

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 March 2014

APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
 Judge Akua Kuenyehia
 Judge Sang-Hyun Song
 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

**Prosecution opposition to the Babala Defence's appeal against his provisional
detention**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Helen Brady

Counsel for the Defence of Jean-Pierre Bemba

Nicholas Kaufman

Counsel for the Defence of Aimé Kilolo Musamba

Ghislain Mabanga

Catherine Mabilie

Counsel for the Defence of Jean – Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

The Office of Public Counsel for the Defence

Xavier-Jean Keita

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

I. Introduction

1. The Prosecution opposes the Babala Defence's appeal ("Appeal")¹ against the Single Judge's decision to maintain Babala in detention ("Decision").² The Appeal fails to identify or substantiate an appealable error in the Decision. Instead, the Appeal: (i) attempts to re-litigate issues before the Appeals Chamber without showing appealable error;³ (ii) makes unfounded and irrelevant accusations;⁴ (iii) amounts to mere disagreement with the Single Judge's findings;⁵ and (iv) at 22 pages, violates Regulation 37(1) of the Regulations of the Court. The Decision, by contrast, was correct both in law and in fact, provided adequate reasoning, and fully complied with Article 60(2). The Appeal should be dismissed and the Decision upheld.

II. Submissions

I. The Single Judge correctly found that Article 58(1)(a) continued to be met.

2. The Babala Defence's ("Appellant") submissions on this ground constitute mere disagreement with the Single Judge's findings and should be dismissed as irrelevant to the Appeals Chamber's determination. As required by the Appeals Chamber,⁶ the Single Judge's reasoning was sufficiently detailed and clearly expressed, with close attention paid to the underlying evidence.⁷

¹ ICC-01/05-01/13-276 OA3.

² ICC-01/05-01/13-258.

³ ICC-01/05-01/13-276, para.61.

⁴ ICC-01/05-01/13-276, paras.42, 65.

⁵ For example by alleging the Decision is "inadequate" without more, see ICC-01/05-01/13-276, paras.23, 26.

⁶ See ICC-01/05-01/13-258, para.4, citing to ICC-02/11-01/11-278-Red, para.49; ICC-01/04-01/06-824, para.124.

⁷ In addition to noting his obligation to provide a fully reasoned decision, the Single Judge devoted eight footnoted paragraphs to his *ex novo* assessment. See ICC-01/05-01/13-258, paras.6-13.

3. First, the Appellant's contention that the Single Judge failed to submit the evidence to an "*examen critique sérieux*"⁸ lacks merit. In addition to not properly characterising the alleged error,⁹ the Appellant does not substantiate this argument. In fact, the Single Judge expressly stated his intention to refer to the underlying materials in his assessment¹⁰ and devoted three paragraphs to reviewing the evidence supporting his findings.¹¹

4. The Appellant contests the evidence relied on in the Decision by challenging the conduct of the Prosecution's investigation,¹² advancing its view of the Prosecution's evidence,¹³ attacking the validity of the arrest warrant,¹⁴ and proclaiming Babala's innocence.¹⁵ However, such broad and general arguments are unsupported and amount to mere disagreement with the Decision. Further, the Appeals Chamber's limited role on appeal does not permit it to "interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion".¹⁶

5. Second, the Appellant's submission that the Single Judge's findings were "*inadéquate*"¹⁷ and not "*simplement motivée*" is unsupported.¹⁸ The Appellant refers to the Single Judge's findings that Babala acted as an intermediary,¹⁹ that he transferred money to Bemba and his defence team,²⁰ and that he used codes to communicate²¹ as examples of matters extraneous to Babala's alleged criminal conduct that the Single

⁸ ICC-01/05-01/13-276, para. 27; see also paras.28-32.

⁹ ICC-01/05-01/08-631-Red OA2, para.62.

¹⁰ ICC-01/05-01/13-276, para.5.

¹¹ ICC-01/05-01/13-276, paras.6-8.

¹² ICC-01/05-01/13-276, paras.28, 31.

¹³ ICC-01/05-01/13-276, para.30.

¹⁴ ICC-01/05-01/13-276, para.32.

¹⁵ ICC-01/05-01/13-276, para.29.

¹⁶ ICC-01/04-01/10-283 OA, para.17.

¹⁷ ICC-01/05-01/13-276, para.26.

¹⁸ ICC-01/05-01/13-276, para.26.

¹⁹ ICC-01/05-01/13-276, paras.33-34.

²⁰ ICC-01/05-01/13-276, para.38.

²¹ ICC-01/05-01/13-276, paras.36-37.

Judge relied on. Again, the Appellant fails to characterise the alleged errors, or describe how they “materially affected the impugned decision”.²²

6. Moreover, the arrest warrant confirms that the conduct to which the Single Judge referred was committed as part and in furtherance of a common plan to commit offences against the administration of justice.²³ As such, the Single Judge did not err by relying on these findings. The Appellant’s characterisation of his alleged criminal behaviour as legitimate political activity,²⁴ and the related claim of the “*politisation de la justice pénale internationale*”,²⁵ is irrelevant to the Appeals Chamber’s determination.

II. The Single Judge correctly found that Article 58(1)(b) continued to be met.

7. The Appellant has failed to demonstrate that the Single Judge erred in his consideration of any of the factors in Article 58(1)(b) and accordingly his submissions should be dismissed.

a. Article 58(1)(b)(i)

8. The Appellant shows no error in characterising the Single Judge’s findings on the possibility of Babala absconding as “*conjectures*” and in claiming that his findings were not specific enough²⁶ and failed to “*balance les raisons*”.²⁷ Rather, the Single Judge was required to, and properly found, the “possibility, not the inevitability, of a future occurrence”,²⁸ *i.e.*, that it is *possible* – based on concrete evidence²⁹ – that Mr Babala may use his contacts to abscond.³⁰

²² Article 83(2); ICC-02/04-01/05-408 OA3, para.80; ICC-01/05-01/08-962 OA3, para.102; ICC-01/04-02/06-271-Red, para.32; see also *Prosecutor v. Rutaganda*, ICTR-69-3-A, Judgment, 26 May 2003, paras.20, 23.

²³ ICC-01/05-01/13-1-Red2-tENG, para.18; see also ICC-01/05-01/13-19-Conf, paras.5, 9, 22, 24-33.

²⁴ ICC-01/05-01/13-276, paras.40-42.

²⁵ ICC-01/05-01/13-276, para.42.

²⁶ ICC-01/05-01/13-276, para.45.

²⁷ ICC-01/05-01/13-276, para.47.

²⁸ ICC-01/05-01/13-258, para.14; see also ICC-01/04-01/07-572 OA4, para.21; ICC-02/11-01/11-278-Red OA, para.56.

9. Rather than alleging a specific error, the Appellant contests the Single Judge's reasoned conclusion by hypothesising about Babala's future actions.³¹ Such an approach must be dismissed because, first, it is not supported by the evidence and, second, it improperly re-litigates the Decision by responding to the observations on Babala's interim release provided by the representatives of the Democratic Republic of the Congo ("DRC Authorities").³²

b. Article 58(1)(b)(ii)

10. The Appellant's reliance on Babala's "*engag[ement d']honneur*" to dispute the Single Judge's findings on the risk of Babala obstructing or endangering the investigation or the court proceedings must be dismissed.³³ The Decision considered and rejected this argument³⁴ and the Appellant does not establish error by repeating his argument. Moreover, in rejecting this argument the Single Judge's approach followed that adopted by other Chambers.³⁵

c. Article 58(1)(b)(iii)

11. Without appropriately characterising the error or clearly defining the scope of its objection, the Appellant contests the Single Judge's reliance on the DRC Authorities' 17 January 2014 observation³⁶ to support his findings.³⁷ These arguments should be dismissed.

²⁹ ICC-02/11-01/11-278-Red OA, para.56.

³⁰ ICC-01/05-01/13-258, para.17.

³¹ ICC-01/05-01/13-276, paras.46-49.

³² ICC-01/05-01/13-276, paras.48-49, 53-54.

³³ ICC-01/05-01/13-276, para.56.

³⁴ ICC-01/05-01/13-258, paras.20, 26, 34.

³⁵ See, e.g., ICC-01/05-01/08-475, para.82; ICC-01/05-01/08-631-Red OA 2, para.10.

³⁶ ICC-01/05-01/13-206-Conf-AnxI.

³⁷ ICC-01/05-01/13-276, paras.7, 9.

12. First, the Single Judge dealt expressly with the late receipt of the transmission,³⁸ and the Appellant does not appear to challenge its inclusion exclusively on this basis. Additionally, the Appellant's argument is inconsistent since he himself relies on the DRC Authorities' 8 January 2014 observation,³⁹ which *also* arrived after the Single Judge's 3 January 2014 deadline,⁴⁰ to support his own position.⁴¹

13. Second, the Appellant's allegation that the Single Judge "[a] *écart[é]*" unfavourable observations⁴² is without merit. Since the Appellant alleges an error of fact, the Appeals Chamber will accord a margin of appreciation to the Single Judge's analysis⁴³ and may only intervene "where it cannot discern how the Chamber's conclusion could have reasonably been reached".⁴⁴ The Decision did not expressly refer to the DRC Authorities' 8 January 2014 observation because it was not relevant to the Single Judge's assessment of risk under Article 58(1)(b)(iii). The 8 January 2014 observation merely confirms Babala's ability to return to the DRC "*si la Cour fait droit à sa demande*".⁴⁵ Therefore the Single Judge was correct in not addressing it in his findings. In contrast, the 17 January 2014 observation establishes a credible risk and therefore was addressed.

14. Finally, the Appellant's two other assertions – that continued commission of crimes was impossible⁴⁶ and the existence of an alleged procedural bias against Babala⁴⁷ – must also be dismissed. The Appellant does not allege an error, but merely attempts to re-litigate issues that the Single Judge explicitly addressed and rejected at first instance.⁴⁸

³⁸ ICC-01/05-01/13-258, para.29.

³⁹ ICC-01/05-01/13-78-Conf-Anx6.

⁴⁰ ICC-01/05-01/13-258, p.3.

⁴¹ See, *e.g.*, ICC-01/05-01/13-276, paras.17, 58.

⁴² ICC-01/05-01/13-276, para.58.

⁴³ ICC-01/04-01/10-283 OA, para.17; ICC-01/05-01/08-2151-Red, para.16.

⁴⁴ ICC-01/05-01/08-631-Red OA 2, para.61; ICC-01/05-01/08-2151-Red, para.16.

⁴⁵ ICC-01/05-01/13-78-Conf-Anx6, p.3.

⁴⁶ ICC-01/05-01/13-276, paras.59, 66.

⁴⁷ ICC-01/05-01/13-276, para.65.

⁴⁸ ICC-01/05-01/13-258, paras.21-22, 32.

III. The Single Judge correctly assessed any change in circumstances since Babala's arrest.

15. To the extent it exists, the Single Judge fully assessed and rejected any change in circumstances since Babala's arrest. The Appellant fails to properly characterise the alleged errors, and fails to assess their material impact on the Decision.

16. The Appellant's attempt to improperly re-litigate the Decision, by claiming that Babala's ability to continue the commission of crimes in the *Bemba* case was severed on 6 December 2013, must be rejected.⁴⁹ The Single Judge addressed this issue, noting that "future and related crimes [...] might also be committed by the suspect in respect of *these* proceedings".⁵⁰ Further, as the Single Judge noted in the Decision (and in another decision⁵¹),⁵² Babala's restricted contact with Bemba's defence team does not preclude him committing Article 70 crimes: he is in the custody of the detention unit of the Court with Bemba and he has demonstrated an ability to circumvent the Registry's communication monitoring system.⁵³

17. Finally, the Appellant's reliance on Rule 119(3)⁵⁴ is inapposite, as it relates to conditional release procedure. Because the Single Judge did not entertain conditional release due to lack of State support,⁵⁵ the Appellant's challenges to the Single Judge's findings⁵⁶ amount to mere disagreement with the outcome rather than demonstrating an appealable error. This argument should be dismissed.

⁴⁹ ICC-01/05-01/13-276, paras.68, 71.

⁵⁰ ICC-01/05-01/13-258, para.32 (emphasis added).

⁵¹ ICC-01/05-01/13-259, para.24.

⁵² ICC-01/05-01/13-258, para.36.

⁵³ ICC-01/05-01/13-258, paras.27, 36.

⁵⁴ ICC-01/05-01/13-276, para.72.

⁵⁵ ICC-01/05-01/13-258, para.37.

⁵⁶ ICC-01/05-01/13-276, para.74.

III. Requested Relief

18. The Appeals Chamber should dismiss the Appeal and uphold the Decision.



Fatou Bensouda, Prosecutor

Dated this 24th Day of March 2014
At The Hague, The Netherlands