

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 12 December 2013

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGUENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO***

Public Document

**Corrigendum to Urgent Defence application for the interim release of Mr Fidèle
Babala Wandu**

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. PROCEDURAL HISTORY

1. On 23 November 2013, at 2.40 a.m., Mr Fidèle Babala Wandu was arrested at his home in Kinshasa pursuant to a warrant of arrest issued by the Single Judge of Pre-Trial Chamber II (“the Chamber”) on 20 November 2013.
2. On 26 November 2013, Mr Fidèle Babala Wandu (“the Applicant”) was transferred to The Hague and imprisoned at the Scheveningen detention centre, where he remains to date.
3. On 27 November 2013, he made his initial appearance before the Chamber.
4. On 4 December 2013, the first status conference was held, during which the Prosecutor informed the Chamber and the Defence, amongst other things, that she intended to continue her investigations.
5. After analysing the Prosecutor’s statements and considering the particularities of the case and his own situation, Mr Fidèle Babala Wandu has decided to submit this application whose basis (II) needs to be clarified, as the extension of his detention may cause him significant and almost irreparable harm (III), and as the applicant has undertaken to abide by any conditions which the Chamber might deem necessary and fair to impose upon him (IV).
6. First of all, considering the serious personal harm which may result from extension of his detention, the applicant prays the Chamber to handle his application urgently and to set, for the Prosecutor and any other party wishing to respond,¹ a response time limit shorter than the one provided for under regulation 34(b) of the Regulations of the Court, pursuant to regulation 35(1) of the Regulations.

¹ Regulation 24 of the Regulations of the Court.

II. BASIS OF THE APPLICATION

7. The basis of the application is twofold: (A) legal and (B) factual.

A. LEGAL BASIS

8. This application is based on universally accepted legal principles enshrined in the Court's founding instruments, namely (a) the presumption of innocence; (b) its corollary which makes liberty the rule and detention the exception in criminal proceedings; (c) the Prosecutor's obligation to investigate incriminating and exonerating circumstances equally; and (d) the option available to the Prosecutor to use a summons to appear as a means to bring certain persons before the Court.

a) The principle of the presumption of innocence

9. Article 66(1) of the Statute states, "Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law." This principle requires that as long as the guilt of a person suspected of having committed a crime has not been established by means of irrefutable evidence, the judicial authorities must respect his or her fundamental rights and avoid employing extreme measures which are unnecessary for the administration of justice.

10. The 26 August 1789 Declaration of the Rights of Man and the Citizen eloquently expresses this requirement even when a suspect must be arrested. Article 9 of the Declaration reads as follows:

[TRANSLATION] As every man is held innocent until found guilty, if arrest be deemed indispensable, all harshness unnecessary to the securing of his person shall be severely repressed by law.

11. The principle of the presumption of innocence, when applied in criminal proceedings, means that appearing before the court while at liberty is the rule, with detention being the exception.

b) Liberty is the rule, and detention the exception

12. This fundamental rule, enshrined almost universally in the procedural rules of democratic nations, means that the mere commission of an offence does not constitute automatic justification for the detention of the accused. As the accused is presumed innocent, he or she has the right to seek leave to remain at liberty when appearing before the judge, who alone has the power to rule for or against continued detention, after hearing the accused, examining prosecution evidence in adversarial proceedings and assessing any risk likely to undermine the integrity of the proceedings. Detention is thus the exception and is only justified if certain conditions are met.

13. It is evident from articles 55(1)(d), 58, 59 and 60 of the Statute that the principle of liberty applies at the ICC and is fully consistent with the principle of the presumption of innocence.

14. This is also enshrined in various international instruments, to wit: (1) article 9(3) of the International Covenant on Civil and Political Rights, which provides that it shall not be the general rule that persons awaiting trial shall be detained in custody; (2) paragraph 6(1) of the United Nations Standard Minimum Rules for Non-custodial Measures and paragraph 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which states that pre-trial detention shall be a means of last resort;² (3) article 6 of the

² United Nations Standard Minimum Rules for Non-custodial Measures, Off. Doc. UN GA A/RES/45/110 (14 Dec. 1990) (The Tokyo Rules), Annex, para. 6(1). Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Off. Doc. UN GA A/RES/43/173 (9 Dec. 1988) ("Principles on Detention"), Annex, principle 39.

Charter of Fundamental Rights of the European Union and articles 5(1) and 5(3) of the European Convention on Human Rights, which also provide that everyone detained during his or her trial shall be “entitled to trial within a reasonable time or to release pending trial”.

15. That detention is an extraordinary measure is also evident in article 60(2) of the Statute, which provides that,

A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

16. Analysis of article 60(2) reveals that the onus is on the Prosecutor to prove the need for detention, as also established in the case law of the European Court of Human Rights.³ Indeed, this article 60(2) requires that the Pre-Trial Chamber be satisfied that the conditions set forth in article 58(1) are met if the person is to continue to be detained. The onus is on the Prosecutor to provide evidence that the article 58(1) conditions are met in order to convince the Chamber of the need to apply the measure.

17. The Defence will demonstrate in its submissions *infra* that the article 58(1) statutory conditions are not met and that the continued detention of Mr Fidèle Babala Wandu is therefore not justified.

18. Before engaging in such demonstration, which is intrinsically linked to the factual basis of this application, the Defence considers it necessary to highlight the particularity of this case, which involves proceedings relating not directly to war crimes or crimes against humanity but to corruptly influencing witnesses and presenting false or forged evidence. The Prosecutor alleges that Mr Fidèle Babala

³ See, in particular, *Hutchinson Reid v. UK* –ECtHR, 20 February 2003.

Wandu is criminally liable for several offences against the administration of justice, described in the following counts:

Count 1. Corruptly influencing witnesses, within the meaning of article 70(1)(c) of the Statute, read with article 25(3)(a), by bribing witnesses to provide false testimony in the Case.

Count 2. Presenting 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.⁴

19. Mr Fidèle Babala Wandu has continuously expressed his surprise at these allegations. He is awaiting disclosure of the evidence in the Prosecutor's possession so as to be able to challenge it on legal and factual grounds, and to prove his innocence, which the Prosecutor would have ascertained had she taken care to comply with all of her statutory obligations.

20. With particular regard to the second count, without reference to any document presented in the main case but, rather, simply applying purely logical reasoning, the Applicant wonders: how did the Prosecutor come to declare certain Defence documents false absent any judicial decision characterising them thus? Given that the bench has yet to rule on the documentary evidence presented in the main case, the Prosecutor's assessment in this regard can be nothing more than speculation.

c) The Prosecutor's obligation to investigate incriminating and exonerating circumstances equally

21. Pursuant to article 54(1) of the Statute, in order to establish the truth, the Prosecutor must extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute and, in so doing, investigate incriminating and exonerating circumstances equally.

⁴ Warrant of Arrest, ICC-01/05-01/13-1-Red 28-11-2013.

22. The Applicant submits that if, upon completing her preliminary investigations, the Prosecutor had only interviewed him, she would not have arrested him, much less in such a deplorable manner. He states that he was arrested at night, at 2.40 a.m., at his home in Kinshasa, in flagrant violation of the Constitution and Code of Criminal Procedure of the DRC.
23. Moreover, national television was saturated with images of his night-time arrest, showing Mr Fidèle Babala Wandu in particularly humiliating and degrading circumstances, thereby constituting an outrageous violation of his right to dignity. He reserves the right to return to this matter in due course.
24. The Applicant wishes to highlight here that if the Prosecutor had investigated his character, she would not have had an arrest warrant issued against him. It would have been more efficient and fairer for her to issue him a summons to appear, with which he would have complied without prevarication or refusal, sure as he is of his innocence in this matter.
25. The Applicant stresses that although he could have appealed to the national authorities to examine the lawfulness of his arrest, he willingly agreed to appear promptly before the ICC in order to ensure the determination of the truth.

d) Summons to appear as a more appropriate method of remand in this instance

26. As every lawsuit must be informed by the principle of the presumption of innocence, any deprivation of liberty must be predicated on the principles of necessity and proportionality. In international law, a measure is considered proportionate only if it is suitable and necessary and its magnitude and scope bear a reasonable relationship to its intended purpose. Accordingly, procedural measures should be neither capricious nor excessive. If a more lenient measure

than detention is sufficient, it must be applied.⁵ In light of his upbringing, level of education, official duties, sense of honour, clean police record and conviction that he is innocent, the Applicant could have appeared before any judicial authority, be it national or of the ICC, to answer any questions without equivocation. A summons to appear rather than a warrant of arrest would have been amply sufficient to secure Mr Fidèle Babala Wandu's appearance before the ICC.

27. Indeed, it is important that the justice administered before this august Court be a model of impartiality and adherence to the fundamental principles of law. This case afforded the Prosecutor an opportunity to make use of a summons to appear as provided for in article 58(7) of the Statute.

28. This possibility is also expressly cited in article 60 of the Statute governing initial proceedings before the Court. Paragraph 1 thereof reads:

Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.⁶

29. The Defence notes that the Court has already experimented with this humane manner of appearance in order to ensure the equitable administration of justice. We need look no further than the situation in Darfur (Sudan) in which the case of Bahar Idriss Abu Garda now serves as a reference.⁷

⁵ *Prosecutor v. Prlic et al., Order on Provisional Release of Berislav Pušić*, Case No. IT-04-74-PT, T. Ch. I, 30 July 2004, para. 15; *Prosecutor v. Limaj et al., Decision on Fatmir Limaj's Request for Provisional Release*, Case No. IT-03-66-AR65, Bench of the Appeals Chamber, 31 October 2003, para. 13; *Prosecutor v. Brdjanin and Talic, Decision on the Motion for Provisional Release of the Accused Momir Talic*; Case No. IT-99-36-T, T. Ch. II, 20 September 2002, para. 23; *Prosecutor v. Mrdja, Decision on Darko Mrdja's Request for Provisional Release*, Case No. IT-02-59-PT, T. Ch. II, 15 April 2002, para. 31; *Prosecutor v. Blagojevic et al., Decision on Request for Provisional Release of Accused Jokic*, Case No. IT-02-60-PT, T. Ch. II, 28 March 2002, para 18; *Prosecutor v. Hadžihasanovic et al, Decision Granting Provisional Release to Enver Hadžihasanovic*, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, para. 8.

⁶ Passages italicised by the Defence.

⁷ Case ICC-02/05-02/09, *The Prosecutor v. Bahar Idriss Abu Garda*.

30. Mr Abu Garda, the president and general coordinator of operations of the United Resistance Front, was charged by the Prosecutor with serious crimes, namely:

- violence to life, in the form of murder, whether committed or attempted, within the meaning of article 8(2)(C)(i) of the Statute;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission, within the meaning of article 8(2)(e)(iii) of the Statute;
- pillaging, within the meaning of article 8(2)(e)(v) of the Statute.

31. The Prosecutor alleged that there were reasonable grounds to believe that Mr Abu Garda was criminally responsible, as a co-perpetrator or an indirect co-perpetrator of the aforementioned three war crimes under article 25(3)(a) of the Statute. Despite the seriousness of the allegations, Mr Abu Garda was the subject not of an arrest warrant but, rather, of a summons to appear issued under seal on 7 May 2009 and unsealed on 17 May 2009. He was not detained by the ICC. His voluntary initial appearance took place on 18 May 2009. Following the confirmation of charges hearing, held on 19-29 October 2009, Pre-Trial Chamber I, ruling on 8 February 2010, declined to confirm the charges against Mr Abu Garda.⁸ On 23 April 2010, Pre-Trial Chamber I rejected the Prosecutor's application for leave to appeal the confirmation decision – that is, the decision declining to confirm the charges.⁹

32. In the Darfur situation, reference can also be made to the case of Mr Abdallah Banda Abakaer Nourain, the Commander-in-Chief of the Justice and Equality Movement – Collective Leadership (JEM-CL), part of the United Resistance Front, who was alleged to be criminally responsible for the same war crimes as Mr Bahar Idriss Abu Garda as co-perpetrator under article 25(3)(a) of the Statute. He too was the subject not of an arrest warrant but of a summons to appear, issued

⁸ ICC-02/05-02/09-243-Red, *Decision on the Confirmation of Charges*, 8 February 2010.

⁹ ICC-02/05-02/09-267, *Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'"*, 23 April 2010.

under seal on 27 August 2009 and unsealed on 16 June 2010. His voluntary initial appearance was on 17 June 2010.¹⁰ The confirmation hearing was held on 8 December 2010, and the confirmation decision was issued on 7 March 2011.¹¹ His trial is scheduled to begin before Trial Chamber IV on 5 May 2014. Mr Banda was not detained either. This did not impede the normal conduct of the proceedings.

33. Likewise, in the situation in Kenya, three persons charged with serious crimes were summonsed and continue to appear before the judges whilst remaining at liberty. They are:

1. Mr William Samoei Ruto, Vice-President of the Republic of Kenya, who was summonsed to appear on 8 March 2011, remained at liberty when he made his initial appearance on 7 April 2011 and at the confirmation hearing from 1 to 8 September 2011. On 23 January 2012, the *Decision on the Confirmation of Charges* was rendered,¹² stating that Mr Ruto was criminally responsible as an indirect co-perpetrator under article 25(3)(a) of the Statute for the three crimes against humanity of:
 - murder (article 7(1)(a));
 - deportation or forcible transfer of population (article 7(1)(d)); and
 - persecution (article 7(1)(h))

His trial, which commenced on 10 September 2013, is proceeding normally and he remains at liberty whilst appearing in Court.¹³

¹⁰ Case ICC-02/05-03/09, *The Prosecutor v. Abdallah Banda Abakaer Nourain*.

¹¹ ICC-02/05-03/09-121-Corr-Red, *Corrigendum of the "Decision on the Confirmation of Charges"*, 8 March 2011

¹² ICC-01/09-01/11-373, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012.

¹³ ICC-01/09-01/11, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*.

2. Mr Joshua Arap Sang, the head of operations at Kass FM in Nairobi (Republic of Kenya), who was summonsed to appear on 8 March 2011, remained at liberty when he made his initial appearance on 7 April 2011 and at the confirmation hearing from 1 to 8 September 2011. On 23 January 2012, the *Decision on the Confirmation of Charges*¹⁴ was rendered, charging Mr Sang with contributing “in any other way” under article 25(3)(d) of the Statute to the commission of the same crimes against humanity as Mr William Samoei Ruto.

His trial, joined with that of Mr William Samoei Ruto, commenced on 10 September 2013 and is proceeding normally, with both accused remaining at liberty whilst appearing in Court.

3. Mr Uhuru Muigai Kenyatta, President of the Republic of Kenya, who was summonsed to appear on 8 March 2011, remained at liberty when he made his initial appearance on 8 April 2011 and at the confirmation hearing from 21 September to 5 October 2011.¹⁵

In a decision on 23 January 2012, Pre-Trial Chamber II confirmed that there were reasonable grounds to believe that Mr Kenyatta was criminally responsible as an indirect co-perpetrator under article 25(3)(a) of the Statute for the five crimes against humanity of:

- murder (article 7(1)(a));
- deportation or forcible transfer of population (article 7(1)(d));
- rape (article 7(1)(g));
- persecution (article 7(1)(h)); and

¹⁴ ICC-01/09-01/11-373, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012.

¹⁵ ICC-01/09-02/11, *The Prosecutor v. Uhuru Muigai Kenyatta*.

- other inhumane acts (article 7(1)(k)).¹⁶

Mr Kenyatta remains at liberty, continuing to perform his duties, throughout the pre-trial phase of the proceedings. His trial is scheduled to commence on 5 February 2014

34. The Defence submits that if voluntary appearance has been authorised in the case of such serious crimes, then there is all the more argument for its application in the proceedings against Mr Fidèle Babala Wandu, proceedings which the Prosecutor unfortunately initiated without gathering appropriate evidence, without interviewing the Suspect in advance, and with a harshness not justified by the charges brought against him, which are far from being established.
35. The Defence requests the Chamber to correct this unjustified precipitousness on the Prosecutor's part; to do what she ought to have done in the first place; to take note of the statements of Mr Fidèle Babala Wandu contained in this application; to release him; and to grant him leave to return to his country, family, and professional activities, while placing him under the obligation, with which he will comply upon his honour, of appearing before the Court whenever ordered to do so. It would thereby give full effect to the universally accepted principle that liberty is the rule and detention the exception.
36. As demonstrated below, Mr Fidèle Babala Wandu offers every guarantee of his voluntary appearance and will never seek to evade the justice of the ICC, from which he is waiting to know why his honour has thus been publicly and scandalously besmirched.

¹⁶ ICC-01/09-02/11-382-Red, *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 26 January 2012.

B. FACTUAL BASIS

37. Fidèle Babala Wandu's situation comprises specific facts necessitating his release in accordance with article 60(2) of the Statute, as the conditions under article 58(1) have not been met in his case.

38. To examine the said conditions, there is need to review the wording of 58(1):

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (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) Where applicable, 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.

39. At the outset it is worth noting, that the use of the conjunction "and" between the two sets of conditions listed under points (a) and (b) implies that both have to be met cumulatively. Conversely, absent one of the two sets, the suspect may not be maintained in custody and therefore must be released.

40. Regarding point (a), the Applicant strongly contests the Prosecutor's claim that there is relevant material substantiating "reasonable grounds to believe" that he committed any of the crimes charged in counts 1 and 2 of the warrant of arrest. He eagerly but calmly waits for the Prosecutor to present evidence in support of each of the counts against him, which he will thoroughly analyse, challenge and prove his innocence.

41. After his first appearance on 27 November 2013, when he was notified of the crimes charged against him, Fidèle Babala Wandu expected the Prosecutor to provide him further information about evidence against him. He was very surprised and disappointed when rather, he heard the Prosecutor stating that she planned to further her investigation. This suggests that the Prosecution at this point in time does not have sufficient evidence to justify the Applicant's continued detention.

42. Regarding point (b), the Defence contends that none of the 3 concerns expressed in the provision apply to Fidèle Babala Wandu for the following reasons:

(a) Fidèle Babala Wandu will freely appear before the Court

43. As a preliminary remark, it is subject to debate whether article 58(1)(b)(i) is applicable at the pre-trial phase. In fact the provision reads as follows: "(b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial". This must be read in conjunction with article 63 of the Statute compelling the Accused to be present during his trial which, contrary to rules 124, 125 and 126 of the Rules of Procedure and Evidence, is not a requirement during the pre-trial phase. Actually, this phase does not absolutely require the Accused's presence. It can hold *in absentia*. The English version of article (58)(1)(b)(i) is more explicit: "(b) The arrest of the person appears necessary: (i) to ensure the person's appearance at trial." The article therefore refers to "trial" and not "pre-trial". As this is a criminal matter in which interpretation must be strict, the use of the term "trial" has to be restricted to its full and complete meaning, which does not include the preliminary or pre-trial phase. This interpretation is supported by

some authors who argue that: “[t]he main reason to detain a suspect is to make sure that the trial can take place with the accused present.”¹⁷

44. Consequently, and in keeping with the principle of presumption of innocence, there is no absolute need to either arrest or detain the applicant at this pre-trial stage allegedly to ensure his appearance in court were he to be tried. This is because the Pre-Trial Chamber may use its powers under article 60(5) of the statute to ensure the appearance of the suspect by issuing either a warrant of arrest or a summons to appear as well as require the Defence to provide guaranties that the suspect will appear.

45. There is no objective ground to doubt that Fidèle Babala Wandu will appear before the Chamber. Moreover, the Chamber can be assured of his personal commitment, hereby made solemnly and publicly and on his honour, to appear before the Judges of the ICC.

46. Fidèle Babala Wandu would like to know why he was arrested; to have justification for suffering such humiliation before his wife, his children, the people of Congo and the international community. Accordingly, he will appear before the Court whenever required, as it is in his interest to restore his damaged honour and prove his complete innocence.

(b) Fidèle Babala Wandu will neither obstruct nor endanger the investigation or court proceedings

47. The Defence submits that the Prosecutor has no relevant material to suggest that the applicant might obstruct or endanger the proceedings if granted interim release. In fact, continued pre-trial detention cannot be predicated solely on

¹⁷ *Commentary on the Rome Statute of the International Criminal Court*, Otto Triffterer, commentary on article 58(b)(i), p. 757.

unsubstantiated fears. The reasons for detention must be exhaustive and interpreted strictly.¹⁸ The question of whether a person applying for release may endanger the proceedings cannot be decided solely in the abstract; a specific danger must be identified.¹⁹

48. Furthermore, reference to general factors such as the general security situation, the gravity of the alleged crimes, the existence of contacts at the national or international level, or the disclosure of confidential information to the charged person²⁰ cannot, on their own, justify detention. In fact, the International Criminal Tribunal for the former Yugoslavia granted interim release to members of government or high-ranking military officers prosecuted for crimes of genocide, crimes against humanity and/or war crimes, even though the persons in question maintained some influence and numerous contacts at both the national and international levels.²¹ The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia pointed out in *Prlic et al.* that “even if the Accused continues to enjoy influence, it does not necessarily follow that he will exercise it unlawfully”.²²

¹⁸ European Court of Human Rights, *Smirnova v. Russia*, Judgment of 24 July 2003, paras. 58 and 59; see also *McKay v. The United Kingdom*, Judgment of 3 October 2006, paras. 30 and 41, from the same court.

¹⁹ *Prosecutor v. Talic*, *Decision on the Motion for Provisional Release*, 20 September 2002. <http://www.un.org/icty/brdjanin/trialc/decision-e/20155759.htm>.

²⁰ See, *inter alia* the decision on appeal in *Prosecutor v. Mico Stanisic*, 17 October 2005, para. 28. <http://www.un.org/icty/stanisic/appeal/decision-e/051017.htm>.

²¹ *Decision on Ramush Haradinaj's Motion for Provisional Release*, 7 June 2005. Trial Chamber III granted Momcilo Perisic's motion for provisional release, 9 June 2005; *Prosecutor v. Milutinovic*, Case No. IT-99-37-PT, *Decision on Second Application for Provisional Release*, 14 April 2005; *Prosecutor v. Ojdanic*, Case No. IT-99-37-PT, *Decision on General Ojdanic's Fourth Application for Provisional Release*, 14 April 2005; *Prosecutor v. Sainovic*, Case No. IT-99-37-PT, *Decision on Third Defence Request for Provisional Release*, 14 April 2005, *Prosecutor v. Talic*, Case No. IT-99-36-1, *Decision on the Motion for Provisional Release*, 20 September 2002.

²² *Prosecutor v. Prlic et al.*, Case No. IT-04-74-PT, *Order on Provisional Release of Jadranko Prlic* (“Prlic Trial Chamber Decision”), 30 July 2004, para. 28 <http://www.un.org/icty/prlic/trialc/order-e/040730e-prl.htm>.

49. The same position is expressed in *Mico Stanisic* in which it was held that the existence of contacts is not in itself proof that the person will use them and that accordingly, it could not serve as a basis for a decision to deny interim release.²³

50. The Defence emphasizes that reasons for the detention must be exhaustive and be interpreted strictly, and that the Prosecution must provide concrete evidence to suggest that the charged person could obstruct or endanger the proceedings.²⁴

51. As Fidèle Babala Wandu is convinced of his innocence in this matter, he hereby makes the public and solemn commitment to neither obstruct nor endanger the investigation or the court proceedings.

(c) As Fidèle Babala Wandu did not commit the crimes with which he is charged it is implausible for him to continue with their commission or the commission of a related crime within the jurisdiction of the Court.

52. The Prosecutor cannot justify fears that the Applicant might continue commission of a crime within the jurisdiction of the Court. The Defence contends that the Prosecution has no relevant material to suggest that Fidèle Babala Wandu might continue the commission of a crime within the jurisdiction of the Court, if granted interim release. If the Prosecution has tangible evidence for such fear, then it should disclose it forthwith to the Defence during consideration of the instant request.

53. The Defence notes that Fidèle Babala Wandu is suspected of corruptly influencing witnesses in the main case, namely ICC-01/05-01/08 *The Prosecutor v. Jean-Pierre Bemba Gombo*. However in that case, both prosecution and defence witness

²³ <http://www.un.org/icty/stanisic/appeal/decision-e/051017.htm>.

²⁴ In *Simatovic*, provisional release was granted in the absence of credible proof of intimidation of Prosecution witnesses by the accused. <http://www.un.org/icty/simatovic/trialc/decision-e/040728-2.htm>.

testimonies are already completed and the hearing is already at the stage of closing submissions. Therefore, it is materially impossible for the applicant to continue commission of the alleged crimes.

54. In case No. 2 concerning Fidèle Babala Wandu, the Prosecution claims that it had applied for the Applicant's arrest as it feared that he would obstruct on-going investigations. The Defence responds that the Applicant's first appearance took place on 27 November 2013 and a status conference was held on 4 December of the same year and that all the allegedly probative material gathered by the Prosecutor are under seal either in Belgium, Holland, or the DRC. Given the circumstances, the Applicant fails to see how he could pollute material to which he cannot have access.

55. The Defence further notes that Fidèle Babala Wandu is a Member of Parliament in the DRC. His home is well known. Were the Chamber to decide, as he earnestly hopes, to release him, he will return to his country the DRC and live in his house with his family.

56. His accounts having been frozen, he cannot flee his country as he has no means to live in exile abroad and mostly, he has no desire to live out of his country. In fact, an examination of statements of the said accounts will show that the Prosecutor's allegation that the Applicant is the manager of Jean-Pierre Bemba's businesses is groundless.

57. As a regularly re-elected Parliamentarian he intends to carry on his mandate. Consequently, he is subject to regular control by the Parliament for any trip out of his constituency.

58. The Defence would like to refer to paragraph 22 of the warrant of arrest which reads: "Fidèle Babala, as a DRC parliamentarian, also has numerous contacts,

including at an international level, and is able to travel freely, including to non-States parties”²⁵ This is the reason for the issuance of a warrant of arrest for the Applicant.

59. The Defence emphasizes that Mr Fidèle Babala holds a diplomatic passport. In order to travel abroad, he needs cumulatively: (1) an exit authorisation signed by the Speaker of the National Assembly; (2) a note verbale issued by the Minister for Foreign Affairs; and (3) a visa. These conditions are clearly stipulated in the Standing Orders of the National Assembly, which are law in the DRC. The Court can therefore ensure his presence in his home in Kinshasa.

60. Considering that the DRC is the country that cooperates best with the ICC, the Applicant’s appearance before the Court in The Hague, whenever needed, shall not pose any difficulty.

61. It follows therefore that, as the conditions stipulated under article 58 paragraph 1 are not met, the Applicant should be released.

III. HARM WHICH COULD RESULT FROM UNJUSTIFIED CONTINUED DETENTION

62. The continued detention of Fidèle Babala Wandu may cause him serious and potentially irreparable harm without serving the interests of justice. The Defence provides a non-exhaustive list of the main forms of harm hereunder:

- *Intrinsic suffering from deprivation of personal liberty*

As a fundamental human right, freedom of movement may be “violated” or “challenged” only when strictly necessary. In the instant case, regarding Mr Fidèle Babala Wandu, such deprivation of freedom is unnecessary as

²⁵ Warrant of Arrest, ICC-01/05-01/13-1-Red, 28-11-2013, para. 22.

respect for his right to freedom of movement will not endanger court proceedings.

- *Suffering due to separation from his wife and children*

The Defence directs the attention of the Chamber to the fact that Fidèle Babala Wandu is married and a father of four children, one of them 8 months old, and that his right to family life, in accordance with international instruments, needs to be respected.²⁶ His continued detention has an impact on his children's physical and psychological health and on their education.

- *Precariousness of family livelihood due to the freezing of the only professional income generated by the Applicant as family head.*
- *Unfair abandonment of his professional activities*

It is by working honestly as a parliamentarian that the Applicant provides for his family while contributing his quota to the consolidation of democracy in the DRC.

IV. APPLICANT'S COMMITMENT TO RESPECT THE CONDITIONS THAT MAY BE ORDERED BY THE CHAMBER

63. The Defence respectfully notifies the Chamber that Mr Fidèle Babala Wandu undertakes to respect the conditions which the Chamber may impose on him if he is granted interim release.

64. He is ready to comply with any decision by the Chamber directing him to appear before it for the continuation of proceedings against him and hereby undertakes not to obstruct such proceedings. He assures the Pre-Trial Chamber that, if released, he shall appear for his trial.

²⁶ Article 8 of the European Convention on Human Rights, article 17 of the International Covenant on Civil and Political Rights, United Nations General Assembly, 16 December 1966.

65. Furthermore Mr Fidèle Babala Wandu respectfully submits that the confirmation hearing can only be held in several months, without excluding possible adjournments for various reasons beyond our control, hence buttressing the argument for his interim release.

FOR THESE REASONS

The Defence requests the Chamber to:

1. FIND the instant application admissible and grounded both in law and in fact;
2. RULE that the conditions stipulated under article 58(1) are not met with respect to Fidèle Babala Wandu ;
3. HOLD that Fidèle Babala Wandu provides solid guarantees that he will appear before the Court whenever he is required to do so;
4. HOLD that his continued detention will unnecessarily cause him serious harm at personal, family and professional levels;
5. GRANT HIM, consequently, the interim release requested and, if need be, predicate such release on any conditions the Court may consider appropriate.

And justice will be done.

RESPECTFULLY SUBMITTED

[signed]

Prof Jean-Pierre Fofé Djofia Malewa
Counsel for Fidèle Babala Wandu

Dated this Thursday, 12 December 2013

At The Hague, The Netherlands