

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

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

Date: **24 February 2014**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser

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***

CONFIDENTIAL

**Defence Response to Letter No. 580/D.030/166/PGR/MUN/2014 of 17 February 2014
(ICC-01/05-01/13-206-Conf-AnxI) annexed to the *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) and
Request for application of rule 118(3) of the Rules of Procedure and Evidence**

Source: Defence for Mr Fidèle Babala Wandu

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye
Ms Florence Darques Lane

Defence Counsel for Mr Babala

Mr Jean-Pierre Kilenda Kakengi Basila

Defence Counsel for Mr Kilolo

Mr Ghislain Mabanga
Ms Catherine Mabilile

Defence Counsel for Mr Mangenda

Mr Jean Flamme

Defence Counsel for Mr Jean-Pierre Bemba Gombo

Mr Nicholas Kaufman

Defence Counsel for Mr Narcisse Arido

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. On 18 February 2014, the Registry of the International Criminal Court (hereinafter “the Registry”) informed Pre-Trial Chamber II (hereinafter “the Chamber” or “the Single Judge”) that the Public Prosecutor’s Office of the Democratic Republic of the Congo had submitted new observations on Mr Fidèle Babala’s application for interim release. The Registry also transmitted to the Chamber the Congolese authorities’ application requesting the Single Judge to take these new observations into account despite their late submission.¹
2. The Congolese authorities’ observations, contained in a letter filed as confidential,² read as follows:

“[TRANSLATION] Subject: *The Prosecutor v. J.P. BEMBA GOMBO and others.*

To the Registrar of the International Criminal Court in The Hague, The Netherlands

Dear Sir,

Following Letter No. 033/EMMA/033/KBI/CAB/MIN/J&DH/2014 of 9 January 2014 sent to you by Her Excellency the Minister of Justice and Human Rights, pertaining to the aforementioned case and of which a copy was sent to me, I deem it my duty to inform the Court that Mr Fidèle Babala Wandu’s interim release and return to the DRC may disrupt public order and aggravate the political climate in a post-conflict country in need of peace for its reconstruction.

Furthermore, should Mr Fidèle Babala return to the Democratic Republic of the Congo by decision of the Court, it would be difficult for the DRC authorities to prevent him from continuing to commit the acts ascribed to him, in particular the subornation of witnesses, an offence which can be committed in complete secrecy.

Lastly, there is also the risk that Fidèle Babala could retaliate against those persons who allegedly denounced him for the acts which led to his arrest.

Yours faithfully,

THE PUBLIC PROSECUTOR,
Flory KABANGE NUMBI
p.p. First Advocate General
SAFARI KASONGO”

¹ ICC-01/05-01/13-206, p. 1.

² ICC-01/05-01/13-206-Conf-AnxI.

3. The Defence for Mr Fidèle Babala Wandu (hereinafter “the Defence”), which has, hitherto, been unaware that the DRC judicial authorities considered its client as a political detainee in The Hague, will raise serious objections to this surprising letter in the paragraphs below.

II. ARGUMENTS

4. The Defence objects to the form (A) and substance (B) of the contentious letter, as it will be referred to hereinafter.

A. Form of the contentious letter

5. With respect to form, the Defence will address the inadmissibility of the contentious letter for want of standing of its signatory (1) and for late submission of the said observations (2).
6. The present filing is confidential in keeping with the level of confidentiality of the item against which the Defence directs its criticisms. However, the Defence requests that both the confidential annex and this filing be reclassified as public.

1° Inadmissibility for want of standing of the contentious letter’s signatory

7. Under the judicial cooperation agreement of 6 October 2004 between the Democratic Republic of the Congo (hereinafter “the DRC”) and the Office of the Prosecutor of the International Criminal Court (hereinafter “the ICC”), the Public Prosecutor of the DRC certainly plays a key role in the judicial cooperation between the DRC and the ICC. As such, his capacity is limited to ensuring cooperation between the State and the ICC in areas which fall within the following four main categories of cooperation: cooperation through transfer of national proceedings to the ICC; cooperation through transfer of the accused; cooperation through investigations and presentation of evidence; and lastly cooperation through enforcement of court decisions. The Public Prosecutor has no standing to give an opinion on an application for interim release filed by an accused before the Court.

8. Moreover, it is important to note that the Public Prosecutor did not sign this letter in person. It goes without saying that the absence of such a signature must be duly notified to the Court if, as in the present case, an unauthorised person such as the Advocate General, the signatory of the contentious letter, signs on behalf of the Public Prosecutor without the Court being informed of the reasons for his signing *per pro*.
9. The Defence has all the more good cause to question the source of the contentious letter since it was not copied to the President of the National Assembly of the DRC, where Mr Babala, as a member of parliament, holds an office to which he was elected by universal suffrage. Likewise, the letter was not copied for information purposes to the Minister in charge of relations with parliament. It is simply copied to the Justice Minister, who so far has not deigned to withdraw her letter of 9 January 2014 stating that Mr Babala would be welcomed to the DRC should he be granted interim release.
10. Furthermore, the Minister of Justice and Human Rights, to whom the Public Prosecutor reports and who regularly makes commitments on behalf of the DRC, has yet to send a letter invalidating her letter of 9 January 2014 by which she issued a favourable opinion on Mr Babala's return to his country of origin in case of interim release. Hence, there is a blatant contradiction between the government position notified to the Chamber within the prescribed time limit for submission of the observations of Congolese authorities and the position of the Public Prosecutor's Office.

2° Inadmissibility stemming from late submission of the observations contained in the contentious letter

11. Cognisant of the late submission of the observations to the Chamber, the author of the contentious letter requested the Registrar to convince the Single Judge to take them into account despite their being submitted after the deadline.
12. The Defence submits that the Public Prosecutor of the DRC is time-barred and his observations must therefore be considered inadmissible.

13. Indeed, when this contentious issue of interim release arose, Mr Babala submitted his urgent request to the Chamber on 12 December 2013.³
14. As early as 13 December 2013, the Chamber invited the competent authorities of the Kingdom of the Netherlands and of the DRC to file their observations on Fidèle Babala's application not later than **Friday 3 January 2014**, the Chamber ensuring that this date was written in bold.⁴
15. Following that decision, the Registry issued a first note verbale transmitting the said decision to the Public Prosecutor's Office of the DRC and a second note verbale dated 3 January 2014 forwarding the French version thereof.⁵
16. It was at this juncture that the Congolese authorities sought and obtained that the deadline for the submission of its observations be extended to 9 January 2014.⁶
17. This deadline was met by the Congolese authorities through the competent official, namely the Minister of Justice, who, by Letter No. 033/EMMA/033/KBI/CAB/J&DH/2014 of 9 January 2014 to the Chamber, submitted her country's observations on Mr Babala's urgent request.
18. Accordingly, the Chamber having already started its examination of the parties' filings on Mr Babala's request for interim release, there is no justification for new observations from the Public Prosecutor which contradict those of the Justice Minister, who is the sole official with standing to make a commitment on behalf of the DRC.
19. The Defence recalls that, under Regulation 51 of the Regulations of the Court, "[f]or the purposes of a decision on interim release, the Pre-Trial Chamber shall seek observations from the host State and from the State to which the person seeks to be released."
20. The DRC, through its Minister of Justice and Human Rights, submitted its observations in favour of Mr Babala within the time limit set by the Chamber.

³ ICC-01/05-01/13-1-38.

⁴ ICC-01/05-01/13-40.

⁵ ICC-01/05-01/13-206, p. 4.

⁶ ICC-01/05-01/13-206, p. 4.

21. The Public Prosecutor's Office provides no factual or legal justification for the late submission of observations which, by the way, lack any recognised legal ground as to why the DRC is granted an extension of the extinctive deadline for submission of its observations to 9 January 2014.
22. The Defence also observes that article 21(1)(a) of the Statute, pertaining to applicable law, stipulates that the Court shall apply in the first place, this Statute, the Elements of Crimes and its Rule of Procedure and Evidence. However, a closer examination of the Decision of 13 December 2014 requesting observations on the Defence's urgent request for the interim release of Mr Fidèle Babala Wandu, reveals that the Single Judge applies article 60(2) of the Statute, rule 118 of the Rules of Evidence and Procedure and regulation 51 of the Regulations of the Court.⁷

B. Substantive aspects of the contentious letter

23. The contentious letter, which is highly political, is manifestly ill-grounded in its claim to the Court that Mr Fidèle Babala's release and return to the DRC may disrupt public order and aggravate the political climate in a post-conflict country in need of peace for its reconstruction; or its claim that Mr Babala risks retaliating against the persons who allegedly denounced him for the acts which led to his arrest.
24. Hitherto, the Defence had been unaware that, in the understanding of the Congolese judicial authorities, its client was a political detainee in The Hague.
25. The contentious letter lacks detail and even fails to explain how Mr Babala's interim release would lead to the disruption of public order. It does not say anything concrete in this regard or in support of its claim that Mr Babala's interim release may aggravate the political climate in a post-conflict country in need of peace for its reconstruction.
26. From the legal standpoint, articles 6 and 7 of the legislative order to define the organisation and powers of the judiciary gives the Public Prosecutor full powers to

⁷ ICC-01/05-01/13-40, p. 3.

investigate and establish offences likely to disrupt public order. These articles read as follows:

“[TRANSLATION] Article 6:

The public prosecutor's office shall oversee the enforcement of statutes, statutory instruments and judgments.

It shall perform this function *proprio motu* in matters relating to public order.

It shall have oversight of all senior criminal police officers, public officers and court officers, with the exception of those acting for court registries and bailiffs' offices.

It shall be responsible for maintaining order in the courts and tribunals, without prejudice to the judges' powers to maintain order during hearings.

Article 7:

In criminal proceedings, the public prosecutor's office shall investigate violations of statutes and statutory instruments committed on the territory of the Republic.

It shall receive complaints and denunciations, carry out all acts of investigation and refer cases to the courts and tribunals.

27. It follows therefore, that nothing would prevent the Public Prosecutor from implementing these provisions if Mr Babala were to contravene or disrupt public order.

28. However, the Public Prosecutor's Office seems to be setting itself up as a political adversary to Mr Babala in order to obstruct the exercise of his mandate as national Member of Parliament, elected by universal suffrage. The Public Prosecutor's Office, which, under article 149 of the Constitution, is an integral part of the judiciary, cannot make such claims without violating the principle of separation of powers and its duty to guarantee the protection of civil liberties and fundamental human rights.

29. Mr Babala is a duly elected member of parliament. Although he is currently being prosecuted by the ICC, this should not constitute an opportunity for his political opponents to use the Public Prosecutor's Office and the ICC as a means to settle scores. The ICC, which is the "pinnacle of criminal justice", cannot lend itself to this nasty game played by some DRC politicians firmly opposed to dialectics. The ICC is not a political forum where DRC political opponents can settle scores.
30. As Deputy Secretary General of the *Mouvement de Libération du Congo*, an opposition party, and Vice-President of the parliamentary group of the opposition, Mr Babala serves and has always served in strict compliance with the basic documents that govern the republican opposition in the DRC. One of the main priorities of the parliament to which he belongs and of the other institutions of the DRC, namely the President of the Republic, the government as well as the courts and tribunals, is to ensure that State institutions function smoothly, prevent conflicts, establish the rule of law, counter any dictatorial tendencies, guarantee good governance, combat impunity and ensure democratic change of government.⁸
31. Under article 8 of the DRC Constitution of 18 February 2006, "[TRANSLATION] [t]he opposition is recognised in the Democratic Republic of the Congo. The rights which stem from its existence, its activities and its struggle for democratic conquest of power are sacrosanct. The only limits to such rights are those placed on all parties and political activities by this Constitution and the law."
32. Mr Babala has not carried out any armed activity to seize power. He and his party have been key stakeholders in the national cohesion sought by the Head of State at the National Consultations held in Kinshasa from 7 September to 5 October 2013.⁹

⁸ See the Explanatory Statement of the Constitution of 18 February 2006, in Wetsh'okonda Koso Senga, Marcel. *Les textes constitutionnels congolais annotés*, Kinshasa: Editions de la Campagne pour les Droits de l'Homme au Congo (CDHC-ASBL), p. 430.

⁹ See, in this regard, "JPB positivement ahurissant", Le Soft international, Monday 9 September 2013.

<<http://www.Lesoftonline.net/articles/jpb-positivement-ahurissant>>; Mobateli, Angelo. "J.B. Bemba attend des délégués du MLC 'une contribution intellectuelle à la mesure des enjeux' aux Concertations nationales." 7 September 2013 at 12:15.

http://lepotentielonline.com/site2/index.php?option=com_content&view=article&id=2570:j-p-bemba-attend-des-delegues-du-mlc-une-contribution-intellectuelle-a-la-mesure-des-enjeux-aux-concertations-nationales&catid=90:online-depeches&Itemid=511; "RDC : le MLC participera aux Concertations

33. In his closing address, “[TRANSLATION] Joseph Kabila, speaking last, thanked the participants at these sessions for their commitment. The objective of the national consultations was to build national cohesion and find ways to re-establish State authority over the entire country by restoring peace, especially in the East, and by stimulating its development. More than 800 persons from all social and political backgrounds in the country attended these sessions”, including Fidèle Babala Wandu.
34. The contentious letter, which, in fact, considers Mr Babala to be a political prisoner, is considerably out of step with the National consultations, whose final report, approved by the Head of State himself, contains several recommendations, including “[TRANSLATION] the release of the political prisoners” and “[TRANSLATION] monitoring of the situation of the senator and former vice-president, Jean-Pierre Bemba, at the International Criminal Court.”
35. By objecting to the release of Mr Babala on DRC territory, the Public Prosecutor’s Office is acting in breach of article 30 of the Constitution and inciting the Chamber to violate rule 185 of the Rules of Evidence and Procedure.
36. Indeed, article 30 of the DRC Constitution provides that, “[TRANSLATION] [e]veryone within the national territory shall, within that territory, have the right to liberty of movement, to choose his or her residence, to leave the country and to return, under the conditions determined by law. No Congolese national shall be expelled from the territory of the Republic, forced into exile or forced to live outside his or her habitual residence.”
37. This, however, is the measure envisaged in the contentious letter, a measure which is contrary to rule 185(1) of the Rules of Evidence and Procedure pertaining to the release of a person from the custody of the Court other than upon completion of sentence, which provides that where [...] the person has been acquitted at trial or on appeal, or for any

nationales, affirme Thomas Luhaka”, 2 September 2013. <<http://radiookapi.net/actualite/2013/09/02rdc-le-mlc-participera-aux-concertations-nationales-affirme-thomas-luhaka>>; “Cohésion nationale : Discours de ‘Joseph KABILA’ devant le Congrès.” <<http://afrique.kongtimes.info/rdc/politique/6768-cohesion-nationale-discours-joseph-kabila-devant-congres.html>>; “Concertations nationales: Joseph Kabila promet des décisions importantes pour le pays.” 5 October 2013, <<http://radiookapi.net/actualite/2013/10/05/rdc-joseph-kabila-cloture-les-concertations-nationales/>>.

other reason, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person,¹⁰ to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State.”

38. In the present case, Mr Babala has chosen to be released to his country of origin, should the Court decide to release him. Hence, the Defence finds no plausible factual or legal reasons provided by the Public Prosecutor’s Office, which is indeed the guarantor of individual freedoms and fundamental rights of citizens under article 150 of the Constitution, that encourage it to pressure the Chamber into refusing interim release to a detainee who still enjoys all his statutory (article 66(1) of the Statute) and constitutional rights relating, in particular, to the presumption of innocence (article 17 *in fine*).

39. The ICC is not the ally of national officials who gleefully turn their back on the law, who show disdain for the law by practising inequity through politicisation of international criminal justice. The ICC’s role is to judge according to the law by applying the highest human rights standards.

40. In any case, the Defence finds the contentious letter inexplicable and void of any legal basis. Its highly political content is clearly manifest in the first paragraph, which raises the spurious ground of disrupting public order and aggravating the political climate. What political climate are they referring to? How can it be aggravated by Mr Babala when, as far as the Defence is aware, there is no legal dispute between the DRC and Mr Babala.

41. The Public Prosecutor’s observations have no proven relevance in law. Founded on conjecture without the slightest shred of supporting evidence, these observations tend to push the Court to sanction a trend towards politicisation of its justice, whereas the Court should only judge by applying the applicable law under article 21 of the Statute. It is neither the ICC’s mandate from the States Parties nor its mission to serve as an arena of confrontation for political opponents from one or several States Parties, to export their internal squabbling to Maanweg 179 in The Hague, where the senior magistrates of this criminal court adjudicate strictly according to the law and nothing but the law.

¹⁰ Emphasis added by the Defence.

III. Request for application of rule 118(3) of the Rules of Evidence and Procedure

42. Under rule 118(3) of the Rules of Evidence and Procedure, “[a]fter the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing by the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year.”
43. For the reasons set out below, Mr Babala requests that a public hearing be held at which he will present his arguments, once the Chamber has reclassified the contentious letter and the present submission as public documents. The circumstances of Mr Babala’s arrest in Kinshasa during the night of 23 to 24 November 2013 and his immediate transfer to the seat of the Court, in disregard for all his rights, as protected by all the applicable legal and procedural provisions, are a clear reflection of the vindictiveness currently exhibited by his political opponents. For his opponents, the arrest warrant of 20 November 2013 is a welcome opportunity, a lifeline for them to get rid of an embarrassing opponent.
44. At a time when the Court is unjustifiably criticised for being racist in that it prosecutes only Africans,¹¹ it is appropriate to hold a public hearing and thus afford everyone the opportunity of realising that it is rather some African leaders who wish to use the ICC as a means of settling political scores. The Defence perceives this in the discriminatory treatment of Mr Babala by the Public Prosecutor’s Office, which contributed to his immediate transfer to The Hague despite his being one of the architects of national cohesion at the National consultations, whereas the promotion of peace was one of the arguments advanced to justify the refusal to surrender to the Court General Bosco Ntaganda, who has a weightier case to answer than Fidèle Babala Wandu.¹² Under such circumstances, who then is aggravating the political climate?

¹¹ On this issue, see Mouangue Kobila James, “L’Afrique et les juridictions pénales internationales.” Cahiers Thucydide No 10, Centre Thucydide. Analyse et recherche en relations internationales, <www.afri-ct/IMG/pdf/10-L_Afrique_et_les_JIP.pdf>. Douala, February 2012, 59 pages.

¹² On this issue, see Luaula, Raymond. “Transfèrement de Babala à la CPI : duplicité et cynisme du pouvoir héritier de l’AFDL.”, 5 December 2013. <www.Congoone.net/xcong/index.PHP/EDITORIAL/1267-transfert-de-Babala-à-la-cpi-duplicité-et-cynismede-pouvoir-heritier-de-l-afdl>.

45. Since Mr Fidèle Babala Wanda was arrested, there has been no recorded case of disruption of public order, despite his undeniable fame in Kinshasa, where he is the elected representative of Tshangu Sub-region.
46. Likewise, no armed rebellion has developed in the DRC to demand Mr Babala's release.
47. Logically, were there to be a disruption of public order in the DRC, it would occur during Mr Fidèle Babala's detention in The Hague and not if he returned to his country of origin, where his supporters would rather be happy to receive him so that he can further contribute to national cohesion.
48. A public hearing, by its very nature, will put an end to all the attempts at politicising the ICC, initiated through this contentious letter, which imparts a political coloration to a strictly judicial matter. The Chamber, which is fully independent, must be able to invite the said Congolese authorities to come and present their arguments publicly on the matter in an adversarial *inter partes* debate before the Court.
49. The Court's criminal law is not vindictive. Rather, it is vintage comprehensive criminal law which is keen to uphold the highest standards with respect to rights by applying internationally recognised human rights.

FOR THESE REASONS,

MAY IT PLEASE THE CHAMBER TO

In the main

FIND the observations contained in the contentious letter **INADMISSIBLE** for want of standing of their author and for late submission.

In the alternative

DISMISS the observations contained in the contentious letter after an adversarial debate between the Defence and the author of the contentious letter, at a public hearing to which all the other parties in the instant case will be invited.

AND JUSTICE WILL BE DONE.

RESPECTFULLY SUBMITTED.

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Mr Fidèle Babala Wandu

[signed]

At Denderleeuw (East Flanders, Belgium), 24 February 2014