
7. By decision of 13 December 2013, the Single Judge requested that the competent authorities of the Kingdom of the Netherlands, those of the Democratic Republic of the Congo ("the DRC") and the Prosecutor submit observations regarding the Appellant's application **by Friday 3 January 2014**.¹³
8. On 17 December 2013, by way of note verbale, the Registrar transmitted the Single Judge's decision to the Dutch authorities and the Office of the Principal Public Prosecutor [*Parquet général*] ("the ParGR") of the DRC. On 3 January 2014, the French version of the decisions was transmitted to the ParGR. On 8 January 2014, the Congolese Minister for Justice and Human Rights conveyed his country's observations on the Appellant's application to the Court. On 9 January 2014, the ParGR submitted additional observations.¹⁴
9. On 17 February 2014, the ParGR submitted to the Single Judge contrary observations out of time.

⁶ ICC-01/05-01/13-11, *Decision setting the date for the first appearance of Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba et Fidèle Babala, and on issues relating to the publicity of the proceedings*.

⁷ ICC-01/05-01/13-T-2-Red-FRA-WT, 29 pages.

⁸ ICC-01/05-59-Conf-Red, 16-12-2013, "*Rapport intermédiaire du conseil ad hoc*".

⁹ ICC-01/05-64-Conf-Red, 16-12-2013, "*Premier rapport du Conseil indépendant (période du 15 au 30 août 2013)*".

¹⁰ ICC-01/05-66-Conf-Red, 16-12-2013, "*Deuxième rapport du Conseil indépendant (période du 23 août au 16 octobre 2013)*".

¹¹ ICC-01/05-01/13-19-Conf.

¹² ICC-01/05-01/13-38.

¹³ ICC-01/05-01/13-40, *Decision requesting observations on the "Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu."*

¹⁴ ICC-01/05-01/13-78, "Report of the "Registry on the Decisions requesting observations on the 'Requête urgente sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu'".

10. On 14 March 2014, the Single Judge dismissed the Appellant's application: the decision brought before this Bench for adjudication as unjustified in fact and in law.

B. AS TO THE FACTS

11. The aforementioned warrant of arrest charges the Appellant with membership of a network – whose purpose is to present evidence that the party knows is false or forged, within the meaning of article 70(1)(b) of the Statute, read with article 25(3)(c) – by aiding, abetting or otherwise assisting in the presentation of evidence that the party knows is false or forged and presenting false or forged documents to the Court in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*¹⁵ (“the Main Case”).

12. The Appellant also stands charged of corruptly influencing witnesses, within the meaning of article 70(1)(c) of the Statute read with article 25(3)(a), by bribing them to provide false testimony in the Main Case.¹⁶

13. From the three aforecited reports by Independent Counsel, the Appellant notes that the process occasioning the allegations against him ensued from a course of action which included various Prosecution motions and status conferences – all such confidential and *ex parte* motions and status conferences and the various rulings of the Single Judge bore the same hallmarks.

14. This holds true for:

- a. The “Request for judicial order to obtain evidence for investigation under Article 70”;
- b. The *Decision on the Prosecutor's “Request for judicial order to obtain evidence for investigation under Article 70”*;¹⁷
- c. The status conference of 10 October 2013;¹⁸
- d. Prosecution Request ICC-01/05-44-Conf-Exp;
- e. The Single Judge's Decision ICC-01/05-046-Conf-Exp;
- f. Prosecution Request ICC-01/05-51-Conf-Exp.

¹⁵ ICC-01/05-01/13-1-Red-tENG, p. 4.

¹⁶ *Ibidem*, p. 4.

¹⁷ ICC-01/05-52-Conf-Exp, 29 July 2013.

¹⁸ ICC-01/05-T4-CONF-FR and ICC-01/05-T4-CONF-EXP.

The Appellant acquainted himself with said documents upon their reclassification as confidential by the Single Judge.

15. In his application for interim release, the Appellant argued his right to be presumed innocent, the principle that liberty is the rule and detention the exception, the obligation cast on the Prosecutor to investigate incriminating and exonerating circumstances equally and the summons to appear as the most suitable means of bringing him before the Court in the present case.¹⁹
16. The Defence further submitted that, contrary to the terms of the warrant of arrest aforementioned, the Appellant will appear voluntarily before the Court; he will not obstruct or endanger the investigation or the court proceedings; and will not continue with the commission of the crimes.²⁰
17. On 8 January 2013, the DRC stated its willingness to receive the Appellant on its territory, were he to be released by decision of the Pre-Trial Chamber.²¹
18. Contrary to all expectations, whilst the Single Judge was already engaged in adjudging the Appellant's application, on 17 February 2014, the Principal Public Prosecutor [*Procureur général*] ("the PGR") of the DRC furnished further observations²² which were antithetical to the Minister for Justice and Human Rights, who alone in law is empowered to enter undertakings on behalf of the Congolese State *in specie*. These further observations from the PGR adversely affected the Appellant's application, as scrutiny of paragraphs 28 and 29 of the decision under appeal ("the Impugned Decision") makes clear.
19. On 24 February 2014, the Defence challenged the further observations in vain.²³ On 25 February 2014, the Defence transmitted Mr Fidèle Babala Wandu's "*Engagement sur l'honneur*" [sworn undertaking] in respect of his application for interim release.²⁴

¹⁹ ICC-01/05-01/13-38, "*Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu*", pp. 4-12.

²⁰ *Ibidem*, pp. 13-18.

²¹ See the letter from the Minister for Justice and Human Rights, ICC-01/05-01/13-78-Conf-Anx 6.

²² ICC-01/05-01/13-206, "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*'".

²³ ICC-01/05-01/13-217, "*Réponse de la Défense à la lettre référencée N° 580/D.030/166/PGR/MUM/2014 du 17 FÉVRIER (ICC-01/05-01/13-206-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**

20. On 14 March 2014, the Single Judge dismissed the Appellant's urgent application for release of 13 December 2013, whilst declining to grant his request of 24 February 2014 for a public hearing for the discussion of issues of both the admissibility and merits of the "Principal Public Prosecutor's observations" – the manifest substratum of his Decision, which is unfounded in law.

C. AS TO THE LAW

21. In the Impugned Decision, the Single Judge first recalls the general principles which will found his adjudication of the Appellant's application, stating that he will rely on article 60(2) of the Statute to determine whether the article 58(1) conditions are met for the person's continued detention. If not, the person will be released with or without conditions. The Pre-Trial Chamber further states that it will inquire into the facts justifying detention and asserts that it may rely on the same material and information produced in respect of the warrant of arrest.²⁵

22. Accordingly, the Single Judge explains that he will verify anew whether there are reasonable grounds to believe that the crimes alleged by the Prosecutor were committed by the arrested person (article 58(1)(a) and the existence of one or more of the risks listed in article 58(1)(b)). The practice developed by the Appellate Bench and the Court, he further expounds, consists of verifying whether one or more of the article 58(1) risks remain. If so, the Single Judge must briefly assess whether there are still reasonable grounds to believe that the crimes alleged by the Prosecutor in her application were committed.²⁶

23. These explanations thus furnished, thenceforth the Single Judge's entire endeavour – relying on the evidence submitted by the Prosecutor in her application for the warrant for the Appellant's arrest and drawing further on Independent Counsel's reports – consisted

monsieur Fidèle Babala Wandu""(ICC-01/05-01/13-206) and "*Demande d'application de la Règle 118(3) du Règlement de procédure et de preuve*".

²⁴ ICC-01/05-01/13-222-Conf, "*Transmission de l'Engagement sur l'honneur de Monsieur Fidèle BABALA WANDU relativement à sa demande de mise en liberté provisoire*".

²⁵ ICC-01/05-01/13-258, *Decisions on the "Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu"*, para. 2.

²⁶ *Ibidem*, para. 5.

only of elucidating facts founding his Decision to continue the Appellant's detention. The Defence will demonstrate the impropriety of the attitude of the Single Judge by addressing every detail of all the grounds he advances, which appear wholly incongruent.

1. First limb of the Single Judge's appraisal: article 58(1)(a) of the Statute – ascertainment of reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court

24. To justify the Appellant's continued detention, the Single Judge opined that, on the basis of the material appended to the Prosecutor's Application, there were reasonable grounds to believe that Fidèle Babala:

[TRANSLATION]

- i) in agreement with Jean-Pierre Bemba and in accordance with his instructions directly or indirectly distributed sums of money to Defence witnesses and/or members of their families, as well as to Aimé Kilolo and Jean-Jacques Mangenda;
- ii) Fidèle Babala frequently called the Defence witnesses, especially during time periods coinciding with the money transfers and took part in several privileged conference calls with Jean-Pierre Bemba and Aimé Kilolo;
- iii) Fidèle Babala acted as an intermediary in the transmission of the Accused's instructions to members of his family;
- iv) Fidèle Babala used a coded language to discuss financial matters with the Accused.²⁷

25. The Single Judge then states that the material founding his inquiries into Fidèle Babala Wandu's relations consists, on the whole, of the Prosecutor's Application, which was reclassified as confidential and made available to all the suspects on 27 November 2013, including:

- (a) transcripts of telephone calls between Mr Fidèle Babala and Mr Jean-Pierre Bemba, wherein Mr Babala receives instructions about sums of money and their transfer including Mr Jean-Pierre Bemba himself and Aimé Kilolo and wherein the codes were used and references made to witnesses in the Main Case;
- (b) various material showing Fidèle Babala's role within the *Mouvement pour la Libération du Congo* [Movement for the Liberation of the Congo] ("the MLC").²⁸

26. In the Defence view, the entire grounds advanced by the Single Judge for the continued detention of the Appellant are incongruent: firstly, in that they are founded solely on the

²⁷ *Ibidem*, para. 6.

²⁸ *Ibidem*, para. 7.

material brought by the Prosecutor in her application for the warrant of arrest; and secondly in that the grounds for the Impugned Decision are not clearly stated.

1.1. Material underpinning the entire grounds

27. The material relied on by the Single Judge cannot now justify the Appellant's continued detention. Akin to the Single Judge, the Defence has taken cognizance of the much-vaunted material. It is saddened to conclude that the Pre-Trial Chamber failed to undertake a critical and considered scrutiny of the material. As it is, the Prosecutor, in contravention of article 54(1)(a) of the Statute, investigated only incriminating circumstances. Such transgression, the clearly settled jurisprudence of the Court, in *Mbarushima* in particular, roundly condemns.²⁹
28. If the Prosecutor had taken the trouble to first question the Appellant, she would certainly have garnered some material which would have enlightened her as to the nature of his relations with Mr Jean-Pierre Bemba and the members of his team. The relations did not go so far as to cast the Appellant as a judicial protagonist (party or participant) before Trial Chamber III, which is trying the Main Case, so as to entail any role whatsoever on his part in the presentation of the case.
29. By seizing the Single Judge by way of a unilateral, confidential, *ex-parte* application, the Prosecutor acted in disregard of the adversarial principle, a principle which would have allowed her to glean much reliable information regarding the Appellant's precise standing and actual nature of his contact with the members of Mr Jean-Pierre Bemba's defence team and with Mr Bemba himself. The Prosecutor would then have seen that the Appellant's relationship with Jean-Pierre Bemba is undoubtedly a political bond and a friendship; she would also have learnt what he has known for years, namely that Mr Jean-Pierre Bemba has not received legal aid and therefore has had to fund his investigations in the Main Case himself from funds collected from his biological family and political allies.

²⁹ ICC-01/04-01/10-465, para. 51: "Finally, the Chamber wishes to highlight its concern at the technique followed in several instances by some Prosecution investigators, which seems utterly inappropriate when viewed in light of the objective, set out in article 54(1)(a) of the Statute, to establish the truth by "investigating incriminating and exonerating circumstances equally". The reader of the transcripts of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations."

Hence, an undeniable bond of solidarity was forged around him. The Appellant merely transferred the requested money to team members based in The Hague for the purpose of the investigations and for that purpose alone.

30. The Prosecutor has disclosed no evidence that the Appellant sent money to witnesses to corruptly influence them and to allow the Defence to tender false or forged evidence in the Main Case. The Single Judge could have directed from the Prosecutor the subject-matter of all impugned *viva voce* evidence in the Main Case and an estimation of the duration of calls with the Appellant so as to determine whether witnesses could have been coached during that timeframe.
31. To date the Prosecutor has not disclosed a single document containing the Appellant's telephone conversations with Defence Counsel in the Main Case or the Accused himself and the witnesses regarding the content of *viva voce* evidence before Trial Chamber III. Had the Prosecutor first questioned the Appellant, she would have also realised that he was unapprised of the subject-matter of the witnesses' evidence, any strategy whatsoever which might have been contrived for the purported subornation of witnesses, or the confidential orders of the Chamber. No evidence disclosed to date by the Prosecutor mentions any such knowledge on the part of the Appellant.
32. Furthermore, taking into account the time factor alone, the Defence notes that the Prosecutor's application was filed just **one day** before the Pre-Trial Chamber issued the warrant of arrest. Yet, the volume and piecemeal nature of the so-called evidence disclosed preclude its proper analysis in a single day and any ensuing incontrovertible finding that there are reasonable grounds to believe that the Appellant committed the offences laid against him.

1.2. Insufficiency of the entire grounds

33. According to the Single Judge, iii) Fidèle Babala acted as an intermediary in the transmission of the Accused's instructions to members of his family.³⁰
34. Firstly, the Single Judge provides no details of the instructions. Secondly, he does not state the legal provision which the Appellant allegedly violated by transmitting instructions to members of the Accused's family, and which, moreover, remain otherwise unspecified.
35. The Defence recalls that the principle of legality forms the cornerstone of proceedings before the International Criminal Court. Article 22 of the Statute lays down the principle of *Nullum crimen sine lege*:
1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.
36. The Defence submits that the transmission to family members of instructions which are not violative in character does not constitute a crime within the jurisdiction of the ICC.
37. The same holds true for the Single Judge's deprecation of the Appellant's use of coded language in conversations with the Accused about financial matters.³¹ He does not specify the codes or the criminality of their content. On this precise point the Single Judge accepts as gospel the statements of Independent Counsel, who concluded that the codes existed, even though their precise content was never put to the Defence or the Appellant.
38. Furthermore, as regards the table of money transfers to Jean-Pierre Bemba, Aimé Kilolo and Narcisse Arido,³² the Single Judge does not show how the transfers *per se* constitute crimes, since the Appellant has not denied transferring money both for the Accused's personal needs at the detention centre and those of his defence team, which lacks

³⁰ *Ibidem*, para. 6.

³¹ *Ibidem*, paras. 6 and 7.

³² *Ibidem*, para. 7.

resources for its field investigations. The Defence wishes to underscore that the Accused, Jean-Pierre Bemba, has never received any legal aid.

39. Continuing in this vein, the Single Judge adds that various material shows Fidèle Babala's role within the MLC.³³

40. In the Defence view, this ground is insufficient for the continued detention of the Appellant. His role in his political party is inherently constitutional. It is political and has a constitutional basis, since the political opposition is vested with official status in the DRC. Article 18 of the 18 February 2006 Constitution lays down: [TRANSLATION] "Political opposition is recognised in the Democratic Republic of the Congo. The rights connected to its existence, activities and endeavour to win power democratically are inalienable. They shall not be subject to any limitation, save where prescribed in respect of all parties and political activity by this Constitution and the law."

41. The Defence cannot fathom the connection which the Single Judge establishes or wishes to establish between the political activities of the Appellant and the crimes of corruptly influencing witnesses and forging documents levied against him by the Prosecution. Political opposition in the DRC and the wider world does not incur the threat of sanction under the Rome Statute. Is this an attempt at the ICC to end the Appellant's political career? The Defence refuses to believe this and cannot ascribe such an intention to the Single Judge.

42. At this rate, the Defence fears politicisation of international criminal justice. Politicisation of justice is the hallmark of totalitarian regimes to whose ranks the International Criminal Court does not belong. Nor is the Court an authority for the regulation of DRC politics. The Defence has condemned this risk of aberration in responding to the PGR's aforesaid letter, which conveyed to the Chamber contrary observations. Said response must be considered to be reproduced here verbatim and *in toto*.³⁴

43. The Defence is willing to accept that, at this stage in the proceedings, the Chamber may be satisfied that there are reasonable grounds to believe that the alleged crimes were

³³ *Ibidem*, para. 7.

³⁴ ICC-01/05-01/13-217-Conf.

committed by the Appellant.³⁵ But its satisfaction must also be underpinned by tangible information verified by the Single Judge. However, from the grounds for the Impugned Decision, it appears that the Single Judge was not really able to critically appraise the evidence laid before him by the Prosecutor.

2. Second limb of article 58(1)(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) 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

2.1. Appearance at trial

44. The Single Judge points out to the Defence that the personality of a suspect cannot move the Chamber to determine whether arrest is necessary to ensure appearance at trial; and the various circumstances raised – education, professional and social status – are irrelevant in this regard, not decisive to absconsion from justice and do not preclude the risk of flight. The Single Judge also dwells on the gravity of offences against the administration of justice, which may be committed by highly educated individuals.³⁶ He adds that as a DRC parliamentarian, Fidèle Babala has a number of contacts, even internationally, and is able to travel freely, including to non-States parties to the Rome Statute.³⁷

45. Such conjecture does not in principle befit a judge who respects the rights of the defence or, at the very least, the fairness of the proceedings, particularly since the Single Judge does not state the identity, significance or whereabouts of the contacts to demonstrate that Mr Babala would be truly elusive.

46. However, in order to comply with the applicable law, it appears that the terms of article 58(1)(b) prescribe that issuance of a warrant of arrest and, perforce, its validity, are necessary where the Chamber is satisfied that such warrant is the appropriate legal means

³⁵ *Ibidem*, paras. 12 and 13.

³⁶ *Idem*.

³⁷ *Ibidem*, para. 17.

to ensure that the prosecuted person will appear at trial; that said person will not obstruct or endanger the investigation or the court proceedings; or, where applicable, to prevent the person from continuing with the commission of the related crime within the jurisdiction of the Court and which arises out of the same circumstances.

47. The Single Judge gives the distinct impression that he has not taken the trouble to weigh the frivolous and fallacious reasons raised by the PGR, on the one hand, against the clear social and political circumstances, which indisputably argue in favour of rescinding the unfair and indefensible warrant of arrest, on the other.
48. That the Appellant, will appear before the International Criminal Court (“the ICC” or “the Court”) to answer, if required, to the charges laid against him is an undeniable certainty. Mr Babala asked to return to his country, where he has no armed force. He lives in Kinshasa, the capital of the country and seat of government, where the current administration wields the gamut of its powers, at times even to excess. No opponent, not even those enjoying the most popular support or the most affluent, has ever stood firm against the government in Kinshasa.³⁸ On which legal or factual ground can the Appellant refuse to appear before the Court if so obliged? The questions raised here therefore show that the PGR allegations on which the Single Judge relies are entirely baseless.
49. Furthermore, Mr Fidèle Babala’s electorate is also based in Kinshasa, a part of the country untroubled by armed conflict. How can the PGR link Mr Fidèle Babala’s liberty to a risk of undermining peace in a country which is in the process of post-conflict reconstruction? How can the liberty of a political leader, who holds public office and is even engaged in political consultations aimed at securing and consolidating peace and national unity, jeopardise such peace? Manifestly, the PGR’s contentions are petty politicking and unconnected to the law, and aimed at isolating and stifling a political opponent. Is it expedient for the Court to lend its legal, human and material resources to this end, at the risk of losing credibility in the estimation of informed commentators and the public eye?³⁹
50. In response to the observations of the Single Judge, the Defence primarily wished to state that after first questioning the Appellant, an inquiry into his background and personal

³⁸ Case of Mr Etienne Tshisekedi wa Mulumba and Mr Eugène Diomi Ndongala.

³⁹ See the various positions adopted by the African Union since 2011 and in particular that of Mr Jean Ping, former Chairperson of the Commission of the African Union, available at <http://www.slateafrique.com/9667/cpi-ua-afrique-dictateurs-crimes-justice-extradition>.

circumstances would have allowed investigation of exonerating circumstances and made clear that he did not commit the offences of which he stands charged. The Single Judge errs by misappreciation in as much as he takes account only of the investigation of incriminating circumstances whereas, manifestly, the Prosecutor has not fulfilled her article 54(1)(a) statutory obligation to also investigate exonerating circumstances. Thus, the Single Judge's adjudication rests on an irrebuttable presumption of guilt which is wholly antithetical to the Appellant's article 67(1) statutory rights.

51. Yet, at the initial appearance hearing, the Single Judge claimed to remind the Appellant and other suspects of their rights. However, by upholding the detention of the Appellant without the least regard for his statutory rights, the Single Judge violates them.⁴⁰ In his precise words:

[TRANSLATION] First of all you are presumed innocent until the contrary is proven, until proven beyond all doubt that you are guilty and the burden of proof lies with the Prosecution. You have the right not to have imposed on you any reversal of the burden of proof or any onus of rebuttal. You have the right to disclosure of material which proves or attempts to prove your innocence, yes which mitigates your responsibility, or which mitigates your credibility of ... of the evidence tendered by or in the possession of the Prosecution⁴¹

52. The Defence wishes to draw the Appeals Chamber's attention to the fact that from the initial appearance hearing thenceforth, the Single Judge did not devote his attention solely to the pre-trial burden of proof. He clearly explained to the suspects that the Prosecution was duty-bound to establish their responsibility beyond all doubt. It is therefore ill-founded, in justifying continued detention, to rely on whether or not there are reasonable grounds to believe that the conditions of article 58(1) of the Statute are met. The standard of proof at this stage in the proceedings does not preclude actual verification by the Single Judge of the truth of the offences ascribed to the Appellant, especially since, as is the case here, the Prosecutor has already disclosed much of her evidence for the confirmation hearing. The Single Judge is duty-bound to ascertain its factual accuracy.

53. It is an undeniable fact that the Appellant is an elected member of parliament with a constituency. Nor is it disputed that he has relationships with other persons. But he would not go so far as to sacrifice his electoral mandate and his duty as a father by evading justice. The Appellant is not seeking in any way to minimise the gravity of the offences

⁴⁰ ICC-01/05-01/13-T-1-FRA ET WT, 27-11-2013, p. 12, lines 3-28.

⁴¹ *Idem*, p. 12, lines 8-16.

laid against him. But he has pleaded his innocence from the outset and strenuously denies membership of an organisation driven by the idea of corruptly influencing witnesses in the Main Case and forging evidence. With regard to forgery, the Prosecutor has to date failed to present any material to show, in the chain of transmission of those documents which she claims are forged, that forged documents found their way into the Appellant's possession.

54. Nor does the Appellant have supporters who could help him to evade justice.⁴² To date there have been no public rallies in his support or any threats to anyone as a result of his detention in The Hague.

2.2. Obstruction or endangerment of the proceedings

55. The Single Judge relies on material appended to the Prosecutor's Application and ad hoc Counsel's reports which show that the Appellant was the conduit for various money transfers to other suspects in the case and such transfers were specifically discussed in the context of the Main Case.⁴³ He is therefore satisfied as regards what he labels "[TRANSLATION] tangible evidence", thus allowing him to assess whether a risk of obstruction or endangerment of the proceedings remained.⁴⁴

56. The Appellant has given a solemn undertaking not to obstruct the proceedings.⁴⁵ In terms of the urgent application for interim release, he has also undertaken to comply with any conditions which the Chamber may set.⁴⁶ The Judge does not explain his mistrust of the Appellant.

2.3. Risk of commission of further crimes

57. In the Single Judge's view, Mr Fidèle Babala is in a position to commit further crimes.⁴⁷

Previously, regarding the obstruction of justice, he invoked the further observations of the

⁴² ICC-01/05-01/13-258, *Decision on the "Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu"*, para. 18.

⁴³ *Ibidem*, para. 25.

⁴⁴ *Ibidem*, para. 26.

⁴⁵ ICC-01/05-01/13-222.

⁴⁶ ICC-01/05-01/13-38, p. 19, paras. 63 and 64.

⁴⁷ ICC-01/05-01/13-258, para. 32.

PGR, which, given paragraphs 28 and 29 of the Impugned Decision, had a truly adverse effect on the Appellant's Application. The Single Judge repeats his previous reasoning on article 58(1)(b) of the Statute in relation this matter.

58. The Defence submits that the Single Judge should dismiss the further observations of the PGR, firstly as they were out of time, and secondly as they are incompatible with those of the Minister for Justice and Human Rights, who alone is empowered to duly enter undertakings on behalf of the Congolese State.⁴⁸ In reality, the Impugned Decision shows that the Single Judge does not ground his decision on the matter of why he dismissed the observations of the Justice Minister, who was well-disposed to receiving the Appellant on DRC territory in the event of his interim release, and accepted only the observations of the PGR which were not. The letter of 17 February 2014, wherein the ParGR sought to submit its observations, did not in any way supersede the Justice Minister's letter of 8 January 2013.

59. In addition, Mr Babala cannot continue with the commission of the "crime" ascribed to him because the presentation of the Main Case is completed.

60. In sum, whilst disregarding article 58(1) in its entirety, the Impugned Decision violates the fundamental principles of legality, sufficiently expounded above, fairness, presumption of innocence and exceptionality of detention.

61. By relying solely on the material presented by the Prosecutor in her application for the warrant of arrest, the Single Judge does violence to the fair trial requirement insofar as he has not in return afforded the Appellant the opportunity to refute this material and put his side across. The Defence is therefore at a disadvantage since it is quite clear that Judge and Prosecution are one, insofar as he allows the material and views of that party to the proceedings alone to prevail unchallenged. This blatant proclivity does not inspire any confidence on the part of the Defence in the subsequent proceedings and with good reason.

62. Similarly, through his unreserved support for the incriminating material alone, the Single Judge also violates the principle of presumption of innocence enshrined in article 66 of the Statute, a principle which, akin to that of the fairness of the proceedings aforementioned,

⁴⁸ ICC-01/05-01/13-217-Conf. pp. 4-7, 66 paras. 7-22.

requires him to examine and collate the incriminating and exonerating evidence to elicit the truth.

63. Furthermore, and indisputably, the Single Judge also violates the principle of exceptionality of detention. In criminal law, liberty is the rule and detention the exception, as recalled in the *United Nations Standard Minimum Rules for Non-Custodial Measures*, known as “the Tokyo Rules” and adopted by the United Nations General Assembly in Resolution 45/110 of 14 December 1990. Point 6 of the rules, concerning the pre-trial stage, prescribes pre-trial detention as a means of last resort and its provisions merit restating:

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-Trial detention shall last no longer than necessary to achieve the objectives stated under rule [5].1 and shall be administered humanely and with respect for the inherent dignity of human beings.

64. These principles apply before the ICC by virtue of article 21(1)(b).

65. Paragraph 2 of that same article 21 provides that the Court may apply principles and rules of law as interpreted in its previous decisions. It is expedient here respectfully to point out to the Appeals Chamber that as regards issuance of warrants of arrest and/or summonses to appear, the jurisprudence of the Court is both disparate and particularly stringent towards prosecuted persons from the DRC. Regard need only be had to *The Prosecutor v. Bahar Idriss Abu Garda*,⁴⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*⁵⁰ and *The Prosecutor v. Uhuru Muigai Kenyatta*.⁵¹ There is no logical explanation for Mr Babala’s continued pre-trial detention for the lesser offences under the Court’s Statute, whereas there is no risk that he will not appear if required or that he will obstruct the proceedings against him or continue with the commission of the crime charged. The explanation for this may lie in the cooperation between the DRC authorities and the ICC, which is often held up as “exemplary”.

66. As to the alleged commission of further crime, the question arises as to the species of crime he would commit in relation to this case, since with main trial essentially over, no

⁴⁹ ICC-02/05-01/09.

⁵⁰ ICC-01/09-01/11.

⁵¹ ICC-01/09-02/11.

further witnesses should appear and no uncontested material may be tendered. Similarly, it would also be difficult to conceive of retaliation against accusers whose identity he cannot know.

3. A comment regarding changed circumstances since the Appellant's arrest and detention

67. In addition to the uncritical consideration of the various material which the Prosecutor nonetheless placed before him, the Single Judge did not deign to note that many circumstances have changed since the Appellant was placed in custody.

68. The Defence notes that on 6 December 2013, the Accused in the Main Case sent a letter dated 5 December 2013 to Trial Chamber III seeking to change lead counsel.⁵² Thenceforth, Mr Aimé Kilolo no longer acted as counsel for Mr Jean-Pierre Bemba. He was replaced by Mr Peter Haynes. Since then the Appellant, who previously had no access to the confidential record of the Main Case, has no longer had contact with the Accused's Defence team. No longer is he a conduit for the funds for the team's work in the Main Case and the subsistence of the Accused. No longer, therefore, does he have any contact whatsoever with the Accused's Defence team.

69. The Appeals Chamber has held:

The Pre-Trial Chamber in assessing whether the conditions under article 58 (1) continue to be met may, pursuant to article 60 (3), [third] sentence, modify its ruling if it is satisfied that changed circumstances so require. The requirement of "changed circumstances 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."⁵³

70. It has further held:

Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts

⁵² "Enregistrement d'une lettre de M. Jean-Pierre Bemba Gombo datée du 5 décembre 2013", 6 December 2013, ICC-01/05-01/08-2915, with Annex ICC-01/05-01/08-2915-Anx.

⁵³ ICC-01/05-01/08-631-Red, *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"*, p. 20, paragraph 20.

founding its decision, a disregard of the relevant facts, or taking into account facts extraneous to the sub judice issues.⁵⁴

71. In the case at bar, the decision to arrest and continue detention was mainly driven by the Appellant's contact with Counsel for the Accused, with the Accused himself and with some Defence witnesses. Yet such contact ceased with removal of Lead Counsel from the Main Case and also due to the fact that said Lead Counsel cannot now discuss matters concerning investigation costs with the Appellant. The reopening of the Main Case contemplated by the Single Judge⁵⁵ is extremely hypothetical and amounts to pure conjecture bordering on subjectivity which the Appeals Chamber should not countenance.
72. Further, as regards the present case, the Single Judge misappreciated the facts founding his decision. He has taken account only of the incriminating evidence provided by the Prosecutor and not found that she manifestly failed to discharge her obligation to investigate exonerating circumstances pursuant to article 54(1)(a) of the Statute. The Single Judge therefore relied on the Prosecutor's unilateral application and on her evidence which was not subjected to adversariality. Adversariality would have enabled the Single Judge to properly circumscribe the facts of the case and inquire as to their accuracy, had the Prosecution taken the trouble to question the suspects and to confront them with one another. Then, the virtues of the public hearing sought by the Appellant in accordance with rule 119(3) of the Rules of Procedure and Evidence would have taken utmost effect. The Appellant would have thus taken the opportunity to state in no uncertain terms his exact relationship with both the Accused in the Main Case and the members of his Defence team. He would also have furnished to the Honourable Single Judge all the necessary information and explanations concerning his contact with Defence witnesses. All this would have allowed the Single Judge to ascertain whether the Appellant was indeed engaged in a process to corruptly influence witnesses or to falsify or present evidence which is false or forged.

⁵⁴ *Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release*, 9 June 2008, ICC-01/04-01/07-572 OA, para. 25. The same criterion was applied in the Judgment of 16 December 2008, para. 52.

⁵⁵ ICC-01/05-01/13-258, *Decision on the "Requête urgente de la défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu"*, para. 32.

73. Finally, the Single Judge finds fault with the Appellant for not advancing a specific proposal for the conditions of his release; failure to state detailed conditions entails, in his view, insufficiency of the “*Engagement sur l’honneur*”.⁵⁶

74. Such a ground to justify the Appellant’s continued detention has no legal relevance. Indeed rule 119(1) of the Rules of Procedure and Evidence provides: “[t]he Pre-Trial Chamber may set one or more conditions restricting liberty, including the following [...]”. Having regard to the conditions which he may impose on the Appellant, the Single Judge is therefore vested with considerable power to lay down and modify conditions, and revoke them when breached. The Single Judge cannot therefore use the Appellant’s alleged failure to make concrete proposals for conditions as a pretext to deny him release on this ground, given that said Judge is empowered to prescribe, modify and revoke the conditions.

⁵⁶ ICC-01/05-01/13-258, para. 34.

FOR THESE REASONS

MAY IT PLEASE THE CHAMBER TO

ENTERTAIN this appeal and declare it wholly meritorious.

Accordingly, **SET ASIDE** the Impugned Decision in every respect.

And as it behoved the Single Judge,

ORDER THE INTERIM RELEASE of the Appellant, with or without conditions, after a public hearing is held in accordance with rule 118(3) of the Rules of Procedure and Evidence.

AND JUSTICE SHALL BE DONE.

RESPECTFULLY SUBMITTED

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Fidèle Babala Wandu

[signed]

Dated this 19 March 2014, at Denderleeuw