



Original: English

No. ICC-01/05-01/13 OA 5, OA 6, OA 7, OA 8, OA 9

Date: 29 May 2015

THE APPEALS CHAMBER

Before:

**Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Howard Morrison
Judge Piotr Hofmański
Judge Péter Kovács**

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 document

Judgment

**on the appeals against Pre-Trial Chamber II's decisions regarding interim
release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda,
Fidèle Babala Wandu, and Narcisse Arido
and
order for reclassification**

Judgment and order to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr Jean-Pierre Bemba Gombo
Ms Melinda Taylor

Counsel for Mr Aimé Kilolo Musamba
Mr Paul Djunga Mudimbi

Counsel for Mr Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Mr Jean-Jacques Mangenda Kabongo
Mr Christopher Gosnell

Counsel for Mr Narcisse Arido
Mr Charles Achaleke Taku

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Fidèle Babala Wandu against the decision of Pre-Trial Chamber II entitled “Decision on the first review of Fidèle Babala Wandu’s detention pursuant to article 60(3) of the Statute” of 4 July 2014 (ICC-01/05-01/13-538),

In the appeal of Narcisse Arido against the decision of Pre-Trial Chamber II entitled “Decision on ‘Narcisse Arido’s request for interim release’” of 24 July 2014 (ICC-01/05-01/13-588),

In the appeal of Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II entitled “Decision on the first review of Jean-Jacques Mangenda Kabongo’s detention pursuant to article 60(3) of the Statute” of 5 August 2014 (ICC-01/05-01/13-612),

In the appeal of Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II entitled “Decision on the first review of Aimé Kilolo Musamba’s detention pursuant to article 60(3) of the Statute” of 5 August 2014 (ICC-01/05-01/13-611),

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014 (ICC-01/05-01/13-703),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT AND ORDER

1. The decision of Pre-Trial Chamber II entitled “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014 (ICC-01/05-01/13-703) is reversed.
2. The following appeals are dismissed as moot:

- a. the appeal of Fidèle Babala Wandu against the decision of Pre-Trial Chamber II entitled “Decision on the first review of Fidèle Babala Wandu’s detention pursuant to article 60(3) of the Statute” of 4 July 2014 (ICC-01/05-01/13-547-tENG (OA 5));
 - b. the appeal of Narcisse Arido against the decision of Pre-Trial Chamber II entitled “Decision on ‘Narcisse Arido’s request for interim release’” of 24 July 2014 (ICC-01/05-01/13-606-Conf (OA 6));
 - c. the appeal of Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II entitled “Decision on the first review of Jean-Jacques Mangenda Kabongo’s detention pursuant to article 60(3) of the Statute” of 5 August 2014 (ICC-01/05-01/13-626-tENG (OA 7)); and
 - d. the appeal of Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II entitled “Decision on the first review of Aimé Kilolo Musamba’s detention pursuant to article 60(3) of the Statute” of 5 August 2014 (ICC-01/05-01/13-629 (OA 8)).
3. The Registrar shall reclassify as public the following documents:
 - a. ICC-01/05-01/13-537-Conf-AnxII;
 - b. ICC-01/05-01/13-537-Conf-AnxII-tENG-Corr; and
 - c. ICC-01/05-01/13-537-Conf-AnxII-tENG-Corr-Anx.
 4. Mr Arido shall file a public redacted version of “Narcisse Arido’s Document in Support of the Appeal of the Single Judge’s ‘Decision on ‘Narcisse Arido’s Request for Interim Release’” (ICC-01/05-01/13-588)”, 1 August 2014, ICC-01/05-01/13-606-Conf by 16h00 on 12 June 2015.
 5. The Prosecutor shall file a public redacted version of the “Prosecution Response to Mr. Narcisse Arido’s appeal against the ‘Decision on ‘Narcisse Arido’s Request for Interim Release’””, 11 August 2014, ICC-01/05-01/13-627-Conf by 16h00 on 17 June 2015.

REASONS

I. KEY FINDINGS

1. The wording of article 60 (4) of the Statute is unequivocal. It addresses situations in which detention prior to trial has been for an unreasonable period of time “due to inexcusable delay by the Prosecutor”.
2. A Chamber may determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, pursuant to article 60 (3) of the Statute. This provision, which governs the review of the detention in the present circumstances, must be interpreted and applied consistently with “internationally recognized human rights”, pursuant to article 21 (3) of the Statute.
3. The duration of time in detention pending trial is a factor that needs to be considered along with the risks that are being reviewed under article 60 (3) of the Statute, in order to determine whether, all factors being considered, the continued detention “stops being reasonable” and the individual accordingly needs to be released. Such a determination requires balancing the risks under article 58 (1) (b) of the Statute that were found to still exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole.
4. The potential penalty for the offence charged may be a factor to take into account in assessing whether the time in detention is reasonable. Nevertheless, this factor cannot be assessed in isolation, but would need to be considered in light of all of the circumstances of the case, which will always be the guiding factor.

II. PROCEDURAL HISTORY

5. On 19 November 2013, the Prosecutor filed an application for warrants of arrest against, *inter alia*, Mr Aimé Kilolo Musamba, Mr Fidèle Babala Wandu, Mr Jean-Jacques Mangenda Kabongo and Mr Narcisse Arido¹

¹ “Prosecution’s Application for Warrant of Arrest”, ICC-01/05-67-US-Exp, para. 1. A confidential version was registered on 27 November 2013 (*see* ICC-01/05-01/13-19-Conf).

(hereinafter: “Mr Kilolo”, “Mr Babala”, “Mr Mangenda” and “Mr Arido”, and “suspects”, collectively).

6. On 22 November 2013, Pre-Trial Chamber II, its functions being exercised by a single judge² (hereinafter: “Pre-Trial Chamber”), issued a warrant of arrest against, *inter alia*, the suspects.³

7. Following their surrender to the Court, the suspects applied for interim release pursuant to article 60 (2) of the Statute and, on 14 March 2014,⁴ 17 March 2014⁵ and 24 July 2014,⁶ the Pre-Trial Chamber rejected their respective applications.

8. Appeals were filed by all four suspects against these decisions and, on 11 July 2014, the Appeals Chamber, by majority, dismissed those filed by Mr Kilolo, Mr Babala and Mr Mangenda.⁷ Mr Arido’s appeal was filed on 29 July 2014⁸

² [Transcript of 27 November 2013](#), ICC-01/05-01/13-T-1-ENG (CT WT), p. 3, line 22, to p. 4, line 2.

³ “Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO”, dated 20 November 2013 and registered on 22 November 2013, ICC-01/05-01/13-1-US-Exp-tENG; a public redacted version of the English version was registered on 5 December 2013 (*see* [ICC-01/05-01/13-1-Red2-tENG, p. 15](#)). The original French public redacted version dated 20 November 2013 was registered on 28 November 2013 (*see* [ICC-01/05-01/13-1-Red2](#)).

⁴ [“Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’”](#), ICC-01/05-01/13-259 (hereinafter: “Kilolo Article 60 (2) Decision”); [“Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”](#), ICC-01/05-01/13-258 (hereinafter: “Babala Article 60 (2) Decision”).

⁵ [“Decision on the ‘Requête de mise en liberté’ submitted by the Defence for Jean-Jacques Mangenda”](#), ICC-01/05-01/13-261 (hereinafter: “Mangenda Article 60 (2) Decision”).

⁶ [“Decision on ‘Narcisse Arido’s request for interim release’”](#), ICC-01/05-01/13-588 (hereinafter: “Arido Article 60 (2) Decision”).

⁷ [“Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’”](#), ICC-01/05-01/13-558 (OA 2), para. 118, with [“Dissenting Opinion of Judge Erkki Kourula”](#), ICC-01/05-01/13-558-Anx1 (OA 2) and [“Dissenting Opinion of Judge Anita Ušacka”](#), ICC-01/05-01/13-558-Anx2 (OA 2); [“Judgment on the appeal of Mr Fidèle Babala Wandu against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the ‘Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu’”](#), ICC-01/05-01/13-559 (OA 3), para. 118, with [“Dissenting Opinion of Judge Erkki Kourula”](#), ICC-01/05-01/13-559-Anx1 (OA 3) and [“Dissenting Opinion of Judge Anita Ušacka”](#), ICC-01/05-01/13-559-Anx2 (OA 3); [“Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled ‘Decision on the ‘Requête de mise en liberté’ submitted by the Defence for Jean-Jacques Mangenda’”](#), ICC-01/05-01/13-560 (OA 4), para. 131, with [“Dissenting Opinion of Judge Erkki Kourula”](#), ICC-01/05-01/13-560-Anx1 (OA 4) and corrigendum to [“Dissenting Opinion of Judge Anita Ušacka”](#), registered on 14 July 2014, ICC-01/05-01/13-560-Anx2-Corr (OA 4) with one annex, [“Explanatory Note”](#), ICC-01/05-01/13-560-Anx2-Corr-Anx (OA 4).

⁸ [“Narcisse Arido’s Notice of Appeal of the Single Judge’s ‘Decision on ‘Narcisse Arido’s Request for Interim Release’” \(ICC-01/05-01/13-558\)”](#), ICC-01/05-01/13-592 (OA 6). *See also* “Narcisse Arido’s Document in Support of the Appeal of the Single Judge’s ‘Decision on ‘Narcisse Arido’s Request for Interim Release’” (ICC-01/05-01/13-588)”, 1 August 2014, ICC-01/05-01/13-606-Conf (OA 6).

(hereinafter: “Mr Arido’s Appeal (OA 6)”) and was pending before the Appeals Chamber on 21 October 2014, the date that the Pre-Trial Chamber rendered the decision currently challenged on appeal⁹ (hereinafter: “Impugned Decision”).

9. In decisions issued on 4 July 2014, in respect of Mr Babala, and on 5 August 2014, in respect of Mr Kilolo and Mr Mangenda, the Pre-Trial Chamber carried out its periodic review of detention pursuant to article 60 (3) of the Statute, finding in three separate decisions that all three should remain in detention.¹⁰ On 9 July 2014, Mr Babala filed an appeal¹¹ and, on 8 August 2014, Mr Mangenda¹² and Mr Kilolo¹³ also filed appeals against these decisions (hereinafter: “Mr Babala’s Appeal (OA 5)”, “Mr Mangenda’s Appeal (OA 7)” and “Mr Kilolo’s Appeal (OA 8)”, respectively). These appeals were also pending before the Appeals Chamber at the time that the Impugned Decision was rendered.

⁹ [“Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido”](#), ICC-01/05-01/13-703.

¹⁰ [“Decision on the first review of Fidèle Babala Wandu’s detention pursuant to article 60\(3\) of the Statute”](#), ICC-01/05-01/13-538 (hereinafter: “Babala Article 60 (3) Decision”), p. 13; [“Decision on the first review of Aimé Kilolo Musamba’s detention pursuant to article 60\(3\) of the Statute”](#), ICC-01/05-01/13-611 (hereinafter: “Kilolo Article 60 (3) Decision”), p. 13; [“Decision on the first review of Jean-Jacques Mangenda Kabongo’s detention pursuant to article 60\(3\) of the Statute”](#), ICC-01/05-01/13-612 (hereinafter: “Mangenda Article 60 (3) Decision”), p. 17.

¹¹ [“Appeal by the Defence for Mr Fidèle Babala Wandu against the Decision on the first review of Fidèle Babala Wandu’s detention pursuant to article 60\(3\) of the Statute \(ICC-01/05-01/13-538\)”](#), dated 9 July 2014 and registered on 22 August 2014, ICC-01/05-01/13-547-tENG (OA 5); the original French version was dated and registered on 9 July 2014 ([ICC-01/05-01/13-547](#) (OA 5)).

¹² [“Requete \[sic\] d’appel de la decision \[sic\] ICC-01/05-01/13-612 05-08-2014 du Juge unique de la Chambre preliminaire \[sic\] II quant a \[sic\] la premiere \[sic\] revision \[sic\] de la detention \[sic\] preventive \[sic\] de Monsieur Jean-Jacques KABONGO MANGENDA”](#), 8 August 2014, ICC-01/05-01/13-622 (OA 7) with a corrigendum (French original) filed on 12 August 2014 ([ICC-01/05-01/13-622-Corr](#)) and the English version of the corrigendum registered on 26 September 2014 ([ICC-01/05-01/13-622-Corr-tENG](#)); [“Brief on appeal, pursuant to article 82\(1\)\(b\) of the Rome Statute, of decision ICC-01/05-01/13-612 05-08-2014 of the Single Judge of Pre-Trial Chamber II concerning the first review of the pre-trial detention of Jean-Jacques KABONGO MANGENDA”](#), dated 11 August 2014 and registered on 26 September 2014, ICC-01/05-01/13-626-tENG (OA 7); the original French version of the latter was dated and registered on 11 August 2014 ([ICC-01/05-01/13-626](#) (OA 7)).

¹³ [“Notice of Appeal against the decision of the Single Judge ICC-01/05-01/13-611 entitled ‘Decision on the first review of Aimé Kilolo Musamba’s detention pursuant to article 60\(3\) of the Statute’”](#), ICC-01/05-01/13-623 (OA 8); [“Document in Support of Appeal against the decision of the Single Judge ICC-01/05-01/13-611 entitled ‘Decision on the first review of Aimé Kilolo Musamba’s detention pursuant to article 60\(3\) of the Statute’”](#), 12 August 2014, ICC-01/05-01/13-629 (OA 8) with an annex ([ICC-01/05-01/13-629-AnxI](#) (OA 8); an English translation of the annex was registered on 16 September 2014 ([ICC-01/05-01/13-629-AnxI-tENG](#) (OA 8)). These documents were originally filed confidentially *ex parte* but were reclassified as public pursuant to the [“Order on the reclassification of documents”](#), 7 October 2014, ICC-01/05-01/13-687 (OA 8).

10. On 26 September 2014, in its decision requesting observations from States,¹⁴ the Pre-Trial Chamber considered that the duration of the suspects' detention made it necessary for the Pre-Trial Chamber "to proceed *motu proprio* without delay to the review of such state of detention, in particular in light of the statutory penalties applicable to the offences at stake in these proceedings and of the paramount need to ensure that the duration of pre-trial detention shall not be unreasonable".¹⁵ The Pre-Trial Chamber requested that the relevant States submit observations on "the possible conditional release of the suspects to their territory" and their ability to enforce the conditions of rule 119 (1) of the Rules of Procedure and Evidence.¹⁶

11. On 10 and 15 October 2014, the Registrar filed the observations submitted by the relevant authorities of these States.¹⁷ On 16 October 2014, the Pre-Trial Chamber ordered the Prosecutor to submit her views on the review of the detention of the four suspects,¹⁸ which she did on 20 October 2014.¹⁹

12. On 21 October 2014, the Pre-Trial Chamber rendered the Impugned Decision, in which it ordered the conditional release of Mr Kilolo, Mr Babala, Mr Mangenda and Mr Arido.²⁰

¹⁴ ["Decision requesting observations from States for the purposes of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court"](#), ICC-01/05-01/13-683 (hereinafter: "Decision of 26 September 2014").

¹⁵ [Decision of 26 September 2014](#), p. 3.

¹⁶ [Decision of 26 September 2014](#), p. 5.

¹⁷ ["Transmission of the observations submitted by the Belgian, Dutch, French and British authorities on the 'Decision requesting observations for States for the purpose \[sic\] of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court'"](#), ICC-01/05-01/13-691, with four confidential annexes (ICC-01/05-01/13-691-Conf-AnxI, ICC-01/05-01/13-691-Conf-AnxII, ICC-01/05-01/13-691-Conf-AnxIII, ICC-01/05-01/13-691-Conf-AnxIV); ["Transmission of the observations submitted by the Congolese authorities on the 'Decision requesting observations from States for the purpose \[sic\] of the review of the detention of the suspects pursuant to regulation 51 of the Regulations of the Court'"](#), ICC-01/05-01/13-694, with three annexes (ICC-01/05-01/13-694-Anx1, ICC-01/05-01/13-694-Anx2, ICC-01/05-01/13-694-Anx3). The latter annex (Annex 3) was originally filed confidentially, but was reclassified as public pursuant to Pre-Trial Chamber II's decision, ["Decision on the 'Réquête \[sic\] de la Défense de M. Fidèle BABALA WANDU en vue de solliciter la reclassification de ICC-01/05-01/13-694-Conf-Anx3 et ICC-01/05-01/13-696-Conf' submitted by Mr Babala on 27 October 2014"](#), 4 November 2014, ICC-01/05-01/13-741.

¹⁸ ["Decision seeking the views of the Prosecutor for the purposes of the review of the detention of the suspects pursuant to rule 119\(3\) of the Rules of Procedure and Evidence"](#), ICC-01/05-01/13-697.

¹⁹ "Prosecution's Views for the purposes of the Review of the Detention of the Suspects pursuant to Rule 119(3) of the Rules of Procedure and Evidence", ICC-01/05-01/13-699-Conf.

²⁰ [Impugned Decision](#), p. 6.

13. On 22 October 2014, the Prosecutor filed her notice of appeal,²¹ in which she, *inter alia*, requested that the appeal have suspensive effect.²² On the same day, the Appeals Chamber rejected the Prosecutor's request for suspensive effect.²³

14. On 29 October 2014, the Prosecutor filed her document in support of the appeal.²⁴ On 4 November 2014, Mr Kilolo, Mr Babala, Mr Mangenda and Mr Arido filed their separate responses to the Document in Support of the Appeal.²⁵

15. On 13 March 2015, following the solemn undertaking of six newly elected Judges to the Court on 10 March 2015 and the Presidency's election on 11 March 2015, the Appeals Division was composed of Judge Silvia Fernández de Gurmendi, Judge Sanji Mmasenono Monageng, Judge Christine Van den Wyngaert, Judge Howard Morrison and Judge Piotr Hofmański.²⁶

²¹ [“Prosecution’s Notice of Appeal of the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido’ of 21 October 2014 and Urgent Request for Suspensive Effect of the Decision pending Appeal”](#), dated 21 October 2014 and registered on 22 October 2014, ICC-01/05-01/13-706 (OA 9) (hereinafter: “Notice of Appeal”).

²² [Notice of Appeal](#), paras 2-5.

²³ [“Decision on the Prosecutor’s urgent request for suspensive effect of the ‘Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido’ of 21 October 2014”](#), ICC-01/05-01/13-718 (OA 9), para. 8.

²⁴ [“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 (OA 9), with public annex A ([ICC-01/05-01/13-727-Anx](#) (OA 9)), (hereinafter: “Document in Support of the Appeal”).

²⁵ [“Kilolo Defence’s Response to Prosecution Submission ICC-01/05-01/13-727”](#), dated 3 November 2014 and registered on 4 November 2014, ICC-01/05-01/13-742 (OA 9) (hereinafter: “Mr Kilolo’s Response to the Document in Support of the Appeal”). [“Public redacted version of the Response of the Defence for Mr Fidèle Babala Wandu to the ‘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)”, dated 16 December 2014 and registered on 6 February 2015, ICC-01/05-01/13-738-Red-tENG (OA 9) (hereinafter: “Mr Babala’s Response to the Document in Support of the Appeal”); original French confidential version dated and registered on 4 November 2014 (ICC-01/05-01/13-738-Conf (OA 9)); French public redacted version registered on 16 December 2014 ([ICC-01/05-01/13-738-Red](#) (OA 9)); English confidential translation registered on 24 November 2014 (ICC-01/05-01/13-738-Conf-tENG (OA 9)). [“Response to the Prosecutor’s grounds of appeal against decision ICC-01/05-01/13-703 21-10-2014 of the Single Judge of Pre-Trial Chamber II on Jean-Jacques Kabongo Mangenda’s release”](#), dated 4 November 2014 and registered on 26 November 2014, ICC-01/05-01/13-737-tENG (OA 9) (hereinafter: “Mr Mangenda’s Response to the Document in Support of the Appeal”); original French version dated and registered on 4 November 2014 ([ICC-01/05-01/13-737](#) (OA 9)). [“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’” \(ICC-01/05-01/13-727 OA10\)”](#), ICC-01/05-01/13-739 (OA 9), with Public Annex I, [ICC-01/05-01/13-739-Anx](#) (OA 9) (hereinafter: “Mr Arido’s Response to the Document in Support of the Appeal”).

²⁶ [“Decision assigning judges to divisions”](#), ICC-01/05-01/13-844, p. 4.

16. On 19 March 2015, the Presidency granted Judge Christine Van den Wyngaert's request for excusal in the present appeals and temporarily attached, on 20 March 2015, Judge Péter Kovács to the Appeals Chamber for the purpose of this appeal.²⁷

III. PRELIMINARY ISSUES

17. The Appeals Chamber notes that Mr Arido's Response to the Document in Support of the Appeal does not seem to comply with the word limit set out in regulation 36 (3) of the Regulations of the Court. Nevertheless, the Appeals Chamber decides, given the late stage of these proceedings, to accept this document.²⁸

18. Furthermore, the Appeals Chamber notes that several documents in Mr Arido's Appeal (OA 6) were filed on a confidential basis.²⁹ In light of the need for the appellate proceedings to be public to the greatest extent possible, the Appeals Chamber orders Mr Arido and the Prosecutor to file public redacted versions of the submissions that they made in those appeal proceedings. The Appeals Chamber also notes that, in relation to this same appeal, the authorities of the French Republic indicated in a filing to the Appeals Chamber that a document which had previously been filed confidentially may be made public in its entirety.³⁰ The Appeals Chamber therefore orders the Registrar to reclassify that document as public, as well as its English translation.³¹

IV. STANDARD OF REVIEW ON APPEAL

19. In appeals on decisions granting or denying interim release, the Appeals Chamber "will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear

²⁷ "[Decision replacing a judge in the Appeals Chamber](#)", 20 March 2015, ICC-01/05-01/13-863 (OA 5) (OA 6) (OA 7) (OA 8) (OA 9) (OA 10) with public annex, [ICC-01/05-01/13-863-AnxI](#) (OA 5) (OA 6) (OA 7) (OA 8) (OA 9) (OA 10).

²⁸ See regulation 29 (1) of the Regulations of the Court.

²⁹ See "Narcisse Arido's Document in Support of the Appeal of the Single Judge's 'Decision on 'Narcisse Arido's Request for Interim Release''" (ICC-01/05-01/13-588)", 1 August 2014, ICC-01/05-01/13-606-Conf (OA 6); "Prosecution Response to Mr. Narcisse Arido's appeal against the 'Decision on 'Narcisse Arido's Request for Interim Release''", 11 August 2014, ICC-01/05-01/13-627-Conf (OA 6).

³⁰ See "Transmission of the observations submitted by the Dutch and French authorities on the 'Order to consult with the authorities of the Kingdom of the Netherlands and French Republic' (ICC-01/05-01/13-688)", 21 October 2014, ICC-01/05-01/13-704 (OA 6). See annex I (ICC-01/05-01/13-704-AnxI (OA 6)), p. 1, granting permission for the reclassification of document ICC-01/05-01/13-537-Conf-AnxII (OA 6).

³¹ ICC-01/05-01/13-537-Conf-AnxII-tENG-Corr, ICC-01/05-01/13-537-Conf-AnxII-tENG-Corr-Anx.

errors of law, fact or procedure are shown to exist and vitiate the [i]mpugned [d]ecision”.³²

20. Regarding alleged errors of law, the Appeals Chamber will not defer to the relevant Chamber’s legal interpretation, but “will arrive at its own conclusions as to the appropriate law and determine whether or not [that] Chamber misinterpreted the law”.³³

V. MERITS

21. The Appeals Chamber will first address the Prosecutor’s appeal against the Impugned Decision. Following that, the Appeals Chamber will address the four other appeals that were pending at the time of the rendering of the Impugned Decision, which are Mr Babala’s Appeal (OA 5), Mr Arido’s Appeal (OA 6), Mr Mangenda’s Appeal (OA 7), and Mr Kilolo’s Appeal (OA 8).³⁴

22. The Prosecutor raises two grounds of appeal, submitting that the Pre-Trial Chamber: (i) erred in law and in fact in applying article 60 (4) of the Statute to release the suspects;³⁵ and (ii) erred in fact in finding “that the personal assurances of the [f]our [s]uspects represent an adequate condition to address the continuing risks associated with their release”.³⁶ The Prosecutor requests that the Appeals Chamber quash the Impugned Decision, and order the return of the suspects to the Court; or that it remand the issue of their detention for a “review under [a]rticle 60(3)”.³⁷

³² *Prosecutor v. Bosco Ntaganda*, “[Judgment on the appeal of Mr Bosco Ntaganda against the decision of Pre-Trial Chamber II of 18 November 2013 entitled ‘Decision on the Defence’s Application for Interim Release’](#)”, 5 March 2014, ICC-01/04-02/06-271-Red (OA), para. 29, quoting *Prosecutor v. Jean-Pierre Bemba Gombo*, “[Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’](#)”, 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 62, cited in *Prosecutor v. Callixte Mbarushimana*, “[Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the ‘Defence Request for Interim Release’](#)”, 14 July 2011, ICC-01/04-01/10-283 (OA), para. 15.

³³ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “[Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements \(ICC-02/05-03/09-199\) and additional instructions on translation’](#)”, 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.

³⁴ See *supra* paras 8-9.

³⁵ [Document in Support of the Appeal](#), paras 2-23.

³⁶ [Document in Support of the Appeal](#), p. 13, paras 24-30.

³⁷ [Document in Support of the Appeal](#), para. 31.

23. Mr Kilolo, Mr Babala, Mr Mangenda and Mr Arido request that the Appeals Chamber dismiss the Prosecutor's appeal and confirm the Impugned Decision.³⁸

A. Relevant part of the Impugned Decision

24. The relevant portion of the Impugned Decision is set out in full as follows:

CONSIDERING that – apart from Jean-Pierre Bemba, who was already detained at the Detention Centre of the Court in connection with ongoing proceedings in case ICC-01/05-01/08 – the other four suspects in this case (Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido) have been detained since their arrest on 23 November 2013;

CONSIDERING that, as stated in the [Decision of] 26 September 2014, the paramount need to ensure that the duration of pre-trial detention – as enshrined *inter alia* in article 60(4) of the Statute – shall not be unreasonable makes it now necessary for the Chamber to review such detention *motu proprio* and without delay, also in light of the advanced stage reached by these proceedings, the documentary nature of the relevant evidence and the fact that such evidence has by now been acquired in the record, all of which – contrary to what stated [*sic*] by the Prosecutor – also result in 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;

CONSIDERING, more specifically, that the reasonableness of the duration of the detention has to be balanced *inter alia* against the statutory penalties applicable to the offences at stake in these proceedings and that, accordingly, the further extension of the period of the pre-trial detention would result in making its duration disproportionate;

CONSIDERING that a number of procedural developments – first and foremost, the time required by the Dutch authorities to make their and Independent Counsel's final reports on the intercepted communications available to the Court – made it twice necessary to amend the calendar originally set for the completion of pre-trial proceedings, which completion has accordingly been delayed;

CONSIDERING that the fact that the duration of the detention of the [s]uspects' [*sic*] is not due to the Prosecutor's inexcusable delay 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 under article 60(4) of the Statute", which obligation is a corollary of the fundamental right of an accused to a fair and expeditious trial, as also stated by the Appeals Chamber;

³⁸ [Mr Kilolo's Response to the Document in Support of the Appeal](#), para. 85; [Mr Babala's Response to the Document in Support of the Appeal](#), para. 44; [Mr Mangenda's Response to the Document in Support of the Appeal](#), p. 16; [Mr Arido's Response to the Document in Support of the Appeal](#), para. 57.

CONSIDERING that, accordingly, it is now necessary to order the release of the four suspects whose detention is only connected to the offences at stake in these proceedings, namely Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (collectively, “Released Persons”);

CONSIDERING that, by the same token, it is necessary to adopt measures suitable to ensure that the Released Persons will appear at trial, or otherwise before the Court when summoned;

CONSIDERING that all of the Released Persons, within the context of their requests for interim release, have formally stated their commitment to promptly appear before the Court whenever summoned;

CONSIDERING that the Chamber is satisfied that the need to ensure the Released Persons’ appearance before the Court at trial, or whenever otherwise required, is adequately met by making their release conditional upon the signing of a personal commitment to that effect and that, accordingly, detention is no longer necessary for the purposes of article 58(1)(b)(i) of the Statute;³⁹

25. The Pre-Trial Chamber considered that the suspects “are the legitimate holders of documents entitling them to return to the countries of which they are nationals, or where they were residing at the time of their arrest”⁴⁰ and “that, accordingly, since no additional conditions are imposed to the release, there is no need for the Chamber to further consult with the relevant States [...]”.⁴¹ It therefore ordered that the suspects be released subject to the signing of “an individual declaration (i) stating their commitment to appear at trial, or whenever summoned by the Court, and (ii) indicating the address at which they will be staying”.⁴²

B. Summary of submissions

26. In this section, certain submissions are not fully rehearsed as the summaries focus mainly on those arguments that the Appeals Chamber will address in substance.

1. Prosecutor’s submissions before the Appeals Chamber

27. In respect of the first ground of appeal, the Prosecutor argues that the Pre-Trial Chamber erred in its analysis of article 60 (4) of the Statute in two respects. First, she argues that the Pre-Trial Chamber erred in law by disregarding the plain language of

³⁹ [Impugned Decision](#), pp. 4-5 (footnotes omitted).

⁴⁰ [Impugned Decision](#), p. 5.

⁴¹ [Impugned Decision](#), p. 6.

⁴² [Impugned Decision](#), p. 6.

article 60 (4) of the Statute, which requires a finding of “inexcusable delay by the Prosecutor”.⁴³ She contends that the Pre-Trial Chamber “misreads” the jurisprudence of the Appeals Chamber in its judgment in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.⁴⁴ The Prosecutor argues that “the Appeals Chamber’s reference [in that judgment] to the ‘distinct and independent obligation’ [of the Chamber] was only a description of [a]rticle 60(4) as a whole, separate from *inter alia* [a]rticle 60(3)” of the Statute.⁴⁵ In that regard, she argues that the remedy under article 60 (4) of the Statute for an unreasonable period of pre-trial detention applies solely when such delay can be ascribed to the Prosecutor.⁴⁶ She also avers that the Impugned Decision cannot reasonably be interpreted as applying any other provisions of the Statute, arguing, *inter alia*, that the Pre-Trial Chamber did not identify a material change of circumstances or “provide the necessary analysis and reasoning” required under article 60 (3) of the Statute.⁴⁷

28. Second, the Prosecutor avers that the Pre-Trial Chamber erred in finding that the suspects had “been detained for an unreasonable period” as, *inter alia*, such a finding is “predicated on an arbitrary assessment of the proportionality of the period of pre-trial detention relative to a hypothetical future sentence”.⁴⁸ She argues that, given all the relevant circumstances of this case, the Pre-Trial Chamber unreasonably found that the suspects were detained for an unreasonable period prior to trial.⁴⁹

29. In respect of the second ground of appeal, the Prosecutor submits that the condition that has been imposed has no impact on the risks that the four suspects will obstruct or endanger the investigation or the proceedings or commit other related

⁴³ [Document in Support of the Appeal](#), paras 2-3, 5-8.

⁴⁴ [Document in Support of the Appeal](#), para. 7, referring to “[Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’](#)”, 13 February 2007, ICC-01/04-01/06-824 (OA 7) (hereinafter: “*Lubanga OA 7 Judgment*”).

⁴⁵ [Document in Support of the Appeal](#), para. 7, referring to [Impugned Decision](#), p. 5 and [Lubanga OA 7 Judgment](#), para. 98.

⁴⁶ [Document in Support of the Appeal](#), para. 8, referring to [Lubanga OA 7 Judgment](#), paras 118-120, 122, 124.

⁴⁷ [Document in Support of the Appeal](#), paras 3, 9, 12. *See also ibid.*, paras 10-11, 13-14.

⁴⁸ [Document in Support of the Appeal](#), paras 4, 15. *See also ibid.*, paras 16-21.

⁴⁹ [Document in Support of the Appeal](#), paras 22-23.

crimes and is “manifestly inadequate to address the continuing risk that [they] will abscond and will not appear for trial”.⁵⁰

2. *Responses to the Document in Support of the Appeal*

(a) **Mr Kilolo’s submissions**

30. Mr Kilolo submits, *inter alia*, that contrary to the Prosecutor’s argument that the Pre-Trial Chamber is inconsistent with its previous rulings, the assessment under article 58 (1) (b) is not “static and stationary, but must adapt and be adapted to changing circumstances”, including with respect to his situation.⁵¹ Mr Kilolo maintains that article 60 (4) of the Statute “casts a duty upon the Pre-Trial Chamber to make certain an accused’s detention is not unreasonably prolonged as a result of the Prosecutor’s inexcusable delay”.⁵² He argues that by requesting two extensions of deadlines, the Prosecutor did delay the proceedings.⁵³ Mr Kilolo avers further that the suspects have been detained for an unreasonable period, arguing that article 70 offences are subject to a maximum sentence of five years.⁵⁴

(b) **Mr Babala’s submissions**

31. Regarding the Prosecutor’s first ground of appeal, Mr Babala submits that, while the Impugned Decision is ‘economically worded’, the Pre-Trial Chamber did not base its conclusion solely on article 60 (4) of the Statute, but rather on all of the provisions cited in the Impugned Decision.⁵⁵ As to the Prosecutor’s contention that the Pre-Trial Chamber did not identify “any material change in circumstances”, Mr Babala argues that “such change is evident in the fact that the duration of detention had become unreasonable relative to the crimes of which [he] is accused”.⁵⁶ Mr Babala avers in that regard that the Pre-Trial Chamber correctly found that the length of his pre-trial detention was unreasonable because: (i) the time spent in detention, although he has been charged with offences under article 70 of the Statute, is comparable to the duration of pre-trial detention in the case of other suspects

⁵⁰ [Document in Support of the Appeal](#), para. 24. *See also ibid.*, paras 25-30.

⁵¹ [Mr Kilolo’s Response to the Document in Support of the Appeal](#), para. 9. *See also ibid.*, paras 10-11.

⁵² [Mr Kilolo’s Response to the Document in Support of the Appeal](#), para. 12. *See also ibid.*, paras 13-15.

⁵³ [Mr Kilolo’s Response to the Document in Support of the Appeal](#), para. 14.

⁵⁴ [Mr Kilolo’s Response to the Document in Support of the Appeal](#), paras 17-19.

⁵⁵ [Mr Babala’s Response to the Document in Support of the Appeal](#), paras 16-19.

⁵⁶ [Mr Babala’s Response to the Document in Support of the Appeal](#), para. 20. *See also ibid.*, paras 22-29.

charged with core crimes under article 5 of the Statute; and (ii) the Pre-Trial Chamber was correct in holding that, even if the duration of the detention was not due to the Prosecutor's inexcusable delay, Mr Babala's detention had become unreasonable given the offences charged.⁵⁷

32. Regarding the second ground of appeal, Mr Babala submits that the Prosecutor does not show that it was unreasonable for the Pre-Trial Chamber to find that his personal assurance to appear before the Court was an adequate condition.⁵⁸ He further contends that there are no risks of witness interference in his case and that the Prosecutor fails to provide any details specific to his circumstances regarding the risk that he will not appear before the Court.⁵⁹

(c) Mr Mangenda's submissions

33. With respect to the Prosecutor's first ground of appeal, Mr Mangenda submits that the Pre-Trial Chamber did not find that there was no inexcusable delay by the Prosecutor and, in any case, by seeking an extension of time on two occasions, the Prosecutor did delay the proceedings.⁶⁰ Mr Mangenda argues that the Pre-Trial Chamber's decision is not limited to article 60 (4) of the Statute as it considered other relevant provisions of the Statute.⁶¹ Mr Mangenda argues further that the passage of time is not in itself a changed circumstance; however, "it is the fact that the duration becomes unreasonable over time which constitutes the new circumstance".⁶² He adds that "[c]hanged circumstances' are [...] established when the prolongation of the 'reasonable' duration of pre-trial detention is disproportionate to the maximum sentence applicable for the alleged crimes at issue".⁶³ Additionally, Mr Mangenda submits that the Prosecutor's argument regarding the maximum statutory penalty for offences under article 70 of the Statute is speculative and inconsistent with article 70 (3) of the Statute.⁶⁴

⁵⁷ [Mr Babala's Response to the Document in Support of the Appeal](#), paras 25, 28.

⁵⁸ [Mr Babala's Response to the Document in Support of the Appeal](#), para. 32.

⁵⁹ [Mr Babala's Response to the Document in Support of the Appeal](#), paras 33-43.

⁶⁰ [Mr Mangenda's Response to the Document in Support of the Appeal](#), para 2.

⁶¹ [Mr Mangenda's Response to the Document in Support of the Appeal](#), para. 3.

⁶² [Mr Mangenda's Response to the Document in Support of the Appeal](#), para. 4.

⁶³ [Mr Mangenda's Response to the Document in Support of the Appeal](#), para. 4.

⁶⁴ [Mr Mangenda's Response to the Document in Support of the Appeal](#), para. 4.

34. Regarding the second ground of appeal, Mr Mangenda submits that the Pre-Trial Chamber was right to conclude that his personal undertaking constituted a sufficient guarantee to ensure his appearance before the Court.⁶⁵

(d) Mr Arido's submissions

35. With respect to the Prosecutor's first ground of appeal, Mr Arido submits that the Pre-Trial Chamber did not err in finding that he and the three other suspects should be released on the grounds that the Pre-Trial Chamber: (i) based its decision on article 60 (3) of the Statute and its "overarching obligation to prevent unlawful detention";⁶⁶ (ii) correctly reviewed changed circumstances under article 60 (3) of the Statute;⁶⁷ (iii) alternatively, did not err in applying article 60 (4) of the Statute in the absence of inexcusable delay by the Prosecutor;⁶⁸ (iv) correctly assessed the maximum sentence applicable;⁶⁹ and (v) did not err by finding that the "period of pre-trial detention was about to become disproportionate".⁷⁰

36. Regarding the second ground of appeal, Mr Arido submits that the Pre-Trial Chamber correctly found that the personal assurances provided by the four suspects were an adequate condition for release and that the Pre-Trial Chamber did not abuse its discretion by imposing one condition for release.⁷¹

C. Determination of the Appeals Chamber

37. In light of how it views the Impugned Decision, this appeal, and the outcome thereof, the Appeals Chamber finds it appropriate to address the Prosecutor's two grounds of appeal together. Additionally, the Appeals Chamber notes that several of the arguments contained in Mr Kilolo and Mr Mangenda's Responses to the Document in Support of the Appeal are not responsive to the grounds of appeal raised by the Prosecutor and appear instead to raise arguments that do not arise from the Impugned Decision.⁷² As these arguments would in essence require the Appeals

⁶⁵ [Mr Mangenda's Response to the Document in Support of the Appeal](#), para. 13.

⁶⁶ [Mr Arido's Response to the Document in Support of the Appeal](#), p. 4 sub-title A, paras 6-14.

⁶⁷ [Mr Arido's Response to the Document in Support of the Appeal](#), paras 15-26.

⁶⁸ [Mr Arido's Response to the Document in Support of the Appeal](#), paras 27-28.

⁶⁹ [Mr Arido's Response to the Document in Support of the Appeal](#), paras 29-37.

⁷⁰ [Mr Arido's Response to the Document in Support of the Appeal](#), p. 14 sub-title E, paras 38-51.

⁷¹ [Mr Arido's Response to the Document in Support of the Appeal](#), paras 53-56.

⁷² [Mr Kilolo's Response to the Document in Support of the Appeal](#), para. 14; [Mr Mangenda's Response to the Document in Support of the Appeal](#), para. 2, p. 4 (regarding arguments related to the

Chamber to act as a first-instance Chamber and are outside the scope of the present matters on appeal, the Appeals Chamber declines to consider these arguments.

38. Turning to the reasons underlying the Pre-Trial Chamber's conclusion to release the four suspects, the Appeals Chamber notes that the Pre-Trial Chamber relied almost exclusively on the reasonableness of the length of the pre-trial detention when contrasted with the statutory penalties applicable to article 70 offences. Regarding the risk of absconding under article 58 (1) (b) (i) of the Statute, the Pre-Trial Chamber stated that detention was no longer necessary, and that the suspects could be released subject to one condition, the signing of a declaration stating their commitment to appear at trial, or whenever summoned by the Court, and indicating the address at which they will be staying.⁷³ In relation to the other two risks in article 58 (1) (b) (ii) and (iii) – obstructing or endangering the investigation or court proceedings and continuing with the commission of the same or a related crime – the Pre-Trial Chamber merely stated that those risks were reduced, without elaborating to what degree.⁷⁴

39. The Appeals Chamber finds three errors in this approach. First, the Pre-Trial Chamber incorrectly interpreted article 60 (4) of the Statute. Second, it failed to properly balance the duration of the suspects' detention against the risks set out in article 58 (1) (b) of the Statute. Third, the Pre-Trial Chamber failed to conduct a proper assessment of the risks set out in article 58 (1) (b) of the Statute.⁷⁵

1. First error – incorrect interpretation of article 60 (4) of the Statute

40. The Appeals Chamber recalls that the Pre-Trial Chamber considered that, even though the duration of the suspects' detention was not due to the Prosecutor's inexcusable delay, it still had a “distinct and independent obligation... to ensure that a person is not detained for an unreasonable period prior to trial under article 60(4) of

Prosecutor having inexcusably delayed the proceedings), paras 8-12, pp. 9-13 (regarding the argument that the Pre-Trial Chamber should have found “an absence of reasonable grounds [under article 58 (1) (a) of the Statute] and release[d] [Mr Mangenda] accordingly”).

⁷³ [Impugned Decision](#), p. 6.

⁷⁴ [Impugned Decision](#), p. 4.

⁷⁵ With regard to article 58 (1) of the Statute, as the Prosecutor's arguments pertain specifically to the Pre-Trial Chamber's alleged error in failing to conduct a proper assessment of the risks under article 58 (1) (b) of the Statute, the Appeals Chamber will limit its review to this provision without considering the condition under article 58 (1) (a) of the Statute, which would normally form part of the Pre-Trial Chamber's determination pursuant to article 60 (3) of the Statute.

the Statute’, which obligation is a corollary of the fundamental right of an accused to a fair and expeditious trial, as also stated by the Appeals Chamber”.⁷⁶

41. Article 60 (4) of the Statute provides:

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. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

42. The Appeals Chamber finds that the wording of article 60 (4) of the Statute is unequivocal. It addresses situations in which detention prior to trial has been for an unreasonable period of time “due to inexcusable delay by the Prosecutor”. As such, the Pre-Trial Chamber erred in concluding that article 60 (4) of the Statute was applicable where the period of pre-trial detention was not due to inexcusable delay by the Prosecutor. Furthermore, the judgment of the Appeals Chamber cited by the Pre-Trial Chamber is not authority for the proposition that article 60 (4) of the Statute is applicable in the absence of inexcusable delay by the Prosecutor.⁷⁷

2. *Second error – improper balancing of duration of detention against article 58 (1) (b) risks*

43. Notwithstanding the above, the Appeals Chamber finds that a Chamber may determine that a detained person has been in detention for an unreasonable period, even in the absence of inexcusable delay by the Prosecutor, pursuant to article 60 (3) of the Statute.⁷⁸ This provision, which governs the review of the detention in the present circumstances, must be interpreted and applied consistently with

⁷⁶ [Impugned Decision](#), p. 5, referring to [Lubanga OA 7 Judgment](#), para. 98.

⁷⁷ In the paragraph of the judgment referred to by the Pre-Trial Chamber, the Appeals Chamber stated that: “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” ([Lubanga OA 7 Judgment](#), para. 98 – emphasis added). In its consideration of the second ground of appeal in that case, the Appeals Chamber did not decide that there was an independent obligation under article 60 (4) of the Statute to ensure that a person is not detained for an unreasonable period where there is no inexcusable delay by the Prosecutor. The Appeals Chamber in fact referred to submissions of the parties which addressed whether there had been a delay by the Prosecutor – and itself concluded, in relation to Mr Lubanga’s argument that the Pre-Trial Chamber had “failed to address properly the question of inexcusable delay by the Prosecutor”, that because the Pre-Trial Chamber had determined that the period of detention was not unreasonable, “the question of the inexcusable delay had become moot”. See [Lubanga OA 7 Judgment](#), paras 109, 113, 117-120, 122, 124.

⁷⁸ This statement and what follows are not intended to preclude the application of the principles expounded upon herein in other relevant contexts, including in relation to article 60 (2) of the Statute.

“internationally recognized human rights”, pursuant to article 21 (3) of the Statute. Therefore, this provision is also a proper legal avenue to protect the right to liberty of a person, as well as the right to be tried within a reasonable period of time or to release pending trial.⁷⁹

44. The Appeals Chamber considers that the lapse of time in detention cannot be considered on its own to be a changed circumstance within the meaning of article 60 (3) of the Statute. This is so because the review of an individual’s detention under article 60 (3) of the Statute is based on whether the conditions of article 58 (1) (a) and (b) of the Statute, which were found to be met in the initial article 60 (2) assessment, have changed such that detention is no longer justified.

45. However, in light of the recognized human rights principles mentioned above, the duration of time in detention pending trial is a factor that needs to be considered along with the risks that are being reviewed under article 60 (3) of the Statute, in order to determine whether, all factors being considered, the continued detention “stops being reasonable”⁸⁰ and the individual accordingly needs to be released. In the context of the legal framework of the Court, such a determination requires balancing the risks under article 58 (1) (b) of the Statute that were found to still exist against the duration of detention, taking into account relevant factors that may have delayed the proceedings and the circumstances of the case as a whole. The potential penalty for the offence charged may be a factor to take into account in assessing whether the time

⁷⁹ See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 United Nations Treaty Series 14668, article 9 (3) (“Anyone arrested or detained on a criminal charge [...] shall be entitled to trial within a reasonable time or to release [...]”); *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889, article 5 (3) (“Everyone arrested or detained [...] shall be entitled to trial within a reasonable time or to release pending trial”); *African Charter on Human and Peoples’ Rights*, 27 June 1981, 1520 United Nations Treaty Series 26363, articles 6 (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”) and 7 (1) (d) (“1. Every individual shall have the right to have his cause heard. This comprises: [...] d. [T]he right to be tried within a reasonable time by an impartial court or tribunal”); *American Convention on Human Rights “Pact of San Jose, Costa Rica”*, 22 November 1969, 1144 United Nations Treaty Series 17955, article 7 (5) (“Any person detained [...] shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings”).

⁸⁰ Inter-American Commission of Human Rights, [*Luis Lizardo Cabrera v. Dominican Republic*](#), 19 February 1998, Case No. 10.832, Report No. 35/96, OEA/Ser.L/V/II.98 doc. 7 rev. at 821, para. 71. See also European Court of Human Rights (hereinafter: “ECtHR”), Chamber, [*Wemhoff v. Germany*](#), “Judgment”, 27 June 1968, application no. 2122/64, para. 5 of the “Law” part.

in detention is reasonable. Nevertheless, this factor cannot be assessed in isolation, but would need to be considered in light of all of the circumstances of the case. In the context of this appeal and in light of the findings made in the Impugned Decision, the Appeals Chamber does not find it necessary or appropriate to list other specific factors that a Chamber should take into account when considering the reasonableness of detention. Interim release and the issue of the reasonableness of the period of detention are fact intensive and case specific. The Appeals Chamber recalls that it has already 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 circumstances of each case”.⁸¹ Thus, the circumstances of the specific case as a whole will always be the guiding factor.⁸²

46. Therefore, the Appeals Chamber finds that the Pre-Trial Chamber erred in law in its approach. This is so because the overriding factor considered in terms of the reasonableness of the length of detention appears to have been the statutory maximum sentence for the offences of which the individuals were suspected when balanced against the period of time that the suspects had already spent in detention.⁸³ As it is not apparent from the Impugned Decision that any proper assessment of the risks listed in article 58 (1) (b) was undertaken – which is addressed below under the third error – it also does not appear that an appropriate balancing exercise was undertaken. Furthermore, the Pre-Trial Chamber, in the Impugned Decision, compared the length of pre-trial detention with the statutory maximum penalty in circumstances in which it had previously stated that it remained to be determined how the statutory maximum

⁸¹ [Lubanga OA 7 Judgment](#), para. 122.

⁸² See ECtHR, Chamber, [Chraidi v. Germany](#), “Judgment”, 26 October 2006, application no. 65655/01, para. 35, where it was held that “[t]he Court reiterates that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features [...]”; International Criminal Tribunal for the former Yugoslavia (hereinafter: “ICTY”), Trial Chamber, *Prosecutor v. Zejnil Delalić et al.*, “[Decision on Motion for Provisional Release filed by the accused Zejnil Delalić](#)”, 25 September 1996, IT-96-21-T, para. 26, where the Trial Chamber held that “[p]re-trial detention cannot extend beyond a reasonable period of time” and that “[t]he exact length of time after which detention is no longer lawful depends on the individual circumstances of the case concerned”; ICTY, Appeals Chamber, *Ramush Haradinaj et al.*, “[Decision on Lahi Brahimaj’s Interlocutory Appeal Against the Trial Chamber’s Decision Denying his Provisional Release](#)” 9 March 2006, IT-04-84-AR65.2, para. 23, where the Appeals Chamber found that “[u]ndisputably, a Trial Chamber may determine whether the particular circumstances of a case warrant that provisional release be granted to an accused based on the actual or likely excessive length of his pre-trial detention” (footnotes omitted).

⁸³ See [Impugned Decision](#), p. 4.

penalty might apply in cases of multiple offences.⁸⁴ However, the Pre-Trial Chamber did not offer any explanation as to why it considered such an assessment to be possible in the Impugned Decision, in light of what it had previously held, and therefore erred in that regard.

3. *Third error – failure to conduct a proper risk assessment under article 58 (1) (b) of the Statute*

47. In respect of the third error, the Appeals Chamber recalls that, pursuant to article 60 (2) of the Statute, a person applying for interim release shall be released, with or without conditions, if the Pre-Trial Chamber is not satisfied that the conditions set forth in article 58 (1) (b) of the Statute are met. Pursuant to article 60 (3) of the Statute, this ruling shall be reviewed periodically and the Pre-Trial Chamber may modify its ruling “if it is satisfied that changed circumstances so require”.

48. In considering whether changed circumstances require a modification of its previous ruling on detention under article 60 (3) of the Statute, the first consideration for the Pre-Trial Chamber is whether the alternative risks under article 58 (1) (b) of the Statute remain present so as to justify the continued detention of the person concerned. If they do not, the person must be released, with or without conditions, pursuant to article 60 (3) of the Statute. Once this is established, there is no need for any further inquiry into other factors that may justify release. It is only if the article 58 (1) (b) risks remain present to a degree which potentially justifies further detention that other factors may need to be balanced against these risks, as articulated above.

49. The Appeals Chamber notes that it is not apparent from the face of the Impugned Decision that a proper risk assessment under article 60 (3) of the Statute was undertaken. First, unlike in the previous seven decisions on detention rendered in this case under articles 60 (2) or 60 (3) of the Statute, the suspects were not assessed as individuals, but were dealt with as a group. There was no individual consideration of their specific circumstances or whether those circumstances had changed from the previous decision(s). While there may be an overlap in some of the reasoning applicable to the four suspects, examining their individual circumstances was

⁸⁴ See [Babala Article 60 \(2\) Decision](#), para. 22; [Kilolo Article 60 \(2\) Decision](#), para. 31; [Babala Article 60 \(3\) Decision](#), para. 14; [Kilolo Article 60 \(3\) Decision](#), para. 10.

necessary in order to make a proper assessment of whether the risks set out in article 58 (1) (b) of the Statute continued to necessitate detention in relation to each individual suspect.

50. Second, the Appeals Chamber is of the view that the divergence between the previous decisions to detain each suspect and the brief finding in the Impugned Decision that the risks under article 58 (1) (b) of the Statute no longer necessitated detention or were reduced suggests, in the absence of any explanation, that no proper risk assessment was undertaken. The Appeals Chamber recalls that, in those previous seven decisions, three of which were confirmed by the Appeals Chamber, the Pre-Trial Chamber consistently held that *all three* of the risks listed in article 58 (1) (b) either were, or continued to be, met, and that detention was justified.

51. In respect of article 58 (1) (b) (i) of the Statute, the Pre-Trial Chamber found that the suspects had “formally stated their commitment to promptly appear” and concluded that the need to ensure their appearance at trial would be met by a signed personal declaration.⁸⁵ In the Impugned Decision, the Pre-Trial Chamber did not address its previous factual findings, such as (i) those concerning the existence of networks and available finances,⁸⁶ (ii) the ease with which one of the suspects could leave the country to which he wished to be released,⁸⁷ (iii) the advanced stage of disclosure which enhanced the suspects’ knowledge of the Prosecutor’s case and was therefore potentially relevant to the risk of flight,⁸⁸ and (iv) the fact that new evidence in the record at the time of the article 60 (3) review strengthened the belief that a suspect could abscond and interfere with court proceedings.⁸⁹

52. In respect of article 58 (1) (b) (ii) and (iii) of the Statute, the Appeals Chamber recalls that the Pre-Trial Chamber previously consistently found that, in respect of

⁸⁵ [Impugned Decision](#), p. 5.

⁸⁶ [Babala Article 60 \(2\) Decision](#), paras 17-18; [Kilolo Article 60 \(2\) Decision](#), paras 20-22, 24-26; [Mangenda Article 60 \(2\) Decision](#), paras 28-30; [Arido Article 60 \(2\) Decision](#), paras 12-14; [Babala Article 60 \(3\) Decision](#), para. 7; [Kilolo Article 60 \(3\) Decision](#), paras 7, 18; [Mangenda Article 60 \(3\) Decision](#), paras 12, 14.

⁸⁷ [Mangenda Article 60 \(2\) Decision](#), paras 26-27; [Mangenda Article 60 \(3\) Decision](#), para. 22.

⁸⁸ [Babala Article 60 \(2\) Decision](#), para. 19; [Kilolo Article 60 \(2\) Decision](#), para. 28; [Mangenda Article 60 \(2\) Decision](#), para. 31; [Babala Article 60 \(3\) Decision](#), paras 5-6; [Kilolo Article 60 \(3\) Decision](#), paras 5, 18; [Mangenda Article 60 \(3\) Decision](#), paras 12, 14.

⁸⁹ [Babala Article 60 \(3\) Decision](#), paras 6-7.

each of the suspects, these risks were met⁹⁰ and that, given the nature of the crimes at stake, detention was the only context allowing for the effective management of the risks of obstruction and endangering the proceedings and of the commission of further related crimes.⁹¹

53. In the Impugned Decision, the Pre-Trial Chamber considered:

the advanced stage reached by these proceedings, the documentary nature of the relevant evidence and the fact that such evidence has by now been acquired in the record, all of which – contrary to what stated [*sic*] by the Prosecutor – also result in 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[.]⁹²

54. The Appeals Chamber considers that these findings are unclear in light of their divergence from findings made in the previous decisions, as well as the fact that the Pre-Trial Chamber did not explain the manner in which the facts underlying those previous findings had changed. In this regard, it is unclear how the advanced stage of the proceedings at the time of the Impugned Decision, and the fact that the “evidence has by now been acquired in the record”,⁹³ were considered factors that reduced the risk previously referred to and found to exist. The Pre-Trial Chamber did not explain why the risk of obstruction or further commission of crimes does not exist in relation to future court proceedings, contrary to previous findings that it made regarding both the *Bemba* case involving charges against Mr Bemba in relation to article 5 crimes and the instant case.⁹⁴ It also did not address whether there could be a risk as far as witnesses who may contextualise the evidence are concerned,⁹⁵ or any possible future evidence that could be obtained. Similarly, it did not indicate what new information

⁹⁰ [Babala Article 60 \(2\) Decision](#), paras 27, 31-33; [Kilolo Article 60 \(2\) Decision](#), paras 35-37, 39; [Mangenda Article 60 \(2\) Decision](#), paras 36, 38; [Babala Article 60 \(3\) Decision](#), para. 16; [Arido Article 60 \(2\) Decision](#), paras 19-20, 22, 24; [Kilolo Article 60 \(3\) Decision](#), paras 16-18; [Mangenda Article 60 \(3\) Decision](#), paras 19, 24.

⁹¹ [Babala Article 60 \(2\) Decision](#), para. 27; [Kilolo Article 60 \(2\) Decision](#), para. 37; [Arido Article 60 \(2\) Decision](#), para. 21; [Mangenda Article 60 \(2\) Decision](#), para. 41; [Babala Article 60 \(3\) Decision](#), para. 18; [Kilolo Article 60 \(3\) Decision](#), para. 20; [Mangenda Article 60 \(3\) Decision](#), para. 28.

⁹² [Impugned Decision](#), p. 4.

⁹³ [Impugned Decision](#), p. 4.

⁹⁴ [Arido Article 60 \(2\) Decision](#), para. 23 ; [Babala Article 60 \(2\) Decision](#), para. 32; [Kilolo Article 60 \(2\) Decision](#), para. 36; [Mangenda Article 60 \(2\) Decision](#), paras 34, 37-38; [Babala Article 60 \(3\) Decision](#), paras 12-13; [Kilolo Article 60 \(3\) Decision](#), paras 14-17; [Mangenda Article 60 \(3\) Decision](#), paras 17-19.

⁹⁵ [Document in Support of the Appeal](#), para. 12.

had been placed in the record which was significant enough to reduce the risk of obstruction or commission of further crimes, as opposed to what was in the record at the time of the previous decisions.

55. In these circumstances, the Appeals Chamber concludes that it is not apparent that the Pre-Trial Chamber conducted a proper assessment of the risks justifying detention that are listed in article 58 (1) (b) of the Statute. Moreover, without a proper assessment of the risks, it is unclear on what basis the Pre-Trial Chamber reached its conclusion that the imposition of one condition was sufficient to mitigate those risks. The Pre-Trial Chamber therefore erred in law in its review under article 60 (3) of the Statute.

VI. APPROPRIATE RELIEF

56. On an appeal pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the circumstances of the present case, the Appeals Chamber deems it appropriate to reverse the Impugned Decision. The Appeals Chamber notes in this regard that the article 70 proceedings are no longer at the pre-trial stage and that Trial Chamber VII has now been seized of the case.⁹⁶ Accordingly, the matter is remanded to the Trial Chamber.

57. However, given the specific situation of the suspects in this case, i.e. that they were ordered to be released on 21 October 2014, to which suspensive effect was not granted by the Appeals Chamber, and the length of time that has passed since their release, the Appeals Chamber finds that it would not be in the interests of justice for the suspects to be re-arrested because of the reversal of the Impugned Decision. Accordingly, despite reversing the Impugned Decision, the Appeals Chamber decides, in view of the exceptional circumstances, to maintain the relief ordered therein, i.e. the release of the suspects, pending the Trial Chamber's determination on this matter.

⁹⁶ See Presidency, "[Decision constituting Trial Chamber VII and referring to it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*](#)", 30 January 2015, ICC-01/05-01/13-805.

VII. THE FOUR RELATED APPEALS

58. The Appeals Chamber notes that the Impugned Decision releasing the four suspects was issued at a time when appeals brought by those suspects, in relation to previous decisions maintaining their detention, were pending. As the relief sought in those four appeals was the release of the suspects – and as the suspects were in fact released, and remain released to date, including further to this judgment – those appeals are dismissed as moot.

Done in both English and French, the English version being authoritative.



Judge Silvia Fernández de Gurmendi
On behalf of the Presiding Judge

Dated this 29th day of May 2015

At The Hague, The Netherlands