

**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 Kilolo 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:**

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**REGISTRY**

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**I. Introduction**

1. The Prosecution opposes the Kilolo Defence's appeal ("Appeal")<sup>1</sup> against the Single Judge's decision to maintain Kilolo in detention ("Decision").<sup>2</sup> The Appeal fails to identify or substantiate an appealable error in the Decision. Instead, the Appeal re-litigates issues before the Appeals Chamber without showing appealable error<sup>3</sup> and amounts to mere disagreement with the Single Judge's findings.<sup>4</sup> 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 balanced the presumption of innocence and the necessity of continued detention.

2. The Kilolo Defence's ("Appellant") broad submissions on the first ground of appeal<sup>5</sup> fail to identify a discernible error in the Single Judge's exercise of discretion and should be dismissed. The Single Judge articulated the correct legal principles of the presumption of innocence and the exceptionality of detention.<sup>6</sup> He also acknowledged – in line with the jurisprudence of the Court<sup>7</sup> – that these do not prevent detention when the conditions of Article 58(1)(b) are satisfied.<sup>8</sup> The Appeals Chamber confirms that it is not enough to "simply claim that an impugned decision violated the overall fairness or led to a violation of his or her human rights without specifying and substantiating such claim".<sup>9</sup>

<sup>1</sup> ICC-01/05-01/13-290; ICC-01/05-01/13-260.

<sup>2</sup> ICC-01/05-01/13-259.

<sup>3</sup> ICC-01/05-01/13-290, paras. 29-30, 32, 34-37, 39.

<sup>4</sup> ICC-01/05-01/13-290, paras. 4, 25-28, 34-37, 39.

<sup>5</sup> ICC-01/05-01/13-290, para. 4.

<sup>6</sup> ICC-01/05-01/13-259, para. 3.

<sup>7</sup> ICC-01/04-01/06-824, para. 134; ICC-01/04-01/07-572, para. 11.

<sup>8</sup> ICC-01/05-01/13-259, para. 3.

<sup>9</sup> ICC-01/05-01/08-2151-Red, para. 41.

3. The Appellant's sub-arguments are similarly flawed. First, the Single Judge's denial of the Appellant's request for an oral hearing was not arbitrary.<sup>10</sup> Rather, the Single Judge reasonably determined that the "great amount" of material referred to in the Decision made it "not necessary or appropriate to hold a hearing".<sup>11</sup> Contrary to the Appellant's argument, Rule 118(3) places the decision of whether to hold a hearing entirely at the discretion of the Single Judge. Further, the Single Judge was correct to reject the request because he did not consider interim release appropriate: the Belgian authorities had previously clarified that a hearing was necessary only if the Appeal "*devait être accueillie favorablement*".<sup>12</sup>

4. Second, the Appellant misreads the Decision in arguing that the Single Judge's language "impl[ied] guilt".<sup>13</sup> Once the Single Judge determined that the evidence established "reasonable grounds to believe" that crimes were committed,<sup>14</sup> all references to the Appellant's conduct must be read in this context. The Decision thus refers not to Kilolo's "actual conduct",<sup>15</sup> but to the conduct in which the Single Judge found reasonable grounds to believe he engaged.

5. Third, the Single Judge did not err when refusing to consider Kilolo's personal circumstances as "mitigating"<sup>16</sup> factors under Article 58(1)(b)(i). The Appellant has not demonstrated that the Single Judge failed to consider, or to give proper weight to, relevant considerations which led him to err in exercising his discretion. The Single Judge provided detailed reasons for why he discounted these factors. The Appeals Chamber will accord a margin of appreciation to the Single Judge's analysis<sup>17</sup> and may only intervene "where it cannot discern how the Chamber's conclusion could

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<sup>10</sup> ICC-01/05-01/13-290, para. 6.

<sup>11</sup> ICC-01/05-01/13-259, para. 47.

<sup>12</sup> ICC-01/05-01/13-95-Conf-Anx9, p. 8.

<sup>13</sup> ICC-01/05-01/13-290, para. 7.

<sup>14</sup> The Single Judge repeated this eight times. See ICC-01/05-01/13-259, paras. 5, 6, 13, 16, 37.

<sup>15</sup> ICC-01/05-01/13-290, para. 8.

<sup>16</sup> ICC-01/05-01/13-290, para. 9.

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

have reasonably been reached”.<sup>18</sup> Far from “arbitrarily” denying the value of personal circumstances,<sup>19</sup> the Single Judge reasoned that “education, professional or social status” do not affect the assessment of risk under Article 58(1)(b)(i) because they are “*per se* neutral and inconclusive in respect of the need to assess the existence of flight risks”.<sup>20</sup> Moreover, as the Appellant does not describe how the error “materially affected”<sup>21</sup> the Decision, the Appeals Chamber should dismiss this argument.

6. Fourth, the Appellant’s argument that the Decision lacks concrete and specific reasoning<sup>22</sup> amounts to a mere disagreement with it. The Appellant fails to properly characterise any alleged error or clearly define the scope of his objection. His resort to contesting generally the Single Judge’s Article 58(1)(a) findings<sup>23</sup> is insufficient to support this ground of appeal. In any case, the Decision provides detailed reasoning based on concrete evidence: the Single Judge stated his intention to refer to the underlying materials in his assessment<sup>24</sup> and devoted eight paragraphs to reviewing the evidence.<sup>25</sup>

7. Fifth, the Appellant’s hyperbolic accusation of racial bias<sup>26</sup> are unfounded and, accordingly, irrelevant to the Appeals Chamber’s decision.<sup>27</sup> The dearth of evidentiary support and the Appellant’s complete failure to identify any genuine error or explain its material effect on the Decision belies his claim.

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<sup>18</sup> ICC-01/05-01/08-631-Red OA 2, para. 61; ICC-01/05-01/08-2151-Red, para. 16.

<sup>19</sup> ICC-01/05-01/13-290, para. 9.

<sup>20</sup> ICC-01/05-01/13-259, para. 23; see supporting jurisprudence at the ICTY, *Prosecutor v. Zoran Kupreskic et al.*, Decision on Motion for Provisional Release filed by Zoran Kupreskic, Mirjan Kupreskic, Drago Josipovic and Dragan Pasic (joined by Marinko Katava and Vladimir Santic), 15 December 1997, para. 11; *Prosecutor v. Darko Mrda*, Decision on Darko Mrda’s Request for Provisional Release, 15 April 2002, para. 38.

<sup>21</sup> 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.

<sup>22</sup> ICC-01/05-01/13-290, paras. 10-12.

<sup>23</sup> ICC-01/05-01/13-290, para. 11.

<sup>24</sup> ICC-01/05-01/13-259, para. 4.

<sup>25</sup> ICC-01/05-01/13-259, paras. 6-13.

<sup>26</sup> ICC-01/05-01/13-290, paras. 13, 45.

<sup>27</sup> The Appellant makes other unfounded and irrelevant accusations, ICC-01/05-01/13-290, paras. 13, 34, 35, 41, 45, and employs unnecessary and unprofessional invective, ICC-01/05-01/13-290, paras. 8, 34, 35, 41 (“bewildering”, “appalling and amiss”, “outrageous”).

8. Sixth, the Appellant's claim that the Single Judge erred in characterising Article 70 offences as crimes of the utmost gravity<sup>28</sup> should be dismissed as immaterial to the Appeals Chamber's determination. Because the Single Judge does not rely on this finding to maintain Kilolo in detention, a different finding would have no impact on the outcome of the Decision.

9. Seventh, the Appellant's contention that the Decision violates the principle that detention is exceptional<sup>29</sup> fails because it repeats a previous submission and fails to demonstrate that the Single Judge discernibly erred in exercising his discretion in denying the Appellant provisional release. The Single Judge gave adequate and detailed reasoning for not taking into account Kilolo's personal circumstances: because they did not have an impact in any way on the risk assessment under Article 58(1)(b)(i).<sup>30</sup> The case law that the Appellant cites in support is either irrelevant<sup>31</sup> or inapposite.<sup>32</sup>

10. Eighth, the Appellant's submission that the Single Judge reversed the burden of proof<sup>33</sup> misrepresents the Single Judge's reasoning and fails to properly characterise the error or describe its material effect on the Decision. The structure of the Decision was such that the Single Judge made his findings based on the evidence, before turning to whether any Defence argument undermined his conclusion. For example, the Single Judge found that he "[wa]s persuaded that the submissions brought forward by the Defence for Mr Kilolo are *not suitable to weaken the persuasiveness of the factors supporting the existence of a flight risk*".<sup>34</sup> The Single Judge did not reverse the

<sup>28</sup> ICC-01/05-01/13-290, paras. 14-15.

<sup>29</sup> ICC-01/05-01/13-290, paras. 16-19.

<sup>30</sup> ICC-01/05-01/13-259, para. 23.

<sup>31</sup> *E.g.* "good behaviour in detention" is clearly not at issue here. ICC-01/05-01/13-290, para. 18.

<sup>32</sup> In each case cited by the Appellant the suspects were maintained in detention.

<sup>33</sup> ICC-01/05-01/13-290, paras. 20-21.

<sup>34</sup> ICC-01/05-01/13-259, para. 28 (emphasis added); see also ICC-01/05-01/13-259, paras. 15-16.

burden of proof. He laid out the circumstances leading him to his conclusion, which is compatible with Article 67(1)(g) and (i).

II. The Single Judge correctly made an Article 58(1)(a) assessment in the Decision.

11. The Appellant's second ground of appeal, that the Single Judge inappropriately assessed *ex novo* whether reasonable grounds existed to believe Kilolo committed offences under Article 70,<sup>35</sup> is legally incorrect. Article 60(2) requires the Single Judge to satisfy himself that "the conditions set forth in article 58, paragraph 1, are met" to continue to detain Kilolo, which necessarily includes an assessment under Article 58(1)(a).<sup>36</sup> Therefore the Single Judge was correct to note his obligation to make this analysis,<sup>37</sup> and then to conduct it.<sup>38</sup> Far from "preclud[ing] Mr Kilolo from . . . arguing for interim release",<sup>39</sup> the Single Judge upheld Kilolo's right to have the evidentiary basis for his detention reviewed in light of any changed circumstances.

III. The Single Judge correctly applied the conditions of Article 58(1)(b).

12. In his third ground, the Appellant fails to demonstrate that the Single Judge erred in his consideration of any Article 58(1)(b) factor. The Appellant's submissions should be dismissed accordingly.

13. Before turning to the three limbs of Article 58(1)(b), the Appellant submits<sup>40</sup> that the Single Judge misapplied the legal standard used to assess risk: the "possibility,

<sup>35</sup> ICC-01/05-01/13-290, paras. 22-23.

<sup>36</sup> See, e.g., ICC-02/11-01/11-278-Red, para. 23.

<sup>37</sup> ICC-01/05-01/13-259, para. 5.

<sup>38</sup> ICC-01/05-01/13-259, paras. 6-16.

<sup>39</sup> ICC-01/05-01/13-290, para. 23.

<sup>40</sup> ICC-01/05-01/13-290, para. 24.

not the inevitability” test.<sup>41</sup> In addition to the Appellant’s failure to describe the material effect of the alleged error, the construction of his proposed test – that “possible” means “likely”<sup>42</sup> – is contrived, and not supported by the jurisprudence of this Court<sup>43</sup> or by the words’ plain meaning.<sup>44</sup> Again, the Appellant’s argument fails to implicate a specific instance of misapplication of the test and is manifestly ill-founded.

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

14. The Appellant’s arguments under this ground<sup>45</sup> fail to identify errors and instead constitute general disagreement with the Decision.

15. The Appellant’s first alleged error, that Bemba and Kilolo are associates,<sup>46</sup> disregards the Single Judge’s clear and detailed reasoning why Kilolo’s continued association with Bemba was relevant to his Article 58(1)(b)(i) assessment, and fails to show that the Single Judge erred.<sup>47</sup> The Appellant likewise fails to demonstrate why his preferred test, requiring the Prosecution make “a clear and irrefutable showing that Mr Bemba would finance the getaway of a professional acquaintance and a showing that he would do so for Mr Kilolo specifically”,<sup>48</sup> should apply, especially when it demands a level of certainty way beyond the Appeals Chamber’s articulated “possibility” threshold. In any case, there *is* a wealth of evidence tying Kilolo to Bemba outside of a strictly professional relationship, including criminal conduct<sup>49</sup> and political activities.<sup>50</sup>

<sup>41</sup> See ICC-01/05-01/13-259, para. 19.

<sup>42</sup> ICC-01/05-01/13-290, para. 24.

<sup>43</sup> See, e.g., ICC-01/04-01/07-572, paras. 22, 24 (“the appellant *might* attempt to evade his trial” (emphasis added) and “[t]he possibility of his absconding remains visible”, respectively).

<sup>44</sup> The Oxford English dictionary (online) lists “possibly” as meaning “in accordance with what can or may . . . occur”, and “likely” as meaning “that looks as if it would happen, be realized [...]; probable”. <http://www.oed.com/>.

<sup>45</sup> See ICC-01/05-01/13-290, paras. 25-37.

<sup>46</sup> ICC-01/05-01/13-290, paras. 25-27.

<sup>47</sup> ICC-01/05-01/13-259, para. 20.

<sup>48</sup> ICC-01/05-01/13-290, para. 28 (emphasis omitted).

<sup>49</sup> See, e.g., ICC-01/05-66-Conf-Anx-Corr; ICC-01/05-64-Conf-Anx.

<sup>50</sup> <http://www.youtube.com/watch?v=M0DLFcGTaUQ&noredirect=1>.



16. The Appellant's second alleged error<sup>51</sup> – that Kilolo could travel in Europe without a passport<sup>52</sup> – fails to show that the Single Judge erred in relying on this factor. The Single Judge's reliance on this factor was consistent with Chambers in other cases.<sup>53</sup> The Appellant mischaracterises the Decision when he claims that the Single Judge found that Kilolo could travel to Cameroon; the Single Judge was merely reiterating his findings in the arrest warrant.<sup>54</sup> Moreover, by responding to the Prosecution's arguments,<sup>55</sup> and attempting to re-submit Kilolo's personal guarantee,<sup>56</sup> the Appellant inappropriately re-litigates the Decision.

17. Finally, the Appellant disagrees with the Decision and re-litigates the issue of his risk of flight by submitting that Kilolo's "entire personal and professional life is in Belgium".<sup>57</sup> The Appellant identifies no error in the Decision. He instead attempts to re-argue his previous submissions at second instance<sup>58</sup> and supplant the Single Judge's reasoned findings with his own hypothesis.<sup>59</sup>

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

18. The Appellant's allegation that reasoning on Article 58(1)(b)(ii) is "conspicuously absent"<sup>60</sup> from the Decision is broad, unsupported, and amounts to a disagreement with the Single Judge's conclusion rather than an identification of a discernible error. The Appellant fails to substantiate the alleged error with specific examples or describe its material effect on the Decision. On the contrary, the Single Judge devoted six paragraphs to his assessment of the underlying evidence.<sup>61</sup> The

<sup>51</sup> ICC-01/05-01/13-290, paras. 29-33.

<sup>52</sup> ICC-01/05-01/13-259, paras. 20-22.

<sup>53</sup> ICC-01/04-01/10-163, para. 57; ICC-01/04-02/06-147, para. 53.

<sup>54</sup> See ICC-01/05-01/13-1-Red2-tENG, para. 22.

<sup>55</sup> ICC-01/05-01/13-290, paras. 29-30 ("The Prosecution contends..."; "The Prosecution further indicated...").

<sup>56</sup> ICC-01/05-01/13-290, para. 32.

<sup>57</sup> ICC-01/05-01/13-290, paras. 34-37.

<sup>58</sup> ICC-01/05-01/13-42, paras. 38, 40, 50, 61-62.

<sup>59</sup> ICC-01/05-01/13-290, para. 35.

<sup>60</sup> ICC-01/05-01/13-290, para. 39.

<sup>61</sup> ICC-01/05-01/13-259, paras. 33-38.

Appellant also attempts to re-litigate his case before the Appeals Chamber.<sup>62</sup> Finally, the Appellant's argument is internally inconsistent: the Appellant claims that Kilolo would be "more limited in his contact with Mr Bemba", even while admitting that those in the ICC Detention Centre are allowed "unimpeded contact with the external world".<sup>63</sup>

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

19. The Defence's characterisation of the Single Judge's reasoning under this limb as being too "general"<sup>64</sup> and not "concrete"<sup>65</sup> is unsubstantiated. The Single Judge did not err in using words like "might", "likely" and "could" in his reasoning<sup>66</sup> as the relevant test requires only "the possibility, not the inevitability, of a future occurrence". The Appellant's proposed test – a "concrete risk"<sup>67</sup> – is not the law of this Court and, in any case, the test inappropriately conflates two distinct concepts. The Single Judge's finding that future crimes were "impossible to specify in detail"<sup>68</sup> did not contravene the separate "concrete and specific" standard<sup>69</sup> because the *risk* of the commission of crimes, which must be established based on concrete evidence, is separate from the *nature of the crime* being "impossible to specify in detail".

### III. Requested Relief

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<sup>62</sup> ICC-01/05-01/13-290, para. 39.

<sup>63</sup> ICC-01/05-01/13-290, para. 40.

<sup>64</sup> ICC-01/05-01/13-290, para. 42.

<sup>65</sup> ICC-01/05-01/13-290, para. 43.

<sup>66</sup> ICC-01/05-01/13-259, paras. 39-40, 43; see also paras. 20, 36.

<sup>67</sup> ICC-01/05-01/13-290, para. 42.

<sup>68</sup> ICC-01/05-01/13-259, para. 39.

<sup>69</sup> ICC-01/05-01/13-259, para. 19.

20. The Appellant has not demonstrated that the Single Judge discernibly erred in his Decision. The Appeals Chamber should therefore dismiss the Appeal and uphold the Decision.



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**Fatou Bensouda, Prosecutor**

Dated this 31<sup>st</sup> Day of March 2014  
At The Hague, The Netherlands