

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/05-01/08**  
Date: **19 January 2015**

**THE APPEALS CHAMBER**

**Before:** Judge Sanji Mmasenono Monageng, Presiding Judge  
Judge Sang-Hyun Song  
Judge Akua Kuenyehia  
Judge Erkki Kourula  
Judge Anita Ušacka

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

***IN THE CASE OF***

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

**Public Redacted with Public Annex**

**Public redacted version of “Prosecution Response to Defence Appeal against Trial Chamber III’s ‘Decision on ‘Defence Urgent Motion for Provisional Release’”, 19 January 2015**

**Source:** Office of the Prosecutor

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

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## Overview

1. The Defence appeal<sup>1</sup> against the Trial Chamber's decision denying interim release during the deliberations phase of this case<sup>2</sup> should be dismissed. The Trial Chamber correctly and reasonably determined that there was no change of circumstance relevant to Mr Bemba's detention, and declined to grant interim release. No error of law or fact is shown. Absent any error, the Appeals Chamber should defer to the Trial Chamber's appreciation of the case before it.
  
2. Mr Bemba was arrested and detained in order to ensure his appearance for trial.<sup>3</sup> The circumstances requiring his detention remain unchanged. Moreover, the Trial Chamber has now determined the further risk that Mr Bemba may obstruct or endanger the Court's proceedings if released.<sup>4</sup> Mr Bemba should remain in custody to ensure he attends the trial's conclusion and receives the judgment of the Trial Chamber, and to preserve the process of this Court.
  
3. The broad comparison drawn in the Appeal between Mr Bemba and "other" — unspecified — "political figures accused before the ICC" is inapposite.<sup>5</sup> The question of attendance at judicial hearings is distinct from the question of the necessity of detention; in fact, no accused person "remain[s] at liberty" and is "excused from hearings" in order to "fulfil their political ambitions and duties in their home countries".<sup>6</sup> Some accused persons have been permitted to attend the Court on the basis of a summons, given their particular circumstances and an individualised assessment of the necessity of their detention under articles 58 and 60 of the Rome Statute ("Statute"). Likewise, one such accused person has been excused from attending certain judicial hearings, having made a relevant application under the

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<sup>1</sup> See ICC-01/05-01/08-3230-Conf ("Appeal").

<sup>2</sup> See ICC-01/05-01/08-3221 ("Decision").

<sup>3</sup> See *e.g.* ICC-01/05-01/08-2151-Red OA10, paras.29, 32-34; ICC-01/05-01/08-2034-Red, paras.8, 10.

<sup>4</sup> *Contra* Appeal, para.4. See Decision, para.49.

<sup>5</sup> *Contra* Appeal, para.3.

<sup>6</sup> *Contra* Appeal, para.3.

Rules of Procedure and Evidence (“Rules”).<sup>7</sup> Mr Bemba, however, differs from these accused persons in all material respects. Nor can such a generalised comparison assist the Appeals Chamber in determining this appeal.

### **Confidentiality**

4. This response is filed confidentially, in accord with regulation 23*bis*(2) of the Regulations of the Court (“Regulations”). The Office of the Prosecutor (“Prosecution”) will file a public redacted version simultaneously.

### **Procedural matters**

5. As a preliminary matter, the Prosecution makes two procedural observations.

6. First, the Prosecution notes that the purported background presented by the Defence, concerning the relationship between this case and the proceedings in case ICC-01/05-01/13,<sup>8</sup> is partial, of very limited relevance to this appeal, and a matter which is subject to active litigation before the Trial Chamber.<sup>9</sup> Accordingly, this appeal—which relates to quite a different matter—is not the proper forum for these matters to be further litigated, and the Prosecution has declined to do so here. For these reasons, the Appeals Chamber should disregard paragraphs 21-22 of the Appeal.

7. Second, the Prosecution draws to the attention of the Defence the Appeals Chamber’s recent instruction to “all parties” before it, concerning the inclusion in written filings of a word count and appropriate certification.<sup>10</sup>

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<sup>7</sup> See Rules, rule 134*quater*(1). This rule is not only limited to accused persons “subject to a summons to appear” but also requires, stringently, the showing that the person “is mandated to fulfil extraordinary public duties at the highest national level”. See also rule 134*ter*.

<sup>8</sup> See Appeal, paras.21-22.

<sup>9</sup> See *e.g.* [REDACTED].

<sup>10</sup> See below fn.84.

## Submissions

8. None of the three grounds of appeal advanced by the Defence has any merit.<sup>11</sup>

9. The Trial Chamber properly concluded that the risk of Mr Bemba's flight remains<sup>12</sup>—and this conclusion is only reaffirmed by the fact that Mr Bemba has now heard the strength of the Prosecution evidence against him and been forced to abandon reliance on a number of witnesses called in his defence.<sup>13</sup> If anything, the flight risk may thus be enhanced. In reaching its conclusion, the Trial Chamber correctly understood article 58(1)(b)(i) of the Statute to encompass the appearance of an accused person before the Court until the issue of a verdict.

10. The Trial Chamber has now determined that Mr Bemba's detention is further justified by the need to ensure that he does not obstruct or endanger the Court's proceedings.<sup>14</sup> It reached this conclusion on the basis of its own assessment of the relevant facts, which included the confirmation of charges against Mr Bemba by another Chamber of this Court for offences against the administration of justice under article 70 of the Statute. This was both legally correct and reasonable.

11. Finally, the Trial Chamber appropriately declined to order conditional release. Not only did it consider it unclear whether Belgium had offered to accept Mr Bemba onto its territory, and to enforce conditions,<sup>15</sup> but it also determined that no condition short of detention would sufficiently mitigate the risks of Mr Bemba's flight or his obstruction or endangerment of the Court's proceedings.<sup>16</sup> It thus

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<sup>11</sup> The Prosecution notes the reference in the Appeal to "the four grounds set out below" (Appeal, para.8) but in fact identifies only three grounds of appeal, beginning at paragraphs 15, 21, and 31. The Prosecution understands the Appeal accordingly.

<sup>12</sup> Decision, paras.36-37.

<sup>13</sup> See e.g. ICC-01/05-01/08-3141-Conf, para.119 ("Based on the 'notice of some specifics' of the related Article 70 case, the Defence had no other choice but to exclude 14 of its witnesses in its Closing Brief"). This amounts to approximately 40% of the total number of Defence witnesses called.

<sup>14</sup> Decision, paras.49, 51.

<sup>15</sup> Decision, para.56.

<sup>16</sup> Decision, paras.58-59.

declined to invite representatives of Belgium to appear before it.<sup>17</sup> The Trial Chamber did not abuse its discretion in these respects.

*The Trial Chamber correctly defined a “trial” for the purpose of article 58(1)(b)(i)*

12. The Defence fails to show any error in the Trial Chamber’s conclusion that “the commencement of deliberations does not mean that the *trial* has concluded” and that, accordingly, “neither the closure of evidence nor the start of deliberations mean, *per se*, that the condition of [a]rticle 58(1)(b)(i) is no longer met.”<sup>18</sup> Contrary to the Defence submissions,<sup>19</sup> the Trial Chamber interpreted the Statute correctly.<sup>20</sup> As the Trial Chamber correctly found, the Presiding Judge’s passing reference to “deliberations” as a new “phase” of the case—a term consistent with the language of the Statute<sup>21</sup>—did not imply that the trial had concluded.<sup>22</sup>

13. The term “trial” in article 58(1)(b)(i) of the Statute, viewed in its context, must necessarily include the period of judicial deliberations leading to the issue of the Trial Chamber’s decision pursuant to article 74. The jurisprudence of the Court, especially the two authorities cited in the Decision,<sup>23</sup> supports this interpretation:

- In *Katanga*, the Appeals Chamber expressly referred to the fact that the trial in question “was at the deliberations stage”.<sup>24</sup> It further stated that “nothing in the Statute, the Rules [...] or the Regulations [...] prevents the

<sup>17</sup> Decision, para.61.

<sup>18</sup> Decision, para.30 (emphasis supplied).

<sup>19</sup> *Contra* Appeal, paras.17-19 (claiming that the Trial Chamber failed to give effect to the “plain language reading” of the Statute, emphasised “terminology over substance”, and focused only on the “technical scope of a ‘trial’”).

<sup>20</sup> See ICC-01/09-01/11-1598 OA8, para.105. See further ICC-01/04-01/06-3121-Red, para.277 (“According to article 31 of the Vienna Convention on the Law of Treaties, treaty provisions are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty”).

<sup>21</sup> See Statute, art.74(1) (“judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations”).

<sup>22</sup> See Decision, para.28. *Contra* Appeal, para.15. Read in context, the Presiding Judge’s expression of thanks to participants in the trial for their tireless work “to ensure that this trial has come to an end in good terms” manifestly was intended only to “mark[] the conclusion of this stage [...] of the proceedings”: see ICC-01/05-01/08-T-365-Red-ENG, pp.67-68.

<sup>23</sup> See Decision, para.29 (citing ICC-01/04-01/07-3363 OA13 (“*Katanga* Appeal Decision”); ICC-01/09-01/11-1186 (“*Ruto and Sang* Decision”)).

<sup>24</sup> *Katanga* Appeal Decision, para.17.

Trial Chamber from re-opening the hearing of evidence at the deliberations stage of the proceedings”,<sup>25</sup> with the necessary implication that trial proceedings continue throughout deliberations. Although the *Katanga* Appeals Decision specifically concerns the application of Regulation 55, the Defence is incorrect to imply that the same reasoning is not persuasive in this appeal by analogy.<sup>26</sup>

- The Defence entirely fails to address the *Ruto and Sang* Decision, in which the Trial Chamber likewise contemplated the trial to include not only the hearing of evidence and submissions by the Parties but also the delivery of the judgment and any sentencing, victim impact, or reparation hearings.<sup>27</sup>

14. The ordinary meaning of the term “trial”, according to the *Oxford English Dictionary*, is “[t]he examination and determination of a cause by a judicial tribunal; determination of the guilt or innocence of an accused person by a court”.<sup>28</sup> In both aspects of this definition, the trial encompasses not just the examination of a cause but also its *determination*. Likewise, other provisions of the Statute, such as articles 36(10),<sup>29</sup> 64(6),<sup>30</sup> and 76(2),<sup>31</sup> necessarily include the deliberations period within the ambit of a “trial”.

15. The Defence argument that an accused person “does not ‘appear’ at deliberations” cannot alter the clear ordinary meaning of the term “trial”, both in

<sup>25</sup> *Katanga* Appeal Decision, para.17.

<sup>26</sup> *Contra* Appeal, para.16.

<sup>27</sup> See *Ruto and Sang* Decision, para.79. See also ICC-01/09-01/11-777, paras.104, 110.

<sup>28</sup> See “trial, n.1”, *OED Online*, December 2014.

<sup>29</sup> A judge of a Trial Chamber must continue in office “to complete any trial [...] the hearing of which has already commenced before that Chamber”. Self-evidently, this must include the deliberations period.

<sup>30</sup> The powers in article 64(6) are applicable “during the course of a trial”. As noted in the *Katanga* Appeal Decision, it may be appropriate for a Trial Chamber to employ powers such as article 64(6)(d) even during deliberations. See *above* para.13.

<sup>31</sup> Once deliberations are complete, “[i]n the event of a conviction”, any sentencing hearing must be convened “before the completion of the trial”. See further ICC-01/04-01/06-2871 (setting the date for a sentencing hearing in *Lubanga*, following the issue of the Trial Chamber’s judgment pursuant to article 74); ICC-01/04-01/07-3458 (setting the date for a sentencing hearing in *Katanga*, following the issue of the Trial Chamber’s judgment pursuant to article 74).

article 58(1)(b)(i) and the Statute more generally.<sup>32</sup> Mr Bemba remains “needed in The Hague” to receive judgment in due course; the proceedings have not finished.<sup>33</sup> It is implicit in article 81(3)(a) of the Statute, which provides that “a convicted person shall remain in custody pending an appeal”, that the personal appearance before the Court of an accused person is accorded just as much weight at the conclusion of a trial as at its beginning. As such, the Trial Chamber’s interpretation of the term “trial” in article 58(1)(b)(i) is not only consistent with its ordinary meaning in its context but also with the object and purpose of the Statute.

16. The Defence is incorrect to imply that there is an “accepted practice at the ICTY” regarding provisional release during the deliberations period.<sup>34</sup> Just two of the four authorities cited—decisions of ICTY Trial Chambers in *Prlić* and *Stanišić and Župljanin*<sup>35</sup>—are even relevant to the facts of this appeal.<sup>36</sup> They are also distinguishable from this case, as both the *Prlić* defendants and Stanišić had surrendered voluntarily to the jurisdiction of the ICTY.<sup>37</sup> By contrast, no provisional release was granted for the period of deliberations for Župljanin, who had not surrendered voluntarily.<sup>38</sup>

<sup>32</sup> *Contra Appeal*, para.17.

<sup>33</sup> *Contra Appeal*, para.18.

<sup>34</sup> *Contra Appeal*, para.19.

<sup>35</sup> See *Appeal*, para.19, fn.21 (citing ICTY, *Prosecutor v. Prlić et al*, IT-04-74-T, Decision on Motion for Provisional Release of the Accused Milivoj Petković, 30 November 2011, paras.37-38; ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Decision Granting Mico Stanišić’s Request for Provisional Release, 6 June 2012, para.26).

<sup>36</sup> Regarding the two irrelevant authorities, see *Appeal*, para.19, fn.21 (citing ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Order of the Provisional Release of the Accused *Proprio Motu*, 6 November 2014; ICTY, *Prosecutor v. Haradinaj et al*, IT-04-84bis-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 8 December 2010, paras.25-26). In *Šešelj*, the Trial Chamber, by majority, ordered provisional release during deliberations on the basis “strictly of humanitarian grounds”, citing “confidential information that points to a deterioration in the Accused’s health”. Although the *Šešelj* Trial Chamber noted that the Accused was “awaiting the Judgement”, this is in the context of a very significant “prolongation of the procedure following the replacement of a judge”. Likewise, in *Haradinaj*, the Trial Chamber granted provisional release in the context of a case-specific, fact-intensive analysis concerning provisional release during the “winter recess”. Although Mr Bemba sought interim release for the 2014 winter recess at this Court, his application in that respect is now moot; he seeks no relief in this respect: see *Appeal*, para.44. Nor in this appeal does he claim that his release was necessitated by exigent humanitarian considerations.

<sup>37</sup> See ICTY, ‘IT-04-74: *Prlić et al*—Case Information Sheet’ (showing that Prlić, Stojić, Praljak, Petković, Corić, and Pušić all surrendered on 5 April 2004); ICTY, ‘IT-08-91: *Stanišić and Župljanin*—Case Information Sheet’ (showing that Stanišić surrendered on 11 March 2005).

<sup>38</sup> See ICTY, ‘IT-08-91: *Stanišić and Župljanin*—Case Information Sheet’ (showing that Župljanin was arrested on 11 June 2008). Indeed, Župljanin did not even apply for provisional release after the close of the hearing of

17. The Defence further ignores the authoritative line of jurisprudence by the ICTY Appeals Chamber which takes a very cautious approach. For example, it has been repeatedly stated that “an application for provisional release brought at a late stage of the proceedings, and in particular after the close of the Prosecution case, should only be granted when serious and sufficiently compelling humanitarian reasons exist”.<sup>39</sup> This makes clear, at the very least, that the advanced stage of the proceedings is a significant factor which may equally militate *against* granting provisional release.<sup>40</sup> Various Chambers of the ICTY have acknowledged, expressly or by implication, that any flight risk may be enhanced as trial proceedings progress towards their conclusion,<sup>41</sup> giving the Accused the opportunity to evaluate the strength of the case against them.

18. Notwithstanding the Defence’s primary submission that the Trial Chamber was legally incorrect in the definition of “trial” for the purpose of article 58(1)(b)(i), it also appears to contend, incorrectly, that the Decision is insufficiently reasoned.<sup>42</sup>

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evidence. See further ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Judgement, Vol.3, 27 March 2013, para.18 (Stanišić was provisionally released on eleven occasions; Župljanin was never granted provisional release); ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-PT, Decision on Stojan Župljanin’s Motion for Provisional Release, 30 June 2009, paras.7-11.

<sup>39</sup> See e.g. ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.15, Decision on Prosecution’s Appeal against the Trial Chamber’s Decision on Slobodan Prljak’s Motion for Provisional Release, 8 July 2009, para.7; ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.14, Decision on Jadranko Prlić’s Appeal against the ‘*Décision relative à la demande de mise en liberté provisoire de l’Accusé Prlić*’, 9 April 2009, para.8; ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.11, Decision on Prljak’s Appeal of the Trial Chamber’s 2 December 2008 Decision on Provisional Release, 17 December 2008, paras.7, 15; ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.7, Decision on ‘Prosecution’s Appeal from *Décision relative à la demande de mise en liberté provisoire de l’Accusé Petković* dated 31 March 2008’, 21 April 2008, paras.15, 17. But see also ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.35, Decision on the Prosecution’s Appeal of the Decision on Further Extension of Milivoj Petković’s Provisional Release, 12 June 2012, para.5; ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.31, Decision on the Prosecution’s Appeal of the Decision on Further Extension of Jadranko Prlić’s Provisional Release, 23 April 2012, para.5; ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.26, Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlić, 15 December 2011, para.5.

<sup>40</sup> *Contra* Appeal, para.19 (“provisional release [...] while waiting for a Judgement to be delivered[] is viewed as not creating additional risks”).

<sup>41</sup> See e.g. ICTY, *Prosecutor v. Prlić et al*, IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Prljak, Petković, and Corić, 11 March 2008, para.30; ICTY, *Prosecutor v. Popović et al*, IT-05-88-T, Decision on Gvero’s Motion for Provisional Release with Judge Agius’ Dissenting Opinion and Judge Prost’s Separate Declaration, 17 December 2009, paras.15, 18; ICTY, *Prosecutor v. Popović et al*, IT-05-88-T, Decision on Gvero’s Motion for Provisional Release, 15 June 2009, para.16; ICTY, *Prosecutor v. Milutinović et al*, IT-05-87-T, Decision on Joint Defence Motion for Provisional Release during Winter Recess, 5 December 2006, paras.9-10.

<sup>42</sup> *Contra* Appeal, para.20.

Yet, to the contrary, the Decision is sufficiently reasoned. The Trial Chamber made clear the basis upon which it reached its legal conclusion<sup>43</sup> and was not obliged to address expressly each Defence argument.<sup>44</sup> Certainly, given the consistency of its reasoning with the terms of the Statute, the Trial Chamber was not obliged to address “why a different standard should be applied at the ICC as from other international courts” —even if this were true.<sup>45</sup>

*The Trial Chamber did not err in taking an independent judicial determination into account as a matter of fact*

19. The Trial Chamber did not only determine that Mr Bemba’s continued detention is necessary to ensure his appearance for the remainder of his trial, and that there was no material change of circumstance.<sup>46</sup> It also concluded that Mr Bemba’s detention is necessary given the risk that he may obstruct or endanger the Court’s proceedings.<sup>47</sup>

20. The Trial Chamber’s conclusion that Mr Bemba may obstruct or endanger the Court’s proceedings was not solely based upon the fact that charges have been confirmed against him in case ICC-01/05-01/13,<sup>48</sup> nor was it the mere application of a separate “finding[.]” by Pre-Trial Chamber II.<sup>49</sup> Rather, the Trial Chamber made its own, independent determination of the relevant risk. The decision confirming the charges in case ICC-01/05-01/13 was a relevant (but not the sole) piece of evidence supporting this determination. The Defence misapprehension of the Trial Chamber’s approach in this respect vitiates this ground of appeal.

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<sup>43</sup> See Decision, paras.27-32.

<sup>44</sup> See e.g. ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

<sup>45</sup> *Contra* Appeal, para.20.

<sup>46</sup> Decision, paras.32, 36-37.

<sup>47</sup> Decision, para.51.

<sup>48</sup> *Contra* Appeal, para.27.

<sup>49</sup> *Contra* Appeal, paras.23, 30.

21. The correctness of the Trial Chamber’s approach—and the misapprehension undermining the Appeal—is demonstrated not only by the plain words of the Decision but also the other factors evidently taken into account. Thus:

- the Trial Chamber explained that it referred to “the existence of a finding by Pre-Trial Chamber II that there are ‘substantial grounds to believe’ that the accused committed or solicited offences against the administration of justice related to the *Bemba* case” only as “*a matter of fact and strictly for the purposes of its assessment under Article 58(1)(b)(ii)*”;<sup>50</sup>
- the Trial Chamber stated that it took into account other factors considered “equally relevant in assessing whether the accused has the incentive and means to obstruct or endanger the proceedings”;<sup>51</sup> and,
- the Trial Chamber considered whether a “personal guarantee” from Mr Bemba was sufficient to offset the risk it had identified.<sup>52</sup>

22. The fact that the Trial Chamber did not merely apply Pre-Trial Chamber II’s finding is yet further indicated by the distinct issues of which the two Chambers were seised. Pre-Trial Chamber II made a finding concerning Mr Bemba’s alleged past conduct. The Trial Chamber, on the other hand, made a finding as to Mr Bemba’s anticipated *future* conduct.<sup>53</sup> Although the Trial Chamber rightly considered suspicions of past conduct to be highly relevant to future conduct, the two issues are different.

<sup>50</sup> Decision, para.49 (emphasis added).

<sup>51</sup> Decision, para.49. These factors were “the three factors relating to the accused’s incentive to abscond, and its finding as to ‘the financial and material support from which the accused benefits’, which underlay its finding that the accused poses a flight risk”: see Decision, paras.25, 49, and fn.92.

<sup>52</sup> Decision, para.50.

<sup>53</sup> See ICC-01/04-01/07-572 OA4 (“*Ngudjolo* Appeal Decision”), para.21 (“The question revolves around the possibility, not the inevitability, of a future occurrence”).

23. For all these reasons, the facts of this case are quite different from those of the *Ngudjolo* Appeal Decision, which does not assist the Defence.<sup>54</sup> In that case, the Appeals Chamber disapproved a judge's apparent reliance upon the finding in a separate judicial decision in place of the judge's own independent analysis.<sup>55</sup> Here, by contrast, the Trial Chamber's independent analysis is plain. In this context, it was neither incorrect in law nor unreasonable to recognise that Pre-Trial Chamber II's decision itself was evidence of Mr Bemba's suspected past conduct.

24. The Trial Chamber was not obliged itself to "scrutinise the evidence underpinning" Pre-Trial Chamber II's analysis, and therefore was not obliged to afford the parties an opportunity to make submissions on that evidence, and especially "other evidence in the casefile unknown to the first Chamber."<sup>56</sup> The material point for the Trial Chamber was not whether Mr Bemba had actually committed the article 70 offences alleged but simply that Pre-Trial Chamber II (applying the relevant standard of proof) had considered there were substantial grounds to believe that he had committed such offences. Reliance on Pre-Trial Chamber II's decision itself, rather than the underlying evidence, is consistent, for example, with the Appeals Chamber's approval in *Ntaganda* of reliance on a UN report, having regard *inter alia* to the clarity of the document's purpose and the "quite rigorous" basis upon which it was compiled.<sup>57</sup> Moreover, the Trial Chamber's awareness of the standard of proof applied by Pre-Trial Chamber II, and therefore the limits of its analysis, is demonstrated by its observation, applying the Appeals Chamber's guidance, that it need only be satisfied of a "possibility" that Mr Bemba may engage in proscribed conduct.<sup>58</sup> As such, there was no need for the Parties to be heard by the Trial Chamber regarding any countervailing evidence. Nor is it significant that Mr Bemba has sought leave from Pre-Trial Chamber II to

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<sup>54</sup> *Contra* Appeal, para.25.

<sup>55</sup> See *Ngudjolo* Appeal Decision, para.26. See further ICC-01/04-01/07-345, p.9.

<sup>56</sup> *Contra* Appeal, para.24.

<sup>57</sup> See ICC-01/04-02/06-271-Red, paras.37-43.

<sup>58</sup> Decision, para.49 (citing ICC-01/05-01/08-323 OA, para.67).

appeal its decision.<sup>59</sup> In all respects, the Trial Chamber adequately heard the Parties, including the Defence.<sup>60</sup>

25. The Defence assertion that “there is no evidence in the Main Case on the matter of whether Mr Bemba committed or solicited offences against the administration of justice” is also immaterial.<sup>61</sup> The Trial Chamber acknowledged that, for the purpose of adjudicating Mr Bemba’s guilt or innocence, it had not authorised the “submission of evidence collected in investigations related to case ICC-01/05-01/13” yet also reasoned:

Insofar as information has a factual bearing on the question of whether there exists a risk that the accused may ‘obstruct or endanger the [...] court proceedings’, it falls squarely within the scope of the Chamber’s assessment pursuant to Article 58(1)(b)(ii).<sup>62</sup>

26. The Defence shows no error in this analysis. The Trial Chamber thus correctly distinguished between evidence admitted for the purpose of determining the merits of Mr Bemba’s guilt or innocence and evidence admissible for the purpose of its (essentially procedural) determination concerning detention under article 58(1)(b)(ii).

27. Finally, the Defence assertion that a “Chamber has a duty to draw its own reasonable conclusions on the evidence admitted in the case before it”, although correct, adds nothing to their argument.<sup>63</sup> Both the *Stakić* and *Karemera* Appeal Judgments merely confirm the common sense view that a Trial Chamber “is not

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<sup>59</sup> *Contra* Appeal, para.27.

<sup>60</sup> *Contra* Appeal, para.27. See Decision, para.43 (noting that the Trial Chamber had “received observations on the conditions of [a]rticle 58(1)(b)(ii), including specifically relating to case ICC-01/05-01/13, from the prosecution, the legal representative, and the defence”).

<sup>61</sup> *Contra* Appeal, para.24.

<sup>62</sup> Decision, para.45.

<sup>63</sup> *Contra* Appeal, para.24.

bound by the factual findings of another case”<sup>64</sup> and that “error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way.”<sup>65</sup> Neither of these principles shows error in the Decision.<sup>66</sup> Likewise, the *Katanga* trial decision reflects the caution which may be necessary in attempting to rely on factual findings from other proceedings for the truth of their contents.<sup>67</sup> Yet, again, this principle is inapposite here, where the Trial Chamber sought to do no such thing.

*The Trial Chamber did not err in denying conditional release*

28. The challenge to the Trial Chamber’s determination not to order conditional release is based upon a further misinterpretation of the Decision and the procedural history of this application.

29. On appeal, the Defence relies on [REDACTED]<sup>68</sup>—which they now state shows that Belgium is “willing to accommodate any request from the Court concerning Mr Bemba’s provisional release”.<sup>69</sup> In this manner, they imply that Belgium has in fact offered to accept Mr Bemba onto its territory, and therefore that the Trial Chamber had no discretion not to consider conditional release.<sup>70</sup> Yet the Defence shows no error in the Trial Chamber’s assessment that “it is not clear that Belgium has ‘offered to accept [the accused] and to enforce conditions’.”<sup>71</sup>

30. The convoluted history of correspondence which the Defence describes as a “catch-22” is irrelevant to the assessment of the reasonableness of the Trial Chamber’s determination of the submissions actually before it.<sup>72</sup> The original

<sup>64</sup> ICTY, *Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006, para.346.

<sup>65</sup> ICTR, *Karemera and Ngirumpatse v. the Prosecutor*, ICTR-98-44-A, Judgement, 29 September 2014, para.439. In the Appeal, the Defence quotes fn.1288 in support of its position, but this appears to be merely a paraphrase and cross-reference to the principle quoted in para.439.

<sup>66</sup> *Contra* Appeal, para.24.

<sup>67</sup> *Contra* Appeal, paras. 28-30 (citing ICC-01/04-01/07-3279-tENG, paras.14, 18).

<sup>68</sup> See [REDACTED].

<sup>69</sup> Appeal, paras.32, 36 (quoting ICC-01/05-01/08-3216, para.10).

<sup>70</sup> See Appeal, para.38.

<sup>71</sup> Decision, para.56.

<sup>72</sup> *Contra* Appeal, paras.31-38.

Defence motion before the Trial Chamber submitted only cursorily that Belgium had, “through an agreement between the Government of Belgium and the ICC”, generally “agreed to accept provisionally released detainees”.<sup>73</sup> The Decision expressly rejected the relevance of this agreement (“it is far from clear that such an agreement constitutes an ‘offer to accept’ the accused onto its territory or to enforce conditions, nor is such an offer self-evident”).<sup>74</sup> The Defence shows no error in this conclusion in its own terms. Instead, the Defence relies on [REDACTED]. But since the original Defence motion presented no argument to the Trial Chamber based on [REDACTED], the Trial Chamber was entirely reasonable to conclude, on the basis of the record to which it was directed, that no offer to accept Mr Bemba was “self-evident”. Indeed, if [REDACTED] has the significance now claimed, it is reasonable to expect that the Defence would in its motion have presented it to the Trial Chamber on such a basis. The approach of the Decision is, at most, a result of the fashion in which the original Defence motion was presented, and not the product of any procedural “stalemate” or “catch-22”.<sup>75</sup>

31. In any event, the Defence fails to show that the Trial Chamber’s approach to the existence of any offer by Belgium to accept Mr Bemba onto its territory, and to enforce conditions, materially affects the Decision.<sup>76</sup> “[N]otwithstanding” its view that neither Belgium nor any other State had offered to accept Mr Bemba for conditional release, the Trial Chamber nonetheless did consider “whether conditional release might be appropriate in the present circumstances”.<sup>77</sup> The Defence shows no error in the Trial Chamber’s assessment that “there is no condition short of detention” which could mitigate either the risk under article

<sup>73</sup> See ICC-01/05-01/08-3211, paras.7, 47. By contrast, the Defence spent 12 paragraphs of its 58-paragraph motion rehearsing its arguments concerning the ongoing abuse of process litigation and its discontent with the Trial Chamber’s rejection of a filing which did not comply with regulation 37(1) of the Regulations: see paras.16-28. See also Decision, para.62.

<sup>74</sup> Decision, para.56.

<sup>75</sup> *Contra* Appeal, paras.37-38.

<sup>76</sup> See e.g. ICC-01/05-01/08-2151-Red OA10, para.41.

<sup>77</sup> Decision, para.57.

58(1)(b)(i) or (ii). In such circumstances, the Trial Chamber’s “discretion to consider conditional release is unfettered”.<sup>78</sup>

32. In the Decision, the Trial Chamber acknowledged the “personal guarantees” made by Mr Bemba (including willingness to surrender his passport, to accept 24-hour electronic surveillance, to report to local authorities on a daily basis, etc.) which reflect possible conditions.<sup>79</sup> The Defence does not show that the Trial Chamber was unreasonable in concluding that such conditions would be insufficient to mitigate the risks identified, or indeed that the Trial Chamber did not make its “finding on the basis of submissions and evidence before it”.<sup>80</sup> In such circumstances, the Trial Chamber was reasonable to consider that its determination would not further be assisted by requesting further submissions from the Belgian authorities.<sup>81</sup>

33. The conditional release granted to Mr Bemba’s co-defendants in case ICC-01/05-01/13—a matter which the Prosecution has itself appealed—is immaterial to these proceedings.<sup>82</sup> As the very authorities cited by the Defence underline, error cannot be established by simply demonstrating that another Chamber has exercised its discretion in a different way.<sup>83</sup> Nor in any event is Mr Bemba—who is already awaiting judgment in this case—in any analogous situation to his co-defendants in ICC-01/05-01/13.

<sup>78</sup> See ICC-02/11-01/11-278-Red OA, para.79.

<sup>79</sup> See *e.g.* Decision, paras.35 (citing ICC-01/05-01/08-3211, para.55), 50.

<sup>80</sup> *Contra* Appeal, para.40.

<sup>81</sup> *Contra* Appeal, para.39.

<sup>82</sup> *Contra* Appeal, para.39.

<sup>83</sup> See *above* para.27.

## Conclusion

34. For the reasons above, the Appeal should be dismissed.

Word Count: 5,042<sup>84</sup>



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Fatou Bensouda, Prosecutor

Dated this 19<sup>th</sup> day of January 2015

At The Hague, The Netherlands

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<sup>84</sup> It is hereby certified that this document contains the number of words specified and complies in all respects with the requirements of Regulation 36 of the Regulations. This statement (56 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para.32; ICC-01/09-01/11 OA7 OA8, para.26.