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International Criminal Court

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No.: **ICC-01/05-01/13**
Date: **29 October 2014**

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, AIME KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO

Public with Public Annex

Prosecution Appeal against the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido"

Source: **Office of the Prosecutor**

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Overview

1. The release of Mr. Kilolo, Mr. Mangenda, Mr. Babala, and Mr. Arido (the "Four Suspects")[1] is vitiated by multiple errors which warrant reversal: the Single Judge went well beyond the boundaries of a proper exercise of his discretion and also erred in law and fact. The Decision is also fundamentally incompatible with the Single Judge's eight previous consistent decisions requiring the continued detention of the Four Suspects on the basis, *inter alia*, of the presence of all three of the risks identified in Article 58(1)(b) of the Rome Statute ("Statute").[2] Nor has there been any material change of circumstances. The Decision incorrectly and unreasonably analyses Article 60(4) of the Statute—especially by ignoring the express requirement for any unreasonable period of pre-trial detention to have been caused by the inexcusable delay of the Prosecutor—leading the Single Judge to conclude erroneously that it was "necessary" to order release (Ground One). Nor could any reasonable trier of fact have concluded that the personal assurances of the Four Suspects were an adequate measure to address the risks which the Single Judge continued to recognise to be associated with their release (Ground Two).

Submissions

Ground One: the Single Judge erred in law and fact by incorrectly and unreasonably applying Article 60(4) to release the Four Suspects

[1] *See* ICC-01/05-01/13-703 ("Decision").
[2] *See e.g.* ICC-01/05-01/13-612 ("Mangenda Art.60(3) Decision"); ICC-01/05-01/13-611 ("Kilolo Art.60(3) Decision"); ICC-01/05-01/13-588 ("Arido Art.60(2) Decision"); ICC-01/05-01/13-538 ("Babala Art.60(3) Decision"); ICC-01/05-01/13-261 ("Mangenda Art.60(2) Decision", affirmed by ICC-01/05-01/13-560 OA4); ICC-01/05-01/13-259 ("Kilolo Art.60(2) Decision", affirmed by ICC-01/05-01/13-558 OA2); ICC-01/05-01/13-258 ("Babala Art.60(2) Decision", affirmed by ICC-01/05-01/13-559 OA3); ICC-01/05-01/13-1-Red2 ("Arrest Warrant").

2. The Decision wrongly analyses Article 60(4) in two respects. As a result of these errors, jointly or severally, the Single Judge's order releasing the Four Suspects was unsound.

3. First, the Decision errs in law by disregarding the plain language of the Statute, requiring that an order of release on the basis of Article 60(4) is contingent on a finding of "inexcusable delay by the Prosecutor," while simultaneously disclaiming such a finding. The Decision cannot reasonably be interpreted as applying any provision other than Article 60(4), such as Article 60(3) or any part of Article 67. Any such reading would equally demonstrate the Decision to be erroneous on its face, given its failure to make the necessary findings, to provide adequate reasoning, or to meet the specific requirements of Article 60(3) and appellate case law.

4. Second, the Decision errs in law and fact in concluding that the Four Suspects have been detained for an unreasonable period.

Release pursuant to Article 60(4) is contingent upon a finding of inexcusable delay by the Prosecutor

5. The threshold condition triggering the operation of Article 60(4) was misapplied in the Decision, and is not met on the facts of this case. Accordingly, the Single Judge erred in law in applying Article 60(4) as a basis to order the release of the Four Suspects. This materially affected the Decision, and requires its reversal.

6. Article 60(4) states that the "Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor". Only "[i]f such delay occurs" shall the Court "consider" releasing

the person.[3] Yet in this case, as the Single Judge stated, "the duration of the detention of the Suspects is not due to the Prosecutor's inexcusable delay".[4]

7. In concluding that Article 60(4) may be applied without a finding of inexcusable delay by the Prosecutor, the Decision misreads Appeals Chamber jurisprudence. Citing *Lubanga*, the Single Judge notes that even the diligent conduct of the Prosecutor "does not relieve the Chamber of its 'distinct and independent obligation… to ensure that a person is not detained for an unreasonable period prior to trial […]'".[5] Yet the Appeals Chamber's reference to the "distinct and independent obligation" was only a description of Article 60(4) as a whole, separate from *inter alia* Article 60(3):

> As is expanded upon in the determination of the second ground of appeal below, there is a distinct and independent obligation imposed upon the Pre-Trial Chamber to ensure that a person is not detained for an unreasonable period prior to trial under article 60 (4) of the Statute.[6]

8. In its further discussion, the Appeals Chamber expressly and repeatedly stated that Article 60(4) provides a remedy for an unreasonable period of pre-trial detention "due to inexcusable delay by the Prosecutor".[7] At no point did the Appeals Chamber suggest that Article 60(4) contains a further "distinct and independent obligation" for the Pre-Trial Chamber to ensure that a person is not detained for an unreasonable period where there is no inexcusable delay by the Prosecutor. This correct view of the law is further supported by the Single Judge's previous decisions in this case, in which he has repeatedly rejected requests to order release under Article 60(4) because the pace of the proceedings was "certainly not ascribable to the Prosecutor".[8]

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[3] Statute, Art.60(4).
[4] Decision, p.5.
[5] *See* Decision, p.5, fn.9 (citing ICC-01/04-01/06-824 OA7 ("*Lubanga* Appeal Decision"), para.98).
[6] *Lubanga* Appeal Decision, para.98.
[7] *See Lubanga* Appeal Decision, paras.118-120, 122, 124.
[8] *See e.g.* Mangenda Art.60(3) Decision, para.26; Arido Art.60(2) Decision, para.17.

The Decision can only be read as applying Article 60(4), and not any other provision of the Statute

9. The Decision is economically worded and makes passing reference to various provisions of the Statute.[9] However, it can only reasonably be understood to apply Article 60(4), and not Article 67, Article 60(3), or any other provision of the Statute.

10. The Prosecution acknowledges that, in addition to Article 60(4), 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".[10] The Decision also refers to this view.[11] Yet this observation does not modify the plain text of Article 60(4), even if other statutory provisions may separately be applicable to the question of detention. Broad reference to the right to a fair trial does not permit the disregard of the plain words of the Statute in a particular provision. Nor can distinct powers and duties in the Statute be merged to create new, hybrid powers. Accordingly, in seeking to apply Article 60(4), the requirements of Article 60(4) must strictly be applied.

11. The Decision cannot be read to order the Four Suspects' release on the independent basis of Article 67(1)(c) since it does not make the necessary finding, nor engage in any underlying reasoning, that the Four Suspects' right to trial without undue delay is threatened. The lack of any intention to make such a finding, which would apply equally to Mr. Bemba, is further demonstrated by the fact that the Decision only applies to the Four Suspects.

[9] *See* Decision, p.4 ("Noting articles 21, 58(1), 60(3), 60(4) and 67(1) of the Statute").
[10] *Lubanga* Appeal Decision, para.98.
[11] Decision, p.5 (referring to "the fundamental right of an accused to a fair and expeditious trial, as also stated by the Appeals Chamber").

12. Likewise, any view that the Single Judge actually sought to apply Article 60(3) would necessarily establish a further error of the law in the Decision, resulting from its failure to identify a material change in circumstances or to provide the necessary analysis and reasoning in that respect. Indeed, in his previous decisions applying Article 60(3), the Single Judge has repeatedly stressed judicial guidance as to how such reviews should properly be conducted, including identifying the particular changed circumstance and analysing how that change impacts the factors justifying detention.[12] The instant Decision undertakes no such process. Moreover, the only circumstances to which the Decision makes specific reference—in the context of considering whether the risks under Article 58(1)(b)(ii) and (iii) have reduced[13]—are unchanged from previous decisions applying Article 60(3) or are immaterial. For example:

- Although further time has elapsed since previous Article 60(3) decisions, the Single Judge has previously correctly ruled that the mere passage of time does not amount to a changed circumstance.[14]

- The proceedings are advanced in the sense that the Pre-Trial Chamber is now deliberating on the confirmation of charges—but of itself this may enhance the flight risk as much as it may lessen it.[15]

[12] *See e.g.* Mangenda Art.60(3) Decision, para.3 (citing ICC-01/05-01/08-631-Red, para.60; ICC-01/05-01/08-2151-Red, paras.1, 31; ICC-02/11-01/11-548-Red, para.1).
[13] *See* Decision, p.4 (noting the "advanced stage reached by these proceedings, the documentary nature of the relevant evidence and the fact that such evidence has now been acquired in the record").
[14] *See* Kilolo Art.60(3) Decision, para.11 (rejecting "the mere elapsing of time and the prolongation of detention" as a possible changed circumstance for the purpose of Article 60(3)).
[15] *See also e.g.* Kilolo Art.60(3) Decision, para.14 ("As regards the fact that the Prosecutor's investigation is now completed, the Single Judge […] reiterates that, whilst many pieces of evidence might by this stage be beyond the suspects' reach, it cannot yet be excluded that action be taken in respect of other evidentiary items which might still be outstanding. The seriousness and concreteness of this risk should also be appreciated in light of article 83(1) and (2) of the Statute, vesting in the Appeals Chamber 'all the powers of the Trial Chamber', including, most critically, the power to 'call evidence'.").

- Although much of the evidence is documentary, it is not yet admitted into the record of the Trial Chamber. Nor does it account for the fact that Prosecution witnesses will be vital to contextualising and explaining this evidence at trial.

13. The Decision does not elaborate—much less provide sufficient reasoning—upon any other basis upon which the Statute would require the order of the Four Suspects' release.

14. The preceding arguments suffice to demonstrate that the Decision finds no support in the Statute at all. But in addition, and as demonstrated below, regardless of the issue of the proper legal basis under the Statute, it cannot be concluded in law or in fact that the Suspects have been detained for an unreasonable time.

The Decision errs in law and fact in concluding that the Four Suspects have been detained for an unreasonable period of time

15. The first error alone warrants a reversal of the Decision and a return to the *status quo ante*. But in addition, the Decision also errs in law and fact in determining that the second requirement of Article 60(4)—detention for an unreasonable period prior to trial—has been established in this case. The Decision errs in law because it is predicated on an arbitrary assessment of the proportionality of the period of pre-trial detention relative to a hypothetical future sentence. Further, or in the alternative, it errs in fact because it unreasonably concludes, in the context of all the relevant circumstances of this case, that the Four Suspects have been detained for an unreasonable period prior to trial.

16. First, the Decision errs in law because of its reliance on the Single Judge's view that the Four Suspects' pre-trial detention is now "disproportionate" to "the

statutory penalties applicable to the offences at stake in these proceedings".[16] This constitutes reversible error because it pre-judges two questions on a matter of sentencing—namely,

- the quantum of the sentence which may be imposed by the Trial Chamber, if the Four Suspects are tried and convicted; and,

- whether the five-year cap on sentencing upon conviction of a single Article 70 offence, pursuant to Article 70(3), precludes cumulative sentencing upon the conviction of multiple Article 70 offences.

17. These are issues for the Trial Chamber under Article 76 of the Statute and upon which the parties have not yet been heard. Without forming a conclusion on these issues, the Single Judge would not have concluded that the period of pre-trial detention served thus far is disproportionate. As such, the error materially affects the Decision.

18. Implicit in the Single Judge's view that the period of pre-trial detention is "disproportionate" may be the presumption that only a very limited custodial sentence may be imposed upon the Four Suspects if convicted, much less even than the term of five years' imprisonment referred to in Article 70(3). There is no basis for such a presumption, given the very serious and organised nature of the Article 70 violations alleged and the modes by which the Four Suspects are alleged to be liable for these crimes. Alternatively, to the extent that the Single Judge did not presume a very limited custodial sentence (even within a five-year range) then his view as to what constitutes a "disproportionate" relative period of pre-trial detention must be erroneous. In the circumstances of this case, a period of

[16] Decision, p.4.

approximately eleven months' pre-trial detention, to date, cannot be disproportionate.

19. Furthermore, until now, the Single Judge has correctly declined to rule on the proper interpretation of Article 70(3), recognising on multiple occasions that "it remain[s] to be decided how the statutory limit" to sentencing under Article 70 "may apply in case [of] multiple offences".[17] The Decision does not explain why it is now appropriate for the Single Judge to have engaged in such an analysis—and the Prosecution would respectfully submit that it is not.

20. Although Article 60(4) requires an assessment of the general circumstances of the case to determine whether the period of pre-trial detention is reasonable,[18] this should not necessitate the Pre-Trial Chamber to predict the manner in which the Trial Chamber will decide *specific* issues of law and fact during the trial (including the possible interpretation of Article 70(3) and any sentence imposed).

[17] Babala Art.60(3) Decision, para.14; Kilolo Art.60(2) Decision, para.31; Babala Art.60(2) Decision, para.22. *See also* Arido Art.60(2) Decision, para.17.

[18] *Lubanga* Appeal Decision, paras.122 ("the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case"). *See also* paras.123-124 (relevant circumstances include "the amount and location of the evidence" and the "swiftness of action of the organs of the Court in the […] case"). *See further* ECtHR, *Chraidi v. Germany*, 65655/01, 26 October 2006, para.35; ICTY, *Prosecutor v. Delalić et al*, IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, 25 September 1996, para.26 (referring to jurisprudence of the European Commission on Human Rights, enumerating seven factors). Other relevant factors may include the risk that a person will not reappear for trial, evidence of the person's willingness to cooperate with the Court, and the adequacy of measures to re-arrest the person: ICTY, *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, paras.25-28 (the Prosecution relies in this case only upon the first reason cited by the *Brđanin* Trial Chamber); ICTY, *Prosecutor v. Šainović and Ojdanić*, IT-99-37-T, Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release, 26 June 2002, paras.12-15. *See also* ICTR, *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on the Defence Motion for Release, 12 July 2002, para.22; ICTR, *Prosecutor v. Mugenzi et al*, ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)), 8 November 2002, para.36. *See further* De Meester et al, 'Investigation, coercive measures, arrest, and surrender,' in Sluiter et al (eds.), *International Criminal Procedure: Principles and Rules* (Oxford: OUP, 2013) ("De Meester et al"), p.343 ("the case law in the context of the ECtHR allows for a wide margin of appreciation in assessing the reasonableness of the length of detention, taking into account the factors of each individual case. […] Factors such as the complexity of the case and the number of victims and witnesses involved may thus justify very long periods of pre-trial detention.").

21. For the same reasons that the Pre-Trial Chamber should not pre-judge the Trial Chamber's approach on specific issues, the Appeals Chamber should likewise refrain, in deciding this appeal, from ruling on the proper interpretation of Article 70(3) on the merits. The Prosecution brings this appeal only to challenge the *procedural* correctness of the Single Judge's engagement with the merits of the Article 70(3) issue at this stage. It does not advance arguments at this time on the correctness or otherwise of the Single Judge's substantive conclusion, which has not yet been argued on the merits by the parties.

22. Second, and further or in the alternative, the Decision erroneously concludes that the Four Suspects have been detained for an unreasonable period of time prior to trial. This is not a reasonable conclusion, in the Prosecution's submission. In particular, the Single Judge erred in the following respects.

- For the reasons explained above, the Decision gives unreasonable emphasis to the Single Judge's view of the Trial Chamber's ultimate disposition of the legal question associated with Article 70(3).[19]

- In referring to "procedural developments" which have "made it twice necessary to amend the calendar originally set for the completion of pre-trial proceedings",[20] the Decision unreasonably fails to take into account the routine and normal occurrence—perhaps even inevitability—of some adjustment in any pre-trial schedule, as originally contemplated, to take account of changing and/or unforeseen circumstances. The Decision also fails to take into account the necessary domestic procedures applicable to the Dutch authorities in respect of the evidentiary material seized or acquired by them in cooperating with the Court, taking into account the

[19] Decision, p.4.
[20] Decision, p.4.

specific positions and procedural rights of the Defence. The time necessary to address these issues cannot be considered unreasonable or due to any lack of diligence on the part of the Prosecution, the Court, or the Dutch authorities. Additionally, the Decision fails to take into consideration the substantial volume of the material involved and the complexities in its processing by the Dutch authorities—particularly through a single appointed independent expert, much less the attendant procedural steps necessary to discharging the requests of the Chamber itself.[21] The Decision makes no finding of fact dispelling the presumption which should be accorded a compliant State party to have discharged its obligations to the Court as efficiently and expeditiously as reasonably possible.

- The Decision fails to provide adequate reasoning on other factors relevant to assessing the reasonableness of the period of pre-trial detention,[22] and which provide a more balanced picture of the proceedings in this case.[23] These include, for example—

    - the fact that the Four Suspects are alleged to have committed offences under Article 70 (and therefore already to have broken obligations specifically owed to this Court);[24]
    - the fact that the parties have acted diligently;
    - the fact that the judicial authorities have acted diligently;
    - the fact that pre-trial proceedings are well advanced and a timely decision on the confirmation of charges—a significant milestone

[21] *See* ICC-01/05-01/13-410-Conf-Anx, pp.6-21 (in Dutch).
[22] *See above* fn.18.
[23] Although the Decision may make passing reference to some factors, their role is insufficiently explained to ascertain whether sufficient or any weight was attributed to them: *see* Decision, pp.4-5.
[24] *See e.g.* Mangenda Art.60(2) Decision, para.25 (noting that this is even more serious when allegedly committed by persons with a professional obligation to serve justice).

towards the conclusion of pre-trial proceedings[25]—is anticipated by 10 November 2014;

- the continuing risk that the Four Suspects will flee if they are released;[26]
- the continuing risk that the Four Suspects will obstruct or endanger the investigation or the court proceedings or commit related crimes;[27] and
- the fact that the Single Judge has repeatedly determined that the conditions under which release has been considered, taking into account the cooperation of relevant States, have been insufficient to offset the risks associated with release.[28]

23. The Single Judge's previous consistent conclusions that none of the proposed conditions would allow for release—which militate in favour of the reasonableness of the period of pre-trial detention—are not undermined by the (erroneous) conclusion in the present Decision that release on a single condition is now appropriate.[29]

Ground Two: the Single Judge erred in fact by concluding that the personal assurances of the Four Suspects represent an adequate condition to address the continuing risks associated with their release

24. The Decision errs in fact by concluding that releasing the Four Suspects on condition that they sign "a personal statement" to appear before the Court at trial, or whenever otherwise required, is sufficient to make their detention "no longer

[25] *See e.g.* Statute, Art.61(11).
[26] *See below* fn.32.
[27] *See below* fn.33.
[28] *See below* fn.40.
[29] *See further below* Ground Two.

necessary for the purposes of article 58(1)(b)(i) of the Statute."[30] This conclusion was unreasonable because:

- the condition imposed has no impact, nor even purports to have any impact, on the continuing risk—accepted by the Single Judge—that the Four Suspects will obstruct or endanger the investigation or the proceedings or commit related crimes; and

- the condition imposed is manifestly inadequate to address the continuing risk that the Four Suspects will abscond and will not appear for trial.

25. Given the circumstances of this case, and the risks identified, it was unreasonable to have concluded that the release of the Four Suspects on such a limited condition was adequate. As the Single Judge has previously correctly stated:

> A decision granting conditional release cannot be regarded as a gamble, whereby a Chamber 'tests' whether a suspect is or not worth[y] of the trust reposed in him or her by granting such release. It has to be strictly justified and supported by objective elements enabling a Chamber to estimate that the conditions assisting the release are suitable to effectively neutralise the risks listed in paragraph 58(1)(b) of the Statute.[31]

26. The Decision does not depart from the Single Judge's previous consistent findings that there is a risk that the Four Suspects may flee or seek to flee if they are released,[32] and that they may obstruct or endanger the investigation or the court proceedings or commit related crimes.[33] Nothing in the Decision suggests that the concern as to their flight risk is in any way diminished. With respect to the concern

[30] Decision, p.5.
[31] Babala Art.60(3) Decision, para.18.
[32] *See e.g.* Mangenda Art.60(3) Decision, paras.22-23; Kilolo Art.60(3) Decision, paras.7-10, 21; Arido Art.60(2) Decision, paras.12-15; Babala Art.60(3) Decision, paras.5-7, 16, 21; Mangenda Art.60(2) Decision, paras.24-32; Kilolo Art.60(2) Decision, paras.20-32; Babala Art.60(2) Decision, paras.15-23.
[33] *See e.g.* Mangenda Art.60(3) Decision, paras.14-16, 19, 28; Kilolo Art.60(3) Decision, paras.7-10, 16-18; Arido Art.60(2) Decision, paras.18-24; Babala Art.60(3) Decision, paras.5-7, 12-13, 16, 21; Mangenda Art.60(2) Decision, paras.33-38; Kilolo Art.60(2) Decision, paras.33-40; Babala Art.60(2) Decision, paras.24-33.

about potentially obstructing or endangering the investigation, the Decision only concludes that there is a "reduc[ed] […] risk".[34] To the extent that any of these risks is not adequately addressed by release on conditions, then continued detention is justified.[35]

27. Given these continuing risks, the inadequacy of the Single Judge's sole condition for the release of the Four Suspects, is apparent in two ways. Both demonstrate the unreasonableness of the Decision.

28. First, the Single Judge has previously and consistently rejected the contention that the personal assurances of the Four Suspects would be sufficient to offset the established flight risk.[36] The Decision does not explain how such assurances are now adequate for this purpose. Given the nature of the offences alleged against the Four Suspects, the temporal proximity of a decision by which they may be committed for trial, the continued existence of a supporting network which may facilitate an attempt to abscond, and the lack of any measures to supervise their activities while provisionally released, the only reasonable conclusion is that such assurances are inadequate.

29. Second, the Single Judge has previously and consistently recognized the particular need in this case to monitor the Four Suspects' "communications with the external world,"[37] and concluded that the "detention centre" is the "only

[34] Decision, p.4.
[35] *See e.g.* ICC-01/05-01/08-631-Red, para.89. *See also* Statute, Art.60(4) ("the Court shall *consider* releasing the person, with or without conditions", emphasis added).
[36] *See e.g.* Babala Art.60(3) Decision, para.10 ("[t]he suspect's personal commitment not to abscond from the proceedings, or not to unduly influenc[e] witnesses, was likewise assessed […] and found not *per se* decisive, in isolation of all other relevant factors"); Mangenda Art.60(2) Decision, para.26 ("a suspect's commitment to appear cannot be considered as *per se* decisive for the purposes of determining whether one or more of the conditions listed in article 58(1)(b) are met"); Kilolo Art.60(2) Decision, para.42 ("the personal undertakings of a suspect cannot be considered as adequate to nullify all the objective elements supporting the assessment of the persisting existence of one or more of the risks listed under article 58(1)(b)").
[37] *See e.g.* Mangenda Art.60(3) Decision, para.28; Kilolo Art.60(3) Decision, para.20; Arido Art.60(2) Decision, para.26; Babala Art.60(3) Decision, para.18; Kilolo Art.60(2) Decision, para.43; Babala Art.60(2) Decision, para.36. *See further* Mangenda Art.60(3) Decision, para.34; Kilolo Art.60(3) Decision, para.22 ("the availability

environment allowing the effective management of such risks".[38] The Decision fails to address the continuing risks under Article 58(1)(b)(ii) and (iii), even if they may be somewhat reduced,[39] or to explain the basis upon which any lesser conditions may be necessary. Rather, in the prevailing circumstances, if release of the Four Suspects was to be ordered (which the Prosecution maintains it should not), it could only reasonably be ordered on the basis of meaningful and enforceable conditions additional to that imposed in the Decision.[40] The Decision fails to require even the most rudimentary conditions of release, such as ordering the suspects:

- not to commit new offences within the jurisdictions to which they have been released or under the Statute;

- to refrain from harassing, intimidating, threatening, or otherwise interfering with witnesses in this case, or those in Case ICC-01/05-01/08;

- to report to the Registrar in advance any change of address or contact information from that declared;

- to report to the Registrar in advance any intended overnight travel from the address declared and to give notice of the destination, contact information, and duration of the travel;

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of a thorough system of monitoring of all forms of communication available to the suspect is critical […] In the complete absence of such a system […] conditional release […] is not only unwarranted, but also practically unfeasible").

[38] *See e.g.* Mangenda Art.60(3) Decision, paras.12, 28; Arido Art.60(2) Decision, paras.21, 26; Babala Art.60(3) Decision, para.18; Mangenda Art.60(2) Decision, para.41; Kilolo Art.60(2) Decision, paras.37, 43; Babala Art.60(2) Decision, paras.27, 36.

[39] *But see above* para.12.

[40] *See* Mangenda Art.60(3) Decision, paras.29, 33-34; Kilolo Art.60(3) Decision, paras.20-22; Arido Art.60(2) Decision, paras.26-27; Babala Art.60(3) Decision, paras.18-20; Mangenda Art.60(2) Decision, paras.41-43; Kilolo Art.60(2) Decision, paras.41-46; Babala Art.60(2) Decision, paras.36-38.

- not to contact any witness in this case, or those in Case ICC-01/05-01/08, except through or in the presence of Defence counsel accredited to appear on behalf of the Four Suspects before this Court; and

- to report to the Registrar any such contact with witnesses in this case, or those in Case ICC-01/05-01/08.

30. The inadequacy of the conditions for the Four Suspects' release is further heightened by the very limited analysis given in the Decision to other factors which would ordinarily be relevant. These include the differing capacities of the states to which the Four Suspects were to be released,[41] and the limited nature of those states' guarantees.[42] For example, in the case of Mr. Mangenda, the Decision appears to have overlooked the equivocal and limited nature of the state guarantees provided—a matter which the Single Judge had previously emphasised. As recently as 5 August 2014, the Single Judge considered that even the guarantees afforded by the UK and the Belgian authorities were insufficient, calling the UK's "highly equivocal"[43] and Belgium's "insufficient".[44] The Decision fails to address such matters. Yet the Single Judge's former concerns were borne out by the decision of the UK authorities immediately to revoke Mr. Mangenda's visa and to deny him entry to UK territory.[45]

Relief Sought

[41] SCSL, *Prosecutor v. Sesay et al*, SCSL-04-15-AR65, Sesay – Decision on Appeal against Refusal of Bail, 14 December 2004, para.36 ("[w]hile in principle a judge could be satisfied that a particular accused would appear for trial notwithstanding any lack of police enforcement capability, at the same time conditions and guarantees need to be meaningful").
[42] ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005, paras.18, 23 (even State guarantees may be insufficient to ensure that a person will appear for trial—and the lack of such guarantees may "weigh heavily" against interim release). *See also* De Meester et al, p.326 (noting that, while "personal assurances are a factor that is taken into account when assessing the risk of flight, they do not carry much weight", and characterising guarantees by national authorities as "essential for obtaining provisional release" in the practice of the ICTY, ICTR and SCSL).
[43] Mangenda Art.60(3) Decision, para.29. *See also* Mangenda Art.60(2) Decision, para.42.
[44] Mangenda Art.60(3) Decision, paras.32-34.
[45] *See* ICC-01/05-01/13-719.

This document has been re-stamped in order to reflect the correct OA

31. For the reasons above, the Appeals Chamber should determine that the Single Judge erred in exercising his discretion, and erred in law and fact, invalidating the Decision. As a consequence, it should:

a. quash the Decision, and order the immediate return of the Four Suspects to Court, if necessary by asking the States to which they have returned to re-arrest them; or, in the alternative,

b. remand the question of the Four Suspects' detention to the Pre-Trial Chamber and/or Single Judge for immediate review under Article 60(3), including hearing the parties and relevant states as to whether there has been a material change of circumstances and/or whether suitable conditions may be ordered to address the risks associated with the Four Suspects' release.

Word Count: 5,156[46]

Fatou Bensouda, Prosecutor

Dated this 29th day of October 2014

At The Hague, The Netherlands

[46] 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 of Court. This statement (58 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.