

1 Appeals Chamber - Courtroom 1

2 Situation: Central African Republic

3 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,

4 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu

5 and Narcisse Arido - ICC-01/05-01/13

6 Presiding Judge Sanji Mmasenono Monageng

7 Appeals Chamber Hearing for the delivering of a Judgment

8 Friday, 11 July 2014

9 (The hearing starts in open session at 4.33 p.m.)

10 THE COURT USHER: All rise.

11 The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE MONAGENG: Good afternoon, officers.

14 Would the court officer please call the case, or the cases.

15 THE COURT OFFICER: Thank you, your Honour.

16 The situation in the Central African Republic in the case of the Prosecutor versus

17 Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo,

18 Fidèle Babala Wandu and Narcisse Arido, ICC-01/05-01/13.

19 PRESIDING JUDGE MONAGENG: Thank you very much.

20 I am Judge Sanji Mmasenono Monageng and I am presiding on the present appeals in

21 relation to these cases.

22 May I ask the parties to introduce themselves for the record, starting with the

23 Prosecutor and thereafter the Defence for Mr Kilolo, Mr Babala and then

24 Mr Mangenda. You have the floor.

25 MR VANDERPUYE: Good afternoon, your Honour. The Office of the Prosecutor is

1 represented by Kweku Vanderpuye and Reinhold Gallmetzer.

2 PRESIDING JUDGE MONAGENG: Thank you very much.

3 Defence for Mr Kilolo.

4 MR MABANGA: (Interpretation) Thank you, your Honour. The Defence team of
5 Mr Kilolo is represented by Ms Kaur Sethi; Laura-Lou Moreau, case manager; and
6 myself Ghislain Mabanga, lead counsel.

7 PRESIDING JUDGE MONAGENG: Thank you.

8 The Defence for Mr Babala.

9 MR KILENDA: (Interpretation) Thank you, your Honour, for giving me the floor.
10 The Babala Defence team is made up of Ms Adrianna Maria Manolescu;
11 Mr Godefroid Bokolombe, legal assistant; and myself, Jean-Pierre Kilenda, counsel
12 and member of the Brussels Bar.

13 PRESIDING JUDGE MONAGENG: Thank you very much.

14 And Defence for Mr Mangenda.

15 MR FLAMME: (Interpretation) Thank you, your Honour. I am Jean Flamme and
16 I am representing Mr Jean-Jacques Kabongo Mangenda.

17 I would like to correct one point. The surname of my client is Kabongo Mangenda,
18 not the other way around. I thank you.

19 PRESIDING JUDGE MONAGENG: Kabongo Mangenda, Mangenda. Kabongo
20 and Mangenda are the surname? Thank you.

21 Thank you very much.

22 Today the Appeals Chamber is delivering its judgments on three appeals concerning
23 interim release. These include the appeals of Mr Kilolo against the decision of
24 Pre-Trial Chamber II on his application for interim release, and on the appeal by
25 Mr Babala against the decision of Pre-Trial Chamber II on his application for interim

1 release, both of which were rendered on 14 March 2014. The third appeal is of
2 Mr Kabongo Mangenda against the decision of Pre-Trial Chamber II on his
3 application for release, rendered on 17 March 2014.

4 In today's summary, I will refer to each of these decisions as the impugned decision.

5 I shall commence with the summary and reasons for the judgment in relation to the
6 appeal of Mr Kilolo. As with all three summaries today, this summary is not part of
7 the written judgment, which is the only authoritative account of the Appeals
8 Chamber's rulings and reasons. The written judgment will be made available to the
9 parties at the conclusion of this hearing. Judge Kourula and Judge Ušacka dissent.

10 I will also briefly summarise the reasons for their dissenting opinions at the end.

11 On 24 March 2014, Mr Kilolo filed his document in support of the appeal, requesting
12 the Appeals Chamber to dismiss the impugned decision, or alternatively to remand
13 the case to the Pre-Trial Chamber on points of law determined by the Appeals
14 Chamber.

15 Mr Kilolo presents three grounds of appeal.

16 In his first ground of appeal, Mr Kilolo submits that his continued detention is "a
17 manifest injustice and a blatant violation of the presumption of innocence." First, he
18 submits that the Pre-Trial Chamber was biased against him in a number of ways;
19 second, he submits that the Pre-Trial Chamber erred when holding that offences
20 under Article 70 of the Statute are of utmost gravity; and finally, he submits that the
21 Pre-Trial Chamber disregarded that detention must be the exception and not the
22 norm.

23 For reasons developed more fully in the judgment, the Appeals Chamber does not
24 find that the Pre-Trial Chamber showed any kind of bias against Mr Kilolo. Notably:
25 One, the Appeals Chamber dismisses Mr Kilolo's argument that the Pre-Trial

1 Chamber showed bias against him by failing to hold a hearing, or that its language
2 showed bias, or that the Pre-Trial Chamber failed to take into account mitigating
3 circumstances. The Appeals Chamber similarly dismisses Mr Kilolo's arguments
4 that the Pre-Trial Chamber did not provide sufficient reasoning or cite evidence in
5 support of the impugned decision, or that it displayed racial bias towards Mr Kilolo.
6 The Appeals Chamber now turns to Mr Kilolo's argument in relation to the Pre-Trial
7 Chamber's observation in the impugned decision that offences under Article 70 of the
8 Statute are, I quote, "of the utmost gravity," end of quote, which he avers amounts to
9 an unprecedented upgrading and equating of offences to those heinous crimes
10 punishable by life in prison. The Appeals Chamber recalls that it has previously
11 ruled that the gravity of crimes, and the concomitant sentence that may be imposed
12 upon conviction are relevant considerations in assessing the risk that a person may
13 not appear at trial.

14 However, in the present case, the Pre-Trial Chamber's description of offences against
15 the administration of justice as those, and I quote "of the utmost gravity," end of quote,
16 is concerning. The Appeals Chamber emphasises that offences under Article 70 of
17 the Statute, while certainly serious in nature, are by no means considered to be as
18 grave as the core crimes under Article 5 of the Statute.

19 Notwithstanding, the Appeals Chamber notes that the Pre-Trial Chamber's
20 observation in relation to the gravity of the offences allegedly committed by Mr Kilolo
21 is supported by three reasons: First, that offences against the administration of
22 justice, and I quote, "threaten or disrupt the overall fair and efficient functioning of
23 justice in the specific case to which they refer," end of quote; secondly, that these
24 offences, and I quote, "ultimately undermine the public trust in the administration of
25 justice and the judiciary," end of quote; and thirdly, that, and I quote, "such

1 seriousness is only enhanced," end of quote, when committed by those whose, and I
2 quote "professional mission is to serve, rather than disrupt, justice," end of quote.

3 Therefore, given the detailed reasons put forward by the Pre-Trial Chamber for its
4 observations, which are specific to offences under Article 70 of the Statute, the
5 Appeals Chamber finds that despite the language used, it does not consider that the
6 Pre-Trial Chamber actually sought to equate such offences with those under Article 5
7 of the Statute, and accordingly does not find any clear error in this regard.

8 In relation to Mr Kilolo's argument that the Pre-Trial Chamber violated the principle
9 of exceptionality of detention and reversed the burden of proof, the Appeals Chamber
10 notes that under the heading, I quote, "General Principles" in the impugned decision,
11 the Pre-Trial Chamber explicitly recalled the exceptional nature of the detention, and
12 further, indicated its assessment of the materials underpinning the arrest warrant in a
13 de novo manner. The Appeals Chamber finds that, in so finding, the Pre-Trial
14 Chamber was guided by the correct legal standard in making its decision under
15 Article 60(2) of the Statute, and finds no error.

16 Accordingly, the Appeals Chamber dismisses Mr Kilolo's first ground of appeal.

17 Under his second ground of appeal, Mr Kilolo argues that the Pre-Trial Chamber
18 erred by conflating Article 58(1)(a) and Article 58(1)(b) of the Statute. The Appeals
19 Chamber finds Mr Kilolo's argument in relation to the irrelevance of Article 58(1)(a)
20 of the Statute to a decision on interim release to be legally incorrect. Article 60(2) of
21 the Statute provides that, and I quote, "If the Pre-Trial Chamber is satisfied that the
22 conditions set forth in Article 58(1) are met, the person shall continue to be detained,"
23 end of quote. Therefore, it is clear that the conditions underpinning both
24 Article 58(1)(a) and (b) of the Statute must continue to be satisfied in order to
25 maintain the detention of a suspect. Therefore, Mr Kilolo's arguments under his

1 second ground of appeal are dismissed.

2 Under his third ground of appeal, Mr Kilolo challenges the Pre-Trial Chamber's
3 conclusion that his continued detention appeared necessary under Article 58(1)(b) of
4 the Statute.

5 With respect to Article 58(1)(b)(i) of the Statute, in relation to Mr Kilolo's argument
6 regarding the lack of evidence showing a personal relationship between Mr Kilolo
7 and Mr Bemba, or that he could use Mr Bemba's network to abscond, the Appeals
8 Chamber recalls that the Pre-Trial Chamber relied on its findings made in the arrest
9 warrant decision regarding Mr Kilolo's connection to Mr Bemba's network and that
10 his access to Mr Bemba's financial resources could allow him to abscond. The
11 Pre-Trial Chamber's finding regarding Mr Kilolo's connection to Mr Bemba's network
12 appears to stem from the nature and the alleged organised character of the offences
13 charged against him.

14 The Appeals Chamber is therefore not persuaded by Mr Kilolo's argument in relation
15 to his access to Mr Bemba's network of supporters. While the impugned decision is
16 somewhat unclear in respect of the evidence underpinning its finding of the existence
17 of a network, the Appeals Chamber nevertheless can discern how the Pre-Trial
18 Chamber reached the findings it did, based on the totality of the evidence before it.
19 In the view of the Appeals Chamber, it was not unreasonable for the Pre-Trial
20 Chamber to conclude that, given that there was an indication that supporters of
21 Mr Bemba had previously made money available to Mr Kilolo, they could also do so
22 to allow him to evade justice.

23 The Appeals Chamber also dismisses Mr Kilolo's contention that his participation in
24 Congolese politics in 2006 cannot constitute concrete evidence of a flight risk as this
25 was eight years ago. The Appeals Chamber finds that the Pre-Trial Chamber did not

1 rely on his political activities as evidence for a flight risk, but referred to it in the
2 context of assessing the veracity of Mr Kilolo's claims as to his personal
3 circumstances.

4 The Appeals Chamber also dismisses Mr Kilolo's contention that he could not travel
5 without any identification documents within or outside the Schengen area, as the
6 Appeals Chamber finds that what was at issue was not whether Mr Kilolo was legally
7 required to be in possession of a travel document when travelling within the
8 Schengen area, but whether he would likely be able to do so without such documents.

9 With respect to Mr Kilolo's contention that the Pre-Trial Chamber erred in finding
10 that prejudices resulting from the continued detention of Mr Kilolo are irrelevant, the
11 Appeals Chamber considers that the Pre-Trial Chamber's findings as such cannot be
12 faulted. The Pre-Trial Chamber addressed the arguments raised by Mr Kilolo as to
13 his personal circumstances from the perspective of whether the prejudice caused by
14 the detention, in particular to his family life, could be a factor in deciding to grant
15 interim release. In the view of the Appeals Chamber, any detention of a suspect
16 pending investigation and trial is likely to cause prejudice to the person concerned
17 and those close to him. Prejudice caused is in and of itself not a relevant
18 consideration for a determination on interim release.

19 The Appeals Chamber notes further that Mr Kilolo questions the way in which the
20 Pre-Trial Chamber dealt with the arguments pertaining to his personal circumstances,
21 namely, and I quote, "education, professional and social status," end of quote, and
22 how they related to Article 58(1)(b)(i) of the Statute. In this regard, the Appeals
23 Chamber recalls that under his first ground of appeal, Mr Kilolo argues that the
24 Pre-Trial Chamber failed to consider his personal circumstances and failed to provide,
25 and I quote, "any real reason" for doing - quotation closed, for doing so.

1 The Appeals Chamber considers that any decision on whether a person is detained
2 pending his or her trial at this Court indeed ought to be made based on the specific
3 circumstances of the case, as relevant to an assessment of whether or not a suspect is
4 likely to appear before the Court. Personal circumstances of the suspect such as the
5 suspect's education, professional or social status may be relevant to assessing whether
6 or not a suspect will appear before the Court.

7 However, while the Appeals Chamber notes that the Pre-Trial Chamber initially
8 qualified, and I quote, "education, professional or social status," end of quote, to be,
9 and I quote again, "per se neutral and inconclusive in respect of the need to assess the
10 existence of flight risks," end of quote, a statement which the Appeals Chamber
11 considers to be ambiguous in meaning, it appears that the Pre-Trial Chamber went on
12 to assess such factors, as framed in Mr Kilolo's application for interim release, in
13 making its assessment under Article 58(1)(b)(i) of the Statute. Thus, while the
14 Appeals Chamber emphasises the relevance of personal circumstances in this regard,
15 it can discern no clear error in the Pre-Trial Chamber's related findings.

16 The Appeals Chamber is also not persuaded by the arguments advanced by Mr Kilolo
17 in respect of Article 58(1)(b)(ii) of the Statute. For reasons further developed in the
18 judgment, in respect of Mr Kilolo's argument that there is no evidence showing he
19 will obstruct or endanger the court proceedings since he is no longer the lead counsel
20 of Mr Bemba and that disclosure in the Bemba case is completed, the Appeals
21 Chamber finds no error in the Pre-Trial Chamber's finding that it could not, and I
22 quote, "be excluded that the Bemba case is re-opened," end of quote.

23 In relation to Article 58(1)(b)(iii) of the Statute, the Appeals Chamber finds Mr Kilolo's
24 challenge to the Pre-Trial Chamber's finding that, and I quote, "risk relating to the
25 possible commission of related crimes, by its very nature, is such as to make it

1 impossible to specify in detail what the nature of such crimes might be," end of quote,
2 as contravening the, and I quote again, "concrete and specific standard," end of quote,
3 to be without merit. In the Gbagbo OA Judgment, the Appeals Chamber held that
4 Article 58(1)(b)(iii) of the Statute provides that the necessity for detention is to prevent
5 the risk that further crimes may be committed; therefore, and I quote, "the issue is
6 future crimes, which by their nature cannot be specified in detail," end of quote.

7 Accordingly, Mr Kilolo's argument is wrong in law, and is consequently dismissed.

8 Turning to Mr Kilolo's contention that the Pre-Trial Chamber's conclusion amounts to
9 "generalities" and fails to demonstrate the "concrete" risk that he will commit further
10 crimes, the Appeals Chamber recalls that the question of the determination of
11 whether detention appears necessary revolves, and I quote, "around the possibility,
12 not the inevitability, of a future occurrence," end of quote. On the basis of the
13 available evidence, the Pre-Trial Chamber will weigh such evidence and make, quote,
14 "a prediction as to the likelihood of future events," end of quote. The Appeals
15 Chamber finds that the Pre-Trial Chamber correctly articulated this standard and
16 finds no error.

17 The Appeals Chamber therefore dismisses Mr Kilolo's arguments under his third
18 ground of appeal. As the three grounds of appeal have been dismissed, the Appeals
19 Chamber has decided, by majority, to confirm the impugned decision and to dismiss
20 the appeal.

21 As indicated earlier, Judge Kourula and Judge Ušacka both separately dissent from
22 the Appeals Chamber's decision.

23 Judge Kourula, in a separate dissent, opines that, while the majority considered the
24 Pre-Trial Chamber's treatment of the gravity of the offences to be a discrete issue, in
25 his view, this critically impacted upon the Pre-Trial Chamber's determination of

1 whether the conditions under Article 58(1)(b)(i), (ii) and (iii) of the Statute continue to
2 be met. In his view, the language used by the Pre-Trial Chamber in describing the
3 offences for which Mr Kilolo was charged to be, quote, "of the utmost gravity," end of
4 quote, is an indication that it gave too much weight to the seriousness of the alleged
5 offences in finding that the conditions under Article 58(1)(b) of the statute continue to
6 be met.

7 Accordingly, Judge Kourula would have reversed the impugned decision and
8 remanded the assessment of the grounds for detention under Article 58(1)(b) of the
9 Statute, in their entirety, to Pre-Trial Chamber.

10 In Judge Ušacka's opinion, the Pre-Trial Chamber failed to appreciate sufficiently that
11 the matter at hand concerned allegations of offences against the administration of
12 justice, and not core crimes. In her view, by relying extensively on the interim
13 release jurisprudence and the test developed in relation to core crimes, the Pre-Trial
14 Chamber did not give sufficient consideration to the fact that offences against the
15 administration of justice are in no way comparable to core crimes, and that this
16 necessarily impacts on the analysis as to whether continued detention is justified.

17 In Judge Ušacka's view, this constituted an error of the Pre-Trial Chamber that tainted
18 the entire impugned decision, as the Pre-Trial Chamber failed to identify the full legal
19 basis in reviewing detention in the context of offences under Article 70 of the Statute.

20 She would have reversed the impugned decision and remanded the matter to the
21 Pre-Trial Chamber for a new decision on Mr Kilolo's application for interim release.

22 This concludes my summary of the judgment in relation to Mr Kilolo. I will now
23 proceed to the summary of the judgment in relation to Mr Babala.

24 On 19 March 2014, Mr Babala filed the document in support of the appeal in which he
25 raises three grounds of appeal.

1 Under his first ground of appeal, Mr Babala raises three broad arguments arguing
2 that the Pre-Trial Chamber erred in relation to its finding under Article 58(1)(a) of the
3 Statute.

4 Firstly, Mr Babala alleges that the material underpinning the grounds of detention is
5 insufficient and, in particular, that the Pre-Trial Chamber erred in its uncritical
6 acceptance of the material annexed to the Prosecutor's application for warrants of
7 arrest.

8 For the reasons developed in its judgment, the Appeals Chamber discerns no clear
9 error in the Pre-Trial Chamber's findings and dismisses Mr Babala's arguments. In

10 particular, the Appeals Chamber emphasises that, and I quote, "in a decision under

11 Article 60(2) of the Statute, a Pre-Trial Chamber may refer to the decision on the

12 warrant of arrest, without this affecting the de novo character of the Pre-Trial

13 Chamber's decision," end of quote. Accordingly, the Appeals Chamber considers

14 that the Pre-Trial Chamber, in the instant case, was at liberty to rely on the materials

15 underpinning the arrest warrant decision, as assessed "de novo," to support

16 "reasonable grounds to believe" that offences against the administration of justice had

17 been committed by Mr Babala.

18 Secondly, Mr Babala argues that the Pre-Trial Chamber did not sufficiently specify the

19 crimes he is alleged to have committed, and thereby breached the principle of legality

20 for finding "reasonable grounds to believe" that he engaged in conduct which, I quote

21 "does not constitute a crime within the jurisdiction of the ICC," end of quote.

22 For the reasons developed in its judgment, the Appeals Chamber discerns no clear

23 error in the Pre-Trial Chamber's findings and dismisses Mr Babala's arguments in that

24 regard.

25 The Appeals Chamber notes that, with the exception of two references to

1 Article 70(1)(b) of the Statute, the impugned decision does not state the statutory
2 provisions Mr Babala is alleged to have breached, or the nature of the criminal
3 scheme alleged by the Prosecutor. The Appeals Chamber finds that it would have
4 been preferable for the Pre-Trial Chamber to have done so in the impugned decision
5 itself. However, in making its findings under Article 58(1)(a) of the statute in
6 relation to Mr Babala, the Pre-Trial Chamber clearly stated its reliance on an "ex novo"
7 assessment of the materials in support of the arrest warrant decision, which expound
8 further on the nature of the criminal scheme, Mr Babala's involvement therein, and
9 the subparagraphs of Article 70 of the Statute under which he is charged. Therefore,
10 the alleged criminal nature of the scheme and related evidence is evident in
11 documents referred to in the impugned decision, and which were made available to
12 Mr Babala on 27 November 2013, despite not being further elaborated upon in the
13 impugned decision.

14 Thirdly, Mr Babala argues a number of errors relating to the burden of proof,
15 presumption of innocence and fairness of the proceedings. The Appeals Chamber
16 dismisses all his arguments on the ground that it can discern no clear error on the part
17 of the Pre-Trial Chamber.

18 In particular, regarding Mr Babala's argument that the Pre-Trial Chamber referred to
19 a higher burden of proof during his initial appearance before the Court than that
20 required at the pre-trial stage, the Appeals Chamber finds that, in so arguing,
21 Mr Babala erroneously attributes the evidentiary burden at trial to that at the pre-trial
22 stage of proceedings.

23 In relation to Mr Babala's arguments that the Pre-Trial Chamber violated the, and I
24 quote, "fundamental principles of presumption of innocence and the exceptionality of
25 detention," end of quote, the Appeals Chamber observes that the Pre-Trial Chamber

1 recalled the exceptional nature of detention in the impugned decision and then noted
2 that, where the relevant statutory requirements are satisfied, and I quote, "the
3 presumption of innocence does not per se prevent detention," end of quote. The
4 Appeals Chamber finds that, in so finding, the Pre-Trial Chamber was guided by the
5 correct legal standard in making its decision under Article 60(2) of the Statute, and
6 finds no error.

7 Accordingly, the Appeals Chamber dismisses Mr Babala's ground of appeal.

8 I shall now turn to Mr Babala's second ground of appeal.

9 Under his second ground of appeal, Mr Babala submits that the Pre-Trial Chamber
10 erred in finding that the conditions under Article 58(1)(b) of the Statute were fulfilled
11 and justified his condition -- his continued detention. For the reasons contained in
12 its judgment, the Appeals Chamber discerns no clear error on the part of the Pre-Trial
13 Chamber and dismisses Mr Babala's arguments.

14 Regarding Article 58(1)(b)(i) of the Statute, as found in the Kilolo OA 2 judgment,
15 which I just summarised, the Appeals Chamber recalls its concern regarding the
16 Pre-Trial Chamber's language when referring to the offences against the
17 administration of justice as being of utmost gravity. Nevertheless, on the basis of the
18 Pre-Trial Chamber's reasons put forward in the impugned decision, the Appeals
19 Chamber does not consider that the Pre-Trial Chamber actually sought to equate such
20 offences with those under Article 5 of the Statute, despite the language it used, and
21 therefore did not err in that regard.

22 With respect to Mr Babala's contention that the Pre-Trial Chamber failed to identify
23 the contacts he has as a parliamentarian in the DRC, the Appeals Chamber notes that
24 the Pre-Trial Chamber recalled its finding in the arrest warrant decision that
25 Mr Babala was a DRC parliamentarian, which provided him with, and I quote,

1 "numerous contacts, including at international level, and is able to travel freely,
2 including to non-State parties," end of quote.

3 When making this finding, the Pre-Trial Chamber explicitly referred to Mr Babala's
4 role in the Movement for the Liberation of the Congo party, Congolese press articles
5 and to specific translated excerpts of phone call intercepts as its evidentiary basis to
6 establish the existence of the said "contacts," and that this evidence was disclosed to
7 Mr Babala on 27 November 2013. The Appeals Chamber further observes in
8 particular that the excerpts of phone call intercepts refer to individuals and groups of
9 individuals connected to Mr Babala and finds that it was sufficiently detailed to
10 justify the Pre-Trial Chamber's conclusion regarding the existence of such contacts.

11 In relation to Article 58(1)(b)(ii) of the Statute, Mr Babala advances several arguments,
12 which, for reasons developed in the judgment, are dismissed by the Appeals
13 Chamber. In particular, he argues that the Pre-Trial Chamber erred in relying on the
14 observations of the Parquet Général of the DRC made on 17 February 2014, on the
15 basis of their incompatibility with the previous DRC Authorities' observations made
16 on 9 January 2014, without providing reasons for doing so.

17 The Appeals Chamber is not persuaded by Mr Babala's contention, as it considers that
18 the Pre-Trial Chamber was not unreasonable in relying on the Parquet Général's
19 observations of 17 February 2014, given it was within its discretion to do so.

20 Turning to Article 58(1)(b)(iii) of the Statute, Mr Babala argues that he could not
21 commit further crimes because the disclosure of evidence in the Bemba case is
22 completed and since he does not know the identity of any potential accusers, he
23 cannot retaliate against them. The Appeals Chamber notes that, in so arguing,
24 Mr Babala merely reiterates arguments put forward before the Pre-Trial Chamber,
25 and fails to specify an error on the part of the Pre-Trial Chamber arising from the

1 impugned decision. The Appeals Chamber therefore dismisses Mr Babala's
2 arguments.

3 I shall now turn to Mr Babala's third ground of appeal.

4 With respect to his third ground of appeal, Mr Babala argues that the Pre-Trial
5 Chamber erred: by not taking into account changed circumstances pursuant to
6 Article 60(3) of the Statute; in denying his request for a hearing; and by denying his
7 request for release on the basis of his failure to present specific conditions for release.
8 The Appeals Chamber, for the reasons expounded in its judgment, dismisses
9 Mr Babala's arguments in that regard.

10 In particular, the Appeals Chamber finds that Mr Babala's submission that the
11 Pre-Trial Chamber erred in finding that he had failed to advance conditions for
12 release, and therefore used his failure, and I quote, "as a pretext to deny him release,"
13 end of quote, on this basis, to be without merit. The Appeals Chamber recalls that
14 the Pre-Trial Chamber was satisfied that the conditions set forth in Article 58(1) of the
15 Statute were fulfilled. The Appeals Chamber observes also that no State had
16 expressly offered to accept him and to enforce conditions. Consequently, the
17 Appeals Chamber finds that the Pre-Trial Chamber did not abuse its discretion in that
18 regard, and therefore it can discern no clear error in the Pre-Trial Chamber's findings.
19 In conclusion, as the three grounds of appeal of Mr Babala have been dismissed, the
20 Appeals Chamber, by majority, confirms the impugned decision and dismisses the
21 appeal.

22 As indicated earlier, Judge Kourula and Judge Ušacka both separately dissent from
23 the Appeals Chamber's decision.

24 Judge Kourula dissents for similar reasons as expressed in his dissenting opinion in
25 the Kilolo OA 2 judgment.

1 Judge Ušacka dissents also for similar reasons as expressed in her dissenting opinion
2 in the Kilolo OA 2 judgment.

3 Finally, I shall summarise the judgment in relation to Mr Kabongo Mangenda.

4 Mr Kabongo Mangenda, presents three grounds of appeal.

5 Under his first ground of appeal, he argues that the Pre-Trial Chamber erred in
6 dismissing his arguments directed at demonstrating that the arrest warrant decision
7 was erroneous. Accordingly, he argues that, in fact, his application should not have
8 been characterised as one of, I quote, "interim release," but rather, and I quote, "purely
9 and simply as an application for immediate release on the ground of unlawful arrest,"
10 end of quote, and that Article 60(2) of the Statute is therefore not applicable at all.

11 Mr Kabongo Mangenda avers that he has a fundamental right to submit questions
12 pertaining to his right to freedom "immediately" to a court, separately from the
13 process of the confirmation of charges, and that the Pre-Trial Chamber erred in law by
14 erroneously conflating these two issues, and by finding that compensation was the
15 only available remedy under the Statute.

16 He argues that the arrest warrant was unlawful due to its failure to sufficiently
17 specify particulars; its reliance on the evidence yielded by the allegedly unlawful
18 mandate of the Independent Counsel; and by the allegedly unlawful monitoring of
19 telephone conversations by the Registry.

20 The Appeals Chamber notes that there exists an internationally recognised human
21 right to have the lawfulness of one's arrest and/or detention judicially reviewed,
22 which entails the related remedy of release. Indeed, the Appeals Chamber has
23 previously found that this human right, and I quote, "is entrenched in Article 60 of the
24 Statute," end of quote.

25 Accordingly, in circumstances where a suspect has already been surrendered to the

1 Court, the Appeals Chamber does not consider that the remedy of release is available,
2 except as provided for in Article 60 of the Statute. This means that the principal
3 consideration is not whether a warrant of arrest has been illegally issued, but whether
4 the conditions for detention under Article 58(1) of the Statute are presently met.

5 Mr Kabongo Mangenda requested to be released based on the purported
6 unlawfulness of the arrest warrant decision; he did not request a finding of
7 unlawfulness as a basis for seeking compensation under Article 85 of the Statute.

8 The Appeals Chamber can therefore discern no clear error in the Pre-Trial Chamber's
9 decision to dismiss Mr Mangenda's arguments on this point.

10 I will now turn to Mr Kabongo Mangenda's second ground of appeal.

11 Under his second ground of appeal, he argues that the Pre-Trial Chamber erred when
12 it found that reasonable grounds to believe existed that he was criminally responsible
13 for offences under Article 70 of the Statute. In that regard, he advances three main
14 arguments, regarding: (i) his alleged frequent receipt of money transfers through
15 Western Union in relation to Defence witnesses appearing in court; (ii) his close work
16 with Mr Kilolo in witness coaching; and (iii) his involvement in privileged conference
17 calls with Mr Bemba and Mr Babala.

18 For reasons developed further in the judgment, the Appeals Chamber dismisses his
19 arguments on the basis that there is no clear error in the Pre-Trial Chamber's decision
20 to defer substantive considerations around the admissibility of evidence, such as the
21 issue of the mandate of Independent Counsel, to the confirmation of charges. The
22 Appeals Chamber is cognizant of the requirement, at this stage of proceedings, to be
23 satisfied of, and I quote, "reasonable grounds to believe," end of quote, that a suspect
24 committed the crimes alleged, in order to maintain detention. However, the Appeals
25 Chamber does not consider that substantive considerations around admissibility of

1 evidence can be appropriately addressed in the context of a decision taken on interim
2 release, in the absence of obvious male fides.

3 Therefore, due to the fact that the Pre-Trial Chamber clearly articulated the evidence
4 for which it formed the view that "reasonable grounds to believe" that Mr Kabongo
5 Mangenda had committed the offences alleged, the Appeals Chamber considers that
6 the arguments brought by Mr Kabongo Mangenda in relation to his second ground of
7 appeal amount to a mere disagreement with the Pre-Trial Chamber's findings and fail
8 to show a clear error therein.

9 I will now turn to his third and final ground of appeal.

10 Under his third ground of appeal, Mr Kabongo Mangenda argues that the Pre-Trial
11 Chamber erred when it found that his detention appeared necessary for the grounds
12 set out in Article 58(1)(b) of the Statute; that the Pre-Trial Chamber erred regarding
13 conditions of release; and further erred by not calling a hearing on the application for
14 interim release.

15 In relation to Article 58(1)(b)(i) of the Statute, he argues that, one, that the Pre-Trial
16 Chamber erred in finding that he could travel within and outside the Schengen area
17 as the Registry has his passport and his Dutch residence permit; two, that the
18 Pre-Trial Chamber erred in law when it relied on the gravity of the alleged offences;
19 thirdly, that his involvement in a network which could provide him with financial
20 resources to abscond from the jurisdiction of the Court has not been established; and
21 finally, that the Pre-Trial Chamber committed an error of law in failing to consider his
22 personality as a criterion in its assessment of a risk of flight.

23 The Appeals Chamber dismisses these arguments for reasons further developed in
24 the judgment. However, in so doing, the Appeals Chamber emphasises its concerns
25 in relation to the Pre-Trial Chamber's treatment of the gravity of the offences.

1 Nevertheless, on the basis of the Pre-Trial Chamber's reasons put forward in the
2 impugned decision, the Appeals Chamber does not consider that the Pre-Trial
3 Chamber actually sought to equate such offences with those under Article 5 of the
4 Statute, despite the language it used, and therefore did not err in that regard.

5 The Appeals Chamber further notes that any decision on whether a person is
6 detained pending his or her trial at this Court indeed ought to be made based on the
7 specific circumstances of the case, as relevant to an assessment of whether or not a
8 suspect is likely to appear before the Court. Personal circumstances of the suspect
9 such as the suspect's education, professional or social status may be relevant to
10 assessing whether or not a suspect will appear before the Court.

11 However, while the Appeals Chamber notes that the Pre-Trial Chamber initially
12 qualified, and I quote, "education, professional or social status," close, to be "per se
13 neutral and inconclusive in respect of the need to assess the existence of flight risks,"
14 end of quote, a statement which the Appeals Chamber considers to be ambiguous in
15 meaning, it appears that the Pre-Trial Chamber went on to assess such factors in
16 making its assessment under Article 58(1)(b)(i) of the Statute. Thus, while the
17 Appeals Chamber emphasises the relevance of personal circumstances in this regard,
18 it can discern no clear error in the Pre-Trial Chamber's related findings.

19 As to Mr Kabongo Mangenda's argument that the Pre-Trial Chamber erred in relation
20 to Article 58(1)(b)(ii) of the Statute on the basis that stating that a criminal
21 investigation is underway does not establish criminal intent, the Appeals Chamber
22 finds that he merely proposes an alternative assessment of the evidence before the
23 Pre-Trial Chamber, without indicating why the Pre-Trial Chamber's approach was
24 unreasonable. Therefore, the Appeals Chamber can discern no clear error in the
25 Pre-Trial Chamber's finding, and accordingly rejects his argument.

1 In relation to his argument that the Pre-Trial Chamber's finding in relation to
2 Article 58(1)(b)(iii) of the Statute is incorrect because it is based on hypotheses, the
3 Appeals Chamber recalls that it has previously found that the assessment of whether
4 detention appears necessary under Article 58(1)(b) of the Statute, and I quote,
5 "revolves around the possibility, not the inevitability, of a future occurrence," end of
6 quote, and therefore dismisses Mr Mangenda's arguments.

7 For reasons developed in the judgment, the Appeals Chamber dismisses his
8 remaining arguments under his third ground of appeal that the Pre-Trial Chamber
9 erred in its interpretation of the United Kingdom Authorities' Observations, that the
10 Pre-Trial Chamber failed to consider his need to be with his two children and wife
11 and that he was not required to propose conditions for his release, and that the
12 Pre-Trial Chamber therefore erred in that regard.

13 The Appeals Chamber also finds that his contention that the Pre-Trial Chamber failed
14 to address his request to have a hearing to be without merit, as the Appeals Chamber
15 does not consider that the Pre-Trial Chamber abused its discretion in electing not to
16 convene a hearing. In terms of his request that the Appeals Chamber order a
17 hearing, he does not advance any argument in support of his request. Accordingly,
18 his arguments on these points are dismissed.

19 As indicated earlier, Judges Kourula and Ušacka both separately dissent from the
20 Appeals Chamber's decision.

21 Judge Kourula dissents for similar reasons as expressed in his dissenting opinion in
22 the Kilolo OA 2 and Babala OA 3 judgments. However, in addition to these reasons,
23 Judge Kourula also opines that Mr Kabongo Mangenda's challenges to the legality of
24 the mandate of the Independent Counsel and, following from his alleged illegality,
25 the admissibility of the evidence collected by that Independent Counsel, which was

1 relied upon for both the arrest warrant and the conclusion, pursuant to Article 58(1)(a)
2 of the Statute, ought to have been considered by the Pre-Trial Chamber at this stage of
3 proceedings rather than waiting until the confirmation stage.

4 Accordingly, Judge Kourula would have reversed the impugned decision and
5 remanded the assessment of the grounds for detention under Article 58(1)(a) and (b)
6 of the Statute, in their entirety, to Pre-Trial Chamber.

7 Judge Ušacka dissents also for similar reasons as expressed in her dissenting opinion
8 in the Kilolo OA 2 and Babala OA 3 judgments. In addition, she opines that

9 Mr Kabongo Mangenda's arguments in relation to the first ground of appeal should
10 have been rejected in limine because they are not properly before the

11 Appeals Chamber. In Judge Ušacka's view, these arguments are essentially

12 challenging the correctness of the arrest warrant decision itself, which, however, is

13 not the subject of the present appeal. If Mr Mangenda had wished to appeal the

14 arrest warrant decision, he should have sought leave to appeal it under Article 82(1)(d)

15 of the Statute within the relevant time limit. In her view, he cannot bring arguments

16 in relation to the arrest warrant decision in an appeal brought under Article 82(1)(b)

17 of the Statute directed against a decision issued under Article 60(2) of the Statute.

18 Accordingly, Judge Ušacka would have reversed the impugned decision and

19 remanded the matter to the Pre-Trial Chamber for a new decision on Mr Kabongo

20 Mangenda's application for interim release.

21 This concludes my summaries of the judgment. My last task is to thank the

22 interpreters, court reporters, the parties and, of course, the staff - supporting staff - of
23 the Court.

24 The session is now closed.

25 I also -- I'm not sure whether Mr Babala, Kilolo, Kabongo Mangenda are in court, and

1 if they are in court, I also wish to thank them.

2 The session is now closed.

3 THE COURT USHER: All rise.

4 (The hearing ends in open session at 5.36 p.m.)

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