



Original: **French**

No: ICC-01/05-01/13

Date of original version:

4 November 2014

Date of public redacted version:

16 December 2014

THE APPEALS CHAMBER

Before:

Judge Sanji Mmasenono Monageng, Presiding Judge

Judge Sang-Hyun Song

Judge Akua Kuenyehia

Judge Erkki Kourula

Judge Anita Usacka

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

Public redacted version of the Response of the Defence for Mr Fidèle Babala Wandu to the “Prosecution Appeal against the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcise Arido’” (ICC-01/05-01/13-727)

Source: Counsel for the Defence of Mr Fidèle Babala Wandu

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

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I PROCEDURAL HISTORY

1. On 20 November 2013, the Pre-Trial Chamber issued a warrant of arrest under seal for Mr Fidèle Babala, and for Messrs Jean-Pierre Bemba Gombo, Jean-Jacques Mangenda Kabongo Aimé Kilolo Musamba, and Narcisse Arido.¹
2. Mr Babala was arrested in Kinshasa during the night of 23 to 24 November 2013 and immediately transferred to The Hague where he remained in pre-trial detention until 21 October 2014.
3. On 21 October 2014, the Single Judge ordered the interim release of Mr Babala, and of Messrs Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Narcisse Arido² (“the Decision on Interim Release”).
4. On that same day, the Prosecutor filed an application requesting the Pre-Trial Chamber to grant an interim stay of the Decision on Interim Release,³ as well as a notice of appeal which included an urgent request for suspensive effect of the Decision pending the appeal.⁴
5. On 22 October 2014, the Pre-Trial Chamber rejected the Prosecution’s application as being “without merit”.⁵ The Appeals Chamber also rejected the Prosecution’s request for suspensive effect included in its notice of appeal of the same day.⁶
6. The Prosecution filed its appeal brief on 29 October 2004⁷ (“the Prosecutor’s Appeal”) to which the Defence of Mr Babala (“the Defence”) hereby responds.

II. STANDARD OF REVIEW AND PURPOSE OF THE RESPONSE

7. The Appeals Chamber has repeatedly explained its approach to appeals against decisions on interim release. In its judgment on the Defence appeal, the Appeals Chamber stated that:

In considering appeals in relation to decisions granting or denying interim release, the Appeals Chamber has previously held that it “will not review the findings of the Pre-Trial Chamber de novo, instead it will intervene in the findings of the Pre-Trial Chamber only

¹ ICC-01/05-01/13-1-Red2-T-ENG.

² ICC-01/05-01/13-703.

³ ICC-01/05-01/13-705.

⁴ ICC-01/05-01/13-706.

⁵ ICC-01/05-01/13-711, p. 4.

⁶ ICC-01/05-01/13-718.

⁷ ICC-01/05-01/13-727.

where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision.⁸

8. On this same point, in the *Ngudjolo* case, the Appeals Chamber held that:

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 misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues.⁹

9. The Appeals Chamber's approach to errors of fact was reiterated in the *Bemba* case:

The Appelas Chamber has held that a Pre-Trial or Trial Chamber commits such an error [of fact] if it missapreciates facts, disregards relevant facts or takes into account facts extraneous to the sub judice issues. In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber. In determining whether the Trial Chamber has missapreciated facts in a decision on interim release, the Appeals Chamber "will defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention". Therefore, the Appeals Chamber "will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it."¹⁰

10. With respect to errors of law, the Appeals Chamber held in the *Banda* case that "it will arrive at its own conclusions as to the appropriate law and determination whether or not the Trial Chamber misinterpreted the law".¹¹
11. The Prosecutor requests the Appeals Chamber to set aside the Decision on Interim Release and order the immediate return of Mr Babala to the Detention Centre, or in the alternative, remand the issue of the interim release of the suspects to the Pre-Trial Chamber. In support of its application, the Prosecution presents two grounds of appeal, contending that (i) the Single Judge erred in law and fact by incorrectly applying article 60(4) and (ii) he erred in fact by concluding that the personal assurances of the four suspects represent an adequate condition to address the continuing risks associated with their interim release.
12. The Defence wishes to demonstrate herein that the Prosecutor's appeal lacks merit because the Decision on Interim Release is founded in law and based on the correct assessment of the facts. The Prosecutor's Appeal is clearly at odds with the Single Judge's analysis thereby demonstrating the Prosecution's misinterpretation of the impugned decision.

⁸ ICC-01/05-01/13-559, para. 18.

⁹ ICC-01/04-01/07-572-OA4, para. 25.

¹⁰ ICC-01/05-01/08-2151-Red, para.16. Footnotes omitted.

¹¹ ICC-01/05-01/13-559, para. 20 citing ICC-02/05-03/09-295 OA 2, para. 20.

III. DEFENCE RESPONSE

13. Before addressing the Prosecution's arguments, the Defence notes with regret the Prosecution's approach of making general and abstract observations which refer to all the suspects in the case, without considering the particular circumstances of each suspect. This is in violation of rule 136(2) of the Rules of Procedure and Evidence ("RPE") which provides that, "[i]n joint trials, each accused shall be accorded the same rights as if such accused were being tried separately."
14. The Defence will: (a) demonstrate that the Decision on Interim Release is grounded in law; (b) prove that the Judge correctly concluded that the duration of detention had become unreasonable; and lastly (C) show that the personal assurances of Mr Babala are sufficient because there is no risk linked to his interim release.

A. Legal basis of the Decision on Interim Release

15. In the first ground of appeal, the Prosecutor claims that the Single Judge unreasonably and incorrectly applied article 60(4). However, the Prosecutor disregards the entirety of the Decision on Interim Release and, consequently, the statutory provisions cited by the Single Judge.
16. The Defence concurs with the Prosecutor that, "the Decision is economically worded and makes passing reference to various provisions of the Statute".¹² However, the Prosecutor has no legal basis to submit that the only reasonable interpretation is that the Single Judge based his decision on article 60(4).
17. On page four of the Decision on Interim Release, the Single Judge cites the following provisions on which the impugned Decision is based: "Noting articles 21, 58(1), 60(3), 60(4) and 67(1) of the Statute, rules 118(1), (2) and (3) and 119(1) of the Rules of Procedure and Evidence and regulation 51 of the Regulations of the Court".
18. In his analysis, the Single Judge assessed the suspects' risk of absconsion,¹³ and whether the duration of the detention was reasonable.¹⁴ Hence, it is clear that the Single Judge based his decision on several provisions. Nowhere in the impugned Decision is it stated that the sole legal basis of the decision is article 60(4). The

¹² Prosecutor's Appeal, para. 9.

¹³ Decision on Interim Release, p. 4, para. 4.

¹⁴ Decision on Interim Release, p. 4, para. 5.

Prosecutor appears to rely erroneously on the expression “inter alia, in article 60(4)”.¹⁵ However, the expression does not mean that this provision is the exclusive legal basis of the decision.

19. The Defence considers the Decision on Interim Release as based on all the legal provisions cited by the Single Judge. Nothing in this Decision proves otherwise. Hence, the Prosecutor’s submissions on this issue should be rejected as unfounded.
20. Despite the Prosecutor’s arguments that the Single Judge did not identify any material change in circumstances, the Defence submits that such change is evident in the fact that the duration of detention had become unreasonable relative to the crimes of which Mr Babala is accused. The Single Judge stated the paramount need to ensure that, as enshrined *especially*¹⁶ in article 60(4) of the Statute, the duration of pre-trial detention does not become unreasonable.

B. Unreasonable duration of detention

21. First of all, the Defence wishes to recall that, as regards errors of fact, the Appeals Chamber does not substitute its analysis and interpretation of facts for that of the Pre-Trial Chamber. The Appeals Chamber only intervenes in case of manifest error, where relevant facts have been disregarded or where external factors formed the basis of the decision.
22. The Prosecutor’s argument on this issue also lacks merit.¹⁷ Considering that the suspects (excluding Mr Bemba) have served one-fifth of the maximum sentence that the Chamber may impose for offences under article 70, how can the Prosecutor consider this duration of detention reasonable?
23. The Prosecutor’s argument is that the protracted duration of the proceedings is justified by: (i) the complexity of the proceedings; (ii) the number of accused; and (iii) the involvement of several States in the execution of the warrant and seizure of material.
24. Firstly, the case under article 70 does not have the same degree of complexity as the routine cases of the ICC. This point has been underscored by the Appeals Chamber as follows:

¹⁵ Decision on Interim Release, p. 4, para. 4.

¹⁶ Emphasis added.

¹⁷ Prosecutor’s Appeal, para. 24.

The Appeals Chamber emphasises that offences under article 70 of the Statute, while certainly serious in nature, cannot be considered to be as grave as the core crimes under article 5 of the Statute, being genocide, crimes against humanity, war crimes and the crime of aggression, which are described in that provision to be “the most serious crimes of concern to the international community as a whole.”¹⁸

25. That said, Mr Babala spent eleven months in detention, the same amount of time spent in detention by Messrs Bemba,¹⁹ Lubanga,²⁰ Katanga²¹ and Mbarushimana²² (twelve months) prior to the confirmation of charges. Irrespective of the Pre-Trial Chamber’s ruling on applicable penalties,²³ the seriousness of the crimes of which Mr Babala is accused cannot be compared to that of the most egregious crimes which affect the international community as a whole.
26. Secondly, to accept the argument regarding the number of accused persons and the States involved as justification for prolonged detention would be a clear violation of Mr Babala’s right to be tried separately in the proceedings pursuant to rule 136(2) RPE.
27. The Prosecutor submits that the Single Judge failed to take into consideration the necessary domestic procedures²⁴ applicable to the case, procedures which prolonged the detention period and negate the characterisation of this period as unreasonable. This amounts to nothing more than a misinterpretation of the Decision because the Single Judge expressly referred to this point:

Considering that a number of procedural developments – first and foremost, the time required by the Dutch authorities to make their and Independent Counsel’s final reports on the intercepted communications available to the Court - made it twice necessary to amend the calendar originally set for the completion of pre-trial proceedings, which completion has accordingly been delayed.²⁵

28. The Single Judge’s assertion that the duration of detention was not due to the Prosecutor’s inexcusable delay²⁶ does not preclude the conclusion that, given the gravity of the crimes of which Mr Babala is accused, the duration of his detention had become unreasonable.

¹⁸ ICC-01/05-01/13-559, para.1.

¹⁹ ICC-01/05-01/08-424.

²⁰ ICC-01/04-01/06-824.

²¹ ICC-01/04-01/07-717.

²² ICC-01/04-01/10-465.

²³ Maximum of five years for each count or five years for all the counts. See the Prosecutor’s submissions in the Prosecutor’s Appeal, pp. 8 and 9.

²⁴ Prosecutor’s Appeal, para 22, second point.

²⁵ Decision on Interim Release, pp. 4-5.

²⁶ Decision on Interim Release, p. 5, para. 2.

29. The Defence wishes to recall that under international standards, the general rule is liberty and detention is the exception.²⁷

C. Adequacy of personal assurances to appear

30. In the second ground of appeal, the Prosecutor claims that given the risk of absconsion presented by Mr Babala's release, mere assurances to appear are inadequate.

31. Firstly, the Defence would like to recall the Appeals Chamber's jurisprudence regarding the assessment of facts:

In determining whether the Trial Chamber has missappreciated facts in a decision on interim release, the Appeals Chamber "will defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention". Therefore, the Appeals Chamber "will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it."²⁸

32. The Prosecution fails to explain how the Single Judge erred, and merely challenges the assessment of the potential risks and the importance attached to particular circumstances by the Single Judge. Considering that the Appeals Chamber intervenes only if it cannot discern how the Chamber could reasonably reach a particular conclusion, the Defence respectfully requests that the Chamber reject the Prosecutor's second ground.
33. In a bid to address all the arguments, the Defence will file its submissions on the risk of absconsion and witness interference by Mr Babala.
34. By wilfully disregarding the particular circumstances of each suspect, the Prosecutor appears to have forgotten that there is no reason for Mr Babala to contact the witnesses in this case. No witness testified against him. The only witnesses who mentioned Mr Babala in their statements, [REDACTED], did so only to confirm that they did not know Mr Babala and that the lone contact they had with him was to confirm receipt of the bank transfer.²⁹

²⁷ See, for example, article 9(3) of The International Covenant on Civil and Political Rights ("it shall not be the general rule that persons awaiting trial shall be detained in custody"), Resolution 65(11) of the Committee of Ministers of the Council of Europe ("remand in custody should never be compulsory and should be regarded as an exceptional measure, used only when strictly necessary").

²⁸ ICC-01/05-01/08-2151-Red, para.16. Footnotes omitted.

²⁹ ICC-01/05-01/13-671-Conf, footnote on page 100.

35. [REDACTED] Mr Babala was not a member of the Defence team in the *Bemba* case and never had access to confidential information concerning witnesses. Mr Babala does not know any witness; he only knew their names through this case. Mr Babala does not know any other detail. It is therefore impossible for him to contact them and he has no motive to do so.
36. If mere knowledge of a witness' identity renders interim release impossible on grounds of risk of witness subornation, then every accused person before the Court will have to "[TRANSLATION] choose between one statutory right – the right to disclosure of evidence necessary to mount a defence (article 64(3)(c), which would perforce contain information on witnesses, and the right to seek interim release, also recognised by the Statute."³⁰
37. There is no testimonial evidence against Mr Babala. He has no interest in carrying out reprisals against witnesses.
38. The Prosecutor's claim that the risk of witness interference can only be remedied by monitoring all communication means available to Mr Babala denies the possibility of conditional release to all suspects of offences under article 70 of the Statute by negating the relevance of the Statute's provisions on conditional release, and violates the fundamental right to liberty.

B. The need for continued detention to ensure Mr Babala's presence at trial

39. The Prosecutor devotes only two paragraphs to analysis of the need for detention, still referring to all the suspects jointly, in breach of rule 136(2) RPE.
40. As usual, the Prosecutor's submissions are sweeping and abstract generalisations:

The strength of the Prosecutor's case provides the suspects' with a commensurate motivation to avoid appearing for trial, should the charges be confirmed. (...) In the circumstances, the risk of conviction alone substantially undermines the likelihood that if released, the suspects will voluntarily appear at trial.³¹

³⁰ Dov. Jacobs, *Article 60*, dans *Statut de Rome de la CPI, Commentaire article par article*, sous la direction de Julian Fernandez et Xavier Pacreau, Editions A Pedone, tome 2, 2012, p. 1374. Referred to in the *Lubanga* case, Appeals Chamber, Judgment in the Appeal by Lubanga against Trial Chamber I's decision titled the Decision on Mr Lubanga's request for interim release, 13 February 2007, para. 136.

³¹ Prosecutor's Appeal, paras. 22 and 23.

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41. It could be said that every suspect who appears before a court risks absconding and failing to appear at trial for fear of being convicted. The Prosecutor provides no details as to the risk that Mr Babala, considering his professional and personal circumstances, could fail to appear at trial.
42. According to the case law of the European Court of Human Rights, arguments for and against release cannot be general and abstract,³² like those submitted by the Prosecution in its appeal.
43. The Prosecution fails to present any legal arguments specific to Mr Babala's circumstances. Hence, the Prosecution's position on this point should not be taken into consideration.³³

CONCLUSION

44. In light of the foregoing, the Defence respectfully requests that the Appeals Chamber dismiss the Prosecutor's appeal as unfounded.

AND JUSTICE SHALL BE DONE.

RESPECTFULLY SUBMITTED

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

[signed]

Dated this 16 December 2014
 At Deenderleeuw, East Flanders, Belgium

³² European Court of Human Rights, *Clooth v Belgium*, Judgment of 12 December 1991, para. 44.

³³ [REDACTED].