

1 International Criminal Court
2 Trial Chamber VII
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,
5 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse
6 Arido - ICC-01/05-01/13
7 Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and
8 Judge Raul Pangalangan
9 Status Conference - Courtroom 1
10 Tuesday, 12 June 2018
11 (The hearing starts in open session at 10.59 a.m.)
12 THE COURT USHER: [10:59:50] All rise.
13 The International Criminal Court is now in session.
14 PRESIDING JUDGE SCHMITT: [11:00:18] Good morning, everyone.
15 Could the court officer please call the case.
16 THE COURT OFFICER: [11:00:23] Good morning, your Honour.
17 Situation in the Central African Republic, in the case of The Prosecutor versus
18 Jean-Pierre Bemba Gombo et al, case number ICC-01/05-01/13.
19 For the record, your Honour, we are in open session.
20 PRESIDING JUDGE SCHMITT: [11:00:39] Thank you.
21 I ask for the appearances of the parties, first the Prosecution, please.
22 MR GUARIGLIA: [11:00:44] Good morning, your Honours. My name is
23 Fabricio Guariglia. I am the Director of Prosecutions in the Office of the Prosecutor,
24 appearing today due to the absence of our senior trial lawyer in the case, Mr Kweku
25 Vanderpuye. Appearing with me today are Ms Olivia Struyven, Ms Meritxell Regue

1 and Ms Priya Narayanan.

2 PRESIDING JUDGE SCHMITT: [11:01:03] Thank you.

3 And for the Defence -- we have three defence teams here -- I think I should start with
4 Mrs Taylor, please.

5 MS TAYLOR: [11:01:10] Good morning, Mr President, your Honours. My name is
6 Melinda Taylor. I am appearing on behalf of Mr Jean-Pierre Bemba today with
7 Ms Ines Pierre de la Brière. And Mr Bemba has elected not to be present today.
8 Thank you.

9 PRESIDING JUDGE SCHMITT: [11:01:22] Thank you very much.

10 And now for the Defence of Mr Kilolo, Mr Karnavas.

11 MR KARNAVAS: [11:01:28] Good morning, Mr President, good morning,
12 your Honours, and good morning to everyone in and around the courtroom.
13 Michael Karnavas for Mr Kilolo, along With Rosalie Mbengue and Ms Tatarenko.

14 PRESIDING JUDGE SCHMITT: [11:01:49] It was not so easy, Mr Karnavas.
15 And then for the Defence of Mr Mangenda.

16 MR GOSNELL: [11:01:55] Good morning, Mr President, good morning,
17 your Honours. Christopher Gosnell for Mr Mangenda this morning, who is not
18 present, assisted by Nikki Sethi, legal assistant. Thank you.

19 PRESIDING JUDGE SCHMITT: [11:02:05] Thank you very much.

20 Before I give the floor to the parties for their submissions I would like to make some
21 clarifying remarks on behalf of the Chamber, where we stand today and what legal
22 and factual circumstances we have to consider. Also, that we have a structured
23 discussion afterwards.

24 We are here today because on 8 June 2018 the Appeals Chamber rendered its
25 judgment on the Main Case against Mr Bemba. The Appeals Chamber acquitted

1 Mr Bemba of all charges in that case. This was not done unanimously, noting that
2 two Judges wanted an acquittal proper while two others wanted to uphold his
3 convictions. As indicated in paragraph 73 of the separate opinion of Judges
4 Van den Wyngaert and Morrison, the fifth Judge was, I quote, "of the view that, rather
5 than acquitting Mr Bemba, he should have been sent for a retrial to a newly composed
6 Trial Chamber." Quote end.

7 As a consequence, Mr Bemba is no longer detained in the Main Case. This is the
8 basic here.

9 However, in the present case, Mr Bemba has been convicted for offences against the
10 administration of justice under Article 70(1)(a) and (c) of the Statute. These
11 convictions have been upheld on appeal. They are final. Mr Bemba's original
12 sentence of one additional year of imprisonment and 300,000 Euro fine was reversed
13 and remanded following the Prosecution's successful appeal.

14 Due to the chain of consequences caused by the Appeals Chamber last Friday,
15 the Chamber seeks today to urgently explore the question whether it remains justified
16 to maintain Mr Bemba's detention in this case while deliberating his new sentence
17 also in this case.

18 The Appeals Chamber directs as much, indicating in paragraph 200 of last Friday's
19 judgment that, and I quote again, "it rests with Trial Chamber VII to decide, as
20 a matter of urgency, whether Mr Bemba's continued detention in relation to the case
21 pending before it is warranted."

22 So this is the issue we have to deal with today.

23 Mr Bemba is here in a situation whereby all the time he has spent in detention
24 pursuant to the warrant of arrest issued in these proceedings before this Chamber
25 would need to be automatically deducted from the sentence of imprisonment this

1 Chamber would impose on remand.
2 More specifically, noting that Mr Bemba has been detained on the warrant in this case
3 since 23 November 2013, this amounts to over four years of potential sentencing
4 credit. Article 70(3) of the Statute makes it clear that the maximum term of
5 imprisonment which can be imposed against Mr Bemba is five years, and
6 the Chamber notes that the Prosecution seeks this maximum term in its recent
7 sentencing submissions on remand.
8 Mr Bemba's sentencing credit does therefore not exceed the maximum sentence
9 available, noting also in passing that Rule 163(3) of the Rules removes the possibility
10 of an Article 110 sentence reduction review, after having served two-thirds of the
11 sentence, in the Article 70 proceedings. Consistent with the Appeals Chamber not
12 automatically releasing Mr Bemba and, rather, leaving the decision on continued
13 detention on this Trial Chamber, Mr Bemba is lawfully detained before this Chamber
14 as of this moment.
15 The Chamber would like to hear first from the Bemba Defence, of course, who has
16 already indicated that they seek to make an application for immediate release
17 pursuant to Article 60(2) of the Statute.
18 This is, as I am sure the parties are aware of, but I assume that many people will listen
19 today or will watch it and might not know all the provisions that are at stake, this is
20 closely related to the legal question if the arrest of Mr Bemba appears to be necessary
21 with regard to the conditions set forth in Article 58(1)(b) of the Statute. In this
22 regard, the Chamber has taken note of the undertaking by Mr Bemba in which he
23 accepts certain conditions were he to be released.
24 After the Defence of Mr Bemba, the Chamber will hear the Prosecution's position on
25 this matter, before giving the Bemba Defence a second and final word.

1 Before commencing, the Chamber wishes to address two recent applications raised by
2 the parties before proceeding to the substance of this hearing, and this also I think
3 makes then sense for the other two Defence teams that are present in this case.
4 First, last Friday in request 2289 the Bemba Defence noted the scheduled hearing time
5 in order 2288 and invited the Chamber to consider the possibility of convening this
6 hearing at an earlier date. The Chamber made efforts to try and move up the time of
7 this hearing and I think you will now know that we really made efforts and it was
8 really not possible to convene at an earlier time. The earliest time is indeed where
9 we are sitting now.

10 This request is rejected to the extent the Bemba Defence sought an earlier hearing, but
11 the Chamber appreciates the need for a swift ruling in this matter and can already
12 announce that its decision on Mr Bemba's continued detention will come tomorrow at
13 the latest.

14 Second, the Chamber notes the Prosecution's request for leave to reply to the Defence
15 sentencing submissions in filing 2283. The Chamber considers that no further
16 written submissions are necessary, and that all of these matters can be discussed
17 inter partes in a second sentencing hearing.

18 And I think the Defence of Mr Kilolo and Mr Mangenda will now listen carefully, and
19 also of course Mrs Taylor. The Chamber notes that Mr Kilolo explicitly requested
20 such a hearing. Given last Friday's appeals judgment, the Chamber anticipates that
21 the Bemba Defence may perhaps have also further submissions to make on the new
22 sentence to be imposed, so we will have a second sentencing hearing and this second
23 sentencing hearing will happen on 4 July, next month.

24 However, this is not the opportunity here to engage in submissions of what
25 Mr Bemba's new sentence should be. The Chamber emphasises again that the

1 current status conference solely concerns Mr Bemba's continuing detention while he
2 awaits the renewed determination of his sentence. As I have already indicated,
3 submissions are to focus on whether the three conditions of arresting Mr Bemba in
4 Article 58(1)(b) of the Statute are met. Namely, if the arrest of Mr Bemba appears
5 necessary to ensure his appearance at trial or to ensure that he does not obstruct or
6 endanger the proceedings or to prevent him continuing with the commission of the
7 crimes he has been convicted for. I really ask the parties to centre their arguments
8 on these legal requirements.

9 With these matters addressed, I give now the floor to the Bemba Defence, I give the
10 floor to Ms Taylor.

11 MS TAYLOR: [11:11:10] Thank you very much, Mr President.

12 And I would like to just preface my submissions by expressing our gratitude for the
13 efforts that were made by the Chamber to try and have the hearing at an earlier date.
14 Today, pursuant to Article 60(2), the Defence is requesting this Chamber to grant
15 Mr Bemba's immediate interim release to Belgium where he resides with his family.
16 By my count this is the 15th request that has been submitted on Mr Bemba's behalf
17 since he was first arrested in 2008.

18 And there are two prongs to our request today: Firstly, the grounds for custodial
19 detention under Article 58 are not met. They were not met in January 2015, which is
20 when Judge Tarfusser first ordered the release of Mr Bemba, and they are certainly
21 not met today. And secondly, the fact that Mr Bemba has been detained for over
22 10 years in total and has served over 4.5 times his initial sentence is itself a special
23 circumstance that militates in favour of his release.

24 I would firstly like to address the burden of proof that concerns this application.

25 Now, since Mr Bemba withdrew his previous application, this is legally speaking the

1 first determination that will be made by this Chamber under Article 60(2).
2 The corollary of that is that the burden falls on the Prosecution, not the Defence, to
3 justify that the criteria under Article 58 are met at this point in time. And that's
4 consistent with the case law of this Court. And if I can refer you to our table of
5 authorities, it is the Katanga decision number 330, and that's at page 6 of that
6 decision.
7 Now, the fact that Mr Bemba has been convicted in this case doesn't shift that burden
8 of proof for the following reasons: The burden of proof is a corollary of the
9 presumption of liberty into the Statute. And for Article 70 offences, as this Chamber
10 found in its oral ruling of October 2016, there is no presumption of custody that
11 follows an Article 70 conviction. The Statute says that the Chamber can impose
12 a fine or a custodial sentence, so at this point in time there can be no presumption that
13 this Chamber will impose a further custodial sentence on Mr Bemba. So given that
14 he has already served 4.5 times the initial sentence, there can be no presumption of
15 custody beyond this point.
16 Now in terms of the individual grounds under Article 58, firstly, his ongoing
17 detention is not necessary to secure his presence for these proceedings.
18 There will be no further evidential hearings in this case, as far as we are aware, even
19 though if there are sentencing submissions at this point in time there doesn't seem to
20 be any intent to call evidence or witnesses.
21 And in line with the Chamber's oral decision of October 2016, if there are no appeals
22 pending, the mandatory custody provision in Article 81(3) doesn't apply. So it
23 doesn't follow from the Statute that he has to be detained following his conviction.
24 He is also not a flight risk. He has served any potential sentence in this case. Even
25 if it is theoretically possible that the Chamber could impose a further three months,

1 given that he has endured 10 years of detention, it is not logical, it is not rational that
2 he would risk becoming a fugitive of justice for these three months.
3 He is also requesting to be released to his home in Belgium, an ICC State Party, to be
4 with his wife and five children. And although he has been separated from them for
5 over 10 years, he has throughout his detention maintained close links with them.
6 And if I can refer in this regard to a report from the Registry which states that "his
7 family is of the utmost importance to Mr Bemba and he works hard to maintain his
8 family links with his wife and children." And that's a Main Case filing
9 3375-Conf-Anx3, page 2 in our table of authorities.
10 In its October 2016 decision the Chamber affirmed in relation to Mr Bemba's
11 co-defendants that the existence of such close family ties reduces any flight risk.
12 Belgium, a State Party, has already demonstrated its willingness and its capacity to
13 supervise Mr Bemba's release and re-arrest him if necessary. Belgium executed the
14 arrest warrant against Mr Bemba in 2008. It supervised two instances of day release
15 during the Main Case.
16 The Registry reported that Mr Bemba cooperated with the relevant authorities during
17 his release. If I could refer you to filing, again a Main Case filing, 445, page 12 on
18 our table of authorities.
19 Belgium also enforced the arrest warrant against Mr Kilolo and has supervised his
20 release.
21 And, finally, Mr Bemba has signed an undertaking expressing his willingness to
22 surrender to this Court if required for any purpose and to abide by any conditions
23 imposed by this Chamber.
24 In terms of the second criterion, Mr Bemba also does not present a risk to witnesses.
25 The evidential proceedings have concluded, both in the Main Case and in this case,

1 and on Friday, as mentioned by the Presiding Judge, the Appeals Chamber confirmed
2 that the Main Case itself no longer presents a justification or a reason to continue to
3 detain Mr Bemba.

4 In his undertaking Mr Bemba has in addition agreed not to communicate with any
5 witnesses in this case and not to issue any public statements concerning this case and
6 not to discuss the evidence of this case with any persons except his ICC lawyers.

7 The third criterion concerns the risk that a person will continue to commit the crime
8 or related crimes.

9 Now, firstly, the Statute refers to the word "crimes", it doesn't concern offences on its
10 face.

11 Now bearing in mind the extreme consequence of detaining someone, we submit that
12 before extending this provision to offences, it's necessary to have concrete evidence
13 and serious justifications for adopting such an extensive interpretation of the Statute.

14 Secondly, this case concerned interference with the Main Case, a case which is now
15 closed. Mr Bemba was acquitted in that case. There is, therefore, no objective risk
16 that Mr Bemba would continue to interfere with the final verdict that acquitted him
17 on all counts.

18 Now the second prong of our application concerns the overall length of his detention,
19 such that even if any of the criteria under Article 58 were to be fulfilled, this Chamber
20 would still have a duty to consider whether Mr Bemba should be released in order to
21 prevent unreasonable length of detention.

22 Now in January 2015, Judge Tarfusser found that Mr Bemba's detention of 14 months
23 was already unreasonable and disproportionate in light of the offences in this case.

24 Although the decision was vacated by the Appeals Chamber, the Appeals Chamber
25 did not overturn the specific finding of unreasonableness. The Appeals Chamber

1 also confirmed the Chamber's duty to balance any factors weighing in favour of
2 detention against the defendant's right to be protected against lengthy detention.
3 Now here and now, that is over three years later, that balancing exercise favours
4 Mr Bemba's immediate release. If it was unreasonable for Mr Bemba to be detained
5 in January 2015, then it is certainly unreasonable for him to be detained in June 2018,
6 three and a half years later.

7 Now the reason that Mr Bemba was not immediately released in January 2015 was
8 because Judge Tarfusser attached a clear caveat. The decision ordered that
9 Jean-Pierre Bemba Gombo be released from the detention centre of the Court unless
10 his detention is otherwise required.

11 Mr Bemba's Article 70 release was, therefore, never executed because there was
12 a detention order in the Main Case and because of this order, it was impossible to
13 release Mr Bemba in the Article 70 case and to lift the Article 70 detention order.

14 As a result -- whereas, his co-defendants were released in October 2014 and were able
15 to attend the trial as free men and are currently free men -- Mr Bemba was detained
16 throughout in a maximum security detention environment.

17 This Main Case detention order, this reason for this fundamental difference between
18 his co-defendants' freedom and his detention has now been vacated because of his
19 acquittal on all counts.

20 We can't walk Mr Bemba back in time. We can't go back to January 2015 and give
21 him this lost freedom, this lost time with his family. But we respectfully submit that
22 it is possible to ensure that Mr Bemba does not suffer further prejudice; that he does
23 not ensure any further unnecessary detention as a result of a case for which he was
24 acquitted.

25 We do not ignore the fact that last Friday's judgment acquitting Mr Bemba might be

1 upsetting for some. We do not ignore the fact that many persons, including
2 the Prosecutor, have expressed their concern publicly with its outcome. But it is
3 a verdict which is final and, like any other ruling of this Court, it should be respected
4 in full and is a verdict that has clear implications for the status of the length of his
5 detention.

6 He has effectively gone from having served zero days of Article 70 detention to
7 serving over four and a half years, four and a half times longer than the initial
8 sentence imposed on him.

9 Now the appeal judgment on sentence in this case makes it clear that he should be
10 credited with any unused time that post-dates his Article 70 arrest on 23 November,
11 and that's paragraph 231 of that judgment. And it is the position of the Defence,
12 which we will seek to elaborate in further submissions, that the fact that he has been
13 detained for over 10-and-a-half years might warrant a different approach to
14 punishment in this case.

15 But for the purpose of deciding upon his release it is not, in our submission, necessary
16 to make a determination today as to either the exact sentence that should be imposed
17 on him or the precise amount of credit that should be allocated.

18 It is enough to demonstrate that any further detention would be unnecessary and
19 disproportionate and it would render the outcome of these proceedings a fait
20 accompli. And human rights law says it would; specifically, the Human Rights
21 Committee has found that holding someone in preventative detention for longer than
22 one-third the maximum possible sentence would be incompatible with the
23 presumption of innocence, the right to be tried without undue delay, and, most
24 importantly, the right to bail.

25 If I can refer you to the authorities in our table of authorities, including general

1 comment number 32.

2 International criminal law precedents also say that the judges have to be mindful that
3 the length of detention does not predetermine the outcome of pending judgment and
4 decisions. And at the ICTY, in the Rašić contempt case, even though the Prosecution
5 had a pending appeal against her sentence, the Appeals Chamber found that it was
6 necessary to provisionally release Ms Rašić during the appeal proceedings because
7 she had already served her initial sentence and two-thirds of the sentence requested
8 by the Prosecution.

9 The same approach was taken in the Haraqija and Morina contempt case. For
10 Morina, the Appeals Chamber released him because he had served his initial sentence;
11 again, even though the Prosecution had appealed. Similarly for Haraqija, the
12 Appeals Chamber released him when he had served -- almost served his initial
13 sentence. Again, even though the Prosecution had requested a two-year sentence on
14 appeal, that is, a sentence that was four times longer than the initial sentence.
15 In both cases, the Appeals Chamber found that the fact the defendant had served, or
16 almost served the initial sentence was a special circumstance which could justify
17 release.

18 And this approach was even adopted in war crimes cases where they found that the
19 fact the defendant had served two-thirds and, in some cases, 80 per cent of the initial
20 sentence, justified release as a special circumstance.

21 And if I can refer you to the Kvočka and Hadžihasanović decisions. In this case, we
22 are not speaking about one-third of the maximum possible sentence. We are not
23 talking about serving the initial sentence. We are not even talking about serving
24 two-thirds of the maximum sentence requested by the Prosecution. We are speaking
25 about a case where Mr Bemba has been detained in a maximum security environment

1 for nine-tenths the maximum sentence that can be imposed by this Court for any form
2 of contempt.

3 Accordingly, unless Mr Bemba is released today, he will end up serving that
4 maximum sentence by default rather than by virtue of a reasoned and impartial
5 judicial determination as to appropriate sentence, and he will have served the whole
6 sentence. And even if under the statute defendants can't apply to the Presidency for
7 early release, that would not normally preclude them from applying to national
8 authorities for early release if they were serving their sentence after conviction and
9 released to do so.

10 Now, obviously, the Chamber could not predict Mr Bemba's acquittal in the Main
11 Case and because of the existence of the Main Case detention order, steps could not
12 be taken by this Chamber to address or eliminate this risk of over-incarceration and
13 over-punishment. But today, the outcome is now known. The Appeals Chamber
14 has stated clearly that his detention is not required for the Main Case and that
15 acquittal is final and it should be meaningful and not illusory.

16 This honourable Trial Chamber now has the exclusive power and the responsibility
17 for protecting Mr Bemba's right to liberty and steps can now be taken to address this
18 issue of over-incarceration and over-punishment.

19 Mr President, your Honours, given Mr Bemba's Main Case acquittal after 10 years of
20 detention, given that Mr Bemba's co-defendants are at liberty and have been since
21 October 2014, given that Mr Bemba has served four and a half times the initial
22 sentence and nine-tenths of the maximum possible sentence under the statute, given
23 that he has undertaken to surrender to this Court should any further detection be
24 required, we respectfully submit that there is no legal or objective justification to
25 separate Mr Bemba from his family for one day further.

1 We therefore request that he be immediately released to Belgium.

2 Thank you.

3 PRESIDING JUDGE SCHMITT: [11:32:08] Thank you very much.

4 For the Prosecution, Mr Guariglia.

5 MR GUARIGLIA: [11:32:13] Thank you so much, your Honours.

6 The position of the office will be summarised, will be presented by Ms Regue. I will
7 just make a couple of points by way of introduction related to the implications of
8 Friday's judgment for this case. And I have heard with attention Mrs Taylor's
9 arguments and her plea that this Chamber somewhat effect or give consequence to
10 the acquittal entered by the majority of the Appeals Chamber on Friday. And
11 your Honours, I would remind the Chamber of the position that this office has taken
12 from the outset of this proceedings. This is an autonomous case with an
13 autonomous level of gravity for different offences that have their own weight and
14 their own consequences. It is not subservient to the Main Case; it is not an appendix
15 to the Main Case. Certainly, jurisdiction of this Trial Chamber is not subservient to
16 the decisions of the Appeals Chamber in a separate case. That position was
17 the position before Friday's judgment; it has not changed. It is the same position that
18 we are going to argue before you today.

19 Any decision by this Chamber must be governed by the specific circumstances of this
20 case, by the applicable legal framework to the specific juncture we're in in this case,
21 are the specific factors that the Chamber has to consider in this case. In this sense,
22 what the Appeals Chamber has decided in a different case is undoubtedly significant
23 for that case and for this institution perhaps, but not for what you have to decide right
24 now.

25 So the two issues for you to decide first, is whether the release provisions are

1 applicable at all to the current situation, and as you will hear from Ms Regue in
2 a second, our position is they are not.

3 Now the second question is whether -- if those provisions are applicable by means of
4 a hypothesis, whether they would lead to this Trial Chamber ordering release. As I
5 said, these are the factors the Chamber has to consider. We will not allow our
6 position in relation to Friday's judgment to taint our position here in the same way;
7 conversely, we should not allow basically the Defence's undoubted and clear
8 satisfaction with Friday's judgment to basically push for a decision by this Chamber
9 on a separate case that has its own level -- own degree of gravity, its own
10 circumstances and its own weight, which cannot be set aside so lightly.

11 So without further ado, your Honours, I am going to give the floor to Ms Regue.

12 MS REGUE: [11:34:52] Good afternoon, your Honours, as instructed in your order,
13 our submissions will focus on the continued detention of Mr Bemba in this case. In
14 addition, we will briefly address some of Mr Bemba's remarks regarding the appeal
15 judgment issued on 8 June 2018 in the Main Case.

16 As your Honours have mentioned, on 8 March 2018 the Appeals Chamber confirmed
17 the convictions of Mr Bemba with respect to offences under Article 70(1)(a) and (c).
18 The convictions are final.

19 Mr Bemba has been found guilty and he no longer benefits from any presumption of
20 innocence in this case. Therefore, Article 60 does not apply at this stage of the
21 proceedings, nor does Rule 119, regarding conditional release. Besides, if the Rule
22 was to apply, Mr Bemba's undertaking is clearly insufficient. He should identify,
23 and he did, a State where he wants to be released, but also he should -- that this State
24 should be consulted. In application of Rule 119(3), the Court should seek
25 observations from the relevant States.

1 Your Honours follow this procedure in your decision 1151 of 17 August 2015 when
2 you decided on the conditional release of the order for convicted persons before the
3 start of the trial.

4 Mr Bemba has been in detention pursuant to an arrest warrant in this case
5 since 23 November 2013. That is over four years. As Mr Bemba notes in his urgent
6 request, paragraph 2, and the Appeals Chamber has confirmed in the sentencing
7 appeal judgment of this case, paragraph 231, Mr Bemba is entitled to have this time
8 deducted from the sentence that your Honours might impose.

9 The Prosecution has requested Mr Bemba to be sentenced to five years imprisonment
10 in addition to a substantial fine. If the Chamber follows the Prosecution's
11 submissions and imposes a sentence of five years, Mr Bemba should still remain in
12 detention to serve the remainder of the term that he has not served. Since there is no
13 review of sentence for Article 70 offences, any sentence must be served in full.

14 In short, your Honours, Mr Bemba must remain in detention until a sentencing
15 decision is issued. However, the Prosecution will support an expedited resolution of
16 the sentencing proceedings with respect to Mr Bemba. We were willing to withdraw
17 our request for leave to reply, notwithstanding our position on the merits so
18 your Honours could proceed with a decision on Mr Bemba's sentence with reasons to
19 follow. Your Honours could also separate the sentencing proceedings of Mr Bemba
20 from those of the other convicted persons to expedite the resolution of the decision on
21 Mr Bemba's sentence.

22 Notwithstanding that our main position is that Article 60 and Rule 119 do not apply
23 to this situation, we will address your Honours the conditions under Article 58(1)(b).
24 We will focus our submissions on the first requirement, the necessity to ensure the
25 person's appearance in trial.

1 We concede, your Honours, that the lapse of time since the offences took place and
2 also the appeals judgment issued last Friday by the Appeals Chamber are factors that
3 may attenuate Mr Bemba's intention to abscond. However, there is still the
4 possibility that he may do so. This cannot be discarded at this stage. I refer
5 your Honours to the updated report on Mr Bemba's solvency from the Registry.
6 That's filing 01/05-01/13-2278-Anx1.

7 Also, your Honours, Mr Bemba's conviction for offences against the administration of
8 justice have been confirmed on appeal and it's clear that Mr Bemba played an
9 essential role in corruptly influencing at least 14 witnesses through inter alia the
10 authorisation of payments. These offences took place between October 2013 until
11 November -- excuse me, between October 2012 until November 2013. Mr Bemba had
12 the means, as recent as November 2013, and the capacity to mobilise a network of
13 supporters to perpetrate offences. Hence, we cannot discard the possibility that he
14 will use these resources and this network to abscond.

15 I refer your Honours as well to the warrant of arrest issued by the Single Judge on
16 20 November 2013. The Single Judge confirmed that Mr Bemba continued to have
17 political connections, even at an international level, and noted the substantial nature
18 of the financial resources available to him directly or indirectly for the purposes of
19 committing offences.

20 Trial Chamber III in the Main Case reiterated on 23 December 2014 that - that is in
21 decision 01/05-01/08-3221, paragraph 25 - that Mr Bemba benefited from financial and
22 material support. Even last Friday, Judge Van den Wyngaert and Judge Morrison in
23 their separate opinion considered that Mr Bemba would not be released if they would
24 have ordered a retrial as Judge Eboe-Osuji had preferred. That is the appeal
25 judgment 01/05-01/08-3636-Anx2, footnote 57. Hence, they implicitly acknowledge

1 that the conditions underlying detention will be met in the event of new proceedings
2 at this stage.

3 Very briefly, your Honours, I would like to address some of Ms Taylor's remarks in
4 her urgent request today. We submit your Honours that the majority's appeal
5 judgment in the Main Case has no impact on the quantum of the sentence to be
6 imposed on Mr Bemba. These two cases have always proceeded separately. Our
7 sentencing submissions filed on 30 April, that's filing 2279, remain equally relevant.
8 The gravity of the crimes and the culpability of Mr Bemba for the crimes for which he
9 was convicted in this case remain the same, so thus the need of the sentence to reflect
10 it and to have a deterrent effect. For the convictions in this case not to be
11 inconsequential, he should be sentenced to five years. He should also be sentenced
12 to a substantial fine. Since there will be no reparations in the Main Case,
13 the Prosecution's previously expressed concern that there will be not -- sufficient
14 funds to cover legal aid no longer exists.

15 Neither the majority's appeal judgment nor the time that Mr Bemba has spent in
16 detention pursuant to the arrest warrant in the Main Case are relevant factors to
17 determine Mr Bemba's sentence in this case. The fact remains that Mr Bemba was
18 lawfully arrested and has at all times been lawfully detained in the main case
19 pursuant to a valid arrest warrant.

20 And finally, your Honours, contrary to what Mr Bemba suggests in his urgent request
21 that's in paragraph 3, it is not accurate that Mr Bemba has been acquitted of all the
22 charges that the Prosecution brought against him in the Main Case. He was only
23 acquitted of approximately half of the criminal acts, that is, in paragraphs 118 and 198
24 of the majority's appeal judgment. With respect to the remaining of the criminal acts
25 listed in paragraph 116, the majority consider that they fell outside of the charges,

1 reversed the conviction and discontinued the proceedings. That's in paragraph 197.

2 I thank you, your Honours.

3 PRESIDING JUDGE SCHMITT: [11:44:54] Thank you very much.

4 Ms Taylor, do you want to make additional remarks or you want to answer?

5 MS TAYLOR: [11:45:04] Thank you very much, Mr President, your Honours. I

6 would firstly like to address this issue of Mr Bemba's acquittal in the Main Case and

7 the relevance it could have to the specific criteria under Article 58.

8 Now, firstly, yes, these are two separate proceedings, but this Chamber found, and

9 the Appeals Chamber upheld, there was a link between the detention orders; that the

10 Article 70 detention order could not start because of the Main Case detention order.

11 So the reality is, is that if last Friday's acquittal had come earlier, we could be having

12 this hearing earlier. This issue of predetermination would not be so exacerbated.

13 There would not be a risk, such a risk of over-punishment, either over-punishment in

14 this case or divert de facto punishment in the Main Case. So there is that linkage

15 firstly.

16 Secondly, human rights law states that effluxion of time is relevant. The longer that

17 someone is in detention the less likely it is they will be a flight risk. Now that logic

18 applies irrespective as to the legal status of the detention order. If Mr Bemba has

19 been in detention for 10 years, he is not going to risk his livelihood, he is not going to

20 risk his family, he is not going to abscond from justice for three months. So, yes, that

21 10 years is relevant to the risk.

22 It's also relevant to proportionality. He has been separated from his family for

23 10 years so that is also a factor that impacts on the urgency of today's application. So

24 there is that relevance.

25 Yes, Mr Bemba's conviction in this case was confirmed, but something that has not

1 been referred to thus far was that he was acquitted of a third of the charges in this
2 case. So the exact extent to which that must be balanced against the two errors
3 identified by the Appeals Chamber has yet to be determined by the Chamber. And
4 that's the issue we are facing today, that element of predetermination, that that can't
5 be predetermined.

6 Now, the Prosecutor had suggested today that we could have an expedited resolution
7 for Mr Bemba, but that strikes at the heart of the issue, that he would be afforded less
8 time to prepare as a consequence of his detention. He would be prejudiced yet again,
9 as he has been throughout this case, as the only detained defendant. He should not
10 have to choose between liberty and a right to preparation. The way you reconcile
11 that is through his release.

12 Now he has quite clearly stated he wishes to be surrendered to Belgium, but we are
13 willing of course to provide further written assurances and guarantees as to the exact
14 location of his release. And I think in the past this Chamber has released the
15 defendants without going through any further need to have a hearing to hear from
16 Belgium in this case. So we think that is a red herring in that regard.

17 Now in terms of the applicability of Article 60, the ICC has already found in
18 connection with one of Mr Bemba's 15 provisional release applications, that Article 60
19 can still apply at the trial stage. And if it can apply at the Trial Chamber stage, it can
20 also apply at this point. The question is not the stage of the proceedings, it's the
21 right to release and whether detention is justified.

22 Now, if I can also refer to Article 81(3)(b), that specifically envisages that someone on
23 appeal can apply for release if they have already served their sentence. So the
24 Statute specifically envisages that the right to release applies throughout. It's now
25 somehow exhausted because of an artificial distinction concerning the phase.

1 Another issue that's been brought to bear today is of course the fact that under the
2 Statute there is no explicit right to apply for a two-thirds release. We would also say
3 that Rule 163 specifically excludes Article 106 of the Statute.
4 Now what that normally means is that, if someone is released to a national state to
5 serve their Article 70 offence, imprisonment, this Court doesn't supervise that under
6 our statute. Which means that if Mr Bemba had been released to Belgium when the
7 sentence in this case was first handed down, he could apply for release under
8 Belgium law, which is potentially at a 50 per cent mark, or a two-thirds mark.
9 So yet again, he shouldn't be prejudiced by virtue of the fact that he has served almost
10 the entirety of a maximum possible sentence here rather than in a national setting.
11 Now in terms of the individual criteria under Article 58, even though the burden falls
12 to the Prosecution, we haven't heard any concrete indicia as to how the criteria are
13 fulfilled in this case. And again, the Appeals Chamber has affirmed it is not enough
14 to simply reiterate the findings in an arrest warrant decision. There is a duty to
15 make a reasoned determination at the time of the application as to whether the
16 criteria under Article 58 are met. The fact that they were met in 2013 does not
17 dispose of the issue, because, if it had, Judge Tarfusser wouldn't have released him in
18 January 2015; that's the same judge. And as I mentioned, the Appeals Chamber has
19 specifically said that even the judges can't simply refer to their previous arrest
20 warrant decision because that would render Article 60 nugatory.
21 And, again, we have heard brief references to his solvency report with no indication
22 as to how that is relevant to his cooperation, to someone who has indicated quite
23 clearly he will cooperate with this Chamber, he will agree to abide by any conditions
24 imposed by that Chamber.
25 So given these circumstances, given the burden of proof on the Prosecution, and

- 1 given the overall length of time, the Prosecution has failed to substantiate how his
2 continued detention is necessary and how it is reasonable and proportionate.
3 Thank you.
- 4 PRESIDING JUDGE SCHMITT: [11:52:35] Thank you.
5 (Trial Chamber confers)
- 6 PRESIDING JUDGE SCHMITT: [11:53:07] This concludes the status conference. As
7 previously indicated, the Chamber's decision on this matter will be rendered by
8 tomorrow at the latest.
- 9 THE COURT USHER: [11:53:20] All rise.
10 (The hearing ends in open session at 11.53 a.m.)