

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
5 Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and
6 Narcisse 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 Wednesday, 19 October 2016
11 (The status conference starts in open session at 3.18 p.m.)
12 THE COURT USHER: [15:18:02] All rise.
13 The International Criminal Court is now in session.
14 PRESIDING JUDGE SCHMITT: I understand that we have now a new
15 transcript and, because of that, the court officer would have to call the case
16 again, please.
17 THE COURT OFFICER: [15:18:31] Yes, indeed. Thank you, Mr President.
18 The situation in the Central African Republic in the case of The Prosecutor
19 versus Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques
20 Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, case reference
21 ICC-01/05-01/13.
22 We are in open session.
23 PRESIDING JUDGE SCHMITT: Question to the parties, has the composition
24 remained unchanged? That is true for the Prosecution. Is it also true for
25 Defence counsel?

1 Nodding would be sufficient, I would say. Thank you very much.

2 Mr Vanderpuye or Madam Prosecutor, you have indicated that you have an
3 application to make.

4 MR VANDERPUYE: Thank you, Mr President. Good afternoon to you, your
5 Honours. Good afternoon, everyone.

6 You'd made inquiry just before we broke as to whether the Prosecution had a
7 particular application in respect of the conviction that's been rendered by the
8 Chamber, and indeed we do. We indicated several days ago that should the
9 Chamber render a decision of conviction under Article 74 of the Statute that the
10 Prosecution would apply to the Chamber for the accused to be remanded to the
11 custody of the detention centre pending sentencing in this case.

12 We think in light of the findings that the Chamber has made, both in respect of
13 the seriousness of the offences of which the accused have been convicted, the
14 number of counts on which several of the accused, particularly Mr Bemba
15 Mangenda and Mr Kilolo have been convicted, as well as the counts on which
16 Mr Babala has been convicted and Mr Arido have been convicted, we consider
17 that detention pending sentence is appropriate. Moreover, we believe that it's
18 authorised, if not specifically directed under Article 81(3)(a) of the Statute,
19 which essentially establishes a general principle or a general rule that a
20 convicted person be committed to detention pending appeal.

21 We believe that the sentencing proceedings will occur before the appeal, but
22 we think it is appropriate in these circumstances that the Chamber take that
23 action. It is qualified, that is 81(3)(a) is qualified and essentially provides that
24 an accused person shall remain in custody unless the Chamber issues an order
25 to the contrary. The onus therefore is on the Defence to establish cogent and

1 compelling reasons why they should remain at liberty in the case of -- or,
2 interim release in the case of Mr Arido, Kilolo, Mr Babala and Mr Mangenda.
3 We don't believe that there are any circumstances in light of the Chamber's
4 findings and convictions which would justify allowing them to remain at
5 liberty pending sentencing. Mr Bemba obviously is already in detention,
6 based on his conviction in the Main Case.

7 Alternatively, we submit that should the Chamber determine that the accused
8 are not in custody currently, although they are before the Court involuntarily
9 pursuant to an order of the Chamber to be here, that they are not free to leave
10 the courtroom at their own will without the Chamber's leave, and that having
11 to be in the courtroom and having to be in court today is what we would
12 consider to be a substantial interference with their freedom of action.

13 Should the Court nevertheless find that they are not within the Court's custody
14 as of this moment, then we would submit that the convictions in themselves
15 constitute a sufficient change in circumstances to the disfavour of the accused
16 which warrant a revocation of their interim release status.

17 They are no longer benefited by the presumption of innocence, as the Chamber
18 has rendered a decision of conviction.

19 The second thing is that a sentence will follow, that is a certainty. What the
20 sentence will be is not. But it is entirely possible that the accused face an
21 incarcerative sentence as a result of the convictions in this case, even the
22 accused Babala, even the accused Arido, who have been convicted of less than
23 what was confirmed in the confirmation decision.

24 Therefore, we consider that a revocation of the interim release status of the
25 accused is appropriate in light of these circumstances. It would not be to the

1 accused's benefit to return for a possible sentence which would be incarcerative.
2 It would simply be better for them not to come back, and that's the reason why
3 we say that it is appropriate in these circumstances to ensure their presence for
4 sentencing by detaining them pending the sentencing or the disposition of any
5 sentencing procedure.

6 I'm happy to respond to any questions the Chamber may have or to the
7 arguments that the accused may advance to the contrary with the Chamber's
8 leave.

9 Thank you, Mr President.

10 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Vanderpuye.

11 I assume that the Defence wants to respond. Who wants to start? Yes,
12 please, Mr Kilenda.

13 MR KILENDA: (Interpretation) Thank you, Mr President, for giving me the
14 floor. The Defence notes that the Prosecutor had a lot of time to prepare its
15 motion. We do not want to ask for much, but please grant us only 20 minutes,
16 that is for the Defence teams, so that we can also prepare our responses.

17 PRESIDING JUDGE SCHMITT: That is a reasonable proposal and is
18 conceded, so we have a break of 20 minutes.

19 THE COURT USHER: [15:24:47] All rise.

20 (Recess taken at 3.24 p.m.)

21 (Upon resuming in open session at 3.44 p.m.)

22 THE COURT USHER: [15:44:12] All rise.

23 PRESIDING JUDGE SCHMITT: It is now the turn of the Defence. Who
24 wants to start?

25 Mr Kilenda, you have the floor.

1 MR KILENDA: (Interpretation) Thank you very much, your Honour.
2 Your Honours, a few instants ago you have just pronounced your judgment
3 based on Article 74 of the Statute, a judgment that we respect and we must
4 respect given the oath that is ours, that of lawyers.
5 But the trial is not finished because, as you know, under Article 76 of the
6 Statute, and here I quote, Article 76(1):
7 "In the event of a conviction, the Trial Chamber shall consider the appropriate
8 sentence to be imposed and shall take into account the evidence presented and
9 submissions made during the trial that are relevant to the sentence."
10 To this day, your Honour, your Honours, the parties before you have not yet
11 discussed or had exchanges on the sentencing. The Prosecutor does not know
12 the sentence which you are going to set for the accused.
13 The accused have not yet presented their submissions with regards to the
14 attenuating circumstances or aggravating factors, which could be mentioned
15 by the Prosecutor. Whatever the case, we on the side of the Defence, we do
16 not dine with the judges, to be clear, we are not party to your deliberations.
17 So we do not know what sentence you are going to set. And therefore, we
18 consider that the application of the Prosecutor has no grounds. It has no
19 factual basis or legal basis.
20 We have heard a certain number of things which are manifestly contrary to law,
21 that the presumption of innocence no longer applies and you are invited to
22 reverse the burden of proof, because we are asked to provide evidence which
23 would show that our client can't be re-incarcerated, whereas it is up to the
24 Prosecutor to provide evidence in this regard to revoke the interim release
25 accorded to our clients.

1 And more specifically where it concerns my client, our client, Fidèle Babala, as
2 all the co-accused were, he was released subject to a judgment which specified
3 the conditions. He was released thereupon. And we never -- there was no
4 report of bad behaviour on the part of Mr Babala. He complied always with
5 your orders. He was always present.

6 The Prosecutor alleged when we were before the Pre-Trial Chamber that
7 Mr Babala had friends throughout the world and that he could use that in
8 order to escape justice. But he is here every day. He has been obeying your
9 orders and your calls.

10 So when it comes to the argument according to which the sentence or the
11 judgment, the guilty verdict, this appears to us to be exaggerated in the sense
12 that the Prosecutor, unless he proves the opposite to us, does not know the
13 sentence that you are going to set.

14 And furthermore, we know you are professional judges. You can only set this
15 judgment having listened to all parties, having analysed the submissions of the
16 parties subject to adversarial proceedings, this sentence could, after an
17 exchange of submissions and after all the arguments that are put forward, this
18 could be a fine, it could be. It could be equal to the length of detention.

19 This sentence, your Honour, your Honours, only you know what that sentence
20 would be. So we can't base ourselves on a guilty verdict today to say that you
21 have to revoke the status of release accorded to our clients.

22 The presumption of innocence, in our opinion, that should be in place until
23 there is information to the contrary. And when it comes to this, during which
24 the parties will again debate the judgment that was raised today, we can't base
25 ourselves on this judgment in order to revoke the liberty accorded to our

1 clients.

2 Re-incarceration, to be brief, re-incarceration of our client which is called for by
3 the Prosecutor lacks a factual and legal basis.

4 Thank you, your Honour.

5 With your leave, your Honour, I reserve the right to reply should the
6 Prosecutor raise something challenging my submissions. Thank you.

7 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Kilenda. Who
8 wants to continue?

9 I see Mr Gosnell rising for Mr Mangenda. You have the word.

10 MR GOSNELL: Thank you, Mr President. Good afternoon again.

11 We are in uncharted waters, Mr President, at least as far as the practice of this
12 Court is concerned, and that does make it difficult for all the parties to offer
13 your Honours the most informative submissions possible on this issue,
14 particularly given the circumstances in which the issue arises and it's not
15 possible to offer your Honours any written submissions.

16 Facing that lack of precedent, the parties can nonetheless look at the Statute
17 which, in my submission, is clear as to, at the very least the applicable standard
18 that should apply in present circumstances.

19 The Prosecution submitted to you that the applicable standard that should
20 apply is Article 81(3)(a), which reads, quote: "Unless the Trial Chamber orders
21 otherwise, a convicted person shall remain in custody pending an appeal."

22 At first sight that does seem to possibly encompass the present situation. But
23 if you read the next subsection, Mr President, it says:

24 "When a convicted person's time in custody exceeds the sentence of
25 imprisonment imposed, that person shall be released," et cetera.

1 It's clear from the wording of that provision, Mr President, that Article 81(3)
2 presupposes the existence of a sentence before the presumption of Article
3 81(3)(a) applies.

4 So what provision applies given that Article 81(3)(a) does not apply? Well,
5 the provision that continues to apply, I would suggest, Mr President, is Article
6 62, which reads:

7 "A person subject to a warrant of arrest may apply for interim release pending
8 trial," and so forth.

9 Now, your Honours obviously considered that even after the end of closing
10 arguments, trial was still pending because you did in fact maintain the existing
11 interim release order that you had previously issued, even after the hearing of
12 all the evidence and hearing of all of the submissions of the parties. So trial
13 was still pending as of that moment.

14 And I would suggest, Mr President, the trial is still pending as of this moment,
15 even though a judgment has been rendered, and my basis for saying that is that
16 Article 76, to which my learned friend just referred, falls within Part VI of the
17 Statute which is entitled "The trial". Therefore, even though we have reached
18 perhaps the penultimate step, we have not yet reached the end of the trial
19 proceedings and therefore trial is still pending even if we are nine/tenths of the
20 way through that procedure.

21 If Article 62 applies, then your Honours are then required to look at Article
22 58(1)(b). And your Honours must be satisfied that the burden being upon the
23 applicant for remand into custody that one -- that all of those conditions are
24 satisfied, the burden being on the Prosecution in this case.

25 Now, Mr President, dealing with the specific circumstances of Mr Mangenda.

1 None of the circumstances or conditions set out in Article 58(1)(b) are in fact
2 triggered by the circumstances of his release so far. He has always respected
3 the orders of the Court. He has appeared when required. He has never left
4 the United Kingdom. He has strong ties with the United Kingdom, which he
5 strongly wishes to maintain, and for that reason there is no danger that he is
6 going to abscond or not obey any order of this Court to surrender himself.
7 And he has already served, Mr President, more than 11 months in custody.
8 And as my colleague indicated, we don't know yet what your determination
9 may be as to the duration of sentence. But nevertheless, that is a factor that
10 further shows that none of the three considerations in Article 58(1)(b) apply in
11 present circumstances to Mr Mangenda.
12 And a last point, Mr President, is if your Honours are in any doubt as to the
13 applicable provisions, because, for example, we have not had the opportunity
14 to offer written submissions, I would suggest to your Honours that that should
15 redound to the benefit of the accused rather than to the benefit of the
16 Prosecution.
17 Thank you, Mr President.
18 PRESIDING JUDGE SCHMITT: Thank you, Mr Gosnell.
19 Mr Taku.
20 MR TAKU: May it please the Court, Mr Arido would have loved to follow
21 these proceedings, to have had a copy of the judgment in French, understood
22 the basis on which the conviction lies. The summary of the judgment which
23 has been read here, your Honours, while we respect that decision, nevertheless,
24 Mr Arido would have loved to have that judgment in French.
25 The next issue we want to raise, your Honours, is that this application should

1 be dismissed in limine. We sat here and listened to your Honours
2 individualise the criminal responsibility of each individual on the basis of
3 which you entered the verdict of conviction. This application is general. It
4 tries to tar every person with the same brush. And the basic principles of
5 international criminal justice or criminal justice is that applications of this
6 nature should be individualised. If it is not individualised, it's made in
7 general, attempts will have to be made -- it conflicts with the very conviction
8 they've entered today, that you've carefully individualised the responsibility.
9 On the basis of that, there is no application that individualises the application
10 in respect of Mr Arido, it should be dismissed in limine.
11 Your Honours, the application you've granted, it sends a very, very, very
12 dangerous message under administration of international justice because it
13 seeks, your Honours, to prejudge the sentencing, the sentencing hearing and
14 the sentencing that might be given in this case.
15 Because as it exists, if any conviction had been entered, automatically for him
16 that's enough for your Honours to remand him in custody.
17 Although your Honours have underscored the seriousness of the offence, but
18 nevertheless, the mere message, the mere rigour of a trial of this nature, your
19 Honours, the mere fact of spending almost a year in detention away from his
20 family, your Honours, that, on its own, and the message sent out today, even if
21 it were one day detention, that on its own, your Honours, at least is enough to
22 show or to establish the seriousness which you affirm today. But the
23 seriousness of the offence you established today is not the aggravating factors
24 that the Prosecutor must present in a sentencing hearing. So the Prosecutor
25 cannot rely on what you said today even when the Defence has not laid out the

1 mitigating factors to rely on that aspect of the judgment to answer the way -- if
2 persons should be remanded in custody.

3 Your Honours, were that to happen, were he to rely on that way, to rely on that
4 part of the judgment, your Honours, that will in a way take away the burden,
5 the burden from the Prosecutor establishing that aggravating circumstances in
6 a sentencing hearing. We submit, your Honours, that your Honours should
7 reject an attempt to rely on that for the purpose, issuance application.

8 Your Honours, there is no indication that Mr Arido will not appear for
9 sentencing hearing. He has appeared on four separate occasions during the
10 course of the trial, for the status conference in April 2015, and your Honours
11 remember at his own request, he insisted that he wanted to be here at all
12 phases of his trial, if you look at the proceedings of the status conference.

13 Now, during the course of the trial, he was here. During the Prosecution's
14 case, he was present, the Defence case and then for the closing submissions.
15 This covered a period of approximately a year and a half when -- yes, when
16 Mr Arido provided his phone number, as ordered, and at no time has the
17 Registry never contacted the Defence to indicate that Mr Arido was not
18 available.

19 Your Honours, in order to grant Mr Arido the preliminary -- I mean the release,
20 made many formal inquiries from the state where Mr Arido resides and the
21 state said they were able to guarantee that Mr Arido would appear, and they
22 have done so. They've cooperated in every -- at every instance, state
23 cooperation has been total, to guarantee Mr Arido is here.

24 If convicted of this offence, not the crime, and I have been stating, your
25 Honours, that the deterrent effects of sentencing international justice is not by

1 the length of a sentence that may be given, that is out of the way, your Honours.
2 It is not punitive, it is not revenge. International justice is not revenging
3 against anyone, your Honours. But your Honours at the appropriate moment
4 will weigh the evidence the Prosecutor will present for aggravation and the
5 Defence will present.
6 But then, your Honours, under Article 70(3) of the Rome Statute, this offence
7 carries a sentence, it grants your Honours a large discretion, a large discretion
8 that your Honours could even impose a fine.
9 Now, we do not know or nobody is to prejudge what you will say, what your
10 decision will be, but remanding him in custody at this point in time sends a
11 message out there that is a clear prejudgment. The exercising -- already at this
12 point the exercising your discretion, you may give a custody sentence, which is
13 not the case.
14 Your Court is quite open to consider the individual circumstances of each of
15 the convicts, your Honours. And upon a look at the individual circumstances
16 of Mr Arido, your Honours may say whether time served, a fine, or may grant
17 another sentence. Your Honours, upon listening to the totality of the factors
18 that we brought before you may consider also a sentence that your Honours
19 would consider would be in a position to impose.
20 Your Honours, Mr Arido has already been in pre-trial detention for nearly a
21 year, as your Honour will see. While in detention Mr Arido had always been
22 of exemplary good conduct, Mr Arido behaved properly before the Court, and
23 I can assert, your Honours, that de facto presented that conviction
24 automatically is enough for your Honours to revoke your order, your Honours,
25 is not the appropriate factor that you should consider in making the

1 application.

2 So your Honours, on the basis of the fact of the lack of discrete elements by the
3 Prosecutor, individualising the application, to each convict and rely instead on
4 the general application on the basis of conviction alone per se, your Honours,
5 in fact in granting the release, the provisional release, your Honours went
6 through a rigorous process individualising the specific circumstances of each of
7 the convicts and requiring specific information from the state in which they
8 were.

9 It wasn't based on a general application tarring everybody with the same brush.
10 On the basis of this, your Honours, this application ought not even to have
11 been made. It ought to have be dismissed in limine. It's clearly insufficient.
12 It is not a clear basis on which your Honours can rely on to grant the

13 application sought. So I ask your lordship to reject, to deny the application.

14 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Taku.

15 Who wants to continue?

16 Mr Powles, you have the floor.

17 MR POWLES: Thank you very much, Mr President and your Honours. And
18 thank you also for the period that you allowed us to consult before making
19 these submissions. May I also thank my learned colleagues who spoke before
20 me.

21 In terms of the structure of our submissions, may I divide them as follows:

22 First of all to make three preliminary submissions and then to move on to the
23 substance of the Prosecution's application.

24 The first preliminary submission we'd make is that we have all come here
25 today, each party to listen to the Trial Chamber's judgment and to digest the

1 summary of that judgment and verdict.

2 The question of provisional release and sentence, we respectfully submit, are
3 matters for another day.

4 If the Prosecution wishes to persist with an application to remand these
5 defendants into custody, we respectfully submit it would be preferable for
6 them to have done so in writing with proper notice for all parties to consider
7 and digest all the matters that they seek to raise, including State Parties and
8 allow them an opportunity to give a detailed response if appropriate.

9 The defendants have come to court today with two great uncertainties. Firstly,
10 the outcome of a lengthy trial, and secondly, whether and on what basis the
11 Prosecution would make an application to remand them into custody.

12 The Defence did not know the legal basis, nor have an opportunity to fully
13 consider the legal basis that the Prosecution would put forward.

14 In that regard, may I echo the submissions made by my learned friend,
15 Mr Gosnell, in relation to the propriety of Article 81(3) being the appropriate
16 Article on which to consider a remand into custody of these defendants.

17 I won't seek to repeat the submissions made by Mr Gosnell, all I would simply
18 do is stress the word "remain" in subparagraph (a) of subparagraph (3):

19 "Unless the Trial Chamber orders otherwise, a convicted person shall remain in
20 custody pending an appeal."

21 Now, we would respectfully submit that the word "remain" is indicative of the
22 fact that the person is already in custody, which of course is not the case in
23 relation to these defendants.

24 So that's the first preliminary point that we would make.

25 The second is that Mr Kilolo has abided by all conditions upon which he was

1 granted provisional release. We respectfully submit it is a breach of those
2 conditions that should now trigger, if at all, a remand into custody, not solely
3 his conviction.

4 Again, it would have been preferable to have the alleged breaches of those
5 provisional release measures in writing so that they could be fully considered.

6 We observe that there are none because there have been none.

7 The third preliminary observation we'd make is that the question of
8 revocation of provisional release we respectfully submit should really only
9 properly arise at the end of the process when sentence becomes final.

10 So those are our preliminary observations.

11 In relation to the substance of whether or not Mr Kilolo should be remanded
12 into custody, may we make the following remarks: Obviously we oppose the
13 Prosecution application and respectfully request the Trial Chamber to allow
14 Mr Kilolo's provisional release to continue.

15 The main issue, we submit, is whether in light of any possible sentence that the
16 Trial Chamber may impose, Mr Kilolo is now a flight risk. We say that
17 because if one looks at the criteria - and again, Mr Gosnell has already referred
18 to this - if you look at the criteria of Article 58(1)(b), a person may only be
19 remanded into custody if those three conditions are met. And those three
20 conditions are: Firstly, to ensure their appearance at trial; secondly, to ensure
21 that they do not obstruct or endanger the investigation or court proceedings,
22 well, in that regard we would submit that there are no ongoing investigations
23 and no court proceedings that can be obstructed and interfered with; thirdly,
24 under subparagraph 58(1)(b), to prevent them from continuing with the
25 commission of the crime or related crime within the jurisdiction of the Court.

1 Well, since his arrest in relation to these proceedings, Mr Kilolo has committed
2 no crimes and none since his subsequent provisional release.

3 So again, plainly, the main issue and the material issue we would respectfully
4 submit is the first one, whether it is important to remand Mr Kilolo into
5 custody to ensure his appearance at a subsequent hearing.

6 Now, in relation to that, we submit that the best and most powerful indicator
7 that Mr Kilolo is not a flight risk and will return to court for sentence is that he
8 has attended court today.

9 He did so in the knowledge that the Trial Chamber might remand him into
10 custody. And despite that risk, he still complied with all Court and Registry
11 orders and directions to attend court today.

12 Now again, we submit that that is a really powerful indicator that he will
13 return and attend the subsequent sentence hearing regardless of any sentence
14 that might be imposed.

15 It's worth observing that Mr Kilolo prior to today's hearing and since the end of
16 the trial proceedings has spent some time in Kinshasa. Immediately prior to
17 the proceedings today Mr Kilolo was in Kinshasa on business, legal business.
18 He duly, as required, informed the Registry of the fact that he was in Kinshasa
19 and what he was doing.

20 Mr Kilolo himself, himself undertook at his own expense to return from
21 Kinshasa to Belgium and then subsequently to The Hague to attend today's
22 hearing. Again, we submit that is a really powerful indicator as to what his
23 future intentions may be.

24 In relation to what sentence might be imposed, and we stress might be
25 imposed because it is of course a matter exclusively for the Trial Chamber in

1 terms of what the ultimate sentence may be in this case, and there are of course,
2 in relation to the matters upon which Mr Kilolo has been convicted, there are a
3 range of possible sentences that this Trial Chamber may seek to impose.

4 There is obviously, at one end of the spectrum, a fine. The Trial Chamber may
5 impose a prison sentence commensurate with the time that he's already served
6 in custody, or the Trial Chamber may impose a sentence longer than he's
7 already spent in custody but suspend it.

8 Now, if any one of those options are taken by the Trial Chamber in terms of
9 how to dispose and deal with the convictions that have arisen in this case, it
10 would be presumptuous and premature to remand Mr Kilolo into custody
11 today.

12 It's obviously a matter for another day. But just as a precursor, we submit that
13 there are very strong and powerful reasons why the Trial Chamber should not
14 impose a custodial sentence in this case and, of course, these submissions will
15 be expanded upon in due course, but just as a precursor, we would submit the
16 following.

17 First, Mr Kilolo has already spent nearly one year in custody. He was arrested
18 in circumstances which are well known to the Trial Chamber, which have been
19 outlined before during the course of the proceedings. He spent from 23
20 November 2013 to 21 October 2014 in custody, nearly 11 months, a year.

21 That's the first point.

22 Second, since his release on 23 November 2013, he has subsequently built up
23 both his professional and personal life. He's been working, as I've already
24 outlined, both in Kinshasa and at the Brussels bar in Belgium on some cases on
25 a pro bono basis and assisting people during the course of their court

1 proceedings. He is also a family man. His wife does not work and he's the
2 sole provider of the family and his children.

3 The third point that we'd make is that while the offence is plainly serious, it is
4 not one that necessarily automatically warrants a custodial sentence. And we
5 draw some comfort in making that submission from the way that similar
6 matters have been dealt with by other international tribunals. Again, it will
7 be a matter that will be explored fully before sentence, but just as a precursor
8 and as set out in summary form and concisely and collectively, in the
9 dissenting opinion of Judge Ušacka in the Appeals Chamber decision of 11 July
10 2014. Now, at paragraph 8 reference is made to the Tadić, decision, the Milan
11 Vujin decision, a contempt case at the ICTY in which Milan Vujin, a lawyer
12 who had been accused of presenting evidence and matters on appeal that he
13 knew to be false and to have manipulated witnesses against the interests of his
14 own client. Both the Trial Chamber and then subsequently the Appeals
15 Chamber affirmed a decision to impose a fine on Milan Vujin, a fine of some
16 15,000 guilders, Dutch guilders. I don't know what that translates at in terms
17 of euros. But again, it's indicative of a sentence that an international tribunal
18 has imposed other than custody and that we respectfully submit could fall
19 within the range of sentences that this Trial Chamber may seek to ultimately
20 impose.

21 Before the Special Court of Sierra Leone, the second decision referred to by
22 Judge Ušacka in the case of Bangura, Kabura, Kanu and Kamara, a contempt
23 case for bringing witnesses or inducing them to recant their testimony, the
24 accused in that case were sentenced between 18 months and two years, and
25 one had his sentence suspended.

1 So those are two cases which show, we respectfully submit, a range of
2 sentences that can be imposed by international courts in these kind of cases.
3 I won't go into any great detail and test the Trial Chamber's patience by
4 expanding upon it, but at paragraph 9 of the dissenting opinion, Judge Ušacka
5 sets out some of the domestic provisions that transpose and implement the
6 ICC's Article 70 offences into domestic law. Certainly, in Germany and
7 certainly in the UK, the maximum sentences for these kind of offences in
8 domestic courts having arisen at the ICC, Judge Ušacka refers to the fact that in
9 Germany they could be up to one year imprisonment under UK, and in
10 England and Wales, under the ICC act, the International Criminal Court Act
11 2001, which makes relevant domestic offences applicable if committed before
12 the Court with respect to perjury, Judge Ušacka notes that the maximum
13 prison sentence would, in the UK, for these kind of offences, be two years. Of
14 course, in other jurisdictions, the sentence would be longer but that, we
15 respectfully submit, is an indication of the kind of maximum sentences that can
16 be imposed for these kind of offences and certainly in two domestic
17 jurisdictions.

18 So while ultimately it is of course a matter for the Trial Chamber to impose the
19 sentence that the Trial Chamber deems fit, if the Trial Chamber is guided
20 potentially by those examples and those kind of precedents and sentences
21 domestically, the maximum sentence that could be imposed in this case could
22 be one of around two years.

23 Taking into account early release provisions, having already spent one year in
24 custody, Mr Kilolo has already served the full amount of any potential
25 sentence that may be imposed, and a remand into custody would frustrate that

1 process going forward.

2 Finally, may we say this, there are of course a number of conditions that have
3 already been imposed by the Trial Chamber in granting Mr Kilolo and the
4 other defendants provisional release on 17 August of 2015. That was the last
5 decision in relation to provisional release. The conditions then that were
6 imposed by the Trial Chamber were to abide by all instructions and orders
7 from the Court. Mr Kilolo, we respectfully submit, has diligently complied
8 with all instructions and orders of the Court to attend court hearings, which he
9 has done as directed, without fail.

10 The second is to ensure that his most recent address is provided to the Court
11 and State authorities and not change address without notifying the Court.

12 The third is that he provide advance notice to the Court of any overnight travel
13 from the location from which he resides.

14 Fourth, not to contact any Prosecution witnesses in the Article 70 or Main Case.
15 And fifth, to refrain from making public statements directly or indirectly about
16 the case.

17 Now, those conditions that were imposed upon Mr Kilolo, we respectfully
18 submit should allay any concerns that the Trial Chamber may have as to
19 whether he will appear at any subsequent sentencing hearing in due course
20 and we would submit that those conditions should remain in force and will
21 achieve the desired outcome of the Trial Chamber in terms of being able to
22 move this case forward in an appropriate and proper way.

23 And those would be our respectful submissions.

24 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Powles.

25 Mrs Taylor, do you want to have the floor?

1 MS TAYLOR: Thank you, Mr President. If I may make a brief intervention
2 on a question of law. The Trial Chamber has throughout this trial iterated
3 that this is an Article 70 case, not an Article 5 case. So before turning to
4 Article 81(3), we should first look at the provisions which specifically govern
5 Article 70 cases, and that is Article 70 itself. And in subsection (3) it says, "In
6 the event of conviction, the Court may impose a term of imprisonment, not
7 exceeding five years, or a fine."
8 So the Trial Chamber clearly has the competence either to imprison someone or
9 not to do so. The article specifically envisages that there must be a range of
10 scenarios where someone can be prosecuted and convicted for Article 70 and
11 never spend a day in custody.
12 If that's the case, the Prosecution's interpretation of Article 81(3) simply cannot
13 apply because it would mean that every Article 70 defendant, upon conviction,
14 must be detained, which is incompatible with the fact that the Trial Chamber
15 must have that power to make a choice between a fine or a custodial sentence
16 after the sentencing phase.
17 So we respectfully submit that this interpretation, apart from the fact that it's
18 incompatible with the plain meaning and the use of the word "remains" is also
19 incompatible with the specific legal provisions which apply to Article 70
20 offences.
21 I therefore join the submissions of my colleagues that the applicable provisions
22 would be Article 58 and Rule 119, in which case the burden obviously rests
23 with the Prosecution to prove that the Trial Chamber's order of conditional
24 release no longer applies.
25 Similarly, in order to meet that burden, they would have to do so on the basis

1 of specific grounded evidentially-founded arguments and not simply on the
2 abstract fact that there has been a conviction today.

3 Thank you very much.

4 PRESIDING JUDGE SCHMITT: Thank you very much.

5 Mr Vanderpuye, do you want to respond? But if, please quickly.

6 MR VANDERPUYE: Mr President, I do, because I think, I think I can
7 probably clarify a few things.

8 Now, just based on what Ms Taylor just submitted, it's clear and I think quite
9 obvious, that the Prosecution submission in respect of the revocation of the
10 interim release status of those accused that are on interim release is not based
11 on some speculative or abstract fact. It is based upon the findings of this
12 Chamber in issuing a conviction for the crimes that were confirmed against
13 these accused for the violation of Article 70.

14 So it's not abstract, it is proven, because it was announced by this Chamber
15 only moments ago that that's what the Chamber's findings were with respect to
16 these accused.

17 That has to do with the application to revoke the provisional release status of
18 the accused, separate and apart from the arguments that we've advanced in
19 respect of Article 81(3)(a).

20 In respect of the revocation of the accused provisional release status, I think my
21 colleagues have pointed out something that is important. All of them,
22 seemingly uniformly, have recognized that this Chamber has not imposed a
23 sentence yet. Some have made submissions on sentencing, which I think at
24 this point are premature. But the point of the matter is that it is unknown
25 what the Chamber will do. And what is important is to guarantee the

1 Chamber the ability to impose a sentence which will be held on another day.
2 These accused need to be before the Court. So the fact that the sentence is
3 unknown is a factor which militates in support of our position concerning the
4 increased risk.

5 The assessment here isn't whether or not the Chamber is going to impose an
6 incarcerative or nonincarcerative sentence. It's whether the Chamber is going
7 to have an opportunity to impose a sentence, period, and that's what the
8 application concerns.

9 What we're after is to ensure the Chamber has the ability to impose a sentence,
10 whatever that sentence is going to be, based on the submissions of the parties
11 at a later date. And we don't want to be in a position down the road where
12 the accused have decided on advice, or otherwise, that it's in their best interest
13 not to appear before this Chamber for sentencing.

14 To counter my colleague's arguments, Mr Powles' arguments, concerning
15 turning to other tribunals concerning similar types of offences, there is no
16 tribunal that has dealt with this type of offence to the scale and extent that this
17 Chamber has just found that many of these accused have committed.

18 There is no parallel. There is no ICTY case or ICTR case that deals with 42
19 counts of offences against the administration of justice perpetrated by a single
20 accused, let alone three accused in this case that essentially the Chamber has
21 found have committed that many offences, in addition to Mr Babala's aiding
22 and abetting of the commission of at least two of those offences with
23 knowledge, we assert, of the broader plan, and Mr Arido's direct perpetration
24 of four of those offences in this case. There is no parallel.

25 It is presumptuous to assume that the Chamber in the face of those

1 circumstances will not impose an incarcerative sentence, particularly given the
2 findings that the Chamber has made concerning the seriousness of the offence.
3 We should not lose sight of the fact that the offences that this Chamber has
4 found were committed by these five accused occurred in the context of a trial
5 on charges of the most serious nature recognized by the international
6 community. That was a trial for war crimes and crimes against humanity that
7 Mr Bemba faced.
8 It's the most serious charges that a person could face in a criminal matter.
9 That's what these gentlemen have been convicted of interfering with,
10 deliberately, and aiding and abetting.
11 But that's what we're talking about here. So I think in terms of what the
12 Chamber's sentence will be and how the Chamber will arrive at that, I agree
13 with my colleagues that that hasn't been determined yet, but that's a separate
14 question than what is the risk of flight? What is the risk that the Chamber will
15 not have the chance to impose such a sentence? And the standard for that is
16 whether there is a possibility that that might occur, not whether there is a
17 probability that that might occur. And we would submit that the convictions
18 in and of themselves change that circumstance. It is a circumstance that was
19 not contemplated, could not have been contemplated at the time that these
20 accused were released pending the disposition of this trial.
21 And we would submit that the Chamber's verdict or decision of conviction
22 under Article 74 is a concrete change in circumstance in this case which the
23 Chamber should have regard to, considering that -- its own decision, and
24 considering the nature of the crimes. These gentlemen are convicted of crimes
25 which show that they do not respect the authority of this Court. When a

1 person interferes with a witness, bribes a witness, corruptly influences the
2 testimony of a witness, solicits false testimony before a court to the extent that
3 it has occurred and this Chamber has found occurred in the Bemba case, the
4 Main Case, that is evidence in and of itself that they're a bad risk to return for
5 sentencing, which would involve necessarily abiding by an order of this Court,
6 the same court who they thumbed their nose at when they committed the
7 crimes that this Chamber found.

8 So I think that in terms of, in terms of the revocation of the interim release
9 status, I think that clarifies the issue, I hope.

10 With respect to Article, the application of Article 81(3)(a), the language of that
11 provision is quite clear. Mr Gosnell read it. I mean it says essentially,
12 essentially, unless the Trial Chamber orders otherwise, a convicted person shall
13 remain in custody pending appeal. That's about as plain as it could be.

14 Are they convicted people? That's question number one. We would submit,
15 with the Chamber's Article 74 decision of conviction, yes, they're convicted
16 people.

17 Second question: Are they in custody? And the question is are they free to
18 leave? I would say they're not free to leave at this moment.

19 Is their presence in this courtroom a substantial interference with their freedom
20 of action? I would say yes, because they can't get up and walk out as we're
21 speaking now or as the Chamber is speaking now without leave of court.

22 To the extent they are compelled to be here, they are not here voluntarily, they
23 are here pursuant to an order of this Chamber that says you better be here or
24 else, and it's in their interest to be here otherwise they're going into detention.

25 So it is not as my learned friends might couch it, that they're here out of the

1 goodness of their heart. They're here because the Chamber has said that they
2 have to be here. Their appearance is therefore compelled. They cannot leave
3 the courtroom. They are in the Court's custody. They go nowhere unless
4 you say so. That's custody.

5 And the question then is: Does Article 81(3)(a) say that their custody should
6 be continued if they convicted? And the answer is yes. The language is
7 plain.

8 Mr Gosnell's reference to the further provision, I think he referenced Article
9 81(3)(c), is a separate provision because 81 -- 81(3) itself talks about the
10 condition or what transpires when a person is convicted. And that's as plain
11 as day.

12 Commentaries also, I should point out to the article itself in Mr Schabas's book
13 the International Criminal Court: A Commentary on the Rome Statute, first
14 edition, page 936 also acknowledges a general rule on detention pending
15 appeal.

16 In another book, an article, another book by my colleague Ms Struyven. An
17 article by Björn Elberling on Article 81 of the ICC Statute notes in particular,
18 and I'm going to quote this: "Article 81(3) contains the general rule for
19 convicted persons, namely, that they shall remain in custody or, where they
20 have been granted provisional release, again be taken into custody pending
21 appeal."

22 You'll find that in the book which is called Code of International Criminal Law
23 and Procedure, Annotated, first edition, Larcier publications at page 405.

24 So the application of Article 81(3) is quite clear. We've made a two-prong
25 application. One is we believe Article 81(3) applies and therefore mandates

1 that these accused are detained pending sentencing, which subsumes
2 pending -- rather, the other way around, pending appeal subsumes pending
3 sentencing. We've asked for a more narrow application.

4 And if the Chamber is not persuaded that Article 81(3) applies to those accused
5 that are on interim release, other than Mr Bemba in other words, then the
6 convictions themselves establish a sufficient basis upon which the Chamber
7 should revoke the interim release order.

8 I want to add also in respect to Mr Taku's arguments, and maybe I've got this
9 wrong and he'll correct me if I have, but he said essentially that we could not
10 rely on the conviction in making our submissions, which I would think, maybe
11 I've got it wrong, but that doesn't make much sense to me.

12 The conviction is rendered by this Chamber for a purpose. And if nobody can
13 rely on the conviction, least of all for the purposes of establishing whether the
14 accused should remain in custody, then the conviction is of no value until the
15 appeals judgment is rendered, which certainly cannot be the case.

16 The conviction has the full force and effect of the law of the Statute and of this
17 Court, and when the Chamber has rendered its Article 74 decision of
18 conviction, that person is convicted.

19 So, your Honour, I would say if the Chamber requires additional time to
20 consider the submissions of the parties, the Prosecution --

21 PRESIDING JUDGE SCHMITT: No, we don't need additional time.

22 MR VANDERPUYE: Very well then. Very well, Mr President. Then that
23 concludes my submissions. The only thing I would add, just to make it clear,
24 is that we've made, we've made two arguments here. And I would invite the
25 Chamber to make a decision based upon the first, which is the application of

1 Article 81(3), prior to considering the application of revocation of interim
2 release.

3 Thank you, Mr President.

4 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Vanderpuye.

5 Mr Taku is rising. I give you the floor, but I don't want a complete second
6 round, so to speak. But you have been addressed directly by Mr Vanderpuye
7 so I give you the floor. Please be short.

8 MR TAKU: Yes, your Honours. I think what is material at this point in time
9 for your Honours to make a determination is the question of the status of my
10 client and the others pending sentencing. And I say so for good reason
11 because we cannot presume in our circumstances that having -- after a
12 sentencing judgment -- sentencing, an appeal must therefore arise.

13 So reading the provisions of the law, as my colleague has done, to say that
14 before sentencing they must be remanded pending appeal, when at this point
15 in time we see -- we do not know what the sentencing will be and whether an
16 appeal will rely as a fact, your Honours, is clearly preposterous.

17 Secondly, we ask your Honours to look at the history of this case. When the
18 appeal of the Prosecutor against the provisional release succeeded before the
19 Appeals Chamber, the Appeals Chamber said, well, the appeal succeeds, the
20 matter is remanded to the Trial Chamber to continue, but we are not ordering
21 that they be remanded.

22 Within that period, your Honours, your Honours would clearly have seen that
23 although there were no constraining decisions, they appeared before your
24 Honours, even though they knew at that point in time that in considering the
25 application that was remanded to you, you could well have ordered a remand

1 at that time. Your Honours did not. Your Honours asked and got new
2 conditions for the provisional release, which the Pre-Trial Judge had granted to
3 continue. And they respect your Honours.
4 So if the Appeals Chamber at this point in time, when there was a clear
5 indication that the appeal against the provisional release had succeeded, and
6 that they could well be remanded, they came before your Honours, they didn't
7 escape. They didn't escape. And ever since they respected every order to be
8 here, your Honours.
9 The Prosecutor cannot cite the circumstance of a decision of this Court
10 conviction to say that it's enough for them to be remanded pending hearing,
11 not appeals. His submission goes to pending appeal. But the issue here is
12 pending sentencing, your Honours. So we rely on the manner in which the
13 matter was handled by Appeals Chamber. The decision of Appeals Chamber
14 in that circumstance, not to remand in custody. And the fact that they
15 voluntarily came, knowing that you could well have decided to remand them,
16 but they appeared in order to face the due process of the law.
17 So, your Honours, again, the submission of the Prosecutor is completely
18 misconceived, your Honour, and there is no address the fundamental issue that
19 must be considered in granting the application. We urge the Court, your
20 Honour, that he hasn't even responded to the issue of individualising the entire
21 process here, even though the people appeared, they were generally charged,
22 but the fundamental principle of criminal law is to individualise. It is tarring
23 everybody with the same brush, your Honours. You can't consider the
24 application in that context, your Honours. If we did that, miscarriage of
25 justice.

1 In that case, again I said it will, in a way, your Honours, prejudge the
2 sentencing hearing, your Honours, in which you will rely on the personal
3 circumstances of each convict. The Prosecutor has not brought application
4 before your Lordship individualising the case of each particular accused in
5 order to enable you to make an informed decision depending on each accused.
6 That has not been done, your Honours.

7 And that would be -- this collective, collective punishment that the Prosecutor
8 seeks also undermines the obligation that you are not going again to relitigate
9 the Main Case. He cannot cite the Main Case, what happened in the Main
10 Case, in this case on 29 September 2014 when we started this case. You said
11 you were not going. You will look at this case on the facts of this case as they
12 were.

13 Those statements you made about the administration of justice, your Honours,
14 are not the governing circumstances which he will present in due time. He
15 cannot rely on the finding, your Honours, of the Court to say it is because they
16 find it is serious enough on the basis of your finding alone to say that he has to
17 make his case. For that he hasn't made it, your Honour. So I urge the Court
18 to deny the application.

19 PRESIDING JUDGE SCHMITT: Thank you, Mr Taku.

20 I think, Mr Djunga, I give you also the floor now. But as I also already said to
21 Mr Taku, I would very much appreciate if you would keep it short.

22 MR DJUNGA: (Interpretation) Thank you, Mr President. I'll be very brief,
23 indeed extremely brief.

24 Mr President, I believe that the Prosecutor's application puts all of us in a very
25 uncomfortable situation. A criminal trial is not a game of hide and seek. The

1 Prosecutor, I may summarise, is simply asking for the following of you, and
2 I'm trying to encapsulate everything that he's trying to say. He's saying detain
3 all these accused persons because there is a risk that they may not appear
4 during the sentencing hearing. That's all they're asking for.
5 What does this mean? It means that you must have an opportunity to assess
6 that risk. Maybe the Prosecutor has information today to the effect that these
7 people will not come or that Mr Kilolo will not show up.
8 But he must provide to you and to us that information. He cannot just stand
9 up here, Mr President, and claim that you should detain him or them simply
10 because there is a flight risk.
11 What is the risk, Mr President? How do you assess that risk? The onus of
12 proof is on the Prosecutor and Maître Kilenda said that clearly. He must
13 provide sufficient evidence that they will not show up.
14 How can you assess this risk, Mr President? That will be all. Thank you.
15 PRESIDING JUDGE SCHMITT: Thank you very much.
16 The Chamber will now -- Mr Mangenda -- I know that you will keep it short.
17 I know you. Again, you know, it's relatively late today, so I apologise. Of
18 course, Mr Gosnell. But I know of course that you will keep it short too.
19 MR GOSNELL: My own liberty may be at stake, Mr President, if I keep being
20 referred to as "Mr Mangenda".
21 Mr President, I promise I will not detain you for more than 90 seconds and that
22 I will only address two issues that were only raised in reply by the Prosecution.
23 The first issue is I wonder whether it's entirely fair to have precedents being
24 cited in support of a position only in a reply when it was perfectly foreseeable
25 that those precedents could have been cited during the first round of

1 submissions?

2 The second point, Mr President, is the submission by the Prosecution that the
3 standard to be applied in respect of the existence of any of the Article 58(1)(b)
4 conditions is, and I quote, "a possibility, possibility that those conditions might
5 occur."

6 Mr President, I'll only say that that oversimplifies the standard, and I would
7 direct your Honours' attention to paragraph 22 of your own decision, 1151,
8 which reflects a more complex balancing exercise taking into account, yes,
9 indeed, that there may be in one respect a higher risk, but at the same time
10 there is an analysis that your Honours would engage in that goes beyond
11 merely assessing the possibility of the occurrence of one of the three factors.

12 Thank you, Mr President.

13 PRESIDING JUDGE SCHMITT: Thank you, Mr Gosnell, and also for taking
14 my misunderstanding and my misspelling lightly, so to speak.

15 The Chamber will now retire to deliberate on the Prosecution request. Please
16 stay in the courtroom or close by so that we can reconvene quickly.

17 THE COURT USHER: [16:42:30] All rise.

18 (Recess taken at 4.42 p.m.)

19 (Upon resuming in open session at 5.01 p.m.)

20 THE COURT USHER: [17:01:47] All rise.

21 PRESIDING JUDGE SCHMITT: The Chamber will now issue its oral decision
22 on the Prosecution's request to remand the accused and place them into
23 custody in case of conviction or in the case of the conviction today.

24 Today the Prosecution requested that four of the convicted persons are
25 remanded. The Chamber does not consider that Article 81(3)(a) of the Statute

1 applies in the present circumstances. The four convicted persons at issue
2 were not in custody when the judgment was rendered, so they do not,
3 quotation of the provision, "remain in custody pending an appeal."
4 Furthermore, there is no appeal pending at this stage as the provision requires.
5 The Chamber recalls that in its decision of 17 August 2015 regarding interim
6 release, it ordered the continued release of Mr Kilolo, Mr Mangenda, Mr Babala
7 and Mr Arido under precondition that they abide by the conditions imposed
8 by the Chamber in this decision.
9 These conditions included, inter alia, to follow all instructions from the Court,
10 including an order from this Chamber to be present in The Hague at their trial.
11 The Chamber has considered the arguments made by the parties and noting
12 Articles 60(3) and (5) and Article 61(11) of the Statute takes the following
13 considerations into account:
14 First, Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido at no point in time
15 have shown any indication that they will not face the trial or attend hearings
16 scheduled by the Chamber. All convicted persons have been cooperating
17 with the Court and complying with the Chamber's orders and its decisions in
18 this respect.
19 Second, the Chamber notes that most of the convicted persons currently live
20 with their families and have established a life in their current locations. They
21 are integrated in their places of residency, all of which militates against them
22 suddenly fleeing.
23 The Chamber considers this to be an encouraging factor when it comes to the
24 question if they will continue to abide by the Chamber's orders during the
25 sentencing phase.

1 Third, the Chamber takes note that the maximum sentence for offences under
2 Article 70 is a term of imprisonment of five years or a fine or both.

3 Further, the Chamber notes that Mr Kilolo, Mr Mangenda, Mr Babala and
4 Mr Arido have already spent 11 months in custody.

5 For the reasons above, there is no evidence that the convicted persons will
6 attempt to flee the jurisdiction of the Court, even knowing that they have been
7 convicted.

8 The Chamber is persuaded that the aforementioned convicted persons will
9 continue to abide by all instructions and orders from this Chamber and the
10 Court in general throughout the sentencing phase.

11 Accordingly, the Chamber does not consider it necessary or that it appears to
12 the Chamber necessary to issue an order of detention to secure the convicted
13 persons' presence during sentencing.

14 The Chamber, therefore, rejects the Prosecution's request to remand Mr Kilolo,
15 Mr Mangenda, Mr Babala and Mr Arido.

16 This concludes the oral decision of the Chamber.

17 And this also concludes the proceedings for today. Thank you very much to
18 everybody. The Chamber will issue a decision setting out a future timeline
19 shortly.

20 THE COURT USHER: [17:06:43] All rise.

21 (The hearing ends in open session at 5.06 p.m.)

22