

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 31 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's response to the Mangenda Defence's appeal against the Single
 Judge's Decision to continue his 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

Göran Sluiter

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

I. Introduction

1. The Prosecution opposes the Mangenda Defence's appeal ("Appeal")¹ against the Single Judge's decision to maintain his detention ("Decision").² The Appeal fails to identify or substantiate any appealable error of fact or law in the Decision. Instead, the Appeal: (i) improperly raises issues regarding the purported illegality of the arrest warrant that fall outside of the scope of appellate review;³ (ii) attempts to re-litigate issues before the Appeals Chamber without showing an appealable error that would invalidate the Decision;⁴ (iii) amounts to mere disagreement with the Single Judge's findings;⁵ and (iv) violates Regulation 36 of the Regulations of the Court⁶ and circumvents the Appeals Chamber's rejection of the Mangenda Defence's previous request for a time and page extension.⁷ The Decision is correct in law and fact, provides adequate reasoning, and fully complies with Article 60(2). The Appeal should therefore be dismissed and the Decision upheld.

II. Submissions

I. The purported illegality of the arrest warrant is not an appealable issue

2. The Appellant makes multiple submissions regarding alleged errors of law based on the claimed illegality of (i) the arrest warrant;⁸ (ii) the mandate of the Independent Counsel,⁹ and (iii) the conversations underpinning the reports of the Independent Counsel.¹⁰ The Appellant further alleges that the latter two issues lead

¹ ICC-01/05-01/13-277 OA4; ICC-01/05-01/13-288 OA4.

² ICC-01/05-01/13-261.

³ ICC-01/05-01/13-288, paras. 1-15.

⁴ ICC-01/05-01/13-288, paras. 7-12.

⁵ See, for example, ICC-01/05-01/13-288, paras. 26, 30.

⁶ Regulation 36 stipulates that an average page "shall not exceed 300 words". The Appeal includes over 395 words per page on average.

⁷ ICC-01/05-01/13-286.

⁸ ICC-01/05-01/13-288, paras. 1-15.

⁹ ICC-01/05-01/13-288, paras. 7-10.

¹⁰ ICC-01/05-01/13-288, paras. 7, 10.

to the illegality of the arrest warrant. All of the Appellant's arguments fail on the law and should be summarily dismissed. Moreover, the faulty reasoning and inaccuracy of the Appeal, is underpinned only by self-serving factual distortions. For these reasons, the arguments should be dismissed in their entirety.

3. The Single Judge expressly found that his decision on whether to grant interim release pending trial pursuant to Article 60(2) did not extend to matters concerning the validity of the arrest warrant.¹¹ The Appellant challenges the legality of his arrest warrant, but has not shown that the Single Judge erred by not considering these matters as relevant considerations in his decision. An appeal against a decision on interim release is not the place to challenge, through the backdoor, the legality of the arrest warrant. Instead, in an appeal against a decision on interim release pursuant to Article 82(1)(b), the Appellant must show a "clear error[...] of law, fact or procedure"¹² in the Single Judge's examination under Article 60(2) of whether the conditions in Article 58(1)(a) or (b) are met. Because he has failed to do so, his challenge on this point must fail.

4. In addition, the arguments underlying the Appellant's submission regarding the alleged illegality of the arrest warrant lack merit. The submission that the Single Judge erred in his finding that the only remedy for illegal arrest and detention is the right to compensation¹³ is legally incorrect. Article 85 and Rules 173 and 174 clearly and exhaustively regulate the matter.

5. Moreover, the argument that the Single Judge erroneously relied on the work of the Independent Counsel¹⁴ merely reiterates the Appellant's submissions before

¹¹ ICC-01/05-01/13-261, para. 2.

¹² ICC-01/05-01/08-631-Red, para. 62. See also ICC-01/05-01/08-1626-Red OA7, para. 44; ICC-01/04-01/10-283 OA, para. 15.

¹³ ICC-01/05-01/13-261, para. 2, challenged in ICC-01/05-01/13-288, para. 6.

¹⁴ ICC-01/05-01/13-288, paras. 7-11.

the Single Judge,¹⁵ and thereby impermissibly attempts to re-litigate - for the third time - the issues regarding the decision on the appointment of the Independent Counsel that he already attempted to appeal.¹⁶ The Single Judge¹⁷ and, recently, the Appeals Chamber denied this appeal.¹⁸ Mere disagreements with a decision are inadequate to identify appealable errors.¹⁹

6. Finally, the Appellant's arguments regarding alleged illegally obtained telephone conversations²⁰ must also be dismissed for similar reasons. They are an attempt to appeal against a separate decision, which allowed the collection of such evidence. Further, they fail to demonstrate a link between the purported illegal collection of the evidence and the requirements for continued detention.

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

7. The Appellant's submissions on this ground constitute mere disagreement with the Single Judge's findings and should be dismissed.²¹ The Appeals Chamber has held that, in determining the propriety of a Pre-Trial or Trial Chamber's decision on interim release, it will "defer or accord a margin of appreciation both to the inferences [that the Pre-Trial or Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention" and "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

¹⁵ ICC-01/05-01/13-71, paras. 6-8.

¹⁶ ICC-01/05-01/13-149.

¹⁷ ICC-01/05-01/13-187.

¹⁸ ICC-01/05-01/13-203; ICC-01/05-01/13-295.

¹⁹ See by analogy the finding of the Appeals Chamber that "the mere disagreement between a party and a Chamber as regards the [Decision] does not constitute an appealable issue for the purposes of article 82(1)(d) of the Statute.": ICC-01/05-01/13-295, para. 16.

²⁰ ICC-01/05-01/13-288, paras. 7, 12.

²¹ ICC-01/05-01/13-288, paras. 17-21.

evidence before it.”²² The appraisal of evidence lies, in the first place, with the relevant Chamber.²³

8. In the Decision the Single Judge, “mindful of a recent ‘recommendation’ issued by the Appeals Chamber”, set out clearly and in detail his “full reasoning” and specifically referred to some of the materials relied upon in issuing the arrest warrant, which he “reconsidered and assessed *ex novo*”.²⁴

9. In particular, contrary to the Appellant’s contention,²⁵ the Single Judge did consider the materials received from the Registry in relation to the deposits the Appellant made into Jean-Pierre Bemba’s Detention Centre account and found them to be irrelevant for the determination under Article 60(2). He concluded that this fact, “even if ascertained as true, is not suitable to weaken the fact that, in light of the material submitted by both the Prosecutor and Independent Counsel, Jean-Jacques Mangenda appears as the author (or the intermediary) of money transfers to the benefit of witnesses in connection with their appearance in the Main Case.”²⁶ As required by the Appeals Chamber,²⁷ the Single Judge’s reasoning was sufficiently detailed and clearly expressed, with close attention paid to the underlying evidence.²⁸

10. The Appellant also contends, without merit, that the Single Judge erred in not considering his arguments regarding his close work with Aimé Kilolo and his influence over Defence witnesses.²⁹ The Single Judge in fact considered this argument, finding that the Appellant’s “generic statement” as to his role was unsuitable to

²² ICC-01/05-01/08-1937-Red2 OA09, para.48; ICC-01/04-01/10-283 OA, para.17.

²³ ICC-01/04-01/07-572 OA6, para.25. See also ICC-01/05-01/08-323 OA, para.52; ICC-01/04-01/10-283 OA, para. 17; ICC-01/05-01/08-1626-Red OA7, para.45; ICC-01/05-01/08-1937-Red2 OA09, para.48.

²⁴ ICC-01/05-01/13-261, para. 9.

²⁵ ICC-01/05-01/13-288, para. 18.

²⁶ ICC-01/05-01/13-261, para. 17.

²⁷ See ICC-01/05-01/13-261, para. 9, citing to ICC-02/11-01/11-278-Red, para. 49; ICC-01/04-01/06-824, para. 124.

²⁸ In addition to noting his obligation to provide a fully reasoned decision, the Single Judge devoted 11 footnoted paragraphs to his *ex novo* assessment. See ICC-01/05-01/13-261, paras. 12-22.

²⁹ ICC-01/05-01/13-288, para. 19.

contradict the “numerous elements showing not only his full awareness of the scheme being implemented, but also his instrumental role in its implementation, and even his appreciation of its efficient outcome”.³⁰ The Appellant’s further allegations of the lack of precision in the Single Judge’s reasoning on this point³¹ and his view that the Independent Counsel’s reports on which the Single Judge relied lack probative value, amount to no more than disagreement with the findings of the Single Judge.³²

11. Further, the Appellant’s contention that the Single Judge erred in fact by not mentioning any “facts” in relation to Count 1 - presenting evidence that the party know is false or forged under Article 70(1)(b), is inaccurate.³³ The Single Judge devoted two full paragraphs to a review of the evidence supporting his findings regarding Count 1.³⁴ Moreover, the question of whether there has been a finding on the authenticity of the allegedly false documents presented in the Main Case is irrelevant for the determination that the Single Judge properly made in the context of deciding on the Appellant’s continued detention.³⁵ The Single Judge must assess the facts before him independently. His determination cannot be conditioned by the evaluation of another Chamber.³⁶

12. The Single Judge also did not err by considering the participation of the Appellant in certain conversations with Bemba and Fidèle Babala.³⁷ The Appellant fails to demonstrate how this particular finding - with which the Appellant disagrees - amounts to an appealable error materially affecting the Decision. In particular, the mere consideration by the Single Judge of this factor to support the conclusion does not constitute an error. Moreover, it does not lack reasoning, because this very factor

³⁰ ICC-01/05-01/13-261, para. 19.

³¹ ICC-01/05-01/13-288, para. 19.

³² ICC-01/05-01/13-288, para. 19.

³³ ICC-01/05-01/13-288, para. 20.

³⁴ ICC-01/05-01/13-261, paras. 12-13.

³⁵ ICC-01/05-01/13-288, para. 20.

³⁶ See also findings of the Single Judge when rejecting the identical argument advanced by the Appellant in first instance: ICC-01/05-01/13-261, paras. 20-21.

³⁷ ICC-01/05-01/13-288, para. 21.

comprises an extensive part of the Single Judge's conclusion that the conditions under Article 58(1)(a) continued to be met.³⁸

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

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

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

14. The Appellant contends that the Single Judge committed an error of law and fact in finding that the Appellant still represented a flight risk.³⁹ In so doing, he repeats arguments that he has already advanced before the Single Judge.⁴⁰ In particular, he argues that it was no longer true that he could travel outside of the Schengen area given that his passport is with the Registry.⁴¹ In addition he also states that his ability to travel within the Schengen area was also curtailed, as his other identity papers are with the Registry.⁴² However, the Appellant ignores the Single Judge's finding that, despite these circumstances, the Appellant remained a flight risk based on the fact that "circulation within the Schengen area can by large occur without the need that any document be shown."⁴³ The Appellant's arguments do not demonstrate a discernible error.

15. The Appellant erroneously asserts that the Single Judge's referral to the gravity of offences against the administration of justice in assessing the risk of flight

³⁸ ICC-01/05-01/13-261, paras. 11-22.

³⁹ ICC-01/05-01/13-288, para. 22.

⁴⁰ ICC-01/05-01/13-71, para. 19.

⁴¹ ICC-01/05-01/13-288, para. 22.

⁴² ICC-01/05-01/13-288, para. 22.

⁴³ ICC-01/05-01/13-261, para. 27.

constitutes an error of law.⁴⁴ As the Appeals Chamber has held, the gravity of crimes is a relevant factor to consider when assessing the risk of absconding, because “[i]f a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond.”⁴⁵ The Single Judge did not regard this factor in isolation, but “as part of [his] consideration that the Appellant might abscond.”⁴⁶ Further, Article 58 does not list *any* of the factors that a Pre-trial Chamber may consider when assessing the risk of absconding.⁴⁷ The Single Judge’s clearly reasoned determination on this point is fully consistent with the applicable law.

16. The Appellant disagrees with the Single Judge, who did not consider his personal circumstances and the existence of his young family relevant for the purposes of the determination under Article 60(2).⁴⁸ However, he has not demonstrated an appealable error in the Single Judge’s determination that would materially affect the Decision.⁴⁹ To the contrary, this finding is consistent with the Single Judge’s conclusion that the Appellant’s professional background is another factor favouring his continued detention for offences against the administration of justice.⁵⁰

17. The Appellant argues, without merit, that a network of contacts able to supply him with funds has not been established.⁵¹ Once again, the argument amounts to mere disagreement with the Decision and does not comprise an appealable error. Moreover, it is unsupported. The Single Judge enumerated several factors leading to

⁴⁴ ICC-01/05-01/13-288, para. 22.

⁴⁵ ICC-01/04-01/06-824 OA7, para. 136. See also ICC-01/04-01/07-572 OA6, paras. 21, 24; ICC-01/05-01/08-323 OA, para. 55; ICC-01/05-01/08-631-Red OA2, para. 67; ICC-01/04-01/10-283 OA, para. 21; ICC-02/11-01/11-278-Red OA, para. 54.

⁴⁶ ICC-01/04-01/06-824 OA7, para. 136. See also ICC-01/04-01/07-572 OA6, paras. 21, 24; ICC-01/05-01/08-323 OA, para. 55; ICC-01/05-01/08-631-Red OA2, para. 67; ICC-01/04-01/10-283 OA, para. 21; ICC-02/11-01/11-278-Red OA, para. 54.

⁴⁷ ICC-01/05-01/13-288, para. 22.

⁴⁸ ICC-01/05-01/13-288, para. 26.

⁴⁹ ICC-01/05-01/13-261, para. 32.

⁵⁰ ICC-01/05-01/13-261, para. 25.

⁵¹ ICC-01/05-01/13-288, para. 23.

his conclusion that the Appellant still had access to the Bemba network, which could supply him with the means to abscond, and that none of the elements alleged by the Appellant were sufficient to weaken this conclusion.⁵² The Single Judge properly reached this conclusion based on the “possibility, not the inevitability, of a future occurrence”,⁵³ *i.e.*, that it is possible – based on concrete evidence⁵⁴ – that Mangenda may use his contacts to abscond.⁵⁵

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

18. Regarding the second prong of Article 58(1)(b), the Appellant alleges that an error “*de fait et d’appréciation*” was committed when the Single Judge found that the mere fact that the Appellant had informed Aimé Kilolo of an existing investigation constituted criminal intent.⁵⁶ This allegation is without merit, as the Single Judge only found that there were elements “suitable to signal” Mangenda’s “readiness to take action”.⁵⁷ The Single Judge also considered a different conversation between Mangenda and Kilolo, in which Mangenda stated concerns about the investigation and received reassurance from the other party that he might have a “solution”,⁵⁸ as well as a number of additional factors in support of his conclusion that the conditions of detention under Article 58(1)(b)(ii) are met.⁵⁹ The Appellant does not demonstrate an error in these intermediate findings, or that such errors affected the Single Judge’s overall conclusion with respect to Article 58(1)(b)(ii). Since the Appellant alleges an error of fact, the Appeals Chamber may intervene only “where it cannot discern how

⁵² ICC-01/05-01/13-261, para. 29.

⁵³ 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.

⁵⁴ ICC-02/11-01/11-278-Red OA, para. 56.

⁵⁵ ICC-01/05-01/13-261, paras. 28-29.

⁵⁶ ICC-01/05-01/13-288, para. 27.

⁵⁷ ICC-01/05-01/13-261, para. 35.

⁵⁸ ICC-01/05-01/13-261, para. 35.

⁵⁹ ICC-01/05-01/13-261, paras. 33-35.

the Chamber's conclusion could have reasonably been reached".⁶⁰ This is clearly not the case here.

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

19. In accordance with the Court's well-established jurisprudence,⁶¹ the Single Judge was correct in assessing the possibility that future crimes might be committed in the context of the present proceedings to determine the propriety of continued detention.⁶² As such, no appealable error was committed.⁶³ This ground of appeal must therefore be dismissed.

IV. The Single Judge correctly found that conditional release was unfeasible.

20. Contrary to the Appellant's arguments,⁶⁴ the Single Judge properly assessed the observations of the United Kingdom authorities in relation to the possibility of accommodating Mangenda on UK territory upon release.⁶⁵ The Single Judge's conclusion was based on the lack of an expression of willingness by the UK authorities to accept Mangenda. The Appellant's disagreement does not change this analysis. Since the "identification of a State willing to accept the person concerned as well as enforce related conditions is necessary"⁶⁶ to grant conditional release, the Single Judge did not err in his reasoning.

21. Finally, once an assessment is made on whether the conditions for detention, as an exceptional measure, continue to be met, "humanitarian" reasons for conditional

⁶⁰ ICC-01/05-01/08-631-Red OA 2, para. 61; ICC-01/05-01/08-2151-Red, para. 16.

⁶¹ 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.

⁶² ICC-01/05-01/13-261, para. 36.

⁶³ ICC-01/05-01/13-288, para. 28.

⁶⁴ ICC-01/05-01/13-288, para. 30.

⁶⁵ ICC-01/05-01/13-261, para. 42.

⁶⁶ ICC-01/05-01/08-631-Red OA2, para. 106, quoted in ICC-01/05-01/08-1626-Red OA7, para. 48.

release (*i.e.*, to exercise the right to family life) play no role.⁶⁷ Conditional release can only be considered when risks enumerated in Article 58(1)(b) exist, if “the Chamber considers that these can be mitigated by the imposition of certain conditions of release.”⁶⁸ In this case, the Single Judge remained “persuaded that it is difficult to conceive of measures which might effectively counteract the risks associated with the suspect’s communications with the external world” other than the continuation of detention.⁶⁹ The Appellant has thus not demonstrated an appealable error in this respect.

V. The Single Judge has unfettered discretion to decide on holding a hearing pursuant to Article 118(3)

22. Far from not responding to the Appellant’s request for an oral hearing,⁷⁰ the Single Judge reasoned that the “abundance of the material” available to him, a “great amount of which” was referred to in the Decision made it “not necessary or appropriate to hold a hearing”.⁷¹ Further, contrary to the Appellant’s argument, Rule 118(3) places the determination of whether to order a hearing entirely within the Single Judge’s discretion. Again, this ground of appeal is unsustainable.

III. Requested Relief

23. For the foregoing reasons, the Appeals Chamber should dismiss the Appeal and uphold the Decision.



Fatou Bensouda, Prosecutor

Dated this 31st Day of March 2014
At The Hague, The Netherlands

⁶⁷ ICC-01/05-01/13-288, para. 30.

⁶⁸ ICC-01/05-01/08-1626-Red OA7, para. 55; ICC-02/11-01/11-278-Red OA, para. 77.

⁶⁹ ICC-01/05-01/13-261, para. 41.

⁷⁰ ICC-01/05-01/13-288, para. 31.

⁷¹ ICC-01/05-01/13-261, para. 44.