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Date: 22 January 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR v.

***Jean Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean Jacques Mangenda
Kabongo, Fidèle Babala Wandu and Narcisse Arido***

Public Redacted document

**Public redacted version of the Amended and corrected version of Prosecution
Response to the “Requête urgente de la Défense sollicitant la mise en liberté
provisoire de monsieur Fidèle Babala Wandu” of 3 January 2014 (ICC-01/05-01/13-
38), filed on 10 January 2014 [ICC-01/05-01/13-81-Conf-AnxA]**

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The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Jean-Pierre Bemba

Nicholas Kaufman

Counsel for the Defence of Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for the Defence of Jean – Jacques Mangenda Kabongo

Jean Flamme

Counsel for the Defence of Fidele Babala Wandu

Jean Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations

Other

Introduction

1. The Prosecution hereby opposes Fidèle Babala Wandu's ("Babala") request for provisional release in its entirety ("Request").¹ The Request advances no cogent reasons why provisional release should be granted. On the contrary, the same reasons warranting his arrest justify his continued detention, pursuant to Articles 60(2) and 58(1) of the Rome Statute ("Statute").
2. The nature of the crimes for which Babala has been arrested—offences against the administration of justice—underscores why provisional release here is wholly inappropriate. Babala's active participation in a scheme committed to corrupting witnesses and presenting contrived evidence in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* ("Bemba case") removes any doubt about the propriety of his detention pending trial.
3. Given Babala's direct interest in the outcome of these proceedings, he now has an even greater incentive to persist in the unlawful conduct for which he was arrested concerning the *Bemba* case, in which he had no such interest. As set out below, there are reasonable grounds to believe that, if released, Babala would not respect the conditions of his release, would not appear voluntarily at future proceedings, and would interfere with the ongoing investigations and likely commit further offences in violation Article 70 of the Statute to secure his interests in this case. For these reasons, the Request should be denied and Babala should remain in custody.

Procedural history

4. On 19 November 2013, the Prosecution filed an application for a warrant of arrest ("Application") against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-

¹ ICC-01/05-01/13-38-Corr filed on 13 December 2013 intended to supersede the "Requête urgente de la Défense sollicitant la mise en liberté provisoire".

Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (together, the “Suspects”) for alleged offences against the administration of justice pursuant to Article 70 of the Statute.²

5. The Single Judge issued a warrant of arrest for the Suspects on 20 November 2013,³ pursuant to which Babala was arrested at his residence in Kinshasa, Democratic Republic of the Congo (“DRC”) on 23 November. He was transferred to the Court’s Detention Center on 26 November.
6. On 12 December 2013, Babala filed his Request,⁴ upon which the Single Judge ordered the Prosecutor and the relevant authorities of the DRC and of the Kingdom of the Netherlands to submit their views on the Request no later than 3 January 2014.⁵

Confidentiality

7. This present filing is classified as “Confidential” as it contains information not yet accessible to the public. The Prosecution will file a public redacted version as soon as practicable.

Submissions

8. The Request advances no compelling reasons for interim release in the circumstances. To the contrary, the conditions underpinning the necessity for Babala’s continued detention as provided in Articles 58 and 60(2) are fully satisfied.

² Prosecution’s Application for Warrant of Arrest (“AWA”) filed under seal, ICC-01/05-67-US-Exp. The AWA and its supporting materials were reclassified as confidential on 27 November 2013, ICC-01/05-67-Conf.

³ ICC-01/05-01/13-1-US-Exp-tENG. The Warrant of Arrest was unsealed on 28 November 2013, ICC-01/05-01/13-1-Red2-tENG.

⁴ ICC-01/05-01/13-38. The next day, 13 December 2013, Babala’s Defence filed a corrigendum ICC-01/05-01/13-38-Corr. The Prosecution responds to the Corrigendum as it is intended to supersede the earlier version of the Request.

⁵ ICC-01/05-01/13-40.

9. Pursuant to Article 60(2), a person shall continue to be detained if the Pre-Trial Chamber “is satisfied that the conditions set forth in article 58, paragraph 1, are met.” In reaching a decision pursuant to Article 60(2), the Pre-Trial Chamber must decide “in light of the material placed before it.”⁶
10. While the Pre-Trial Chamber’s power is “not conditioned by its previous decision to direct the issuance of a warrant of arrest,”⁷ the factors underpinning the decision to issue a warrant of arrest may be the same as those for a taken decision under Article 60(2). In particular, “a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chamber’s decision.”⁸ Moreover, the Appeals Chamber confirms that when assessing the need for continued detention a *prima facie* test of necessity is applied.⁹
11. Clearly suspects have a fundamental right to be presumed innocent and detained exceptionally under human rights law.¹⁰ However, for crimes over which this Court has jurisdiction, both the Statute and the Court’s jurisprudence establish conditions that, if satisfied, require a suspect’s detention.
12. Here, the evidence satisfies the three limbs of Article 58(1)(b) that “define[...] the legal framework within which justification of his detention may be examined.”¹¹ In the *Ntaganda* case, the Pre-Trial Chamber confirmed that “the evidence presented in relation to the necessity of continued detention for the purpose of article 58(1)(b) of the Statute does not have to be of the same nature and strength

⁶ ICC-01/04-01/07-572 (OA 4), para. 12, cited in ICC-02/11-01/11-278-Red (OA), para. 23.

⁷ ICC-01/04-01/07-572 (OA 4), para. 10, cited in ICC-02/11-01/11-278-Red (OA), paras. 23, 27.

⁸ ICC-02/11-01/11-278-Red (OA), para. 27.

⁹ ICC-01/04-01/07-572 (OA 4), para.21: “[w]hat may justify arrest (and in this context, continued detention) under article 58(1)(b) of the Statute is that it must ‘appear’ to be necessary. The question revolves around the **possibility, not the inevitability**, of a future occurrence.[...]” (emphasis added); para. 24: “The possibility of ...absconding remains visible. No material was placed before the Pre-Trial Chamber revealing such a possibility as imaginary.”

¹⁰ ICC-01/05-01/13-38-Corr, paras. 9-14.

¹¹ ICC-01/04-01/07-572 (OA 4), para. 12.

as the evidence required to establish reasonable grounds to believe that the person has committed one or more crimes referred to in the Prosecutor's application, in accordance with article 58(1)(a) of the Statute.”¹²

13. Babala was arrested on the basis of evidence that clearly satisfied Article 58(1)(a) and (b). In accordance with Article 58(1)(a), the Single Judge determined that there existed reasonable grounds to believe that Babala had committed crimes against the administration of justice pursuant to Article 70, specifically that:

- i. he, in accordance with Jean-Pierre Bemba’s (“Bemba”) instructions, directly or indirectly disbursed sums of money to Defence witnesses and/or members of their families, and to Aimé Kilolo (“Kilolo”) and Jean-Jacques Mangenda (“Mangenda”);
- ii. he frequently called Defence witnesses, and took part in several privileged-line conference calls with Bemba and Kilolo;
- iii. he acted as an intermediary in the transmission of the Accused’s [Bemba] instructions to members of his family; and [that]
- iv. he used coded language to discuss financial matters with the Accused.¹³

14. Contrary to the Request, the relevant standard of proof to justify an arrest and detention does not require the Chamber to examine the evidence proffered “*contradictoirement*,”¹⁴ but merely to establish the likelihood of a future occurrence on the basis of the evidence presented.¹⁵ Appeals Chamber jurisprudence confirms that “[w]hat may justify arrest (and, in this context, continued detention) under article 58(1)(b) of the Statute is that it must ‘appear’

¹² ICC-01/04-02/06-147, para. 47.

¹³ ICC-01/05-01/13-1-Red2-tENG, para. 18. See also ICC-01/05-67-Conf, esp. para. 85.

¹⁴ ICC-01/05-01/13-38-Corr, para. 12.

¹⁵ ICC-01/04-01/07-572 (OA 4), para 21.

to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence.”¹⁶

15. It must be noted that when issuing the warrant of arrest against the Suspects, the Single Judge was satisfied that the arrest was necessary for all three grounds under Article 58(1)(b).¹⁷ In so doing, the Single Judge specifically noted that the Prosecution’s submission included “numerous, objective, specific and detailed items of evidence” in relation to the alleged criminal conduct of each of the Suspects, and that this record amounts to a “considerable and indeed quite a remarkable quantity of items of evidence which furnish objective and incriminating information and details pertaining directly and specifically to the Prosecutor’s factual allegations.”¹⁸

I. Article 58(1)(b)(i) - continued detention is necessary to ensure appearance at trial

a. *Babala is likely to abscond if released from detention*

16. Babala is unlikely to appear for trial unless compelled to do so. He faces charges carrying a penalty of up to five years imprisonment. Additionally, he faces potentially serious fines. The Appeals Chamber has accepted that “the gravity of the charges and the resulting expectation of a lengthy prison sentence are relevant factors for decisions on interim release,”¹⁹ and that “[e]vading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail.”²⁰

¹⁶ ICC-01/04-01/07-572 (OA 4), para. 21, cited in ICC-02/11-01/11-278-Red (OA), para.56.

¹⁷ ICC-01/05-01/13-1-Red2-tENG, paras. 21-23.

¹⁸ ICC-01/05-01/13-1-Red2-tENG, para. 12. See ICC-01/05-67-Conf and corresponding annexes.

¹⁹ ICC-02/11-01/11-278-Red (OA), para. 54, citing *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-283 (OA), para. 21.

²⁰ ICC-01/04-01/07-572 (OA 4), para. 21.

17. The possible sanctions in this case comprise a considerable incentive for Babala to abscond. Given that Babala is a DRC Member of Parliament and Bemba's right-hand man, the political consequences of his potential imprisonment provide further motivation for him to evade justice.

18. The Request implies that the nature of the offences alleged against Babala merit provisional release.²¹ However, it is the nature of these crimes with which he is charged that demonstrate precisely the opposite — a total disregard for the administration of justice of this Court. Babala's personal, public and solemn promise to appear at trial does not outweigh the palpable risk of flight in these circumstances. To ensure his appearance at trial he must remain in custody; no less stringent measure is available or appropriate.

b. Babala has the means to abscond if released from detention

19. It is sufficient for the Chamber to establish that it is *possible* that a suspect has the necessary assets to abscond, if that risk is established on the basis of concrete evidence.²²

20. As the Single Judge has found, Babala, as a DRC parliamentarian, and close associate of Bemba for years as his *Chef de cabinet* and principal political adviser during his time as DRC Vice-President, has numerous contacts, including at the international level, and is able to travel freely, including to non-States parties.²³

21. As Bemba's loyal and trusted *homme de confiance*, Babala has a large network of supporters, including members of the MLC, who could assist his flight.²⁴ As the Appeals Chamber in *Gbagbo* held, "[t]he existence of a political party that supports the detained person is a factor that is relevant to the determination of

²¹ ICC-01/05-01/13-38-Corr, paras. 12, 18.

²² ICC-02/11-01/11-278-Red (OA), para. 56.

²³ ICC-01/05-01/13-1-Red2-tENG, para. 22.

²⁴ [REDACTED].

whether the continued detention appears necessary under article 58(1)(b)(i) of the Statute, because such support could indeed facilitate absconding.”²⁵

22. Babala has been Bemba’s key financial manager and one of the few people trusted with Bemba’s finances.²⁶ [REDACTED].²⁷ In a conversation [REDACTED].²⁸
23. In the scheme resulting in his arrest, Babala has acted as the “wire” between Bemba and his family and staff, passing on Bemba’s instructions to them.²⁹
24. Further, under Bemba’s instructions,³⁰ Babala provided payments to Bemba Defence witnesses and transferred money to them and/or their relatives, as well as to co-suspects Kilolo and Mangenda.³¹ Babala transferred these funds both directly and indirectly.³² He transferred at least [REDACTED].³³ To Mangenda and Kilolo, he transferred [REDACTED].³⁴ In sum, the call data records and the evidence of bank transfers demonstrate that he corruptly influenced Defence witnesses in exchange for false testimony and documents, on behalf of Bemba.
25. These facts reasonably show that Babala likely has access to substantial funds even if his personal accounts have been frozen. The fact that there exists a *possibility* – let alone a strong likelihood - that Babala has the financial means to abscond is already enough to reject his application, “[e]ven if there was no evidence that funds had been or definitely would be used for such purposes.”³⁵

²⁵ ICC-02/11-01/11-278-Red (OA), para. 59.

²⁶ ICC-01/05-67-Conf, para. 70.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ ICC-01/05-67-Conf, para. 72, [REDACTED].

³⁰ See, for example, [REDACTED].

³¹ ICC-01/05-67-Conf, paras. 70, 71.

³² ICC-01/05-67-Conf, paras 5-6, 74, 76, 78-80. See, for example, [REDACTED].

³³ [REDACTED].

³⁴ [REDACTED].

³⁵ ICC-01/04-01/10-283 (OA), para. 25.

26. If released, Babala can travel within the Schengen area of the European Union,³⁶ allowing him to “move from one country to another each time he suspects that he is at risk of being apprehended” and thus “mak[ing] it easier for him to flee.”³⁷ He can also access other countries, including non-States parties.
27. Contrary to the Defence’s assertion, the fact that Babala is in possession of a diplomatic passport would further facilitate his ability to travel freely rather than hamper it. The authorization needed from various entities of the DRC before travelling is not an argument carrying much weight due to the size of the DRC, its relative instability in certain regions and its porous borders. Babala’s involvement with the MLC would provide him with the means to flee within the DRC or to neighboring countries. Therefore, even with concrete guarantees from the DRC authorities to restrict his travels from Kinshasa, his ability to abscond remains significant. The DRC authorities were unable to execute, for instance, the arrest warrant against Bosco Ntaganda for six years at a minimum.³⁸

c. Babala’s personal guarantees are insufficient

28. Babala’s personal word that he will appear before the Court³⁹ is manifestly insufficient to mitigate the risks arising under Article 58(1)(b). The personal guarantee cannot be determinative in assessing conditional release; in the *Bemba* case the Defence advanced a list of personal guarantees, which the Pre-Trial Chamber “consider[ed],” but ultimately did not use in its determination on interim release.⁴⁰ His level of education, the position he holds or his personal

³⁶ Comprising 26 countries: European Commission, “Schengen Area”, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/>. Schengen Agreement of 1985 on Schengen cooperation, as incorporated into the EU legal framework by the 1997 Treaty of Amsterdam: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/.

³⁷ ICC-01/04-01/10-163, para. 57.

³⁸ The warrant of arrest against Bosco Ntaganda was issued on 22 August 2006 under seal. The redacted version of the arrest warrant was made public on 6 March 2007.

³⁹ ICC-01/05-01/13-38-Corr, para. 45.

⁴⁰ ICC-01/05-01/08-475, para. 82; *see also* ICC-01/05-01/08-631-Red (OA 2), para. 10; ICC-01/05-01/08-321, para. 37; ICC-01/05-01/08-403, para. 50; and ICC-02/11-01/11-180-Red, para. 55.

conviction of his innocence are hardly relevant factors when considering his Request.⁴¹

29. An “analysis of all relevant factors taken together”⁴² in this particular case shows that Babala is likely to abscond, and has the means to do so. His continued detention is therefore necessary and appropriate to ensure his future appearance at trial.

II. Article 58(1)(b)(ii) - continued detention is necessary to ensure that Babala does not obstruct or endanger the investigation or the Court proceedings

30. There is a high risk that, if released, Babala would obstruct and endanger the investigation of the crimes for which he has been arrested. Babala’s access to witnesses and documentary evidence in the case would provide him with a continued means and opportunity to conceal or fabricate evidence, compounding the crimes for which he is suspected to have committed. Babala has already demonstrated his willingness to unlawfully interfere with witnesses during the *Bemba* case, and has every motive to continue doing so with his personal liberty now at stake.⁴³ While the possibility for Babala to continue influencing and corrupting witnesses exists from the Detention Centre even in a monitored environment, there is unlimited possibility for him to do so if he is released. He would then have unrestricted access to persons via telephone, email and internet, regardless of the country in which he is located.

31. In fact, the Single Judge found that the conduct that may constitute offences against the administration of justice has continued from at least early 2012, and in all likelihood continues to date, making it necessary to prevent the Suspects

⁴¹ ICC-01/05-01/13-38-Corr, para. 26.

⁴² ICC-01/05-01/08-323 (OA), para. 55.

from further obstructing or endangering the investigation or the trial, and so that the commission of the crime does not continue.⁴⁴

32. In the *Gbagbo* case, the Appeals Chamber confirmed that the disclosure of evidence to a suspect “amplified” the risk to the investigation and the proceedings in case of release, noting that “[d]isclosure enhances the detainee’s knowledge of the Prosecutor’s investigation. Therefore, under article 58(1)(b)(ii) of the Statute it may be a relevant factor.”⁴⁵ Given that the arrest warrant application and the underlying evidence has been available to Babala since 27 November 2013, Babala’s means and opportunity to act have increased since his arrest.

33. Babala has access now to documentary evidence and potential witnesses in this case. While his incarceration provides certain limits to his capacity to act against witnesses, Babala retains the ability to communicate from the ICC Detention Centre. If he were to be released, there would obviously exist no means of curtailing his communications and ability to act against witnesses.⁴⁶

34. As the evidence submitted to the Chamber shows, Babala played a significant role early on and throughout the bribery scheme; he transferred money to Defence witnesses, pursuant to Bemba’s instructions and with the assistance of [REDACTED] associates.

35. The evidence collected and disclosed to Babala reveals his full knowledge of the purpose of these payments and his part in furthering the bribery and corruption scheme.⁴⁷ The call data reports show his participation in conference calls with

⁴⁴ ICC-01/05-01/13-1-Red2-tENG, para. 23.

⁴⁵ ICC-02/11-01/11-278-Red, para. 65.

⁴⁶ See ICC-01/04-01/06-586-t-EN, p.6 where PTCI denied a request for provisional release based in part on the risk posed by unmonitored communications.

⁴⁷ For instance, Babala’s conversations with Bemba, [REDACTED], reveal Babala’s knowledge that the funds were being transferred to Defence witnesses [REDACTED].

Bemba and Kilolo on [REDACTED]. The Prosecution has advanced evidence on [REDACTED].⁴⁸

36. For these reasons, it is necessary Babala should remain in custody since he has a strong and direct motive to interfere with the investigations and proceedings before this Court. His means to do so are evidenced by the ease with which he was able to access and transfer funds, and dictate instructions to witnesses.

III. Article 58(1)(b)(iii) - continued detention is necessary to prevent the commission of crimes

37. Continued detention is necessary to prevent Babala from continuing with the commission of crimes within the jurisdiction of the Court in the context of current investigations and prosecutions, in particular under Article 70. The conduct that may constitute Article 70 offences has continued, unabated, since early 2012. The risk that such conduct would continue in the context of the case where Babala himself is a party is greatly increased.

38. The Prosecution need not determine exactly what crimes Babala may commit. The Appeals Chamber has held that, “[t]he reason for detention under article 58(1)(b)(iii) of the Statute is the risk that further crimes may be committed – therefore the issue is *future* crimes, which by their nature cannot be specified in detail.”⁴⁹ The Appeals Chamber has confirmed that the Chamber may take into account the nature of the crimes with which a suspect has been already charged in its determination.⁵⁰ The potential crimes that Babala could commit in the context of this investigation can be anticipated, nonetheless, given the nature of the crimes for which he has been arrested.

⁴⁸ [REDACTED].

⁴⁹ ICC-02/11-01/11-278-Red (OA), para.70 (original emphasis).

⁵⁰ ICC-02/11-01/11-278-Red (OA), para.70.

39. Babala has the ability and the means to commit crimes and influence the Prosecution's ongoing investigation, particularly given his proximity to Bemba's supporters' network. As the Appeals Chamber has confirmed, "it is not an unreasonable prediction that phone calls or e-mails may be used to continue to contribute to the commission of crimes."⁵¹ If released, there is, at a minimum the risk that Babala could commit further offences under Article 70 of the Statute, regardless of his location.⁵²

IV. The arrest warrant is appropriate at this stage of the proceedings

40. The Defence's arguments that the issuance of an arrest warrant may not be appropriate at the "pre-trial stage" of the proceedings⁵³ and that the conditions of his arrest were deplorable and in violation of Congolese law⁵⁴ warranting his right to be released are specious.

41. First, Article 58(1)(a) states unambiguously that an arrest warrant will be issued "at any time after the initiation of an investigation," provided that the relevant conditions are met. To interpret it otherwise would be contrary to the intent of the Statute's drafters as it would frustrate the very purpose of an arrest warrant: suspects who met the conditions for arrest would have ample time and opportunity at any stage of the proceedings to abscond and/or interfere with the on-going investigations and/or commit further crimes.

42. Additionally, the Pre-Trial Chamber in the *Ntaganda* case has noted that Article 58(1)(b) is an assessment on the suspect's likelihood of "appear[ing] at the confirmation of charges hearing and by implication at trial if the charges (all or

⁵¹ ICC-01/04-01/10-283 (OA), para.60.

⁵² ICC-01/05-01/13-38-Corr, para. 54.

⁵³ ICC-01/05-01/13-38-Corr, para. 43.

⁵⁴ ICC-01/05-01/13-38-Corr, para. 22.

any) are confirmed.”⁵⁵ Any interpretation of the Statute that excludes the confirmation hearing from this assessment is erroneous.

43. Second, the circumstances of Babala’s arrest are not at issue in this matter. However, the Prosecution notes that Babala did not substantiate his allegations regarding the illegality of his arrest pursuant to DRC law, nor did he file such a complaint before the DRC’s judicial system.⁵⁶

44. Last, when considering a petition for interim release the Pre-Trial Chamber’s assessment is circumscribed by Article 58(1)(a) and (b): the Chamber must determine whether the conditions for maintaining Babala in detention are met. These conditions were met when Babala was arrested and continue to be met today which warrant Babala’s detention.

Relief Requested

45. For the foregoing reasons, the Prosecution respectfully requests that the Chamber deny the Request and order Babala’s continued detention.



Fatou Bensouda,
Prosecutor

Dated this 22nd day of January 2014

At The Hague, The Netherlands

⁵⁵ ICC-01/04-02/06-147, para. 54.

⁵⁶ ICC-01/05-01/13-38-Corr, para. 22.