

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,
5 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido - ICC-01/05-01/13
6 Single Judge Silvia Fernández de Gurmendi
7 Appeals Hearing for the Delivery of a Judgment
8 Friday, 29 May 2015
9 (The hearing starts in open session at 4.31 p.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: Good afternoon. The Court is in session.
14 Would the court officer please call the case.
15 THE COURT OFFICER: Thank you, your Honour.
16 The Situation in the Central African Republic, in the case of The Prosecutor versus Jean-Pierre
17 Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala
18 Wandu and Narcisse Arido, ICC-01/05-01/13.
19 We are in open session.
20 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: Thank you.
21 May I ask the parties to introduce themselves for the record please, starting with the Defence.
22 Could we start with the Defence of -- yes, you can start.
23 MS TAYLOR: Good afternoon, Madam President. My name is Melinda Taylor. I'm
24 appearing today for Mr Jean-Pierre Bemba together with Mr Clayton Wiggins and Ms Ines
25 Pierre de la Brière. Thank you.

1 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

2 MR KEÏTA: (Interpretation) Good afternoon, your Honour. I am Jean Xavier Keïta, senior
3 counsel within the office of Public Counsel for the Defence. I am replacing a colleague who
4 apologises since he had to leave on mission. I thought I would assist Mr Kilolo, but
5 unfortunately he is stuck in traffic and I beg of you to accept his apologies. I am not assisting
6 him, I am in actual fact representing him, and I do hope that he will be able to attend court
7 very quickly.

8 Ms Leuka Gropa is with me today, case manager, within Mr Paul Djunga's team.

9 Thank you.

10 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you, Mr Keïta.

11 MS SETHI: Good afternoon, Madam President. I am here on behalf of the counsel for
12 Jean-Jacques Mangenda, Mr Christopher Gosnell, who has been excused by the Chamber.
13 My name is Havneet Sethi, I'm the case manager for the Mangenda Defence, and I am assisted
14 today by Ms Alix Janssens. Thank you.

15 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: (Speaks English) Thank you.

16 MR KILENDA: (Interpretation) Good afternoon. I am Mr Kilenda, member of the
17 Brussels Bar. With me today is, to my right, Ms Coralie Klipfel and Mr Antoine Robert, who
18 are my legal assistants. And just behind me diagonally Ms Adriana-Maria Manolescu, case
19 manager. Thank you.

20 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: (Interpretation) Thank you.

21 MR TAKU: May it please your Honour, my name is Chief Charles Taku. I represent Mr
22 Arido. With me today, your Honour, is Mr Tharcisse Gatarama, who is our legal assistant.
23 We have here also Mr Tibor Bajnovic, who is our pro bono legal assistant. We have Mr
24 Michael Rowse, who is our case manager. Thank you very much, your Honour.

25 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: Thank you.

1 So I think I can now turn to the Office of the Prosecutor, please.

2 MS BRADY: Good afternoon, your Honour. Helen Brady, appearing on behalf of the
3 Prosecution, and with me today are appeals counsel Reinhold Gallmetzer and Mr Mathew
4 Cross, also an appeals counsel. Thank you.

5 SINGLE JUDGE FERNÁNDEZ DE GURMENDI: Thank you very much.

6 And I'm Judge Silvia Fernández de Gurmendi.

7 Today on behalf of Presiding Judge Sanji Monageng, I will read the summary of the
8 Appeals Chamber's judgments on the appeals against the decisions of the Single
9 Judge of Pre-Trial Chamber II regarding interim release in relation to Mr Jean-Pierre
10 Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda, Monsieur
11 Fidèle Babala Wandu and Mr Narcisse Arido.

12 I shall now summarise the Appeals Chamber's judgments and the reasons for them.

13 In today's summary I will refer to the Pre-Trial Chamber and not to the Single Judge and I will
14 also refer to Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido collectively as "the suspects."

15 Please note that only the written judgments are authoritative. They will be notified
16 to the parties shortly after this hearing.

17 I will begin with the judgment regarding Mr Kilolo, Mr Mangenda, Mr Babala and Mr
18 Arido. Following that I will read the summary of the judgment regarding Mr
19 Bemba.

20 I shall start with a brief procedural history regarding the first judgment.

21 On 24 July 2014, the Pre-Trial Chamber rejected Mr Arido's request for interim release
22 and confirmed his detention.

23 On 4 July 2014 and on 5 August 2014, the Pre-Trial Chamber carried out its periodic
24 review of detention pursuant to Article 60(3) of the Statute in respect of Mr Babala, Mr
25 Kilolo, and Mr Mangenda and found in these three separate decisions that all three

1 should remain in detention.

2 Mr Arido, Mr Babala, Mr Mangenda and Mr Kilolo filed appeals against these
3 decisions.

4 These four appeals were pending before the Appeals Chamber when the Pre-Trial
5 Chamber ordered their interim release from detention on 21 October 2014. The
6 Prosecutor appealed this decision, raising two grounds of appeal.

7 First, she submits that the Pre-Trial Chamber erred in applying Article 60(4) of the
8 Statute to release the suspects and in finding that they had been detained for an
9 unreasonable period of time.

10 Second, the Prosecutor argues that the Pre-Trial Chamber erred in finding that the
11 four suspects' personal assurances were an adequate condition to address the
12 continuing risks associated with their release.

13 For the reasons that follow, the Appeals Chamber reverses the Pre-Trial Chamber's
14 decision releasing Mr Arido, Mr Babala, Mr Mangenda and Mr Kilolo and remands
15 the matter to the Trial Chamber now seized of the case.

16 However, given that the suspects in this case were ordered to be released on 21
17 October 2014 and the length of time that has passed since their release, the Appeals
18 Chamber finds that it would not be in the interests of justice for the suspects to be
19 re-arrested because of the reversal of the Impugned Decision. Accordingly, the
20 Appeals Chamber decides, in view of the exceptional circumstances, to maintain the
21 relief ordered therein, that is, the release of the suspects pending the Trial Chamber's
22 determination on this matter.

23 The Appeals Chamber finds three errors in the Pre-Trial Chamber's approach.

24 First, the Pre-Trial Chamber incorrectly interpreted Article 60(4) of the Statute.

25 Second, it failed to properly balance the duration of the suspects' detention against

1 the risks set out in Article 58(1)(b) of the Statute.

2 Third, the Pre-Trial Chamber failed to conduct a proper assessment of the risks set out
3 in Article 58(1)(b) of the Statute.

4 Regarding the incorrect interpretation of Article 60(4) of the Statute, the Appeals
5 Chamber finds that the wording of Article 60(4) of the Statute is unequivocal.

6 The Pre-Trial Chamber therefore erred in concluding that this provision was
7 applicable where the period of detention prior to trial was not due to inexcusable
8 delay by the Prosecutor.

9 However, the Appeals Chamber finds that the Chamber may determine that a
10 detained person has been in detention for an unreasonable period even in the absence
11 of an inexcusable delay by the Prosecutor pursuant to Article 60(3) of the Statute.

12 In this respect, the Appeals Chamber considers that Article 60(3) of the Statute must
13 be interpreted and applied consistently with internationally recognised human rights
14 pursuant to Article 21(3) of the Statute. Therefore, this provision is a proper legal
15 avenue to protect the right to liberty of a person as well as the right to be tried within
16 a reasonable period of time or to release pending trial.

17 In that regard, the duration of time in detention pending trial is a factor that needs to
18 be considered along with the risks that are being reviewed under Article 60(3) of the
19 Statute in order to determine whether all factors being considered, the continued
20 detention stops being reasonable and the individual accordingly needs to be released.

21 In the context of the legal framework of the Court, such a determination requires
22 balancing the risks under Article 58(1)(b) of the Statute that were found to still exist
23 against the duration of detention taking into account relevant factors that may have
24 delayed the proceedings and the circumstances of the case as a whole.

25 The potential penalty for the offence charged may be a factor to take into account in

1 assessing whether the time in detention is reasonable. However, this factor cannot
2 be assessed in isolation, but would need to be considered in light of all the
3 circumstances of the case.

4 In the present case, the Appeals Chamber finds that the Pre-Trial Chamber failed to
5 properly balance the duration of the suspects' detention against the risks set out in
6 Article 58(1)(b) of the Statute.

7 The Appeals Chamber notes that the overriding factor considered in terms of the
8 reasonableness of the length of detention appears to have been the statutory
9 maximum sentence for the offences of which the individuals were suspected when
10 balanced against the period of time that the suspects had already spent in detention.

11 In this regard, the Pre-Trial Chamber compared the length of pre-trial detention with
12 the statutory maximum penalty in circumstances in which it had stated in its previous
13 decisions that it remained to be determined how the statutory maximum penalty
14 might apply in cases of multiple offences.

15 The Pre-Trial Chamber did not explain why it considered such an assessment to now
16 be possible when it was not before.

17 Furthermore, the Appeals Chamber finds that the Pre-Trial Chamber failed to conduct
18 a proper risk assessment under Article 60(3) of the Statute.

19 First, unlike in the previous seven decisions on detention rendered in this case under
20 Articles 60(2) or 60(3) of the Statute, the suspects were not assessed as individuals, but
21 were dealt with as a group. While there may be an overlap in some of the reasoning
22 applicable to the four suspects, examining their individual circumstances was
23 necessary in order to make a proper assessment of whether the risks set out in Article
24 58(1)(b) of the Statute continued to necessitate detention in relation to each individual
25 suspect.

1 Second, the Appeals Chamber is of the view that the divergence between the previous
2 decisions to detain each suspect and the brief finding in the Pre-Trial Chamber's
3 decision that the risks under Article 58(1)(b) of the Statute no longer necessitated
4 detention or were reduced suggests, in the absence of any explanation, that no proper
5 risk assessment was undertaken.

6 The Appeals Chamber recalls that in those previous seven decisions, the Pre-Trial
7 Chamber consistently held that all three of the risks listed in Article 58(1)(b) either
8 were or continued to be met and that detention was justified.

9 As the Appeals Chamber has found that a proper assessment of the risks listed in
10 Article 58(1)(b) was not undertaken, it follows from this that an appropriate balancing
11 exercise was also not undertaken. Moreover, without a proper assessment of the
12 risks, it is unclear on what basis the Pre-Trial Chamber reached its conclusion that the
13 imposition of one condition was sufficient to mitigate those risks.

14 This concludes the summary of the Appeals Chamber's reasons for reversing the
15 Pre-Trial Chamber's decision in relation to Mr Babala, Mr Arido, Mr Mangenda and
16 Mr Kilolo.

17 With respect to the four related pending appeals filed by Mr Babala, Mr Arido, Mr
18 Mangenda and Mr Kilolo, the Appeals Chamber notes that the Pre-Trial Chamber's
19 decision releasing the four suspects was issued at a time when appeals brought by
20 those suspects in relation to previous decisions maintaining their detention were
21 pending. As the relief sought in those four appeals was the release of the
22 suspects -- and as the suspects were in fact released and remain released to date,
23 including further to this judgment -- those appeals are dismissed as moot.

24 I will now turn to the judgment regarding Mr Bemba.

25 On 11 December 2014, Mr Bemba requested to be released from detention in the

1 Article 70 proceedings.

2 On 23 January 2015, the Pre-Trial Chamber ordered the release of Mr Bemba. The

3 Prosecutor appealed this decision, raising two grounds of appeal:

4 First, the Prosecutor argues that the Pre-Trial Chamber erred in its analysis of Article

5 60(4), failed to conduct a proper analysis of Article 60(2) of the Statute and erred in

6 finding that Mr Bemba has been detained for an unreasonable period.

7 Second, the Prosecutor submits that the Pre-Trial Chamber erred by releasing Mr

8 Bemba without imposing conditions to offset the risks under Article 58(1)(b) of the

9 Statute.

10 For the reasons that follow, the Appeals Chamber reverses the Pre-Trial Chamber's

11 decision ordering the release of Mr Bemba and remands the matter to the Trial

12 Chamber now seized of the case.

13 The Appeals Chamber observes that the Pre-Trial Chamber's decision in this appeal is

14 almost identical to the decision just summarised in relation to the release from

15 detention of Mr Bemba's four co-suspects.

16 In this regard, the Pre-Trial Chamber repeated almost verbatim its findings that from

17 that decision with respect to Article 58(1)(b)(ii) and (iii) of the Statute, which relates to

18 the risk of obstructing the proceedings of the investigations and the risk of the

19 commission of related crimes in the future.

20 With respect to the legal analysis of the reasonableness of the duration of detention,

21 the Pre-Trial Chamber held that "the same reasoning of the decision regarding the

22 four suspects applies to Mr Bemba's situation."

23 The Appeals Chamber recalls that in the judgment relevant to the four suspects, it

24 held that the Pre-Trial Chamber committed three errors. Given that the Pre-Trial

25 Chamber's decision relevant to Mr Bemba is premised on the reasoning and findings

1 of the decision relevant to the four suspects, the Appeals Chamber finds that the
2 Pre-Trial Chamber committed the same errors in the decision on Mr Bemba's interim
3 release.

4 Accordingly, the Appeals Chamber finds that the Pre-Trial Chamber's reliance on
5 Article 60(4) is erroneous in law for the reasons set out in the judgment just
6 summarised in relation to Mr Bemba's four co-suspects.

7 However, as held in today's Judgment, a Pre-Trial Chamber may determine that a
8 detained person has been in detention for an unreasonable period, even in the
9 absence of inexcusable delay by the Prosecutor. In that same judgment, the Appeals
10 Chamber also indicated that this holding does not preclude a Pre-Trial Chamber from
11 considering whether the duration of detention is reasonable in other relevant contexts,
12 including in relation to Article 60(2) of the Statute.

13 The Appeals Chamber notes that an Article 60(2) assessment does not automatically
14 occur within a set period of time following the person's detention pursuant to a
15 warrant of arrest and indeed may only occur after a substantial period of time has
16 elapsed. Given this, the Appeals Chamber considers that Article 60(2) of the Statute
17 must also be interpreted and applied consistently with internationally recognized
18 human rights, pursuant to Article 21(3) of the Statute.

19 Therefore, a Pre-Trial Chamber may also determine that a detained person has been
20 in detention for an unreasonable period, even in the absence of inexcusable delay by
21 the Prosecutor, in its decision pursuant to Article 60(2) of the Statute.

22 This determination requires finding that the condition under Article 58(1)(a) is met
23 and balancing the risks under Article 58(1)(b) of the Statute that are found to be met
24 against the duration of detention, taking into account relevant factors that may have
25 delayed the proceedings and the circumstances of the case as a whole.

1 The Appeals Chamber notes that the Pre-Trial Chamber went directly to considering
2 Mr Bemba's request for interim release under Article 60(4) of the Statute instead of
3 making a proper assessment under Article 60(2) of the Statute. By doing so, the
4 Appeals Chamber finds that the Pre-Trial Chamber erred in law.

5 Regarding Article 58(1)(a) of the Statute, the Appeals Chamber finds that the Pre-Trial
6 Chamber's error does not materially affect the Impugned Decision as the charges
7 against Mr Bemba were confirmed on 11 November 2014 pursuant to Article 61(7) of
8 the Statute.

9 However, the Appeals Chamber considers that the Pre-Trial Chamber erred in not
10 carrying out a proper determination of the risks set out in Article 58(1)(b) of the
11 Statute. This decision does not contain any analysis of these risks or any reference to
12 this provision.

13 In this regard, the Appeals Chamber recalls that the Pre-Trial Chamber repeated its
14 findings on the risks of obstructing the proceedings or the investigations and the risk
15 of commission in the future of related crimes were reduced made in relation to its
16 decision ordering the release of Mr Bemba's four co-suspects without explaining how
17 these findings were also applicable to Mr Bemba and without conducting a proper
18 assessment of the specific circumstances of Mr Bemba.

19 Given that a proper assessment of the risks listed in Article 58(1)(b) of the Statute was
20 not undertaken in the decision, the Pre-Trial Chamber also erred in failing to
21 appropriately balance the duration of detention against those risks.

22 In light of the foregoing, the Appeals Chamber does not find it necessary to address
23 the Prosecutor's second ground of appeal.

24 This concludes the summary of the Appeals Chamber's reasons for reversing the
25 Pre-Trial Chamber's decision ordering the interim release of Mr Bemba.

- 1 This also concludes today's hearing.
- 2 My last task is to thank the interpreters and court reporters.
- 3 The session is now closed.
- 4 THE COURT USHER: All rise.
- 5 (The hearing ends at 4.57 p.m.)