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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 with Public Annex I

Narcisse Arido's Response to "Prosecution Appeal Against the 'Decision ordering the Release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido'" (ICC-01/05-01/13-727 OA10)

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I. INTRODUCTION

1. On 21 October 2014, the Single Judge ordered the immediate release of Mr. Arido as well as of all his co-suspects, other than Mr. Bemba, on the basis of the lengthy period of pre-trial detention to which they were subjected.[1] He ordered them to sign an individual declaration stating their commitment to appear at trial or whenever summoned by the Court, and indicating the address at which they will be staying when released. Finally, he ordered the Registar to promptly make all the practical arrangements as necessary and appropriate to enforce the decision.[2]

2. On 29 October 2014, the Prosecution filed its appeal,[3] requesting the Appeals Chamber to either quash the decision and order the immediate return of the four suspects; or to remand the question of the suspects' detention to the Pre-Trial Chamber for immediate review under Article 60 (3) of the Statute.[4]

3. The Arido Defence opposes the Prosecution Appeal for the reasons stated below.

II. SUBMISSIONS

4. The Prosecution presents two grounds of appeal: first, that the Single Judge committed an error of law and of fact by incorrectly and unreasonably applying Article 60 (4) to the release of the four suspects, and second, that he erred in fact by concluding that the four suspects' personal commitment to appear for trial and the provision of their address and contact details sufficiently addressed the risks associated with their release. Each ground is addressed in detail below in parts A and B. Since each ground of appeal alleges several errors, the Arido Defence has structured its response to address each alleged error under a specific heading.

[1] ICC-01/05-01/13-703 (hereinafter 'Impugned Decision').
[2] *Ibid.*, p. 7.
[3] ICC-01/05-01/13-727 ('Prosecution Appeal').
[4] Prosecution Appeal, para. 31.

GROUND 1: The Single Judge did not err in releasing the suspects in order to prevent an unreasonable period of pre-trial detention

5. The Prosecution states that the Impugned Decision "cannot reasonably be interpreted as applying any provision other than Article 60 (4)".[5] It argues that the Single Judge "wrongly analysed" Article 60 (4) of the Statute and therefore erred in law by ordering the release pursuant to Article 60 (4) in the absence of an inexcusable delay by the Prosecution. The Prosecution also argues that the Single Judge erred in fact in finding that the pre-trial detention was unreasonable.[6]

A. The Impugned Decision is based on Article 60 (3) of the Statute, in conjunction with the Single Judge's overarching obligation to prevent unlawful detention

6. The Arido Defence submits that the Impugned Decision was rendered in the context of a review of the detention pursuant to Article 60 (3) of the Statute. In the Impugned Decision[7] and other decisions, such as those where he sought the views of the relevant states and of the Prosecution, the Single Judge referred to Article 60 (3) and used the term of "review".[8] The Prosecution itself made repeated references to the absence of "changed circumstances" pursuant to Article 60 (3) when submitting its observations on the interim release.[9] In addition, as further described below, a close look at the Single Judge's reasoning makes clear that the decision was made pursuant to Article 60 (3) and meets the requisite requirements for such review.

7. In its appeal, the Prosecution has failed to resort to a systematic interpretation of the provision pertaining to interim release, Article 60, and ignored the relevance of Articles 21 (3), 55 (1) (d) and 64 (2) of the Statute in respect of the interpretation of Article 60. The Arido Defence submits that a reasonable interpretation of Article 60 (3) of the Statute shows that it permits the release of a suspect in order to prevent an unreasonable period of pre-trial detention.

8. Firstly, the Appeals Chamber previously held, when discussing the object and purpose of Article 60 (3), that it is one of the "safeguards against the undue prolongation of the period of detention",[10] describing it as an essential protection against detention that is not in accord with

[5] *Ibid.*, paras 3, 9, 10.
[6] *Ibid.*, para. 2.
[7] *See* Impugned Decision, p. 4, first paragraph, noting Article 60 (3) and (4); *see also ibid.*, third paragraph: "necessary for the Chamber to review such detention *proprio motu* and without delay".
[8] ICC-01/05-01/13-683; ICC-01/05-01/13-697.
[9] ICC-01/05-01/13-699-Conf, paras 1, 9-13.
[10] ICC-01/05-01/08-1019, para. 47, citing to ICC-01/04-01/07-572, para. 14.

the Statute and internationally recognised human rights.[11] By releasing the suspects on the basis of Article 60 (3) in order to avoid an unreasonable period of pre-trial detention, while having also considered that the stage of the proceedings reduced the risks contained in Article 58 (1) (b) (ii) and (iii), and that the commitment to appear of the four suspects reduced the risk that they fail to appear for trial (Article 58 (1) (i)), the Single Judge acted within the premises of Article 60 (3) of the Statute.

9. Secondly, the Arido Defence recalls that the Statute must be applied and interpreted in a way that is consistent with internationally recognised human rights pursuant to Article 21 (3) of the Statute. It is beyond controversy that international human rights law prohibits unreasonable periods of pre-trial detention,[12] This prohibition is closely related to the presumption of innocence,[13] the right to liberty and the corresponding exceptional character of pre-trial detention,[14] and to the right to be tried with a reasonable time.[15] As put by the Inter-American Commission for Human Rights, preventive detention that is prolonged for an unreasonable time is "tantamount to a sentence without a conviction"[16] and to "anticipating a sentence",[17] which is contrary to universally recognized general principles of law".[18]

10. The UN Human Rights Committee, charged with the interpretation of the International Covenant on Civil and Political Rights ('ICCPR'), has held that in cases of pre-trial detention, the detainee must be tried as expeditiously as possible[19] and that extended pre-trial detention is a breach of Article 9 (3) of the ICCPR.[20] The ICCPR states clearly that if a trial within a reasonable time is not possible, then the person *must* be released.[21] Principle 38 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by the UN General Assembly, states unequivocally that "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial."[22]

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[11] *Ibid.*, para. 49, *citing to* Art. 21 (3) of the Statute & Art. 9 (3) of the ICCPR.
[12] ECHR, Art. 5 (3); ICCPR, Art. 9 (3); ACHR, Art. 7 (5).
[13] ECHR, Art. 6 (2); ACHR, Art. 8 (2), ICCPR, Art. 14 (2); UDHR, Art. 11.
[14] ECHR, Art. 5 (1); ACHR, Art. 7 (1); ICCPR, Art. 9 (1); UDHR, Art. 3.
[15] ECHR, Art. 6 (1); ACHR, Art. 8 (1); ICCPR, Art. 14 (1).
[16] IACHR, *Juvenile Reeducation Institute v. Paraguay* Judgement, para. 229.
[17] IACHR, *Suárez-Rosero v. Ecuador* Judgement, para. 77; *López-Álvarez v. Honduras* Judgement, para. 69; *Acosta-Calderón v. Ecuador* Judgement, para. 111.
[18] IACHR, *Juvenile Reeducation Institute v. Paraguay* Judgement, para. 229; *Suárez-Rosero v. Ecuador* Judgement, para. 77; *López Álvarez v. Honduras* Judgement, para 69; *Acosta-Calderón v. Ecuador* Judgement, para. 111.
[19] HRC, General Comment 32, para. 35; HRC, *Sextus v. Trinidad and Tobago* Decision, para. 7.2; ECtHR, *Jabłoński v. Poland* Judgement, para. 102; ECtHR, *Castravet v. Moldova* Judgement, para. 30; ECtHR, *Kučera v. Slovakia* Judgement, para. 95.
[20] HRC, *Koné v. Senegal* Decision, para. 8.6.
[21] ICCPR, Art. 9(3).
[22] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

11. The Arido Defence also recalls that Appeals Chamber's Judge Ušacka supported the argument that unreasonable detention should not only be limited to cases where it is due to inexcusable delay by the Prosecution, as she held that "[A]rticle 21 (3) of the Statute casts a broader obligation on the Pre-Trial Chamber to ensure the reasonableness of the period of pre-trial detention".[23] She also noted that when discussing the question of pre-trial detention, "[t]he overarching consideration must always be that continued detention is not unreasonable or leads to an arbitrary or disproportionate outcome".[24]

12. Thirdly, the Single Judge's interpretation and application of Articles 60 (3) and 60 (4) is also consistent with the rules on treaty interpretation. As an international treaty, the interpretation of the Articles in the ICC Statute is subjected to the Vienna Convention on the Law of Treaties ('VCLT').[25] Article 32 thereof[26] states that when the provision of a treaty, interpreted in accordance with its ordinary meaning and in light of its object and purpose pursuant to Article 31 of the VCLT, leads to a result that is manifestly absurd or unreasonable, recourse may be had to supplementary means of interpretation in order to confirm or to determine its meaning. The Arido Defence submits that interpreting Article 60 (3) and 60 (4) of the Statute as limiting the release of a suspect - in case where any further pre-trial detention would become unreasonably long - only to cases where the length of time is due to an inexcusable delay on the part of the Prosecution is both unreasonable and absurd in light of the Court's duty to protect the fair trial rights of the suspects[27] and the Statutory requirement for the application and interpretation of the applicable law to be in accordance with internationally recognised human rights. It would amount to a finding that there would be no option for releasing a suspect who is held, in the specific circumstances of his/her case, for an unreasonable period of time prior to the final judgement. This would blatantly contradict the object and purpose of the Rome Statute as well as internationally recognised human rights.

13. Last but not least, the Single Judge's finding that Article 60 (4) of the Statute creates an independent obligation for the Judges to ensure that a suspect is not held in pre-trial detention for an unreasonable period of time and to order the release of the suspects pursuant to Article 60 (3) as a result is also consistent with the Statute and the case law. As stated by the Appeals

[23] ICC-02/11-01/11-548-Anx2, para. 14.
[24] ICC-01/05-01/13-558-Anx2, para. 18.
[25] ICC-01/04-168, para. 33.
[26] VCLT, Art. 31 (1) (emphasis added).
[27] The Appeals Chamber, quoting the English Court of Appeals in the *Huang v. Secretary of State*, held that it was the duty of a Court to see the protection of individual fundamental rights, ICC-01/04-01/06-772, para. 39.

Chamber in the *Lubanga* case, a Chamber's obligation to ensure that a person subject to an arrest warrant is not detained for an unreasonable period of time is also contained in other provisions of the Statute, including the suspect's right to a trial without undue delay as protected by Article 67 (1) (c) of the Statute.[28] In addition, the Single Judge and the Pre-Trial Chamber have the obligation to ensure that the suspects are given a fair trial.[29] Further, Article 55 (1) (d) of the Statute protects a person being the subject of an investigation from arbitrary detention. Finally, under Article 57 (3) (c) of the Statute, the Pre-Trial Chamber may, where necessary, provide for the protection of persons who have been arrested.

14. In light of the above, the Arido Defence submits that the Single Judge did not commit any error of law in releasing the four suspects on the basis of Article 60 (3) of the Statute in order to prevent an unreasonable period of pre-trial detention.

B. The Impugned Decision does not fail to meet the requirements of Article 60 (3)

15. The Prosecution states that, should the decision have been rendered under Article 60 (3) of the Statute, the Single Judge erred in law as he failed to make the requisite findings and to provide adequate reasoning.[30] The Arido Defence submits that a review of the Impugned Decision shows that the Single Judge considered the length of the pre-trial detention, as well as the stage of the proceedings, as changed circumstances, and, when reviewing their impact on the necessity for pre-trial detention, concluded that it was no longer necessary.

1. Applicable legal framework

16. The Appeals Chamber has stated that, when undertaking a review pursuant to Article 60 (3), the Pre-Trial Chamber must review its previous ruling "in order to ascertain whether the circumstances bearing on the subject have changed, and if so, whether they warrant the termination of detention".[31] It has held that a new fact satisfying a Chamber that a modification of its prior ruling is necessary could also amount to a changed circumstance,[32] and that the Pre-Trial Chamber must also "consider any other information which has a bearing on the subject".[33]

[28] ICC-01/04-01/06-824, para. 98.
[29] Statute, Art. 64 (2). It is widely recognised that this duty also applies to the Pre-Trial Chamber, ICC-02/11-01/11-33, para. 5; ICC-01/09-02/11-30, para. 6; ICC-01/05-01/08-528, para. 10.
[30] Prosecution Appeal, paras 3, 12.
[31] ICC-01/05-01/08-1019, para. 47.
[32] *Ibid.*, para. 51 (emphasis added).
[33] *Ibid.*, para. 52.

The Single Judge did not have to address each factor underpinning detention in a *de novo* manner to determine whether any of these had changed.[34] However, if he found that there are changed circumstances, he had to consider their impact on the factors that formed the basis for the decision to keep the person in detention.[35]

17. The Arido Defence submits that the process followed by the Single Judge in his decision clearly follows the procedure established by the Appeals Chamber. While he does not explicitly refer to a "changed circumstance", the Arido Defence submits that the Single Judge viewed the length of pre-trial detention of the suspects,[36] as well as the stage of the case - including the written submissions on the confirmation of charges[37] - as changed circumstances.

2. The Single Judge did not err in his Article 60 (3) review

18. The Prosecution submits that the circumstances have not changed,[38] even though it previously accepted that the written submissions on the confirmation of charges amounted to a "new fact"[39]. The Arido Defence submits that the Prosecution merely disagrees with the Single Judge, without demonstrating a clear error and how it materially affects the Impugned Decision. The Prosecution failed to demonstrate how a finding of an unreasonable period of pre-trial detention could not amount to a changed circumstance. As stated by the Appeals Chamber, an applicant's mere disagreement with the conclusions that the Pre-Trial Chamber drew from the available facts, or the weight it accorded to particular factors, is not enough to establish a clear error.[40] As a result, it must be dismissed *in limine*.[41]

19. The Arido Defence also notes that the Appeals Chamber's jurisprudence, to which the Prosecution refers, has been developed and applied exclusively in relation to Article 5 crimes. There is no evidence to suggest, nor has this been asserted by the Prosecution, that this jurisprudence would fully and unconditionally apply to Article 70 offences. On the contrary, it is submitted that the radically different and far less serious nature of these offences gives more reason to critically assess the need for - continuing - detention.

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[34] ICC-02/11-01/11-548-Red, para. 53.
[35] ICC-01/05-01/08-2040, para. 1; ICC-02/11-01/11-187, para. 23; ICC-01/05-01/08-2151-Red, paras 1, 53.
[36] Impugned Decision, p. 4, second paragraph.
[37] *Ibid.*, third paragraph.
[38] Prosecution Appeal, para. 12.
[39] ICC-01/05-01/13-699-Conf, para. 13: "The only new fact concerns the confirmation proceedings that took place between 30 June 2014 and 11 September 2014".
[40] ICC-01/05-01/13-560, para. 27, *citing to* ICC-01/04-01/10-283, paras 21, 31.
[41] *Ibid.*

20. Should the Appeals Chamber decide to consider the Prosecution's argument, the Arido Defence submits that the review of detention pursuant to Article 60 (3) does not require the Single Judge to review his decision on detention *de novo*, or to discuss every "non changed" circumstances, as the Prosecution suggests. The review is limited to how the changed circumstances, if found, affect the previous decision on interim release. This is what the Single Judge did.

21. After considering the length of the pre-trial detention as well as the stage of the proceedings, the Single Judge discussed the risks listed in Article 58 (1) (b). Regarding Article 58 (1) (b) (i) (appearance at trial), he found that detention was no longer necessary in order to ensure the persons' appearance before the Court as a result of the formal commitment of the suspects to appear at trial, provided that they sign an individual declaration stating their commitment to appear at trial or whenever summoned by the Court and indicating the address at which they will be staying.[42]

22. Regarding the risks listed in Article 58 (1) (b) (ii), related to the obstruction or endangering of the investigation or the court proceedings, and in Article 58 (1) (b) (iii), related to the prevention of the continuation of the commission of the offences or related offences, the Single Judge unequivocally held that those were reduced as a result of the "documentary nature of the evidence" and of the fact that they all had now been acquired on the record of the case.[43]

23. The Prosecution's argument that "mere passage of time" does not amount to a changed circumstance is misplaced. The changed circumstance is not the mere passage of time, but the likelihood that, should pre-trial detention continue, it would become unreasonably lengthy and therefore violate the suspects' rights. The fact that the potential for an unreasonable period of pre-trial detention could amount to a changed circumstance with the meaning of Article 60 (3) of the Statute, and therefore lead to a modification of a previous ruling on detention, has been recognised by Pre-Trial Chamber I in the *Lubanga* case.[44] Judge Ušacka has also taken the position that extended pre-trial detention amounted to a change of circumstances with the meaning of Article 60 (3) of the Statute.[45]

[42] Impugned Decision, p. 5, fifth paragraph.
[43] While the Single Judge used the term "crimes" in the Impugned Decision, the Arido Defence finds it important to recall that Article 70 of the Statute concerns offences, not crimes.
[44] ICC-01/04-01/07-702, p. 6.
[45] ICC-02/11-01/11-548-Anx2, para. 18.

24. The Prosecution also argues that the advanced stage of the proceedings may enhance the flight risk.[46] According to the Arido Defence, the advanced stage of the proceedings does the contrary: it has now become clear that there is not sufficient evidence to confirm any charge against Mr. Arido, and that as a result any flight risk - which has never been demonstrated in any concrete manner by the Prosecution - has even be further reduced. This is particularly true in light of the fact that Mr. Arido has already served 11 months of prison, which, in accordance with Article 78 (2) of the Statute, would be deduced from any sentence that may be imposed.

25. However, even if the advanced stage of the proceedings "*may*" enhance a perceived flight risk, the assessment of the facts and the evidence in assessing the risks under Article 58 (1) (b) is left to the discretion of the Single Judge,[47] who decided that any risk of flight was mitigated by the suspects' personal commitment to appear for trial or when summoned. It was within his discretion to do so, and the Prosecution failed to demonstrate that by doing so, the Single Judge abused his discretion.

26. Finally, while recognising that much of the evidence is documentary, the Prosecution argues that it is not yet admitted to the record of the case. It also states that Prosecution's witnesses will be vital to contextualising and explaining this evidence at trial.[48] The Arido Defence notes that it is a common practice that every document referred to during the Confirmation of Charges submissions is admitted into evidence, unless it is expressly ruled inadmissible by the Chamber upon a challenge by any of the participants.[49] Again, the Prosecution failed to demonstrate why or how the Single Judge abused his discretion in explicitly rejecting this argument and by finding that the documentary nature of the evidence and their admission in the record of the case reduced the risks listed in Article 58 (1) (b) (ii) and (iii).[50]

C. Alternatively, the Single Judge did not err in applying Article 60 (4) in the absence of an inexcusable delay on the part of the Prosecution

27. The Prosecution takes the position that the decision is based on Article 60 (4) of the Statute and argues that the Single Judge committed an error of law by not correctly applying Article 60 (4) in finding that it may be applied without a finding of inexcusable delay by the

[46] Prosecution Appeal, para. 12.
[47] ICC-01/04-02/06-271-Red, para. 36; ICC-01/04-01/07-572, para. 25.
[48] Prosecution Appeal, para. 12.
[49] *See e.g.* ICC-01/04-01/06-678 at p. 8.
[50] Impugned Decision, p. 4, third paragraph.

Prosecutor.[51] Should the Appeals Chamber find that the Impugned Decision was in fact based on Article 60 (4) of the Statute, the Arido Defence submits that the Single Judge did not err in law.

28. The Single Judge's finding that he is under an obligation, under Article 60 (4) of the Statute, to ensure that a person is not detained for an unreasonable period prior to trial - notwithstanding the absence of any inexcusable delay by the Prosecution[52] - is correct. The Arido Defence submits that Article 60 (4) should be interpreted as permitting the release of a suspect in order to prevent unreasonably long pre-trial detention, and that the reasoning contained in paragraphs 9 to 13 above, made in the context of Article 60 (3), applies equally to the interpretation of Article 60 (4). Any other conclusion would lead to a situation where a suspect would be held in pre-trial detention indefinitely if an inexcusable delay on the part of the Prosecution cannot be demonstrated. This is plainly unjust.

D. The Single Judge did not err in his assessment of the maximum sentence applicable

29. In the second part of its first ground of Appeal, the Prosecution argues that the Single Judge erred in law by "pre-judging" the maximum sentence for Article 70 offences.[53] It states that the Single Judge pre-judged two sentencing questions, namely the quantum of sentence which may be imposed by the Trial Chamber if the suspects were to be 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.[54]

1. The Single Judge did not "pre-judge" the quantum of sentence

30. The Prosecution argues that the Single Judge appears to have presumed that the sentence possibly imposed on the suspects would be less than 5 years.[55] Referring to the "very serious and organised" nature of the violations alleged, and the modes of liability argued, the Prosecution argues that this reasoning is without basis.[56] This argument is mere speculation. The only reference to a sentence by the Single Judge is to the "statutory penalties applicable to the offences

[51] Prosecution Appeal, paras 3, 5-6, 10.
[52] ICC-01/05-01/13-703, p. 5, first paragraph, *citing to* ICC-01/04-01/06-824, para. 98.
[53] Prosecution Appeal, para. 4.
[54] *Ibid.,* paras 16-21.
[55] *Ibid.,* para. 18.
[56] *Ibid.*

at stake in these proceedings".[57] The Prosecution fails to point out to any specific part of the Impugned Decision wherein the Single Judge takes the position that the four suspects, if tried and convicted, would be given a specific sentence. The Arido Defence submits that mere disagreement with the conclusions that the Pre-Trial Chamber drew is not enough to establish a clear error and that as a result, the Prosecution's argument must be dismissed *in limine*.[58]

31. In any event, the Arido Defence submits that it is impossible to determine the reasonable character of pre-trial detention without making a reference to a possible sentence, since the length of the possible sentence is one of the elements to be taken into account. By doing so, the Single Judge did not commit any error.

32. Finally, it is also pointed out that while the possible length of a prison sentence that could be imposed is a factor in assessing the reasonable duration of pre-trial detention, it should at the same time be emphasised that on the basis of human rights case law and bearing in mind the presumption of innocence, anticipation of a (lengthy) prison sentence cannot be used as *ground* for pre-trial detention.

2. The Single Judge did not "pre-judge" the question of whether cumulative sentencing is possible for Article 70 offences

33. The Prosecution takes the position that the Single Judge has "pre-judged" the question as to whether Article 70 (3), which refers to a maximum penalty of five years or a fine, applies to each individual offence under Article 70 (1) or whether it is the maximum regardless of the number of convictions. It argues that the Single Judge has committed an error of law in doing so.

34. The Prosecution calls upon the Appeals Chamber to "refrain […] from ruling on the proper interpretation of Article 70 (3) of the merits",[59] arguing it is a matter for the Trial Chamber to do in accordance with Article 76 of the Statute.[60] However, the Prosecution has on multiple occasions taken the position that the five-year sentence listed in Article 70 (3) is a maximum for each specific individual offence listed under Article 70 (1).[61] This question is an essential element of the Prosecution's appeal, and the Arido Defence submits that a sentence of

[57] Impugned Decision, p. 4, fourth paragraph.
[58] ICC-01/05-01/13-560, para. 27.
[59] Prosecution Appeal, para. 21.
[60] *Ibid.*
[61] *See e.g.* ICC-01/05-01/13-525-Red, paras 29, 36; ICC-01/05-01/13-88-Red, para. 17.

more than five years cannot be imposed in respect of a person convicted of multiple offences under Article 70.

35. First of all, according to the Prosecution's reasoning, an individual found guilty of committing each of the offences listed under Article 70 (1) could face a maximum penalty of 30 years - the maximum penalty for article 5 crimes other than the extremely grave ones, for which life imprisonment exists.[62] This alone shows the Prosecution's position is unreasonable, as the level of gravity of even the most serious Article 70 offence cannot be said to come close to that of a crime against humanity or a war crime.

36. Secondly, the Prosecution's position also makes little sense in light of the unequivocal wording of Article 70 (3), which would otherwise have explicitly stated that the maximum penalty was five years for each offence, as the drafters did for Rule 116 (3) of the RPE when discussing the fine that can be imposed for Article 70 offences. The rules applicable to similar offences in the *ad hoc* tribunals also provide useful guidance, as it is clear that the maximum sentence listed is one that applies for a finding of contempt and not for each individual underlying offence.[63]

37. Finally, Article 78 of the Statute, which deals with sentencing in the context of Article 5 crimes, provides explicitly that in case of imprisonment for a specified number of years, "[w]hen a person has been convicted of more than one crime, the Court shall pronounce **a sentence for each crime and a joint sentence specifying the total period of imprisonment**. **This period** shall be no less than the highest individual sentence pronounced and **shall not exceed 30 years imprisonment or a sentence of life imprisonment** […]."[64] If in the logic of the Prosecution one were to apply Article 78 to Article 70 offences as well, it is submitted that in case of multiple convictions of core crimes, the joint sentence (other than life imprisonment) cannot exceed 30 years, which is also the maximum sentence for each individual crime. Applying this *mutatis mutandis* to Article 70 offences, it excludes the possibility that the maximum penalty in case of conviction for multiple offences under Article 70 could exceed the maximum sentence for each individual offence, namely five years of imprisonment.

[62] ICC Statute, Art. 77 (1).
[63] MICT RPE, Rule 90 (G); SCSL RPE, Rule 77 (G); ICTY RPE, Rule 77 (G); ICTR RPE, Rule 77 (G).
[64] Emphasis added.

E. The Single Judge did not err in fact by finding that the period of pre-trial detention was about to become disproportionate

38. In the second part of its first ground of Appeal, the Prosecution argues that the Single Judge erred in fact by concluding that the four suspects have been detained for an unreasonable period.[65]

39. As a preliminary matter, the Arido Defence notes that the Single Judge did not find that the length of time spent in pre-trial detention by the Article 70 suspects was unreasonable *per se*, but that any "further extension of the period of the pre-trial detention would result in making its duration disproportionate".[66] In doing so, the Single Judge lived up to his obligation to prevent the duration of detention becomes unreasonable, rather than to remedy a situation of unreasonable - and thus unlawful - detention *ex post facto*.

1. Applicable legal framework

40. The Appeals Chamber has previously held that 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 circumstance of each case[67] and that the complexity of the case can be taken into account.[68]

41. The Arido Defence submits that the Prosecution's reliance on the ICTY and ICTR case law is of limited assistance. First of all, the statutory framework of the ICC and that of the ICTY and ICTR differ significantly. The pre-trial procedure there differs significantly from that of the ICC, since the process of "confirmation of charges" does not exist there. The Prosecution itself recognised it, calling it a "striking difference".[69] In addition, neither the ICTY nor the ICTR have provisions dealing specifically with interim release in order to prevent unreasonably lengthy periods of pre-trial detention. They do not have provisions requiring the Chamber to periodically review its decision on detention, and do not have a statutory provision requiring them to apply and interpret the law in accordance with internationally recognised human rights, unlike Article 21 (3) at the ICC. Finally, the Prosecution only relies on cases where the suspects were charged

[65] Prosecution Appeal, paras 4, 15, 18.
[66] Impugned Decision, p. 4, fourth paragraph.
[67] ICC-01/04-01/06-824, para. 122.
[68] *Ibid.*, para. 123.
[69] ICC-01/04-01/06-637, para. 26.

with "core" crimes. As a result, ICTY and ICTR case law is not directly applicable to the present case, although it can provide some guidance.

42. The Arido Defence submits that reliance on the human rights case law is more appropriate, and required by Article 21 (3) of the Statute. The UN Human Rights Committee has held that what constitutes "reasonable time" is to be assessed on a case-by-case basis, depending on the complexity of the trial and other associated elements, such as impediments to the investigations due to the suspect.[70] The European Court of Human Rights ('ECtHR') has held that the right to be tried within a reasonable time or to be released clearly implies that the persistence of suspicion does not suffice to justify, after a certain lapse of time, the prolongation of the detention.[71] It also held that it was to be assessed depending on the seriousness of the offence.[72]

43. The European Commission on Human Rights, in a 27 May 1966 report prepared in the context of the *Neumeister v. Austria* case, listed a number of factors to be taken into account when assessing the reasonableness of the pre-trial detention: (1) the actual length of detention; (2) the length of detention in relation to the nature of the offence, the penalty prescribed and to be expected in the event of conviction and national legislation on the deduction of the period of detention from any sentence passed; (3) the material, moral or other effects of detention upon the detained person beyond the normal consequences of detention; (4) the conduct of the accused relating to his role in delaying the proceedings and his request for release; (5) the difficulties in the investigation of the case, such as its complexity in respect of the facts or the number of witnesses or accused and the need to obtain evidence abroad; (6) the manner in which the investigation was conducted; and (7) the conduct of the judicial authorities.[73]

2. The Single Judge's reliance on the maximum sentence is justified

44. While it accepts that other factors can be taken into account in order to determine the reasonableness of pre-trial detention, the Arido Defence submits that the two essential elements are the time already spent in detention and the possible length of the sentence. As stated above, the underlying rationale behind the protection against pre-trial detention for an unreasonably long period of time is to avoid that a person "serves" his/her sentence before having been tried, convicted and sentenced, which would violate the most basic fair trial rights. The Prosecution

[70] HRC, *Koné v. Senegal* Decision, para. 8.6.
[71] ECtHR, *Stögmüller v. Austria* Judgement, para. 4.
[72] *Ibid.*
[73] *See* ECtHR, *Neumeister v. Austria* Judgement, paras 23-24.

failed to demonstrate how the Single Judge gave undue weight to the possible sentence, and instead expresses mere disagreement with the Impugned Decision.

3. The diligence of the parties and participants does not preclude a finding that pre-trial detention can become unreasonable

45. The majority of the Prosecution's arguments focus on the fact that all parties in the case acted with the requisite diligence and expeditiousness.[74] This ignores the fact that pre-trial detention can be unreasonably long even if all the parties and participants act as expeditiously as possible. While closely related, the protection against unreasonable pre-trial detention and the right to be tried without undue delay are two separate rights, which are contained in separate provisions in the ICCPR, ECtHR and the ACHR.[75] The ECtHR explicitly stated that the protection against unreasonably long pre-trial detention was "an independent provision which produces its own effects whatever may have been the facts on which the arrest was grounded or the circumstances which made the preliminary investigation as long as it was."[76] It further held that even though the length of time before trial may be "reasonable" or the duration of the preliminary investigations not open to criticisms, detention for that period might still not be reasonable.[77]

46. In any event, the Arido Defence submits that, unlike what the Prosecution purports to present, the Single Judge has also considered the behaviour of the Prosecution, and the relevant domestic proceedings in his assessment.[78]

4. The Single Judge did not fail to provide a reasoned opinion

47. The Prosecution also submits that the Single Judge failed to give a reasoned opinion on other relevant factors when assessing the reasonable nature of the pre-trial detention of the suspects.[79] However, the Prosecution fails to demonstrate how no reasonable trier of fact would have considered these factors and how the Single Judge's alleged error materially affects the decision. It only expresses mere disagreement with the Impugned Decision and its argument must therefore be summarily dismissed.

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[74] ECtHR, *Neumeister v. Austria* Judgement, paras 23-24.
[75] ECHR, Art. 5 (3) & 6 (1); ICCPR, Art. 9 (3) & 14 (3) (c); ACHR, Art. 7 (5) & 8 (1).
[76] ECtHR, *Stögmüller v. Austria* Judgement, para. 5.
[77] *Ibid.; see also* ECtHR, *Matznetter v. Austria* Judgement, para. 12.
[78] Impugned Decision, p. 4, last paragraph; p. 5, first paragraph.
[79] Prosecution Appeal, para. 22.

48. The Arido Defence further submits that the Single Judge also considered the type of offences alleged to have been committed by the Suspects, since he made multiple references to Article 70 of the proceedings. He also considered the advancement of the proceedings[80] and Article 58 (1) (b) (ii) and (iii) risks.[81] Finally, the Single Judge did not have to discuss the previous positions taken by States regarding conditions for release, as he found that the risks under Article 58 (1) (b) (i) were sufficiently addressed by the issuance of an individual declaration stating the suspects' commitment to appear for trial, and that the risks under Article 58 (1) (b) (ii) and (iii) were reduced.

5. The Single Judge did not err in finding that any continuation of the pre-trial detention would have made it unreasonable

49. The Arido Defence submits that the Single Judge did not commit any error of law or fact by finding that the release of the four suspects was necessary in order to prevent an unreasonable period of detention. In fact, the position of the Arido Defence is that pre-trial detention lasting more than a few days was unreasonable since the beginning, as previously argued,[82] particularly in light of the fact that a sentence for Article 70 offences can be limited to a fine, as is provided for by Article 70 (3) of the Statute and Rule 116 (3) of the RPE.

50. The truth is that for Mr. Arido, who has already spent more than 11 months in pre-trial detention before a decision on confirming or declining the charges is rendered, any further time he would spend in prison would potentially exceed any sentence he may be given, should the case go to trial and should he found guilty and sentenced to imprisonment. In addition, as previously stated by the Arido Defence, the time that the Article 70 suspects have already spent in pre-trial detention is more than a number of Article 5 cases,[83] even though the offences are of significant less gravity.[84] The disproportionate character of any continued pre-trial detention is also clear when one looks at the penalties imposed for a finding of contempt in the *ad hoc* tribunals, which range from a fine to 12 months of imprisonment[85] despite a maximum penalty of 7 years for the

[80] Impugned Decision, third paragraph: "Considering […] the advanced stage reached by these proceedings".
[81] *Ibid.*, "Considering that […] reducing the risks that these proceedings or the investigations might be obstructed or endangered, that the alleged crimes be continued or related offences be committed".
[82] ICC-01/05-01/13-477-Red, paras 55-57; ICC-01/05-01/13-606-Conf, paras 21-28.
[83] Mr. Lubanga: around 10 months (http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf); Mr. Katanga: around 11 months (http://www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf); Mr. Ngudjolo Chui: around 7 months (http://www.icc-cpi.int/iccdocs/PIDS/publications/ChuiEng.pdf); Mr. Bemba: around one year (http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf).
[84] ICC-01/05-01/13-560, para. 1.
[85] *See e.g.* 4 months of imprisonment for interfering with a witness in the *Prosecutor v. Beqaj* case; a fine of 15 000 Dutch Guilder (6800 euros) for the presentation of false evidence and instructing witnesses to testify falsely, in the

ICTY,[86] and from one year of probation to 2 years[87] despite a maximum penalty of 7 years for the SCSL.[88]

51. The disproportionate character of the pre-trial detention of the four suspects is also clear when compared with the maximum length of pre-trial detention for the most serious crimes in European domestic jurisdictions, particularly in France (maximum of 4 months if the person was never sentenced before, and when the penalty for the crimes is less or equal to 5 years),[89] the United Kingdom (182 days),[90] Germany (6 months),[91] the Netherlands (104 days),[92] and Poland (9 months).[93]

GROUND 2: The Single Judge did not err in fact by finding that the personal assurances of the four suspects was an adequate condition (Ground 2)

52. The Prosecution argues that the Single Judge found that the risks listed in Article 58 (1) (b) still existed,[94] and that the condition he imposed "has no impact, nor even purports to have any impact" on those risks and is therefore "manifestly inadequate".[95] As a result, the Prosecution submits that continued detention is justified.[96]

A. The Single Judge was under no obligation to set conditions

53. The Arido Defence recalls that the Impugned Decision is based on the length of the pre-trial detention of the four suspects, and states that release is necessary in order to avoid an unreasonable period of pre-trial detention, which would violate the rights of the suspects. As a result, whether or not the risks listed in Article 58 (1) (b) exist is not relevant in this assessment. If the fundamental rights of the suspects risk being violated, then they must be released. In the

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Prosecutor v. *Tadić case*; 3 and 5 months for intimidating witnesses in the *Prosecutor v. Haraqija & Morina* case; 3 months for receiving a bribe for signing a statement before the ICTY, and locating two other men prepared to sign false statements in the *Prosecutor v. Tabaković* case; 12 months (of which 8 were suspended as the convict would have been the only woman in the UNDU) for procuring false evidence in the *Prosecutor v. Rašić* case.

[86] ICTY RPE, Rule 77 (G).

[87] *See e.g.* one year of probation for threatening and intimidating a protected witness in the *Independent Counsel v. Brima et al.* case; 12 months to 2 years for bribing witnesses in the *Independent Counsel v. Bangura et al.* case.

[88] SCSL RPE, Rule 77 (G).

[89] French Criminal Procedure Code, Art. 145-1.

[90] Pre-Trial Detention Comparative Research, Fair Trial International.

[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.*

[94] Prosecution Appeal, paras 24, 26.

[95] *Ibid.*, paras 24, 28.

[96] *Ibid.*, para. 26.

Lubanga case, the Prosecution recognised that consideration of the reasonableness of detention pursuant to article 60 (4) was independent of the question on whether or not there were risks under Article 60 (2).[97] Further, the Single Judge has the discretion to impose or not impose conditions for release, as is clear from the wording of Article 60 (4) of the Statute which states that release ordered under this provision can be done "with or without conditions". The wording of Rule 119 (1) is also abundantly clear ("may" set one or more conditions restricting liberty).

54. The Arido Defence submits that the Prosecution expresses mere disagreement with the conclusions that the Single Judge drew from the available facts or the weight he accorded to particular factors, which is not enough to establish a clear error.[98] In addition, the Arido Defence notes that the Prosecution has the possibility, according to Rule 119 (2) of the RPE, to ask the Pre-Trial Chamber to amend the conditions set for detention and request it to impose the various conditions it lists at paragraph 29 of its appeal. As a result, even if the Appeals Chamber finds that the Single Judge erred with regards to the condition he imposed, this does not invalidate the decision that release is necessary in order to avoid an unreasonable period of pre-trial detention. As a result, the error alleged by the Prosecution does not materially affect the decision and its ground 2 must be dismissed *in limine*.[99]

B. The Single Judge did not abuse his discretion by imposing one condition for release

55. In the event that the Appeals Chamber decides to entertain the Prosecution's second ground of appeal, the Arido Defence submits that the Single Judge acted within his discretion in the Impugned Decision.

56. Pre-trial detention should be an exceptional measure and that, particularly when such pre-trial detention is about to become unreasonably long, other less stringent measures must be considered.[100] The Prosecution failed to support its argument that the Single Judge abused his discretion by doing so. The Arido Defence further submits that the Prosecution's references to previous decisions on interim release by the Single Judge[101] are inapposite, since the Single Judge found that the circumstances changed. He did explain how the imposed condition is adequate, since he found that it would address the flight risk, and found that the risks listed in Article 58 (1)

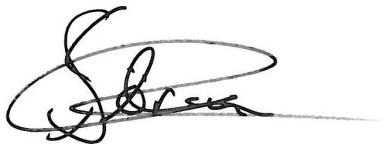
[97] ICC-01/04-01/06-637, para. 19.
[98] ICC-01/05-01/13-560, para. 27.
[99] *Ibid.*, para. 28.
[100] IACtHR, *Barreto Leiva v. Venezuela* Judgement, para. 120; ECtHR, *Khodorkovskiy v. Russia* Judgement, para. 136; ECtHR, *Ladent v. Poland* Judgment, paras 55-56; ECtHR, *Ambruszkiewicz v. Poland* Judgement, para. 31.
[101] Prosecution Appeal, paras 28-29.

(b) (ii) and (iii) were reduced. The Prosecution failed to establish how no reasonable Judge would have found that no condition other than the personal commitment of the four suspects was sufficient.

III. CONCLUSION

57. The Arido Defence submits that the Prosecution has failed to show that the Single Judge erred in law and/or in fact by rendering the Impugned Decision. As a result, it respectfully requests the Appeals Chamber to reject the Prosecution Appeal and upheld the Impugned Decision.

58. Alternatively, should the Appeals Chamber find that the Single Judge erred, the Arido Defence requests the Appeals Chamber to remand the matter to the Pre-Trial Chamber, and permit the parties to make submissions.



Göran Sluiter, Counsel for Mr. Arido

Dated this 4th Day of November 2014
At Amsterdam, The Netherlands