

**Cour
Pénale
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**International
Criminal
Court**

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No. ICC-01/05-01/08 OA 2

Date: 2 December 2009

THE APPEALS CHAMBER

Before:
Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR

v.

JEAN-PIERRE BEMBA GOMBO

Public Redacted Version

Judgment

on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo
Mr Nkwebe Liriss
Mr Karim A.A.Khan

Legal Representative of Victims
Ms Marie Edith Douzima-Lawson

The Office of Public Counsel for victims
Ms Paolina Massidda

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor of 14 August 2009 (ICC-01/05-01/08-476) against the decision of Pre-Trial Chamber II, entitled “Prosecution’s Appeal against ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (ICC-01/05-01/08-475),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Pre-Trial Chamber II of 14 August 2009 entitled “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa” is reversed.

REASONS

I. KEY FINDINGS

1. The Pre-Trial Chamber in assessing whether the requirements under article 58 (1) of the Statute continue to be met may pursuant to article 60 (3) of the Statute, second sentence, modify its ruling if it is satisfied that changed circumstances so require. The requirement of “changed circumstances” imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.

2. In granting conditional release it is necessary to specify the appropriate conditions that make conditional release feasible, identify the State to which Mr

Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. On 3 July 2008, Mr Jean-Pierre Bemba Gombo (hereinafter: “Mr Bemba”) was surrendered to the seat of the Court where his first appearance took place before the Pre-Trial Chamber on 4 July 2008.¹

4. On 20 August 2008, Pre-Trial Chamber III with Judge Hans-Peter Kaul, acting as Single Judge, rendered the “Decision on application for interim release” (ICC-01/05-01/08-80-Anx, hereinafter: “Decision of 20 August 2008”) rejecting Mr Bemba’s first application for interim release² pursuant to article 60 (2) of the Rome Statute (hereinafter: “Statute”) and ordering his continued detention. This decision was subsequently appealed by the Defence. The Appeals Chamber rendered the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’” (ICC-01/05-01/08-323, hereinafter: “Judgment of 16 December 2008”) confirming the Decision of 20 August 2008.

5. On 16 December 2008, Pre-Trial Chamber III with Judge Ekaterina Trendafilova acting as Single Judge, rendered the “Decision on Application for Interim Release” (ICC-01/05-01/08-321, hereinafter: “Decision of 16 December 2008”) rejecting Mr Bemba’s second application for interim release and ordering his continued detention.

6. On 14 April 2009, Pre-Trial Chamber II³ with Judge Ekaterina Trendafilova, acting as Single Judge, rendered the “Decision on Application for Interim Release” (ICC-01/05-01/08-403, hereinafter: “Decision of 14 April 2009”) rejecting Mr

¹ ICC-01/05-01/08-T-3-ENG.

² ICC-01/05-01/08-49 and annexes.

³ On 19 March 2009 the Presidency merged Pre-Trial Chamber III with Pre-Trial Chamber II and assigned the situation in the Central African Republic to Pre-Trial Chamber II. See ICC-01/05-01/08-390.

Bemba's third application for interim release and once again ordering his continued detention.

7. On 15 June 2009, the Pre-Trial Chamber issued the "Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" (ICC-01/05-01/08-424, hereinafter: "Decision of 15 June 2009") confirming the charges against Mr Bemba. The Chamber decided that there was sufficient evidence to establish substantial grounds to believe that Mr Bemba is criminally responsible under article 28 (a) of the Statute for crimes against humanity and war crimes.

8. In light of the approaching deadline of 14 August 2009 for the next review of Mr Bemba's detention under article 60 (3) of the Statute and Rule 118 (2) of the Rules of Procedure and Evidence, Pre-Trial Chamber II with Judge Ekaterina Trendafilova acting as Single Judge, convened a hearing on 29 June 2009 pursuant to rule 118 (3) of the Rules of Procedure and Evidence.

9. At the hearing the Defence requested the interim release of Mr Bemba, citing in support "changed circumstances". The said circumstances included: (i) that the charges recently confirmed against Mr Bemba significantly reduced his responsibility and consequently, if convicted, he would face a lighter sentence⁴; (ii) that he would never abscond because of his personal security situation⁵; (iii) that Mr Bemba's one year detention would be deducted from a possible sentence, thus reducing the likelihood of him absconding⁶; (iv) his readiness to cooperate with the Prosecutor and to surrender voluntarily⁷; and (v) the change in Mr Bemba's financial situation due to the seizure and freezing of all of his assets.⁸

10. In the course of the hearing the Defence also advanced twenty "personal guarantees"⁹ should interim release be granted and requested that Mr Bemba be released to one of the following States, namely, the Kingdom of Belgium, the French

⁴ ICC-01/05-01/08-T-13-ENG WT, p. 13, lines 7-23; p. 14, lines 3-6 and 20-22; see also p. 42, lines 1-7.

⁵ ICC-01/05-01/08-T-13-ENG WT, p. 17, lines 2-24; p.18, lines 20-22.

⁶ ICC-01/05-01/08-T-13-ENG WT, p. 42, lines 8-10.

⁷ ICC-01/05-01/08-T-13-ENG WT, p. 19, lines 21-22; p.43, lines 4-5.

⁸ ICC-01/05-01/08-T-13-ENG WT, p. 21, lines 18-21.

⁹ ICC-01/05-01/08-T-13-ENG WT, p. 25, lines 3 until p. 26, line 23.

Republic, or the Republic of Portugal. Later, in a related filing, the Defence requested that the Federal Republic of Germany, the Italian Republic and the Republic of South Africa be added to the list of States that Mr Bemba wished to be released to.¹⁰

11. Toward the end of the hearing and in closed session, Mr Bemba was given an opportunity to address the Single Judge directly. He reiterated his reasons as to why he would not abscond if released and pleaded to be able to resume his family responsibilities.¹¹ At the close of the hearing the Pre-Trial Chamber invited the States listed by the Defence, as well as the host State to submit their observations pursuant to regulation 51 of the Regulations of the Court.

12. On 2 July 2009, the Prosecutor and the Defence filed supplementary written submissions.¹²

13. On 13 July 2009, the Kingdom of Belgium, the French Republic and the Republic of Portugal submitted their observations.¹³

14. On 22 July 2009, the Office of Public Counsel for Victims (hereinafter: "OPCV") submitted observations.¹⁴

15. On 24 July 2009, the Kingdom of Belgium submitted additional observations.¹⁵ On 29 July 2009, the Republic of Portugal submitted additional observations.¹⁶ Observations by the Federal Republic of Germany and the Italian Republic were submitted on 7 August 2009.¹⁷ Submissions by the Republic of South Africa were submitted on 12 August 2009.¹⁸

16. On 14 August 2009, the Pre-Trial Chamber issued the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of

¹⁰ See ICC-01/05-01/08-433 dated 2 July 2009.

¹¹ See Impugned Decision, paras. 24 and 25.

¹² "Prosecution's Additional Observations on Interim Release pursuant to Rule 118 (3) of the Rules of Procedure and Evidence", ICC-01/05-01/08-431 and "Written Submissions Supplementing the Oral Submissions Made by the Defence at the Hearing of 29 June 2009", ICC-01/05-01/08-432-tENG.

¹³ ICC-01/05-01/08-448-Conf-Anx1, Anx2 and Anx3.

¹⁴ ICC-01/05-01/08-457.

¹⁵ ICC-01/05-01/08-461.

¹⁶ ICC-01/05-01/08-465.

¹⁷ ICC-01/05-01/08-472.

¹⁸ ICC-01/05-01/08-473.

Germany, the Italian Republic, and the Republic of South Africa” (ICC-01/05-01/08-475, hereinafter: “Impugned Decision”), deciding, *inter alia*, that Mr Bemba “be granted conditional release, until decided otherwise” and “that the implementation of this decision be deferred [...]”.¹⁹

B. Proceedings on appeal

17. On 14 August 2009, the Prosecutor (hereinafter: “the Appellant”) filed the “Prosecution’s Appeal against ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”²⁰.

18. On 18 August 2009, the “Observations of the Legal Representatives of the Victims on the Participation of the Victims in the Interlocutory Appeal Filed by the Office of the Prosecutor under Article 81(2)(b) [sic] of the Rome Statute” (“Victims’ Observations and Application”)²¹ were filed and registered on 19 August 2009.

19. On 24 August 2009, the Appellant filed confidentially and *partly ex parte* the “Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo” (ICC-01/05-01/08-483-Conf-Exp) (hereinafter: “Document in Support of the Appeal”),²² and requested, *inter alia*, suspensive effect of the appeal (hereinafter: “Request for Suspensive Effect”).

20. On 26 August 2009, the Appeals Chamber issued the “Order on the Filing of responses to the ‘Observations of the Legal Representatives of the Victims on the Participation of the Victims in the Interlocutory Appeal Filed by the Office of the Prosecutor under Article 81 (2) (b) [sic] of the Rome Statute’ and the Prosecutor’s request for suspensive effect” (ICC-01/05-01/08-481, hereinafter: “Order of 26 August 2009”) which designated 31 August 2009 as the time limit for the parties to respond to the Victims’ Observations and Application and for the Defence to respond to the Request for Suspensive Effect.

¹⁹ Impugned Decision, p. 35.

²⁰ ICC-01/05-01/08-476.

²¹ ICC-01/05-01/08-479-tENG.

²² A public redacted version was subsequently registered on 25 August 2009 (ICC-01/05-01/08-485).

21. On 28 August 2009, Mr Bemba filed the “Application for extension of time limit in accordance with regulation 35 of the Regulations of the Court” (ICC-01/05-01/08-487-tENG, hereinafter: “Application for Extension of Time”) and registered on 31 August 2009, in which Mr Bemba requested an extension of the time limit, stipulated in the Order of 26 August 2009, to an indefinite future date when funds would be available to ensure the effective functioning of the Defence team.

22. On 31 August 2009, the Appeals Chamber rendered the “Decision on the Request by Mr Jean-Pierre Bemba Gombo for an Extension of the Time Limit” (ICC-01/05-01/08-490, hereinafter: “Decision of 31 August 2009”) in which the application was rejected. The reasons for this decision are given below in this judgment.

23. On 31 August 2009, the Appellant filed the “Prosecution’s Response to the Observations of the Legal Representatives of Victims on their Participation in the Prosecution Appeal against the Decision on the Interim Release of Jean-Pierre Bemba Gombo” (ICC-01/05-01/08-489). On the same day, the Legal Representatives of Victims filed the “Réponse des représentants légaux des victimes sur le « Prosecution’s Document in support of the Appeal against Decision on the Interim Release of Jean-Pierre Bemba Gombo » déposé le 24 août 2009” (ICC-01/05-01/08-492)²³ and Mr Bemba filed the “Response to the Prosecutor’s Document in Support of the Appeal and to his Request for Suspensive Effect” (ICC-01/05-01/08-493).

24. On 2 September 2009, the Appeals Chamber ordered the Registrar to reclassify the “Response to the Prosecutor’s Document in Support of the Appeal and to his Request for Suspensive Effect” as confidential and ordered Mr Bemba to file a public redacted version of the document by 4 September 2009.²⁴

25. On 3 September 2009, Mr. Bemba filed the “Submission by the Defence of the Corrected Version and Public Redacted Version of its Response to the Prosecutor’s Document in Support of the Appeal and to his Request for Suspensive Effect, filed on

²³ This filing was later rejected by the Appeals Chamber in its “Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa” (ICC-01/05-01/08-500).

²⁴ “Order on the Reclassification as Confidential of the Response to the Document in Support of the Appeal and on the Filing of a Public Redacted Version”, ICC-01/05-01/08-498-Conf.

31 August 2009” (ICC-01/05-01/08-503-Conf-tENG) with confidential Annex A (ICC-01/05-01/08-503-Conf-AnxA, hereinafter: “Response to the Document in Support of the Appeal”) and public redacted Annex B (ICC-01/05-01/08-503-AnxB).

26. On 3 September 2009, the Appeals Chamber rendered the “Decision on the Request of the Prosecutor for Suspensive Effect” (ICC-01/05-01/08-499) granting the Request for Suspensive Effect in respect of operative paragraph (a) of the Impugned Decision.

27. On the same day, the Appeals Chamber also rendered the “Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (ICC-01/05-01/08-500), which permitted the victims to present their submissions in the appeal by 7 September 2009. The reasons for this decision were subsequently rendered on 20 October 2009.²⁵

28. On 7 September 2009, the “Soumissions des représentants légaux des victimes concernant l'appel interjeté par le Bureau du Procureur à l'égard de la décision portant sur la mise en liberté provisoire de Jean-Pierre Bemba Gombo” was filed (ICC-01/05-01/08-507, hereinafter: “Victims’ Observations”). On 8 September 2009, the legal representatives of the victims filed a “*Corrigendum* to ‘Submissions of the Legal Representatives of the Victims concerning the Appeal lodged by the Office of the Prosecutor regarding the Decision on the Interim Release of Jean-Pierre Bemba Gombo’ and Annex” (ICC-01/05-01/08-507-Corr-tENG, hereinafter: “Corrigendum to the Victims’ Observations”, and ICC-01/05-01/08-507-Corr-Anx-tENG).

29. On 14 September 2009, the Appellant²⁶ and the Defence²⁷ filed their respective responses to the Victims’ Observations.

²⁵ “Reasons for the ‘Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (ICC-01/05-01/08-566).

²⁶ ICC-01/05-01/08-519.

²⁷ ICC-01/05-01/08-521-tENG.

30. On 14 September 2009, the organisation *Association pour la promotion de la démocratie et du développement de la République démocratique du Congo* (hereinafter: “Aprodec”) filed an application for leave to submit observations pursuant to rule 103 of the Rules of Procedure and Evidence.²⁸ On 16 September 2009, Aprodec filed a corrigendum to the application entitled “*Corrigendum, Application for Leave to Intervene as Amicus Curiae in the Case of the Prosecutor v. Jean Pierre Bemba Gombo, Pursuant to Rule 103 of the Rules of Procedure and Evidence*” (ICC-01/05-01/08-522-Corr-tENG).

31. On 29 September 2009, Aprodec filed a “Supplementary Note in Support of the Application for Leave to Intervene as *Amicus Curiae* in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Pursuant to Rule 103 of the Rules of Procedure and Evidence” (ICC-01/05-01/08-538-tENG). On 6 October 2009, the Appellant filed his response²⁹ to the application opposing the participation of Aprodec in the appeal.

32. On 9 November 2009, the Appeals Chamber rendered the “Decision on the application of 14 September 2009 for participation as an amicus curiae” (ICC-01/05-01/08-602) rejecting the request for participation by Aprodec in the appeal.

III. REASONS FOR THE DECISION OF 31 AUGUST 2009

33. In its application dated 28 August 2009 (registered on 31 August 2009) the Defence for Mr Bemba requested an extension of time for the submission of its response to the Document in Support of the Appeal pursuant to regulation 35 of the Regulations of the Court. The basis for the request was that a decision authorising the payment of €36,260.00 had not been implemented, resulting in members of the Defence team being unmotivated to work since they were not being paid. The Defence requested that the Appeals Chamber extend the time limit for the submission of its response to the Document in Support of the Appeal to an indefinite date in the future, until “the time the Registry estimates that the funds necessary for the effective and efficient functioning of the Defence Team will become available.”

²⁸ “Demande d’autorisation d’intervenir comme Amicus Curiae dans l’Affaire le Procureur c. Jean Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour”, ICC-01/05-01/08-522.

²⁹ “Prosecution’s Response to « Demande d’autorisation d’intervenir comme Amicus Curiae dans l’Affaire le Procureur c. Jean Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour »”, ICC-01/05-01/08-544.

34. Regulation 35 of the Regulations of the Court provides that “[t]he Chamber may extend or reduce a time limit if good cause is shown”. In the view of the Appeals Chamber, a time limit requires, by its very terms, a definite date. The Appeals Chamber is not persuaded by the Defence’s argument that because the Defence Team was unmotivated the appeals proceedings should be delayed indefinitely. The argument does not demonstrate good cause, justifying an extension of the time limit. Thus, in its “Decision on the Request by Mr Jean-Pierre Bemba Gombo for an Extension of the Time Limit” dated 31 August 2009, the Appeals Chamber rejected the application.

IV. PRELIMINARY PROCEDURAL ISSUES

A. The admissibility of the appeal

35. The Defence, in its Response to the Document in Support of the Appeal, requests the Appeals Chamber to dismiss the appeal *in limine* on the basis that the appeal is premature. The Defence argues that the Impugned Decision is not a final decision on interim release since the Pre-Trial Chamber deferred determination of the conditions restricting liberty.³⁰

36. The Appeals Chamber finds no merit in the argument of the Defence and, for the following reasons, dismisses the request. Under article 82 (1) (b) of the Statute, either party may appeal “a decision granting or denying release of the person being investigated or prosecuted”. The Appeals Chamber considers the Impugned Decision to be such a decision because by its terms, it granted the conditional release of Mr Bemba. The fact that implementation of the decision has been deferred does not negate the fact that a determination on release has been made. There is therefore no ground for declaring the appeal inadmissible. The Impugned Decision is a decision on release and as such the Appellant may, as a matter of right, lodge his appeal.

B. The corrigendum to the Victims Observations

37. As noted in paragraph 28 above, on 8 September 2009 the legal representatives of the victims filed a Corrigendum to the Victims’ Observations together with an annex. The legal representatives explained that paragraph 15 of the Victims’

³⁰ Response to the Document in Support of the Appeal, paras. 3-9.

Observations was missing a final sentence and its corresponding footnote. The legal representatives then integrated the missing sentence and footnote into the relevant paragraph of the Victims' Observations and submitted same as an annex to the Corrigendum to the Victims' Observations.

38. The Appeals Chamber considers that the purpose of corrigenda is to correct typographical errors. A corrigendum should provide a list of the errors contained in the original document and their specific location within that document, together with the corresponding corrections. A corrigendum may not be used to add or alter the substance of the submissions made in a document. Otherwise, corrigenda could be used by the participants to circumvent time or page limits stipulated in the legal instruments of the Court or by a Chamber.

39. With this in mind, the Appeals Chamber finds that the Corrigendum to the Victims' Observations together with its annex does not conform to the purpose of corrigenda as defined in the paragraph above. The legal representatives, by adding a sentence and a footnote to their filing, have effectively supplemented their submissions without the leave of the Appeals Chamber instead of merely correcting typographical errors in their filing. For these reasons, the Appeals Chamber rejects the Corrigendum to the Victims' Observations together with its annex.

V. MERITS

A. First ground of appeal

40. As his first ground of appeal, the Appellant submits that the Pre-Trial Chamber erred in granting Mr Bemba conditional release on the basis of a "substantial change of circumstances".³¹

1. Relevant part of the Impugned Decision

41. In the Impugned Decision, the Pre-Trial Chamber recalled that article 58 (1) of the Statute required the Chamber to (a) ascertain that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court (article 58 (1) (a) of the Statute), and (b) be satisfied that continued detention appears

³¹ Document in Support of the Appeal, para. 24.

necessary: (i) to ensure the person's appearance at trial; or (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances (article 58 (1) (b) (i) to (iii) of the Statute).³²

42. In relation to the requirement under article 58 (1) (a) of the Statute, the Pre-Trial Chamber established that in light of its recent Decision of 15 June 2009 in which the Chamber found that there were substantial grounds to believe that Mr Bemba was criminally responsible under article 28 (a) of the Statute for two counts of crimes against humanity and three counts of war crimes, the requirement of article 58 (1) (a) of the Statute continued to be satisfied.³³

43. Turning to the requirement of article 58 (1) (b) (i) the Pre-Trial Chamber recalled that in its Decision of 14 April 2009 the Chamber determined that the risk of Mr Bemba absconding was likely because the charges he faced were "various and of such gravity that they could result in multiple convictions leading to an overall lengthy sentence." This factor considered with other existing factors such as Mr Bemba's international ties, international contacts and political position, which could provide him with the means to flee, and the proximity of the date for rendering the decision on whether to confirm the charges against him, made the risk of him absconding more likely.³⁴

44. In the Impugned Decision, the Pre-Trial Chamber stated that it "remains of the view that Mr Jean-Pierre Bemba Gombo maintains his political and professional position" and it "continues to consider that [he] benefits from international contacts and ties." With regard to the charges confirmed, the Pre-Trial Chamber held:

[...] the charges confirmed holding Mr Jean-Pierre Bemba responsible within the meaning of article 28 (a) of the Statute may still result in a conviction leading to an overall lengthy sentence. Bearing in mind that the potential length of sentence could constitute an incentive for [him] to abscond, the [Pre-Trial Chamber] is nonetheless of the view that this factor cannot in itself serve to justify long periods of pre-trial detention. The [Pre-Trial Chamber], in

³² Impugned Decision, para. 39.

³³ Impugned Decision, paras. 46 to 49.

³⁴ Impugned Decision, para. 53.

addition, stresses that Mr Jean-Pierre Bemba still benefits from the presumption of innocence [...].³⁵

45. In addressing the argument of the Defence that Mr Bemba's arrest deprived him of his opportunity to prove that he would appear voluntarily, the Pre-Trial Chamber observed that this same argument had been raised before, and the Chamber in its Decision of 20 August 2008, decided that the argument was of a hypothetical nature lacking any concrete evidence. This finding was subsequently confirmed by the Appeals Chamber. In relation to this factor, the Pre-Trial Chamber reiterated that it "cannot build [its] findings solely on a hypothetical argument. But, bearing in mind some developments related to the present proceedings, [the Chamber] is of the view that it could be assessed with all other relevant factors of the case taken together."³⁶

46. Likewise, with respect to the Defence's argument on the financial situation and resources of Mr Bemba, which it argued had changed due to the seizure and freezing of all of Mr Bemba's assets, the Pre-Trial Chamber re-stated its finding in the Decision of 14 April 2009, that "regardless of the weight to be given to the Defence's argument, the [Chamber's] determination will not be confined to this specific factor."³⁷

47. At this juncture, the Pre-Trial Chamber adduced five additional factors, which in its view, were indicative of new circumstances which arose after the Decision of 14 April 2009 and which were worthy of consideration. These additional factors were identified and assessed as follows: (i) *Mr Bemba's good behaviour in detention*. Mr Bemba was found to have "shown good behaviour in detention and has not tried to interfere with the proceedings before this Court in any way."³⁸ This finding was based on six confidential reports of the Registrar which address the monitoring of Mr Bemba's non-privileged telephone communications between the period 3 July 2008 until 19 January 2009; (ii) *Mr Bemba's conduct during his 24 hour release on 8 July 2009*. Mr Bemba was found to have "cooperated fully with the Court and the national authorities of The Kingdom of the Netherlands and of the Kingdom of Belgium" and "respected all the conditions set by [the Chamber] and returned to the seat of the

³⁵ Impugned Decision, para. 59.

³⁶ Impugned Decision, para. 61.

³⁷ Impugned Decision, para. 62.

³⁸ Impugned Decision, para. 64.

Court, complying with [the Chamber's] order"³⁹; (iii) *Mr Bemba's renewed assurance at the Hearing of 29 June 2009 to cooperate with the Court and to appear at trial voluntarily*. The Pre-Trial Chamber held that "this statement is not *per se* sufficient to grant the suspect interim release. However, the Chamber "accepts [Mr Bemba's] *bona fide* intention to appear at trial and shall assess this factor alongside other factors"⁴⁰; (iv) *Mr Bemba's statement at the Hearing of 29 June 2009 regarding his political career plans and his submission that he would not set aside those past "years of sacrifice" and be a fugitive*. The Pre-Trial Chamber held that "this is a factor which carries some weight when considering whether Mr. Jean-Pierre Bemba has a motive to abscond"⁴¹; and lastly (v) *Mr Bemba's strong family ties*. The Pre-Trial Chamber, having been informed of the importance of Mr Bemba remaining in contact with his family, which is exemplified by the authorisation to have communications with his family outside regular hours⁴², found that Mr Bemba's family situation "forms a factor which in [the Chamber's] opinion makes it more difficult for him to abscond."⁴³

48. The Pre-Trial Chamber concluded its analysis at paragraph 69 of the Impugned Decision as follows:

In weighing all factors outlined above, the [Pre-Trial Chamber] is satisfied that the entirety of factors set out in paragraphs 58 to 68 reflect a substantial change of circumstances since the issuance of the 14 April 2009 Decision. In reaching her finding, the Single Judge did not rely on one single factor but considered all factors collectively. This change in circumstances requires the [Pre-Trial Chamber] to modify the previous ruling ordaining Mr Jean-Pierre Bemba's detention. Thus, having regard to the entire range of factors, and having weighed up all factors, the [Pre-Trial Chamber] considers that the condition of article 58(1)(b)(i) of the Statute is not satisfied any longer.

49. In relation to the Pre-Trial Chamber's findings on whether the requirement of article 58 (1) (b) (ii) had been satisfied, the Chamber dismissed the argument of the Prosecutor and a similar argument of the legal representatives of victims', that if released Mr Bemba could exert pressure on witnesses and victims. The Chamber held that such arguments reflect "a general concern rather than an apprehension linked to

³⁹ Impugned Decision, para. 65.

⁴⁰ Impugned Decision, para. 66.

⁴¹ Impugned Decision, para. 67.

⁴² ICC-01/05-01/08-429-Conf-Exp, pages 3-4, and annexes.

⁴³ Impugned Decision, para. 68.

any specific act or conduct of Mr Bemba himself".⁴⁴ At paragraphs 74 and 75 of the Impugned Decision, the Chamber concluded as follows:

74. Paying due regard to the particular circumstances of the present case, the [Pre-Trial Chamber] is not convinced that Mr Jean-Pierre Bemba would interfere with witnesses or victims. The identities of the victims have not been disclosed to the Defence, a fact which makes Mr Jean-Pierre Bemba's interference unlikely. Even though the identities of 21 witnesses have been disclosed to the Defence, Mr Jean-Pierre Bemba has not tried to contact or threaten any of them or even attempted to obstruct or endanger the investigation or court proceedings during the entire year of pre-trial detention. The Chamber, in exercising its obligations under article 68(1) of the Statute, had ordered that Mr Jean-Pierre Bemba's non-privileged telephone communications be monitored by the Registry over a period of several months. The reports of the Registrar have shown that at no point in time threats to victims or witnesses emanated from Mr Jean-Pierre Bemba. This prompted the Registrar to terminate the monitoring of non-privileged telephone calls.

75. Thus, the [Pre-Trial Chamber] concludes that it seems unlikely that Mr Jean-Pierre Bemba's release would endanger witnesses or victims or lead to the obstruction or endangerment of the investigation or the court proceedings. In light of the aforesaid, the [Pre-Trial Chamber] therefore concludes that the condition of article 58(1)(b)(ii) of the Statute is also not met.

2. Arguments of the Appellant

50. In support of the first ground of appeal, the Appellant argues that in assessing whether or not 'changed circumstances' required a modification of its prior ruling the Pre-Trial Chamber relied on nine factors to justify conditional release. However, in his view, at least seven of these factors "are not changed circumstances" and include: (i) the gravity of the charges against Mr Bemba and in the event of a conviction the overall length of the sentence; (ii) the "political and professional position" of Mr Bemba as well as his "international contacts and ties"; (iii) Mr Bemba's financial position and resources; (iv) Mr Bemba's purported offer to surrender at some time prior to his arrest; (v) Mr Bemba's professed willingness to cooperate and appear voluntarily; (vi) Mr Bemba's unwillingness to set aside his "years of sacrifice" by becoming a fugitive, which would end his political aspirations; and (vii) Mr Bemba's strong family ties and the serious impact of his detention on the lives of his wife and children. The Appellant contends that the facts underlying these seven factors existed

⁴⁴ Impugned Decision, para. 72.

prior to the Pre-Trial Chamber's Decision of 14 April 2009 and have not changed. Moreover, these factors were considered by the Chamber in previous decisions denying interim release "as factors in favour of continued detention".⁴⁵

51. In addition, the Appellant argues that the Pre-Trial Chamber's reliance on Mr Bemba's exemplary behaviour whilst in custody and his conduct during his 24-hour release from prison on 8 July 2009, as evidence of changed circumstances justifying conditional release, is erroneous. Whilst acknowledging that these two factors "arguably arose after the Decision of 14 April 2009"⁴⁶, the Appellant contends that good behaviour whilst in detention should neither be rewarded by release nor construed as a factor that minimises the "potential risk of flight or obstruction of justice outside of detention".⁴⁷ Furthermore, the Appellant asserts that during Mr Bemba's 24-hour release from prison, he was [REDACTED] therefore his return to the seat of the Court was "hardly remarkable" and "certainly not probative of the likelihood that if released he will not flee or obstruct the pending case". Also in the Appellant's view, [REDACTED].⁴⁸

52. Lastly, the Appellant argues that the Pre-Trial Chamber's dismissal of allegations concerning prior interference with witnesses by the Defence amounted to a misappraisal of a previous circumstance that demonstrated the possibility that Mr Bemba could obstruct justice. The Appellant states that the Pre-Trial Chamber had previously noted the "specific allegations of Defence interference with Prosecution witnesses" which "justified concerns that the Accused might use his authority to exert pressure to obstruct and endanger the Court's proceedings."⁴⁹ In the Appellant's contention, these findings were based on the same evidence which the Pre-Trial Chamber rejected in the Impugned Decision. Finally, the Appellant notes that the Pre-Trial Chamber's conclusion that Mr Bemba would not interfere with witnesses and victims "has generated confusion and concerns on the part of victims and witnesses."⁵⁰

⁴⁵ Document in Support of the Appeal, para. 26.

⁴⁶ Document in Support of the Appeal, para. 27.

⁴⁷ Document in Support of the Appeal, para. 28.

⁴⁸ Document in Support of the Appeal, para. 29.

⁴⁹ Document in Support of the Appeal, para. 30.

⁵⁰ Document in Support of the Appeal, para. 30.

3. *Arguments of Mr Bemba*

53. In response, the Defence submits that in order for the Appellant's first ground of appeal to succeed he would have to show that no new circumstances have arisen since the last ruling on detention in the Decision of 14 April 2009. The Defence argues that by the Appellant's own concession, of the nine factors cited by the Pre-Trial Chamber two factors were new, namely: the authorisation for the release of Mr Bemba to attend his father's funeral; and the good conduct of Mr Bemba whilst in detention, validated by the six reports of the Registry on the active monitoring of Mr Bemba's non-privileged communications over a period of several months. In the Defence's view, these two new factors constitute "compelling evidence of Mr Bemba's intention to cooperate fully with the Court and not to obstruct the proper conduct of the proceedings by refraining from intimidating or exerting pressure on witnesses or victims."⁵¹ In addition the Defence aver that the Appellant's refusal to give Mr Bemba credit for his good conduct during his 24 hour release is 'misconceived'.⁵²

54. Furthermore, the Defence submits that the Appellant's allegations of interference with prosecution witnesses by the Defence are general assertions unsupported by any concrete evidence and which cannot be directly attributed to Mr Bemba.⁵³ The Defence submits that given the fact that the Prosecutor has failed to pursue the allegations by filing a complaint, the only inference that can be drawn is that the allegations can no longer be regarded as evidence of a risk that Mr Bemba might interfere with witnesses or obstruct court proceedings.⁵⁴

4. *Observations of the victims and responses thereto*

55. The legal representatives of victims agree with the submissions of the Appellant on the first ground of the appeal. They argue that there has been no change of circumstances since the last decision on detention except for the decision confirming the charges against Mr Bemba. The legal representatives argue that given the nature of the charges confirmed against Mr Bemba and the lengthy sentence that he may

⁵¹ Response to the Document in Support of the Appeal, paras. 31-33.

⁵² Response to the Document in Support of the Appeal, para. 54.

⁵³ Response to the Document in Support of the Appeal, para. 35.

⁵⁴ Response to the Document in Support of the Appeal, para. 78.

serve if convicted; his interim release would not be justified.⁵⁵ In addition, the legal representatives aver that the Pre-Trial Chamber failed to assess adequately the risks to victims and witnesses should Mr Bemba be released.⁵⁶

56. The Appellant, in response to the Victims' Observations, concurs with the submissions of the legal representatives.⁵⁷ The Defence, on the other hand, disagrees and mainly repeats the arguments submitted in the Response to the Document in Support of the Appeal.⁵⁸

5. Determination by the Appeals Chamber

57. As indicated in paragraph 8 above, the Impugned Decision was based on article 60 (3) of the Statute, which reads:

The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

58. The Appeals Chamber previously held that “[t]he ruling that the Pre-Trial Chamber is required to review pursuant to article 60 (3) of the Statute is the determination that it has made in response to an application for interim release pending trial under article 60 (2) of the Statute.”⁵⁹ It follows that the review pursuant to article 60 (3) of the Statute makes it incumbent upon the Pre-Trial Chamber to address anew its prior ruling on the issue of detention or release in light of the requirements under article 58 (1) of the Statute.

59. In this regard, the Appeals Chamber recalls that in a previous decision it decided that “the decision on detention or release pursuant to article 60 (2) read with article 58 (1) of the Statute is not of a discretionary nature. Depending on whether or

⁵⁵ Victims' Observations, para. 14.

⁵⁶ Victims' Observations, para. 15.

⁵⁷ ICC-01/05-01/08-519, paras. 3-4.

⁵⁸ ICC-01/05-01/08-521-tENG, paras. 38-70.

⁵⁹ “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824, para. 94

not the conditions of article 58 (1) of the Statute continue to be met, the detained person *shall* be continued to be detained or *shall* be released.”⁶⁰

60. The Pre-Trial Chamber in assessing whether the conditions under article 58 (1) continue to be met may, pursuant to article 60 (3), second sentence, modify its ruling if it is satisfied that changed circumstances so require. The requirement of “changed circumstances” imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.

61. The Appeals Chamber previously explained its standard of review in relation to decisions pursuant to article 60 (2) of the Statute, denying interim release:

Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues.⁶¹

62. In the present case the Appeals Chamber finds that the above standard of review is equally applicable when reviewing a decision that grants conditional release. In applying this standard to the findings in the Impugned Decision, the Appeals Chamber will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision.

63. The arguments of the Appellant under the first ground of appeal pertain to the factual basis for the decision to release Mr. Bemba. He submits that the Pre-Trial Chamber “wrongly appraised previous circumstances”⁶² and “discounted” certain facts.⁶³ Thus, in order to justify the intervention of the Appeals Chamber, it would have to be demonstrated that the Pre-Trial Chamber committed an error of fact when it misappreciated facts, disregarded relevant facts or took into account facts

⁶⁰ Ibid, para. 134.

⁶¹ “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 9 June 2008, ICC-01/04-01/07-572 OA4, para. 25. This same standard was also applied in the Judgment of 16 December 2008, para. 52.

⁶² Document in Support of the Appeal, para. 30.

⁶³ Document in Support of the Appeal, para. 25.

extraneous to the *sub judice* issues in concluding that the conditions of article 58 (1) are no longer met on account of a “change in circumstances”.

64. In relation to the first ground of appeal and for the reasons set out below, the Appeals Chamber determines that the Pre-Trial Chamber erred in finding that there existed a change in circumstances that necessitated the conditional release of Mr Bemba.

65. The Appeals Chamber discerns clear errors of fact in the assessment of the Pre-Trial Chamber as to whether there existed changed or new circumstances which resulted in the condition under article 58 (1) (b) (i) of the Statute not being met any longer.

(a) Factors under article 58 (1) (b) (i) of the Statute

66. In analysing the condition under article 58 (1) (b) (i) of the Statute, the Pre-Trial Chamber considered “[...] the entirety of factors set out in paragraphs 58 to 68 reflect a substantial change of circumstances since the issuance of the 14 April 2009 Decision”.⁶⁴ The Appeals Chamber is not persuaded by this conclusion for the reasons that follow.

(i) The gravity of the charges confirmed and the overall length of sentence if convicted

67. The Appeals Chamber recalls that in its Judgment of 16 December 2008 the gravity of the charges as a factor in assessing the risk of absconding was described at paragraph 55 as follows:

The Appeals Chamber notes in this context that it has held in the past that the seriousness of the crimes allegedly committed is a relevant factor and may make a person more likely to abscond.

68. The Pre-Trial Chamber in its Decision of 14 April 2009 at paragraph 47 stated:

The risk of absconding increases after arrest, especially when the applicant learns about the charges he is facing and the possible sentence that may result if found guilty. The charges that Mr Jean-Pierre Bemba is facing are various and of such gravity that they might result in multiple convictions leading to an

⁶⁴ Impugned Decision, para. 69.

overall lengthy sentence. If this is taken into consideration, in view of other existing factors [...] the risk of him absconding becomes more likely.

69. In the Impugned Decision at paragraph 59, the Pre-Trial Chamber acknowledges that the charges now confirmed against Mr Bemba “may still result in a conviction leading to an overall lengthy sentence”. However, the Chamber in assessing this factor merely stated that it “could constitute an incentive” to abscond but alone could not justify long periods of pre-trial detention.

70. The Appeals Chamber finds merit in the arguments of the Appellant in this regard. Whilst the confirmation of charges in itself constitutes a “changed circumstance” the finding by the Pre-Trial Chamber that there were substantial grounds to believe that Mr Bemba committed the crimes charged, increased the likelihood that he might abscond. In addition, the length of sentence that Mr Bemba is likely to serve if convicted on these charges is a further incentive for him to abscond. In the view of the Appeals Chamber, the Pre-Trial Chamber misappreciated the weight to be attached to this factor to which it had previously attached much importance.

*(ii) Mr Bemba’s political and professional position,
international contacts and ties*

71. The Appeals Chamber observes that the Pre-Trial Chamber in its previous decisions emphasised Mr Bemba’s political and professional position and his international contacts and ties in favour of continued detention.

72. In the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo” of 10 June 2008 (ICC-01/05-01/08-14-tENG), the Pre-Trial Chamber held that “in light of Mr Jean-Pierre Bemba’s past and present political position, his international contacts, his financial and professional background, and the fact that he has the necessary network and financial resources, he may abscond and avoid the execution of the arrest warrant.”⁶⁵ This finding was reiterated in the Decision of 20 August 2008⁶⁶, the Decision of 16 December 2008⁶⁷, and the Decision

⁶⁵ ICC-01/05-01/08-14-tENG, para. 87.

⁶⁶ ICC-01/05-01/08-80-Anx, paras. 54 and 55.

⁶⁷ ICC-01/05-01/08-321, para. 36.

of 14 April 2009⁶⁸. However, in the Impugned Decision, at paragraph 58, no indication is given as to whether the circumstances underlying these factors have changed. Instead, the Pre-Trial Chamber merely acknowledges that Mr Bemba maintains his political and professional position and benefits from international contacts and ties without indicating the importance or weight that this factor carries when weighed against the other factors. The only inference that can be drawn from the Pre-Trial Chamber's treatment of these factors is that it does not constitute a "changed circumstance". Thus, the Appeals Chamber finds that the Pre-Trial Chamber erred in its appreciation of Mr Bemba's political and professional position and his international contacts and ties.

(iii) Mr Bemba's financial situation and resources

73. The Appeals Chamber notes that in relation to this factor prior decisions of the Pre-Trial Chamber held that Mr Bemba had access to significant financial resources which would enable him to abscond.⁶⁹ In the Impugned Decision the Pre-Trial Chamber in addressing the Defence's submission that Mr Bemba lacked resources on account of the seizure of his assets by the Court, recalled that this same argument had been raised in the Decision of 14 April 2009. In that decision the Pre-Trial Chamber made no finding on the Defence's submission and instead stated that a determination on detention was not "confined to this specific factor".⁷⁰ Likewise, in the Impugned Decision the Pre-Trial Chamber refrained from entering a determination on the financial situation of Mr Bemba or on his ability to use his resources to abscond.

74. The Appeals Chamber considers the financial status of Mr Bemba to be a relevant factor in determining whether he would have the means to abscond or even to interfere with the investigation or the safety of witnesses. In the view of the Appeals Chamber, the Pre-Trial Chamber in omitting to make a finding on Mr Bemba's financial situation disregarded a relevant factor that it previously considered to be important and thus the Pre-Trial Chamber erred.

⁶⁸ ICC-01/05-01/08-403, para. 45.

⁶⁹ See Decision of 20 August 2008, para. 55, Decision of 16 December 2008, paras. 36.

⁷⁰ Decision of 14 April 2009, para. 46.



(iv) *Mr Bemba's offer to surrender at some time prior to his arrest and his professed willingness to cooperate and appear voluntarily*

75. The Pre-Trial Chamber also took into account Mr Bemba's offer to surrender at some time prior to his arrest as well as his stated willingness to cooperate with the Court and to appear voluntarily. The Appeals Chamber notes that both factors were raised on previous occasions before the Pre-Trial Chamber when considering applications for the interim release of Mr Bemba. On each occasion Mr Bemba's offer to cooperate with the Court was held to be insufficient *per se* to grant the suspect interim release⁷¹ and his offer to surrender was rejected on the ground that it was hypothetical and lacking any concrete evidence⁷² The Appeals Chamber in its Judgment of 16 December 2008 confirmed this approach by the Pre-Trial Chamber.⁷³ With regard to Mr Bemba's willingness to cooperate and appear voluntarily, the Pre-Trial Chamber previously determined that such a statement *per se* is insufficient to grant the suspect interim release.⁷⁴ In the Impugned Decision the Pre-Trial Chamber reiterated that it could not premise its findings on this hypothetical argument. Despite this, the Pre-Trial Chamber nevertheless concluded that this factor taken together with all other relevant factors, constituted "changed circumstances". In the absence of any explanation for this change in its stance, the Appeals Chamber finds that the Pre-Trial Chamber erred in its appreciation of the weight to be attached to such hypothetical claims.

(v) *Mr Bemba's unwillingness to set aside his "years of sacrifice" by becoming a fugitive*

76. The Appellant avers that Mr Bemba's political aspirations is by no means a new fact as Mr Bemba had made known his political position in his very first application for interim release.⁷⁵

77. The Appeals Chamber recalls that in the Decision of 16 December 2008, the Pre-Trial Chamber took special note of the fact that Mr Bemba continues to be the

⁷¹ See ICC-01/05-01/08-321, para. 37 and ICC-01/05-01-08-403, para. 50.

⁷² See ICC-01/05-01/08-80-Anx.

⁷³ Judgment of 16 December 2008, para. 56.

⁷⁴ Decision of 16 December 2008, para. 37 and Decision of 14 April 2009, para. 50.

⁷⁵ Document in Support of the Appeal, page 12.

National President of the *Mouvement pour la Libération du Congo* and held that this factor weighed in favour of continued detention.⁷⁶ However, in the Impugned Decision the Pre-Trial Chamber considered this factor to be a changed circumstance and stated that such a factor “carries some weight when considering whether Mr Jean-Pierre Bemba has a motive to abscond.”⁷⁷

78. The Pre-Trial Chamber does not explain why it considered this factor to represent a changed circumstance or why it no longer weighs in favour of continued detention. In the absence of such an explanation the Appeals Chamber finds that the Pre-Trial Chamber misappreciated this factor.

(vi) *Mr Bemba's good behaviour whilst in detention*

79. The Appeals Chamber notes that in relation to the Pre-Trial Chamber's assessment that Mr Bemba has shown good behaviour whilst in detention and has not tried to interfere with the proceedings before the Court in any way, the Pre-Trial Chamber relied on six reports of the Registry which reported on the active monitoring of Mr Bemba's non-privileged communications and visits during the period 3 July 2008 to 19 January 2009.⁷⁸

80. The Appeals Chamber considers that the behaviour of detainees awaiting trial is indeed a relevant factor when considering applications for interim release. However the weight to be attached to this factor must be assessed on a case by case basis. In the present case whilst it is noteworthy that the Registrar concluded [REDACTED] when monitoring Mr Bemba's conversations, the Appeals Chamber observes that [REDACTED] in the recorded conversations between Mr Bemba and his interlocutors compromised the weight that should be attached to the Registrar's conclusion. This [REDACTED] in each of the six reports.

81. Under these circumstances the Appeals Chamber considers that the Pre-Trial Chamber's finding of Mr Bemba's “good behaviour” whilst in detention was erroneous because it disregarded relevant facts in relation to such behaviour.

⁷⁶ Decision of 16 December 2008, para. 45 and footnote 55.

⁷⁷ Impugned Decision, para. 67.

⁷⁸ Due to the confidential nature of these reports they have been classified as under seal. Confidential redacted versions have subsequently been filed. See, ICC-01/05-01-08/346-Conf and Annexes 1 to 10; ICC-01/05-01/08-375-Conf and Annexes 1 to 3; ICC-01/05-01/08-444-Conf and Annexes.

(vii) *Mr Bemba's authorized attendance at his father's funeral*

82. With regard to Mr Bemba's authorised attendance at his father's funeral in Belgium, the Pre-Trial Chamber found that Mr Bemba's cooperation and respect for its orders also demonstrated a willingness to comply with the orders of the Court. Whilst compliance with the orders of the Court is a relevant factor that may be taken into consideration in assessing applications for interim release, once again such determinations must be assessed on a case by case basis in light of all the circumstances.

83. The Appeals Chamber considers that in the instant case the Pre-Trial Chamber failed to consider all relevant facts in relation to Mr Bemba's temporary release. Had it done so, less weight would have been attached to this factor. First, the period of release was limited to only 24 hours, [REDACTED]; second, [REDACTED] and [REDACTED].⁷⁹ Given these facts Mr Bemba was left with no choice but to comply. In addition, [REDACTED].⁸⁰ Accordingly, in the circumstances of the present case, the finding of the Pre-Trial Chamber that Mr Bemba's "compliance" with its orders was an important factor in favour of his release, was erroneous. The finding disregarded relevant facts which were material to the question of how much weight should be attached to the apparent willingness of Mr Bemba to comply with the orders of the Court.

(viii) *Mr Bemba's family ties*

84. In the Impugned Decision the Pre-Trial Chamber considered Mr Bemba to have strong family ties which in the Chamber's opinion made it more difficult for him to abscond.⁸¹ The Pre-Trial Chamber based its view on the fact that a report of the Registrar indicated that Mr Bemba was authorised to have extended hours of communication with his family.⁸²

85. In its analysis the Pre-Trial Chamber considered this factor to be a new circumstance that contributed to its overall prediction that Mr Bemba would not

⁷⁹ See ICC-01/05-01/08-440-Conf, page 4.

⁸⁰ See ICC-01/05-01/08-437-Conf.

⁸¹ Impugned Decision, para. 68.

⁸² ICC-01/05-01/08-429-Conf-Exp.

abscond. The Appellant avers that Mr Bemba's family ties and the impact of his detention on his family had been previously cited before the Chamber.⁸³ Thus, in the Appellant's view, this does not constitute a changed circumstance.

86. The Appeals Chamber is persuaded by the arguments of the Appellant in this regard. The Pre-Trial Chamber in weighing this factor does not explain why Mr Bemba's strong family ties would make it difficult for him to abscond. In particular, the Appeals Chamber notes that the Pre-Trial Chamber neglected to assess whether Mr Bemba possessed the financial means to enable him to abscond with his family.

87. In sum, in analysing each of the factors considered by the Pre-Trial Chamber in its decision, the Appeals Chamber determines that the Pre-Trial Chamber misappreciated and disregarded relevant facts in reaching its conclusion that the entirety of factors before it reflected a "substantial change of circumstances" since the issuance of the Decision of 14 April 2009. The Pre-Trial Chamber acknowledged that the grave charges that Mr Bemba now faces as a result of the Decision of 15 June 2009 makes the risk of him absconding more likely than prior to confirmation. In the view of the Appeals Chamber it was incumbent upon the Pre-Trial Chamber to analyse all of the factors based on this heightened risk, in particular, Mr Bemba's international contacts and ties and his financial situation which the Pre-Trial Chamber did not do.

88. Thus the Appeals Chamber finds that the Pre-Trial Chamber erred in finding that a substantial change of circumstances necessitated the release of Mr Bemba from detention and accordingly reverses this finding.

(b) Factors under article 58 (1) (b) (ii) of the Statute

89. The Appeals Chamber recalls that the conditions set forth in article 58 (1) (b) of the Statute are in the alternative.⁸⁴ If one of those conditions is fulfilled, the other conditions do not have to be addressed, and detention must be maintained. In light of the Appeals Chamber's determination in the previous section of this judgment that the Pre-Trial Chamber erred in finding that the condition under article 58 (1) (b) (i) of the

⁸³ Document in Support of the Appeal, page 13.

⁸⁴ See "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824, para. 139.

Statute is no longer met, the Appeals Chamber will not address the findings of the Pre-Trial Chamber in relation to the condition under article 58 (1) (b) (ii) of the Statute.

B. Second ground of appeal

90. In relation to the second ground of appeal the Appeals Chamber observes that the Appellant's submissions are threefold: first, the Pre-Trial Chamber erred when deciding to grant Mr Bemba conditional release without also determining which conditions to impose; second, the Pre-Trial Chamber erred when granting release without having identified the State to which Mr Bemba will be released; and third, the Pre-Trial Chamber should not have ordered conditional release without determining that the State is able to enforce the conditions imposed.

1. Relevant part of the Impugned Decision

91. At the start of its review, the Pre-Trial Chamber clarified that the approach to a review pursuant to article 60 (3) of the Statute that results in the interim release of the detained person is two-tiered. First, there must be a determination to release the person concerned and second, it is necessary to define the conditions, if any, restricting the liberty of the person pursuant to rule 119 of the Rules of Procedure and Evidence.⁸⁵

92. Having found that the conditions under article 58 (1) (b) of the Statute were no longer satisfied, the Pre-Trial Chamber determined that Mr Bemba "shall therefore be released, albeit under conditions."⁸⁶ However, implementation of its decision was deferred pending a decision of the Chamber on the set of conditions to be imposed on Mr Bemba as well as the State to which he would be released.⁸⁷

93. Accordingly, in the operative part of the Impugned Decision the Pre-Trial Chamber, in relevant part, stated:

FOR THESE REASONS, THE [PRE-TRIAL CHAMBER]

⁸⁵ Impugned Decision, para. 43.

⁸⁶ Impugned Decision, para. 77.

⁸⁷ Impugned Decision, para. 79.

a) decides that Jean-Pierre Bemba Gombo be granted conditional release, until decided otherwise;

b) decides that the implementation of this decision be deferred pending a decision in which State Jean-Pierre Bemba Gombo will be released and which set of conditions shall be imposed on him; [...]

2. *Arguments of the Appellant*

94. The Appellant under this ground of appeal challenges the correctness of the procedure followed by the Pre-Trial Chamber in ordering the conditional release of Mr Bemba before (i) identifying the conditions that would guarantee Mr Bemba's appearance at trial and ensure that he did not obstruct the court proceedings, before (ii) determining which State would accept Mr Bemba, and before (iii) satisfying itself that the chosen State would be able to enforce the conditions.

95. The Appellant, in support of his argument submits that the Pre-Trial Chamber "misapprehended the process when it explained that linking conditional release to the appropriate conditions would wrongly 'give the impression of pre-determination.'" He argues that this rationale incorrectly assumes that the Court can determine the person's right to conditional release "regardless of whether conditions may be fashioned to minimize risks from that release."⁸⁸

96. The Appellant, whilst conceding that the "approach" underlying conditional release is "two-tiered", argues that the decision itself cannot be. In his view, the Court must first determine whether the person's release poses a risk. If it does, it must then consider whether conditions can be fashioned and enforced to mitigate the risk effectively. Hence the decision must be a single one that can only be entered once all the prerequisites are satisfied.⁸⁹

97. Furthermore, the Appellant submits that identifying a State willing to accept the person concerned as well as to enforce conditions imposed by the Court is an essential prerequisite to granting conditional release. Since the Court lacks any direct means of enforcing conditions of release it must rely on the cooperation of States in this regard. Thus the selection of a State for the purposes of conditional release must account for the capacity of the State to ensure compliance with conditions, its legal system, its

⁸⁸ Document in Support of the Appeal, para. 34.

⁸⁹ Document in Support of the Appeal, para. 35.

ability to implement its legal assistance obligations to the Court, the person's nexus with that particular State, and other practical considerations.⁹⁰

98. The Appellant avers that in the present case the Pre-Trial Chamber erred when it “not only ordered conditional release absent a finding that any State is prepared to accept the accused”, but also held that “the inability of a State to offer guarantees of enforcement conditions ‘cannot weigh heavily against the Accused’s release’ because such guarantees only provide assurance to the judge.”⁹¹

3. Arguments of Mr Bemba

99. In response to the Appellant's arguments, the Defence notes at the outset that the Appellant fails to cite any legal provision allegedly violated by the Pre-Trial Chamber with respect to the second ground of appeal.⁹² The Defence argues that the Impugned Decision is a preliminary one with further hearings scheduled for determination of the receiving State as well as the conditions to be attached to such release.⁹³

100. In addition, the Defence submits that the Appellant is wrong in arguing that “States can legally interfere freely with the course of justice in agreeing or refusing to accept individuals granted interim release.” Furthermore, and contrary to the Appellant's argument, a detained person cannot be expected to make private arrangements with States Parties in relation to interim release.⁹⁴ The Defence recalls that States Parties are obliged under article 86 of the Statute to cooperate with the Court. Thus, States under international law cannot rely on impediments under their own internal law in order to evade their international obligations.

4. Observations of the victims and responses thereto

101. The legal representatives of the victims concur fully with the arguments advanced by the Appellant under this ground of appeal.⁹⁵ In addition, they submit that rule 119 (3) of the Rules of Procedure and Evidence obliges the competent Chamber

⁹⁰ Document in Support of the Appeal, paras. 39 and 40.

⁹¹ Document in Support of the Appeal, para. 45.

⁹² Response to the Document in Support of the Appeal, para. 80.

⁹³ Response to the Document in Support of the Appeal, para. 81.

⁹⁴ Response to the Document in Support of the Appeal, paras. 84 and 85.

⁹⁵ Victims' Observations, para. 16.

to consult the victims who may be placed at risk as a result of the release or conditions to be imposed on the person concerned. Thus, in their view, those conditions should be determined prior to the decision on conditional release itself otherwise the victims will not be in a position to present their observations.⁹⁶

102. The Appellant is in broad agreement with the views expressed by the legal representatives under this ground of the appeal.⁹⁷

103. The Defence disagrees and argues that the Impugned Decision does account for the implementation of rule 119 (3) of the Rules of Procedure and Evidence. Since the release of Mr Bemba is deferred pending determination of those conditions the victims will be afforded an opportunity to make their observations before Mr Bemba is released or conditions are imposed.⁹⁸

5. *Determination by the Appeals Chamber*

104. The Appeals Chamber, for the reasons explained below determines that the Pre-Trial Chamber erred in deciding that Mr Bemba should be released with conditions without also specifying the appropriate conditions or identifying a State willing to accept Mr Bemba and enforce the conditions.

105. In the Appeals Chamber's view, a decision on interim release as already explained in paragraph 59 above is not discretionary. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 (1) of the Statute are not met, it shall release the person, with or without conditions. If, however, the release would lead to any of the risks described in article 58 (1) (b) of the Statute, the Chamber may, pursuant to rule 119 of the Rules of Procedure and Evidence, examine appropriate conditions with a view to mitigating or negating the risk. As the list of conditions in rule 119 (1) of the Rules of Procedure and Evidence indicates, the Chamber may also, in appropriate circumstances, impose conditions that do not, *per se*, mitigate the risks described in article 58 (1) (b) of the Statute. The result of this two-tiered examination is a single unseverable decision that grants conditional release on the basis of specific

⁹⁶ Victims' Observations, paras. 17-19.

⁹⁷ ICC-01/05-01/08-519, para. 5.

⁹⁸ ICC-01/05-01/08-521-tENG, paras. 74-75.

and enforceable conditions. Put differently, in such circumstances, release is only possible if specific conditions are imposed.

106. Furthermore, the Appeals Chamber considers that in order to grant conditional release the identification of a State willing to accept the person concerned as well as enforce related conditions is necessary. Rule 119 (3) of the Rules of Procedure and Evidence obliges the Court to seek, *inter alia* the views of the relevant States before imposing or amending any conditions restricting liberty. It follows that a State willing and able to accept the person concerned ought to be identified prior to a decision on conditional release.

107. In addition, the Appeals Chamber notes that the International Criminal Court exercises its functions and powers on the territories of States Parties⁹⁹ and as such is dependent on State cooperation in relation to accepting a person who has been conditionally released as well as ensuring that the conditions imposed by the Court are enforced. Without such cooperation, any decision of the Court granting conditional release would be ineffective.

108. In the circumstances of this case, the Appeals Chamber notes that the Pre-Trial Chamber, after concluding its examination of the conditions under article 58 (1) of the Statute, decided that Mr Bemba should be “released, albeit under conditions.” The Chamber went on to clarify that the set of conditions to be imposed will be determined at a later stage.¹⁰⁰ Furthermore, at paragraph 83 of the Impugned Decision, the Chamber reiterated that “no ruling is rendered on the question [of] which set or type of conditions restricting liberty are deemed appropriate to be imposed on Mr Jean-Pierre Bemba and in which State he shall be conditionally released.” Finally, at the operative part of the Impugned Decision, paragraph (a), the Pre-Trial Chamber decided to grant Mr Bemba conditional release until decided otherwise. Thus in the instant case, the Impugned Decision is flawed because the Pre-Trial Chamber failed to specify the appropriate conditions that make the conditional release of Mr Bemba feasible.

⁹⁹ See article 4 of the Statute.

¹⁰⁰ Impugned Decision, paras. 77 and 78.

109. For these reasons, the Appeals Chamber determines that the Pre-Trial Chamber erred in granting conditional release without specifying the appropriate conditions that make conditional release feasible, identifying the State to which Mr Bemba would be released and whether that State would be able to enforce the conditions imposed by the Court.

VI. APPROPRIATE RELIEF

110. The Appellant requests that the Appeals Chamber reverse the Impugned Decision and order the continued detention of Mr Bemba.¹⁰¹ The Defence requests that the Appeals Chamber find the Appellant's submissions to be lacking in merit and to dismiss them.¹⁰²

111. On an appeal pursuant to article 82 (1) (b) of the Statute the Appeals Chamber may confirm, reverse or amend the Impugned Decision (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, the Appeals Chamber considers it appropriate to reverse the Impugned Decision.



Judge Akua Kuenyehia
Presiding Judge

Dated this 2nd day of December 2009

At The Hague, The Netherlands

¹⁰¹ Document in Support of the Appeal, para. 47.

¹⁰² Response to the Document in Support of the Appeal, para. 96.