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

Date: **15 July 2014**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES
 MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO***

Public with Public Annex

**Prosecution Response to Mr. Babala Wandu's appeal against the "Decision on the
 First Review of Fidèle Babala Wandu's detention pursuant to Article 60(3) of the
 Statute"**

Source: Office of the Prosecutor

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Introduction

1. The appeal brought by the Defence for Mr. Babala Wandu (“Mr. Babala”)¹ against the “Decision on the First Review of Fidèle Babala Wandu’s detention pursuant to Article 60(3) of the Statute”² should be dismissed. Mr. Babala fails to show that the Single Judge of Pre-Trial Chamber II (“Single Judge”) erred in finding no ‘changed circumstance’,³ which is indispensable for any modification of a suspect’s detention under Article 60(3) of the Statute. To the contrary, the Single Judge correctly and reasonably determined that Mr. Babala should continue to be detained pending trial.

Procedural Background

2. Mr. Babala was transferred to the Court from the Democratic Republic of the Congo (“DRC”) on 25 November 2013. His request for interim release pending trial, under Article 60(2) of the Statute, was denied on 14 March 2014. As the Single Judge determined, reasonable grounds continue to justify the belief that Mr. Babala committed the crimes as alleged,⁴ and that his detention is necessary to ensure his appearance at trial, to ensure that he does not obstruct or endanger the Court’s proceedings, and to prevent him from continuing to commit the crimes alleged or related crimes.⁵ The Appeals Chamber confirmed the Article 60(2) Decision on 11 July 2014.⁶ On 4 July, the Single Judge completed his first periodic review under Article 60(3) of the Statute, and decided that Mr. Babala should continue to be detained.⁷ Mr. Babala now challenges this review.

¹ ICC-01/05-01/13-547 OA5 (“Appeal”).

² ICC-01/05-01/13-538 (“Decision”).

³ *See e.g.* Decision, paras.16, 21; Statute, Art.60(3).

⁴ *See* ICC-01/05-01/13-258 (“Article 60(2) Decision”), para.13. *See also* Statute, Arts.58(1)(a), 60(2).

⁵ *See* Article 60(2) Decision, paras.16-19, 26-27, 33. *See also* Statute, Arts.58(1)(b), 60(2).

⁶ ICC-01/05-01/13-559 OA3 (“Appeal Decision”), para.118.

⁷ *See* Decision.

Submissions

3. This appeal turns on a simple point: whether the Single Judge erred in determining that “there has been no change in the relevant circumstances concerning the necessity of Mr. Babala’s detention” and, hence, declining to modify the detention order.⁸ No such error was made. Indeed, Mr. Babala fails to articulate a clear error upon which to base his appeal but, rather, merely disagrees with the Single Judge’s conclusion.⁹ Each of Mr. Babala’s contentions is answered in the Decision itself.

Any modification of detention under Article 60(3) of the Statute is controlled by the existence of “changed circumstances”

4. Article 60(3) of the Statute declares expressly that the Pre-Trial Chamber, conducting its periodic review, may modify a detention order “if it is satisfied that changed circumstances so require”.¹⁰ The Appeals Chamber has explained this law with clarity. For example:

[A] Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must satisfy itself that the conditions under article 58 (1) of the Statute [...] continue to be met. In doing so, the Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute. [...] It should, however, be underlined that the periodic review of a ruling on detention under article 60 (3) of the Statute does *not* require the Chamber to make a decision on detention *ab initio*. The Chamber does not have to enter findings on the circumstances already decided upon [...] Nor does the Chamber have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions. [...] [T]he emphasis of the review is whether there has been a change in any of the circumstances.¹¹

⁸ Decision, para.21. *See also* paras.6, 16.

⁹ *See* Appeal Decision, paras.19-21.

¹⁰ Statute, Art.60(3) (emphasis added). *See also* Appeal Decision, para.110.

¹¹ ICC-01/05-01/08-1019, paras.52-53.

5. The Single Judge correctly directed himself to this law,¹² and Mr. Babala does not contest the correctness of the legal principles set out in the Decision.¹³ His passing reference to certain domestic law concerning interim release does not avail him because, although he acknowledges Article 21 of the Statute, he overlooks the express primacy of the Statute and the Rules.¹⁴ Nothing in Article 60(3) or Rule 118(2) makes it “appropriate”,¹⁵ much less necessary, to have resort to other principles of international law on the question of interim detention, much less, “[f]ailing that”,¹⁶ general principles of law derived by the Court from national laws of legal systems of the world.

The Single Judge did not err in his assessment that there were no “changed circumstances”

6. Based on the Parties’ submissions, the Single Judge concluded that:

there has been no change in the relevant circumstances concerning the necessity of Mr. Babala’s detention to ensure his appearance before the Court, and to ensure that he does not commit further crimes, or obstruct or endanger the investigation or the court proceedings.¹⁷

¹² See Decision, paras.1-4 (citing ICC-01/05-01/08-631-Red; ICC-01/05-01/08-1019; ICC-01/05-01/08-2151-Red; ICC-02/11-01/11-278-Red; ICC-02/11-01/11-548-Red). See also para.6 (“no change in the circumstances underpinning the ruling has occurred, and [...] no new circumstances having a bearing on the conditions under article 58 (1) of the Statute have arisen”).

¹³ See e.g. Appeal, para.13 (noting, without comment, the Single Judge’s direction that submissions which repeat previous arguments for the purpose of a review under Article 60(3) will not be taken into account). See also para.14.

¹⁴ *Contra* Appeal, para.20 (“Le droit applicable devant la CPI est, en vertu de l’article 21 du Statut, certes le Statut, les éléments du crime et le RPP, mais aussi les traités applicables [...] les principes généraux du droit dégagés par la Cour à partir des lois nationales représentant les différents systèmes juridiques du monde [...]”) (emphasis added). See also Decision, para.11 (noting Mr. Babala’s observations at trial concerning “the purported difference between the normative framework governing pre-trial proceedings before the Court and Congolese procedural law”). Mr. Babala fails to articulate any error in the Single Judge’s approach.

¹⁵ See Statute, Art.20(2).

¹⁶ See Statute, Art.20(3) (emphasis added).

¹⁷ Decision, para.21; see also para.6. The Prosecution notes that on this occasion—and in contrast to the Article 60(2) Decision—the Single Judge appears to have overlooked the continuing necessity of Mr. Babala’s detention also under Article 58(1)(b)(iii). This clearly formed the (third) basis for Mr. Babala’s detention under Article 60(2); see Article 60(2) Decision, para.33. That the absence of clear reference to this third basis is an oversight may be inferred from the Single Judge’s previous broader reference to “the persisting existence of reasonable grounds to believe that the requirements set forth under article 58(1) of the Statute and, in particular, the risks listed in paragraph 1(b) thereof”: Decision, para.16. Furthermore, as the Single Judge has previously observed, “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

7. The Single Judge did not err in this conclusion, acknowledging “new elements have been added to the record” but which only “strengthen the conclusions” of the Article 60(2) Decision.¹⁸ He correctly found that “most” of Mr. Babala’s arguments, on the other hand, repeated “arguments already raised in the past” and did “not go beyond the rehearsal or the reiteration of [...] disagreement” between Mr. Babala and the Single Judge or other parties and participants.¹⁹ Mr. Babala appears at least to recognise this reasoning,²⁰ but makes the generalised and undeveloped claim that the Single Judge failed to take into account “new elements” contained in his submissions.²¹ Mr. Babala’s incorporation by reference of these previous arguments before the Appeals Chamber, without further substantiation and explanation, is impermissible.²² An appellant is expected to demonstrate an error on appeal through specific arguments,²³ which must be fully contained in the document in support of the appeal without requiring reference to arguments made elsewhere.²⁴ The Prosecution will therefore only address the two aspects which Mr. Babala does develop: the closure of evidence in case ICC-01/05-01/08 (“*Bemba*”) and the additional 120 days Mr. Babala has now spent in detention.

the risk that the commission of the crimes be continued or that related crimes be committed [...] [O]bservations [...] that the relevant investigation, or these proceedings, [may] be obstructed or endangered [...] are also of relevance for the purposes of assessing the third element listed under article 58(1)(b) of the Statute”: Article 60(2) Decision, para.31.

¹⁸ See Decision, para.6.

¹⁹ Decision, para.15.

²⁰ See e.g. Appeal, paras.9, 13.

²¹ See e.g. Appeal, para.12 (“*La Défense n’arrive à s’expliquer que tous les argument fournis dans ses observations du 30 juin soient taxés de répétitions, car elle est convaincue qu’elle a apporté des nouveaux éléments qui n’ont été pris en compte dans la Décision litigieuse*”) (citation omitted). See also paras.13-14.

²² Contra Appeal, para.8.

²³ See *Uwinkindi v. the Prosecutor*, ICTR-01-75-AR11bis, Decision on Uwinkindi’s Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011, para.36; *Nshogoza v. the Prosecutor*, ICTR-2007-91-A, Judgement, 15 March 2010, para.18; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-A, Judgement, 22 April 2008, para.46; *Nahimana et al. v. the Prosecutor*, ICTR-99-52-A, Judgement, 28 November 2007, para.231; *Muhimana v. the Prosecutor*, ICTR-95-1B-A, Judgement, 21 May 2007, para.87; *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007, para.35. See also *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, 23 July 2009, Judgement, para.26; *Prosecutor v. Galić*, IT-98-29-A, Judgement, 30 November 2006, paras.250, 273. See also below fn.54.

²⁴ ICC-01/04-01/06-774 OA6, para.29.

8. As Mr. Babala concedes,²⁵ the Single Judge gave particular consideration to the question whether the decision on the closure of evidence in *Bemba*, issued subsequent to the Article 60(2) Decision, “might potentially qualify as a ‘changed circumstance’”.²⁶ Mr. Babala’s argument—that there no longer remains a possibility of interference with proceedings in that case—was rightly rejected because, notwithstanding the closure of evidence in *Bemba*, the trial “is still open” and further evidence may yet be taken.²⁷ Moreover, the Single Judge noted that the risk under Article 58(1)(b)(ii)—and indeed (iii)²⁸—is not confined only to the *Bemba* case, but also to Mr. Babala’s own case.²⁹ Thus, even a change in the circumstances of the *Bemba* trial would not necessarily amount to a relevant change of circumstance for the purpose of Mr. Babala’s detention in this case. Likewise, such a change in circumstance would not affect the assessment that Mr. Babala poses a serious flight risk under Article 58(1)(b)(i). As recalled in the Article 60(2) Decision, the Article 58(1)(b) conditions justifying detention are not necessarily cumulative but may be alternative.³⁰

9. Mr. Babala fails to show any error in the Single Judge’s approach in this respect. His assertion that the risk of his obstruction or endangerment of the *Bemba* trial is “one of the most important arguments for his detention” is unsubstantiated, and neglects to address the Single Judge’s finding that his detention was required on the basis of all three criteria in Article 58(1)(b).³¹ Likewise, Mr. Babala complains that the Single Judge failed to explain how Mr. Babala could exercise his influence on the *Bemba* trial when the hearing of evidence is concluded.³² But this ignores the

²⁵ Appeal, para.16.

²⁶ Decision, para.12.

²⁷ Decision, para.13.

²⁸ See above fn.17.

²⁹ See Decision, para.13 (“in spite of the fact that some pieces of evidence relating to these proceedings might at this stage be beyond the suspects’ reach, it cannot nevertheless be excluded that action be taken in respect of other evidentiary items which might still be outstanding”).

³⁰ See Article 60(2) Decision, para.14 (citing ICC-01/04-01/06-824, para.139).

³¹ *Contra* Appeal, para.18 (“*M. Babala devrait être remis en liberté provisoire car un des arguments les plus importants pour sa détention a disparu*”). See above fns.5, 17.

³² See Appeal, para.17.

Single Judge's express view that the hearing of evidence is *not* yet necessarily concluded, and so assumes an incorrect premise. On this basis, since the relevant circumstance remains unchanged, the Single Judge was not obliged to enter a finding anew as to how the requirement in Article 58(1)(b) was met.³³

10. Mr. Babala also contends that the Single Judge erred by failing to consider the additional 120 days for which he has been detained since the Article 60(2) Decision.³⁴ This argument must fail because it does not identify a change material to the Single Judge's Article 58(1)(b) assessment, viewed through the lens of the Article 60(2) Decision.³⁵ Indeed, the Single Judge had considered whether the length of Mr. Babala's pre-trial detention might be disproportionate to any sentence ultimately imposed, and whether this affected the likelihood that he might appear at trial. Yet this circumstance did not militate in favour of interim release since it was not clear that the length of pre-trial detention would be disproportionate to any sentence (bearing in mind Mr. Babala may be convicted of "multiple offences")—and even this analysis was not necessarily dispositive considering, for example, that the flight risk might be greater where the "behaviours" underlying the criminal allegations are still ongoing or have the potential to be so.³⁶ The Single Judge recalled similar considerations when Mr. Babala repeated this argument for the first review.³⁷ Of itself, the repetition of a substantially similar argument would have justified the Single Judge in rejecting it without further consideration.³⁸ Yet, Mr. Babala fails in any event to show that an additional 120 days' detention is material

³³ See ICC-01/05-01/08-1019, para.53 ("the periodic review of a ruling on detention under article 60 (3) of the Statute does not require the Chamber to make a decision on detention *ab initio*. The Chamber does not have to enter findings on the circumstances already decided upon").

³⁴ Appeal, para.15.

³⁵ See ICC-01/05-01/08-1019, para.52 ("the Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute").

³⁶ See Article 60(2) Decision, para.22.

³⁷ See Decision, para.14. This analysis is unaffected by the Appeals Chamber's concern as to the implications of the Single Judge's remark in the Article 60(2) Decision concerning the gravity of Article 70 offences: see Appeal Decision, paras.88-89.

³⁸ See ICC-01/05-01/08-1019, para.53 ("Nor does the Chamber have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions").

to the analysis actually reflected in both the Article 60(2) Decision and the impugned Decision, and hence that the Single Judge erred in his analysis.³⁹

The Single Judge did not abuse his discretion in declining to order interim release with conditions

11. As the Appeals Chamber has explained, the Pre-Trial Chamber's duty to order interim release is not discretionary when none of the criteria in Article 58(1)(b) is met.⁴⁰ However, the Pre-Trial Chamber possesses discretionary power to order interim release subject to conditions, even where it identifies a risk of the conduct enumerated in Article 58(1)(b).⁴¹ Consistent with this law, although the Single Judge was satisfied that there had been no material change of circumstances (and therefore that the criteria in Article 58(1)(b) continue to be met), the Single Judge considered whether interim release subject to conditions was appropriate.⁴² The Single Judge correctly considered that:

A decision granting conditional release cannot be regarded as a gamble, whereby a Chamber "tests" whether a suspect is or [is] not worthy of the trust reposed in him or her by granting such release. It has to be strictly justified and supported by objective elements enabling a Chamber to estimate that the conditions assisting the release are suitable to effectively neutralise the risks listed in paragraph 58(1)(b) of the Statute.⁴³

12. The Single Judge was satisfied that "none of these objective conditions exists today," noting the DRC's observations that it was neither able to assist in ensuring Mr. Babala's compliance with any conditions imposed, nor that it would make itself available for this purpose.⁴⁴ In such circumstances, notwithstanding Mr. Babala's views as to the reasons for the DRC's position or his own personal assurances,⁴⁵ the

³⁹ *Contra* Appeal, para.15.

⁴⁰ See ICC-02/11-01/11-278-Red, para.76; ICC-01/05-01/08-631-Red, paras.59, 105.

⁴¹ See ICC-02/11-01/11-278-Red, paras.79, 87; ICC-01/05-01/08-1626-Red, para.55.

⁴² Decision, para.17.

⁴³ Decision, para.18.

⁴⁴ Decision, para.19.

⁴⁵ See Appeal, paras.10-11. See further Appeal Decision, para.93 (noting the consideration by the Single Judge of Mr. Babala's personal undertaking even in the Article 60(2) Decision).

Single Judge's "discretion to consider conditional release [wa]s unfettered".⁴⁶ The Appeals Chamber has recently re-affirmed this very point in Mr. Babala's case.⁴⁷ Mr. Babala fails to show that the Single Judge abused this discretion.

13. In particular, nothing in Article 21 of the Statute compels the Court in this context to seek to enforce provisions of the domestic law of a particular State.⁴⁸ The Single Judge therefore did not err in not attempting to do so.⁴⁹ Nor did the Single Judge's caution as to the conditions which might be necessary to mitigate the Article 58(1)(b) risks for a person in Mr. Babala's situation⁵⁰ amount to a statement that such persons are *per se* not entitled to consideration for interim release.⁵¹

The Single Judge did not err in declining to grant Mr. Babala a further reply

14. Mr. Babala fails adequately to explain how his arguments concerning the Single Judge's rejection of his request to file a further reply—which are obscure and made without effective citations—have any relevance to the Decision.⁵² Nor does Mr. Babala show that any error would materially affect the Decision.⁵³ These undeveloped and irrelevant arguments should be summarily dismissed.⁵⁴

⁴⁶ ICC-02/11-01/11-278-Red, para.79 (discussing the circumstance where a State has not "offered to accept a detained person and to enforce conditions").

⁴⁷ See Appeal Decision, paras.115-117.

⁴⁸ *Contra* Appeal, para.23.

⁴⁹ *Contra* Appeal, para.22.

⁵⁰ See Decision, para.18.

⁵¹ *Contra* Appeal, para.19 ("C'est donc à dire que les personnes suspectées de subornation des témoins ne peuvent pas de par le monde bénéficier d'une liberté provisoire"). Reference to certain cases at the ICTY does not aid Mr. Babala either in principle (since such matters turn on their own facts) or in particular (since the cases are comparable to Mr. Babala's, especially regarding the existence of State guarantees). *Contra* Appeal, para.19; ICC-01/05-01/13-524, para.31. See also Appeal Decision, para.92.

⁵² See Appeal, paras.24-26.

⁵³ See Appeal Decision, paras.22, 87 (failure to indicate, with sufficient precision, how an error would have materially affected the impugned decision may lead to the Appeals Chamber dismissing arguments *in limine*, without full consideration of their merits).

⁵⁴ See e.g. *Prosecutor v. D.Milošević*, IT-98-29/1-A, Judgement, 12 November 2009, paras.16-17; *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, paras.16-27; *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, paras.14-21; *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, paras.16-24.

Relief Sought

15. For these reasons, the Appeal should be dismissed. Mr. Babala should continue to be detained pending trial.



Fatou Bensouda, Prosecutor

Dated this 15th day of July 2014

At The Hague, The Netherlands