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**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, AIMÉ KILOLO  
 MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA  
 WANDU and NARCISSE ARIDO***

*Public*

**Defence Response to Prosecution Appeal against the “Decision on Mr. Bemba’s  
 Request for Release”**

**Source: Defence for Mr. Jean-Pierre Bemba Gombo**

**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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**Detention Section**

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**Victims Participation and Reparations Section Other**

## INTRODUCTION

1. The Prosecution's 'Appeal against the "Decision on Mr. Bemba's Request for Release"' (the Appeal)<sup>1</sup> has failed to identify any legal or factual error on the part of the Single Judge, and must therefore be dismissed in its entirety.
2. The "Decision on Mr. Bemba's Request for Release" (the Decision)<sup>2</sup> was justified and fell squarely within the parameters of the Single Judge's Statutory authority because the Prosecution failed to discharge its burden to prove to the contrary.
3. No amount of belated legal wrangling or argumentation can obscure the fact that the Prosecution was afforded a full opportunity to adduce relevant and concrete evidence that the criteria under Article 58(1) were met, and it failed to do so. This was not an issue that could be presumed or taken for granted in light of either previous decisions in the case, or the fact of Mr. Bemba's ongoing detention in the Main Case.
4. The Single Judge also committed no error of law or fact in determining that the effluxion of time was a factor that justified Mr. Bemba's release.
5. The effluxion of time is a factor that is directly relevant to the Single Judge's assessment of the criteria under Article 58(1)(b): any putative risks associated with release diminish in time, and in light of the advancement of the proceedings.
6. Article 60(4) further empowered the Single Judge to release Mr. Bemba in order to avoid an unreasonable protraction of his pre-trial detention. The presumption of innocence dictates that Mr. Bemba cannot be compelled to serve the equivalent of a sentence in connection with unproven allegations.
7. The Appeals Chamber has repeatedly afforded Pre-Trial Chambers a significant degree of latitude and discretion in relation to factual and procedural aspects of interim release

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<sup>1</sup> ICC-01/05-01/13-809.

<sup>2</sup> ICC-01/05-01/13-798

decisions, even where the Appeals Chamber has expressed reservations concerning the sufficiency of reasons or the evidential foundation.<sup>3</sup>

8. The presumption of liberty and the Prosecution's burden of proof both demand that this degree of discretion should apply with even more force as concerns a decision to release the defendant.

## SUBMISSIONS

***Ground One: The Prosecution has failed to demonstrate that the Single Judge erred in law and in fact by incorrectly and unreasonably applying article 60(4) to release Mr Bemba***

9. The Prosecution's claim that the Single Judge committed a legal error by failing to find that there was inexcusable delay that was attributable to the Prosecutor, is erroneous.
10. The intent of Article 60(4) is to avoid detention for an unreasonable period of time, and to provide the defendant with a remedy as concerns delays that are not attributable to the Defence. This objective is enshrined in internationally recognised human rights law,<sup>4</sup> and would be frustrated if Article 60(4) were to be interpreted in an overly restrictive manner.<sup>5</sup>

11. As enunciated by Judge Pikis,

“Paragraph (4) of article 60 of the Statute must, like every provision of article 60, be interpreted and applied according to the tenor and in the spirit of internationally recognized human rights bearing on the timeliness of the conduct of judicial proceedings. Ensuring that a person is tried within a reasonable time is a paramount duty of the Court. Delay in the proceedings cannot be at the expense of the detainee”.<sup>6</sup>

12. If the obligation to ensure that a person is tried within a reasonable time is an obligation of the Court, it follows that the Court cannot abdicate its responsibility for considering whether to release a person in the event of a delay in the proceedings.

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<sup>3</sup> ICC-01/04-01/06-824, paras. 124, 136; ICC-01/05-01/11-558, para.64; ICC-02/11-01/11-278-Red, para. 48.

<sup>4</sup> See Principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173, 9 December 1988; ICC-01/04-01/06-1487, para. 37.

<sup>5</sup> The Appeals Chamber has acknowledged that the Court should avoid overly rigid interpretations of the Statute and Rules, which would defeat their underlying objective: ICC-01/09-01/11-1066, para. 50.

<sup>6</sup> Separate Opinion, ICC-01/04-01/06-824, para. 22.

13. It is also notable that in considering whether the Pre-Trial Chamber had correctly dismissed a request for interim release pursuant to Article 60(4) in the Lubanga case, the Appeals Chamber's inquiry encompassed the issue as to whether the Pre-Trial Chamber had properly substantiated its position that "all organs of the Court had acted swiftly".<sup>7</sup>
14. The phrase "due to inexcusable delay by the Prosecutor" also does not require *male fides* on the part of the Prosecution, although the existence of such *male fides* might give rise to an unconditional right to release pursuant to the abuse of process doctrine.<sup>8</sup> As found by the Appeals Chamber, "delay in this context signifies a failure to take timely steps to move the judicial process forward, as the ends of justice may demand".<sup>9</sup>
15. This implies an objective test based on the question as to whether the pace of proceedings before the Court is consistent with the particular requirements of justice, bearing in mind the detained status of the defendant. As recognised by the European Court of Human Rights, the standard of reasonableness concerning delays in detention must be held to a stricter standard than delays in the trial proceedings:
- "The long delay of the trial may in itself be reasonable in view, for instance, of the complexity of the case or the number of witnesses to be summoned, but this does not mean that the continued detention is therefore also reasonable. The Court takes the view that Article 5(3) refers to the latter aspect. This implies at the same time that the criteria for 'reasonable' in Article 5(3) are different from those for the same term in Article 6(1), or at least, have to be applied in a different way. Sine delays may in fact violate Article 5(3) and still be compatible with Article 6(1)."<sup>10</sup>
16. This implies that even if the Prosecution is acting in a diligent manner to prosecute this case, the objective impact of the pace of prosecution on the length of detention might still render the length of detention unreasonable. This outcome was also envisaged by the drafting history of the Statute. Whereas it was initially proposed that the Statute or Rules should include a definitive maximum time period for pre-trial detention, the final Statute eschewed this approach, with the understanding that the Rules would address the question of an appropriate time frame for detention.<sup>11</sup>

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<sup>7</sup> ICC-01/04-01/06-824, para. 124.

<sup>8</sup> ICC-01/04-01/06-772, paras. 29, 36.

<sup>9</sup> ICC-01/04-01/07-572, para. 14.

<sup>10</sup> P. van Dijk et al. (eds). Theory and Practice of the European Convention on Human Rights. (Intersentia 4<sup>th</sup> ed, 2006), p. 492

<sup>11</sup> K. Khan, 'Article 60' in O. Triffterer (ed.) Commentary on the Rome Statute (Hart Publishers 2008), p. 1166 fn. 49.

17. It is therefore apparent that at the time that Article 60(4) was drafted, the drafters considered that the Chamber should possess the power to release the defendant once a maximum time period had been reached, irrespective as to the particular conduct of the parties. In effect, the effluxion of the time period would in itself constitute unreasonable and inexcusable delay.

18. When viewed in this light, the reference to ‘unreasonable’ and ‘inexcusable’ in Article 60(4) was intended to invest the Chamber with the power to release the defendant before such time limits had been reached, if the particular circumstances of the case rendered the prospect of further delay unreasonable and inexcusable. As observed by Khan, the omission to include a specific time limit in the Statute,

“does have the advantage, however, in that it requires the Pre-Trial Chamber to look to the facts, peculiarities, and complications of the case actually before it. It is conceivable that there may be cases, where even a year’s pre-trial detention may be unwarranted, excessive or unreasonable.”<sup>12</sup>

19. The rights of the Defence, as set out in the Statute, must also be viewed as minimum guarantees, which can be exceeded if necessary.<sup>13</sup> Whereas the explicit wording of Article 60(4) requires the Pre-Trial Chamber to “ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”, the wording is not exhaustive, and in no way precludes either the duty or the power of the Chamber to release the defendant in other circumstances.<sup>14</sup>

20. As will be elaborated in the next section, the power and duty to release inheres in other articles of the Statute, including the Chamber’s duty to ensure that the proceedings are conducted in a manner that is fully consistent with the rights of the defendant.<sup>15</sup>

*In any case, any error on the part of the Single Judge as concerns his interpretation of Article 60(4) does not vitiate the outcome of the decision*

21. The Single Judge’s finding that, when viewed in connection with the particular circumstances of the case, delays in the proceedings can justify release, falls within the parameters of the Statute and the jurisprudence of the Court. As such, the Prosecution has

<sup>12</sup> K. Khan, ‘Article 60’, *ibid* p. 1166 fn. 49.

<sup>13</sup> ICC-01/04-01/06-108-Corr, para. 37; ICC-01/04-01/06-1091, para. 18.

<sup>14</sup> This is consistent with the fact that the Appeals Chamber has held that the establishment of specific “minimum” powers in the Statute does not preclude the Court from exercising more enhanced powers in circumstances where there is legal impediment to it doing so: ICC-01/09-01/11-1598, para. 112.

<sup>15</sup> ICC-01/09-01/11-1066, para. 51.

failed to demonstrate the existence of any errors of law, which would materially vitiate the outcome of the decision.<sup>16</sup>

22. The inherent flaw in the Prosecution Appeal is exemplified by its argument that “[t]he Decision can only be read as applying article 60(4), and not any other provision of the Statute”.<sup>17</sup> Even if the Single Judge erred by failing to cite the correct provisions of the Statute, this error will not in itself suffice to invalidate the decision.<sup>18</sup>

23. The Prosecution must in any case demonstrate that this error invalidated the outcome, in the sense that the outcome itself is legally incorrect.

24. This would only be the case if the Prosecution had demonstrated that firstly, Article 60(4) does not support release in these circumstances, and secondly, that Article 60(4) either exhaustively governs this situation or that there are no other legal provisions in the Statute which would empower the Chamber to release Mr. Bemba in these circumstances.

25. Not only has the Prosecution failed to do this, it has in fact conceded that

“the Appeals Chamber has suggested that “other provisions of the Statute” may “also have a bearing upon the obligation to ensure that a person [...] is not detained for an unreasonable period,” such as article 67(1)(c)’s right to “a fair trial without undue delay”.<sup>19</sup>

26. Apart from this reference, the Appeals Chamber later accepted that release could be an appropriate remedy in the event that a case is stayed,<sup>20</sup> and Trial Chamber III has found that Article 64 (4) vests the Chamber with the right to release an accused on humanitarian grounds.<sup>21</sup>

27. The Appeals Chamber has more recently found that the obligation of the accused to be present in person at trial may be modified by the Chamber’s overarching duty to take

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<sup>16</sup> ICC-01/05-01/08-631-Red, para. 62; ICC-01/05-01/13-560, para. 28; ICC-02/04-01/05-408, para.51.

<sup>17</sup> Appeal, para.10.

<sup>18</sup> ICC-01/04-01/06-824, para.120.

<sup>19</sup> Appeal, para. 11, citing to ICC-01/04-01/06-824 OA7, para.98.

<sup>20</sup> ICC-01/04-01/06-1487, paras. 36-37.

<sup>21</sup> ICC-01/05-01/08-1566, para. 51

measures to ensure that the proceedings are carried out in an orderly manner, in accordance with the fair and impartial administration of justice.<sup>22</sup>

28. If the Statutory requirement concerning the accused's presence at trial can be modified, where necessary to ensure the fairness of the proceedings, then it follows that the Chamber's power and duty to take measures to ensure the accused's presence at trial can also be modified where necessary to ensure the overall fairness of the proceedings.<sup>23</sup>

29. The power of the Chamber to do so inheres in the wording of Article 58(1)(b) itself. This provision stipulates that if the first component of Article 58(1)(a) is fulfilled, the Chamber shall issue an arrest warrant if

“The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.”

30. The notion as to what is necessary cannot be construed in vacuum, but must take into consideration the particular circumstances of the case, and the Chamber's duty to ensure the fairness of the proceedings. Article 66 and Article 21(3) further impose a requirement that what is “necessary” must be viewed and interpreted through the lens of the presumption of innocence, and the presumption of liberty.<sup>24</sup>

31. Thus, whilst Article 58(1)(b) specifies that the Pre-Trial Chamber shall issue an arrest warrant where the person's arrest appears necessary to secure their appearance for trial:

- a. The presumption of innocence dictates that a person cannot be held in detention for the purposes of standing trial, for a period which approaches more than a third of the length of any sentence that could be imposed;<sup>25</sup> and
- b. The presumption of liberty qualifies the notion of ‘necessary’ in Article 58(1)(b) such that it cannot be necessary to arrest a person to secure their presence for trial if

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<sup>22</sup> ICC-01/09-01/11-1066, para. 51.

<sup>23</sup> The ICTY Appeals Chamber has found that the absence of judicial activity (for example, judicial recess or a suspension of the proceedings) may be grounds for releasing the defendant on the basis that the defendant's presence is not necessary for the trial: Prosecutor v. Prlic et al, Decision On Prosecution's Appeal Against The Trial Chamber's Decision On Slobodan Praljak's Motion For Provisional Release 26 May 2008, para 10.

<sup>24</sup> ICC-01/05-01/08-475, para. 77; , ICC-01/04-01/10-163, para. 33; ICC-01/05-01/13-558, para. 67.

<sup>25</sup> Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para. 286.



the commencement of the trial is not imminent, but is likely to be significantly delayed.

32. For both aspects, the effluxion of time in and of itself impacts on the Chamber's assessment as to whether the defendant's detention continues to be necessary within the framework of Article 58(1).

33. If a person is detained for longer than a third of the potential sentence, their situation is transformed from one of pre-trial detention to one of pre-conviction punishment. Although it is necessary to secure the defendant's presence for the trial, it is neither necessary nor permissible to subject them to pre-conviction punishment, particularly in the absence of any right to automatic compensation in the event of an acquittal.

34. The presumptions of innocence and liberty therefore qualify the interpretation of 'necessary' in Article 58(1) such that it might not be necessary to detain a person in circumstances in which the trial hearings are not imminent, and the person's continued detention would constitute a punitive rather than a preventative measure.

35. Accordingly, whereas inexcusable delay may in and of itself trigger release pursuant to Article 60(4), it remains a relevant factor as concerns the fulfilment of the Article 58(1) criteria.

36. In this connection, the Appeals Chamber has found that,

“any decision on whether a person is detained pending his or her trial at this Court ought to be made based on the specific circumstances of the case, as relevant to an assessment of whether or not a suspect is likely to appear before the Court”.<sup>26</sup>

37. The time within which the proceedings progress before the Court forms part of the specific circumstances of the case. If the Chamber were to ignore this element, its decision would be flawed due to its failure to take into consideration a relevant factor.

38. Contrary to the Prosecution's assertion that the Decision is based solely on Article 60(4), it is clear that in his decision, the Single Judge took into consideration both the stage of the

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<sup>26</sup> ICC-01/05-01/13-560, para 2.

proceedings and the delays that had occurred within the context of the criteria set out in Article 58(1)(b), and found that on the information put before him, Mr. Bemba's arrest was not necessary.

39. In particular, at page 4, the Single Judge considered the gravity of the alleged crimes, the stage of the proceedings, and the risk of obstruction or the continuation of crimes. His finding that the effluxion of time and advancement of the case had vitiated any concerns regarding potential obstruction/continuation of crimes, and qualified the necessity of Mr. Bemba's continued detention, fell within the framework of the Court's past interpretation and application of Article 58(1)(b).
40. The Appeals Chamber has found that the gravity of the crime and the likely sentence faced by the defendant if convicted are relevant to the assessment as to whether the defendant is likely to abscond.<sup>27</sup> If, the defendant has already served a substantial component of any likely sentence, the incentive to abscond necessarily diminishes. As concluded by the Single Judge, this is particularly the case as concerns offences under Article 70 which, by their nature, do not attract lengthy sentences.<sup>28</sup>
41. Depending on the nature and circumstances of the case, the same can also hold true for the Chamber's assessment under Article 58(1)(b)(ii)). As found by Judge Tarfusser, given that this case is primarily based on documentary evidence, the risk that the defendants could interfere with the progress of the investigations becomes attenuated once such documentation has been collected.<sup>29</sup> This is consistent with jurisprudence of the European Court of Human Rights to the effect that the risk that the defendant might threaten witnesses or obstruct the proceedings diminishes over time.<sup>30</sup>
42. The Prosecution has failed to adduce any legal argument or authority for its position that it was wrong, as a matter of law, for the Single Judge to consider time as a relevant circumstance under Article 58(1)(b). To the contrary, rather than being an error of law, it is clear that the Prosecution's position is predicated on a factual disagreement as to whether the effluxion of time heightened or diminished the risks under Article 58(1).

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<sup>27</sup> ICC-01/05-01/13-560, para. 112.

<sup>28</sup> ICC-01/05-01/13-798, p. 4.

<sup>29</sup> ICC-01/05-01/13-798, p. 4.

<sup>30</sup> *Letellier v. France*, judgment 26 June 1991, para. 39; *Tomasi v. France*, judgment 27 August 1992, para. 95.

43. For example, at paragraph 14, the Prosecution acknowledges that the Single Judge assessed the criteria under Article 58(1) and (correctly) considered the effluxion of time to be a fact that was relevant to his assessment under Article 58.<sup>31</sup> The Prosecution nonetheless avers that the advancement of the proceedings heightens the risk of flight, as does not the fact that the documentary evidence was not yet admitted into the record.<sup>32</sup>
44. Whether this is correct or not is a matter of fact. As a matter of law, the Prosecution was required to demonstrate that it was a clear error for the Single Judge to consider time as a relevant circumstance. However, by advancing the contrary position (namely, that the advancement of the proceedings and effluxion of time heightened the need for detention), the Prosecution has underlined the fact that the Chamber may, as a matter of law, take these circumstances into consideration.
45. As a question of fact, the Prosecution's dispute with the manner in which the Single Judge assessed the Article 58(1)(b) criteria is predicated on a mere disagreement, which falls outside the proper scope of appellate inquiry.
46. The Prosecution has not demonstrated that the Single Judge took into consideration irrelevant factual issues or failed to take into account relevant issues raised in its response to Mr. Bemba's request for release.
47. Apart from a reference to the alleged gravity of the charges, the Prosecution failed to adduce any argument as to why Mr. Bemba was a flight risk. Even if the Prosecution position concerning the gravity of the Article case was correct (which it is not), gravity alone cannot justify detention.<sup>33</sup>
48. With respect to Article 58(1)(b)(ii) and (iii), the Prosecution response to Mr. Bemba request for release did not cite or submit any evidence that would suggest that Mr. Bemba would obstruct the continued investigation of this case.

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<sup>31</sup> ICC-01/05-01/13-809, para. 14.

<sup>32</sup> ICC-01/05-01/13-809, para. 14.

<sup>33</sup> *Ječius v. Lithuania*, no. 34578/97, para. 94

49. Although the Prosecution argued before the Single Judge that the case was also comprised of non-documentary evidence, it did not dispute the fact that the collection of documentary evidence lessened the likelihood that Mr. Bemba would obstruct the investigations as concerns that particular evidence.
50. In terms of non-documentary evidence, the Prosecution did not provide any evidence that Mr. Bemba has threatened, obstructed, or interfered with Prosecution witnesses. The Chamber cannot determine that something is likely on the basis of hypothetical speculation,<sup>34</sup> and evidence of capacity (such as the existence of a network) does not equate to evidence of a predisposition or likelihood to commit certain acts.
51. Similarly, it cannot be extrapolated from the mere fact that a person is suspected or indeed charged with allegations under the Statute that the person is a flight risk, a risk to witnesses or ongoing investigation, or a potential recidivist. Otherwise, if that were the case, the arrest of the person would always be deemed necessary if Article 58(1) (a) is fulfilled, and it would have been unnecessary for the drafters to include these elements as separate criteria under Article 58(1)(b).
52. Although the Chamber's assessment under Article 58(1) is predictive, the term 'necessary' in Article 58(1)(b) requires that the risk must also be sufficiently severe and concrete to justify the extreme measure of Mr. Bemba's detention.<sup>35</sup>
53. The Prosecution has failed to demonstrate that it fell outside the scope of the Single Judge's reasonable discretion to find that Mr. Bemba's continued detention was not necessary, in the absence of any concrete evidence of significant risks that could only be managed in the detention unit.
54. Finally, the Prosecution's arguments concerning the Single Judge's alleged failure to find either that the conditions of detention were no longer met, or that there had been a change in

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<sup>34</sup> ICC-01/05-01/08-323, para. 55. The ECHR has also found in connection with the ground of interfering with the course of justice that supporting evidence is required to substantiate such allegations for the purposes of detention: *Clooth v. Belgium*, 14 EHHR 717, para. 44, *Becciev v. Moldova*, no. 9190/03, para 59.

<sup>35</sup> The United Nations Human Rights Committee has held that in assessing the likelihood that a detainee might abscond, the Court's decision cannot be based on mere conjectures *Hill and Hill v. Spain* (526/93) at para 12.3 The ECHR has also required the existence of relevant and sufficient reasons, beyond the fact there is a reasonable suspicion that the person committed the alleged crime: *Letellier v. France*, judgment 26 June 1991, para. 35.

circumstances,<sup>36</sup> are premised on a fundamental error. The task of the Single Judge was not to review its Article 58 decision with a view to determining its continued applicability. Rather the Judge was required to assess whether the Prosecution had met its burden of demonstrating, on the basis of the submissions before the Judge, that the criteria under Article 58(1) were met at this point in time.<sup>37</sup>

55. Mr. Bemba was not submitting a request for release under Article 60(3) but under Article 60(2).

56. The burden fell on the Prosecution to establish – *ab initio* – that the conditions for detention were met. The Pre-Trial Chamber was not required to assist the Prosecution to meet this burden nor was it in any way bound by its decision under Article 58. The criterion of a ‘change in circumstances’ simply does not apply.

*The Single Judge did not err in law and fact in concluding that Mr Bemba has been detained for an unreasonable period of time*

57. In terms of the alleged error of law posited by the Prosecution, there is no logic or consistency as concerns its current attempt to argue that the Single Judge erred in fact and in law by pre-judging the eventual sentence that could be imposed on this case.<sup>38</sup>

58. The Prosecution has previously advanced the position that when assessing the likelihood that the defendant is a flight risk, it is acceptable for the Chamber to predict the length of the sentence that could be imposed (as based on the charges).<sup>39</sup> The Appeals Chamber has, moreover, confirmed that the length of the sentence is a relevant factor for the Chamber’s assessment as to the existence of a flight risk, and that any such assessment is necessarily predictive.<sup>40</sup>

59. This gravity assessment is not a one way street. In the same manner that the Chamber is required to assess whether more serious charges would heighten the flight risk, the Chamber is also required to consider whether the less serious charges would lessen it.

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<sup>36</sup> ICC-01/05-01/13-809, para. 14.

<sup>37</sup> Separate opinion of Judge Pikis, ICC-01/04-01/06-824, para. 10.

<sup>38</sup> ICC-01/05-01/13-809, para. 18.

<sup>39</sup> ICC-02/11-01/11-223-Corr-Red, paras. 20-21.

<sup>40</sup> ICC-02/11-01/11-278-Red, para. 54.

60. In terms of the Single Judge's factual assessments, apart from expressing its disagreement with the Single Judge's conclusion regarding the unreasonableness of the length of detention, the Prosecution has failed to include any argument as why this was a conclusion that no reasonable Pre-Trial Chamber could have reached.
61. Apart from the fact that the Statute sets out a maximum penalty of 5 years for Article 70 offences, the sentencing practices of the *ad hoc* Tribunals for equivalent charged conduct (interference with witness testimony) supports the reasonableness of the Single Judge's conclusion concerning the disproportionate nature of any detention continuing beyond 14 months.<sup>41</sup>
62. Moreover, given that the ICTY has ordered that different sentences for different contempt convictions can be served concurrently,<sup>42</sup> the Prosecution has failed to demonstrate that it was plainly unreasonable for the Single Judge not to base his decision on the likelihood that Mr. Bemba would receive cumulative sentences of the maximum penalty.<sup>43</sup>
63. It is also incorrect that the Prosecution was not afforded a right to be heard in relation to this issue of cumulative sentencing.<sup>44</sup> The Defence raised the issue of potential sentencing in its Request,<sup>45</sup> and in response, the Prosecution asserted its position regarding the possible imposition of cumulative sentences.<sup>46</sup> The appellate process is not a forum for rehearsing argument that was unsuccessful at first instance.
64. In terms of the Prosecution's attempt to recite a range of factors, which allegedly excuse any delays in the proceedings,<sup>47</sup> the Appeals Chamber cannot take into consideration factual assertions that were not put before the Single Judge. The burden of proof fell on the Prosecution, and it was afforded the full 21 days to raise such issues. The Prosecution did not avail itself of this opportunity to do so. There is no basis for claiming that the Single Judge erred by failing to take into consideration arguments that were not placed before him.

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<sup>41</sup> *Prosecutor v. Beqaj*, Trial Judgment, 27 May 2005 (4 months); *Prosecutor v. Haraqija and Morina*, Appeals Judgment, 23 July 2009 (5 and 3 months respectively); *Prosecutor v. Rasic*, Appeals Judgment, 16 November 2012 (12 months, 8 months of which were suspended).

<sup>42</sup> *Prosecutor v. Seselj*, Appeals Judgment, 28 November 2012, (Case No. IT-03-67-R77.3-A) paras. 21-24.

<sup>43</sup> Cf ICC-01/05-01/13-809, para. 18.

<sup>44</sup> Cf ICC-01/05-01/13-809, para. 19.

<sup>45</sup> ICC-01/05-01/13-782-Red, para. 15.

<sup>46</sup> ICC-01/05-01/13-787-Conf, para. 14.

<sup>47</sup> ICC-01/05-01/13-809, para. 23.

65. In any case, the Prosecution characterisation of the delays triggered by the provision of information from domestic authorities omits relevant contextual information concerning the proportionality of the related delays, and the cumulative impact of such delays.
66. The Prosecution was initially ordered to submit the document containing the charges (DCC) on 18 March 2014, with confirmation written submissions due thirty days later.<sup>48</sup> .
67. The Prosecution subsequently requested a variation of the time frame in order to allow its case to be trial ready, to complete the forensic acquisition of items that were in the possession of the Registry, to enable Mr. Arido to be joined to the proceedings, to allow the Prosecution to obtain the results of requests for assistance directed to national authorities, and the transmission of the Third Report of the Independent Counsel.<sup>49</sup>
68. Although the Single Judge granted the request and postponed the deadline for submitting the DCC and list of evidence, the Single Judge emphasised that the only valid grounds for such delay was the transmission of the third report; the other cited grounds were speculative or unjustified, or the Prosecution had failed to raise them in a prompt manner.<sup>50</sup>
69. Two days before the Prosecution's deadline for submitting the DCC and list of evidence, the Single Judge once again postponed the time frame for the confirmation proceedings.<sup>51</sup> The Single Judge granted this delay in light of the fact that the Third Report had only been transmitted on the 26 May 2014, which was a couple of weeks later than initially anticipated.<sup>52</sup>
70. Nonetheless, although the explicit purpose of the above delays concerned the transmission of the third Independent Report, the Single Judge granted the Prosecution an unfettered right to collect and rely on any further incriminating information collected after the initial

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<sup>48</sup> ICC-01/05-01/13-T-1-ENG, p. 15.

<sup>49</sup> ICC-01/05-01/13-255, p. 4.

<sup>50</sup> ICC-01/05-01/13-255, pp. 4-7.30

<sup>51</sup> ICC-01/05-01/13-443.

<sup>52</sup> ICC-01/05-01/13-443, p. 4.

deadlines for disclosure had expired,<sup>53</sup> which had the corollary effect of enlarging the scope of the confirmation process.

71. Moreover, whereas the Single Judge granted Prosecution requests to vary the confirmation calendar for the purpose of facilitating the inclusion of additional Prosecution evidence, the Single Judge rejected Defence requests for delay.<sup>54</sup>

72. The pace of the proceedings was thus ascribable to the steps taken to prosecute the case.

73. The Single Judge also correctly found that the notion of ‘unreasonable’ or ‘inexcusable’ delay cannot be assessed in isolation, but must be viewed against the backdrop of the cumulative impact of such delays, and their proportionality when viewed in light of the total estimated length of the proceedings, and the possible sentence that could be imposed.<sup>55</sup>

74. Whereas a delay of one or two weeks in isolation might appear reasonable, the combined effect of several such delays, when viewed in connection with other developments concerning the prosecution of the case (such as the addition of a fifth defendant), can disproportionately prejudice the defendant’s right not to be detained for an unreasonable length of time.

75. As set out at paragraphs 15-16 *supra*, the standard for assessing the reasonableness of the length of detention is also stricter than the standard which applies to the reasonableness of the length of the proceedings. It was therefore entirely reasonable for the Single Judge to conclude that the Prosecution’s requests for additional time were justified and reasonable, whilst at the same time determining that the implementation of such delays should not be at the expense of Mr. Bemba’s right not to be detained for an unreasonable length of time

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<sup>53</sup> ICC-01/05-01/13-409.

<sup>54</sup> ICC-01/05-01/13-364.

<sup>55</sup> ICC-01/05-01/13-703, p. 4.



**Ground Two: *The Prosecution has failed to demonstrate that the Single Judge committed a clear error by not imposing conditions***

76. The Prosecution's arguments under this ground are once again flawed by its attempt to avoid its burden of proof, and to import a change of circumstances requirement into the Single Judge's first assessment of the necessity of Mr. Bemba's detention.
77. The Single Judge was required at the time that the release request was filed to base his decision on the arguments and evidence put to him by the Prosecution in response to the release request. If the Single Judge had merely adhered to his previous findings without considering the specific filings before him, he would have denied Mr. Bemba the right to an effective remedy as concerns the legality of his detention.<sup>56</sup>
78. The Chamber's discretion to consider conditional release, and corollary obligation to impose such conditions before releasing the defendant, only applied if the criteria for detention under Article 58(1)(b) would otherwise have been met.
79. In the Decision, the Single Judge did not make any findings that the criteria for detention under Article 58(1)(b) were met. Contrary to the assertion of the Prosecution,<sup>57</sup> an oblique reference to the fact that any putative risks had been reduced by the advancement in the stage of the proceedings and the collection of documentary evidence, did not equate to a finding that such risks were predicated on concrete evidence, or sufficiently serious to render Mr. Bemba's detention necessary.
80. Once again, the Prosecution has failed to grapple with the fact that the existence of risk itself does not justify the extreme measure of pre-trial detention. The Chamber must reach a determination that the risk itself is evidentially founded, and sufficiently serious to warrant the defendant's deprivation of liberty.
81. Otherwise, the nature of international criminal cases would always engender a hypothetical risk that the person could flee. Similarly, if the Prosecution's logic were to be accepted, anyone charged with an Article 70 offence would constitute a risk under Article 58(1)(b)(ii), irrespective of his or her personal circumstances.

<sup>56</sup> *Mansur v. Turkey*, 8 June 1995, Series A no. 319-B (1995) 20 EHRR 535, para 55.

<sup>57</sup> ICC-01/05-01/13-809, para. 26.

82. Since the Single Judge did not make a determination that the criteria under Article 58(1)(b) were fulfilled, it was unnecessary for him to consider whether conditional release was appropriate. The Prosecution has thus failed to demonstrate any error on the part of the Single Judge.
83. Finally, the Prosecution's argument that the Single Judge "abandon[ed] his duty" by delegating the responsibility to impose conditions to Trial Chamber III,<sup>58</sup> is incorrect and misconstrues the findings of the Single Judge.
84. The Single Judge correctly stated that although the effect of his decision was to lift the arrest warrant in the Article 70 case, Mr. Bemba remained subject to an arrest warrant in the Main Case. It therefore fell within the jurisdictional competence of Trial Chamber III to determine firstly, if Mr. Bemba could be released either conditionally or unconditionally in the Main Case, and secondly, if conditions were to be imposed, what those conditions should be, and which State should enforce them.
85. The Single Judge's observation that the Trial Chamber might wish to impose conditions in the Main Case was simply an alternative formulation of the undisputed point that the Single Judge's "decision is obviously without prejudice to any determination which might be made by Trial Chamber III in respect of proceedings in case 01/05-01/08".<sup>59</sup>
86. The Single Judge's acknowledgment of the Trial Chamber's exclusive competence to determine the modalities of any release concerning the Main Case did not equate to an acknowledgement that conditions were warranted either by the particular allegations in the Article 70 case, or by the particular factual arguments presented by the Prosecution in its response to Mr. Bemba's request for release in the Article 70 case.
87. The Single Judge also correctly surmised that in the absence of a decision releasing Mr. Bemba either unconditionally or conditionally in the Main Case, the implementation of Mr.

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<sup>58</sup> ICC-01/05-01/13-809, para. 25.

<sup>59</sup> ICC-01/05-01/13-798, p. 5.

Bemba's physical release is a hypothetical issue.<sup>60</sup> As the case law of the ICC has repeatedly recognised, Judges cannot make judicial determinations on hypothetical or abstract issues.<sup>61</sup>

88. In essence, the Single Judge's decision on release is effectively suspended, pending the resolution of Mr. Bemba's status in the Main Case. Should the Trial Chamber decide to release Mr. Bemba or acquit him, then the question as to which country Mr. Bemba will be released to will either be governed by Rule 185(1) (in the event of an acquittal), or turn on the question as to whether the Trial Chamber imposes unconditional or conditional release.

89. There is therefore no error in the Single Judge's conclusion that since the implementation of the decision is currently suspended, there is no basis for receiving observations or making judicial determinations in relation to matters, which turn on the outcome of proceedings before a different Chamber.

### **RELIEF REQUESTED**

90. The Defence for Mr. Jean-Pierre Bemba Gombo respectfully requests the Honourable Appeals Chamber to reject the Appeal.



Melinda Taylor  
Counsel for Mr. Jean-Pierre Bemba Gombo

This 9<sup>th</sup> day of February, 2015

The Hague, The Netherlands

It is hereby certified that this document contains a total of 5972 words and complies in all respects with the requirements of regulation 36 of the Regulations of the Court

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<sup>60</sup> ICC-01/05-01/13-798, p. 4.n

<sup>61</sup> ICC-01/05-01/08-3114, para. 15; ICC-01/04-01/06-774 para. 63.