



Original: English

No.: ICC-01/05-01/08

Date: 24 August 2009

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Akua Kuenyehia
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

**Prosecution's Document in support of the Appeal against Decision on the Interim
Release of Jean-Pierre Bemba Gombo**

Source: Office of the Prosecutor

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

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Competent authorities of:

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The Republic of France,

The Federal Republic of Germany,

The Italian Republic,

The Kingdom of the Netherlands,

The Republic of Portugal,

The Republic of South Africa

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Introduction

1. On 14 August 2009, Judge Ekaterina Trendafilova, Single Judge of Pre-Trial Chamber II, issued a decision on the interim release of Jean-Pierre Bemba Gombo subject to conditions to be determined in the future.
2. The Decision finds that a substantial change of circumstances now warrants the release of the Accused. In fact, contrary to the Single Judge's conclusions, there has been no change of circumstances in the present case. Most of the circumstances cited are pre-existing and have been cited previously as either grounds for continued detention or irrelevant to an application for release. The only significant intervening factor, the issuance of the decision confirming the charges against the Accused, confirms and increases the risks posed by the Accused if released. The Single Judge's decision is thus error.
3. The Decision orders the conditional release of a person without deciding what conditions need be imposed, including the custodial State that will ensure that the conditions will be met. The Prosecution submits that the Single Judge's failure to properly consider these critical factors in its Decision on provisional release constitutes a further error.

Procedural Background

4. On 3 July 2008, following the issuance of two warrants of arrest,¹ Jean-Pierre Bemba Gombo ("the Accused") was surrendered to the seat of the Court.²
5. After three prior applications for interim release were denied,³ on 29 June 2009, the Single Judge held a hearing on detention. Following the hearing and the receipt of submissions and observations, on 14 August 2009, the Single Judge granted conditional release but deferred implementation of the decision until she determined which State the Accused will be released to and what conditions will be imposed. She also invited the States to which the Accused seeks to be released to appear on specified dates to provide their further views and observations.⁴

¹ ICC-01/04-01/08-14-tENG; ICC-01/05-01/08-15-tENG.

² ICC-01/05-01/08-T-3-ENG ET, 4 July 2008.

³ ICC-01/05-01/08-49 and annexes ("First Application for Interim Release"); ICC-01/05-01/08-200-tENG and annexes ("Second Application for Interim Release"); and ICC-01/05-01/08-333-Conf and annexes ("Third Application for Interim Release"); ICC-01/05-01/08-73-Conf; a public redacted version thereof was issued on 26 August 2008 (ICC-01/05-01/08-80-Anx). ("20 August 2008 Decision"); ICC-01/05-01/08-321 ("16 December 2008 Decision"); ICC-01/05-01/08-403 ("14 April 2009 Decision").

⁴ "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" ("Appealed Decision"), ICC-01/05-01/08-475.

6. On 14 August 2009, the Prosecution filed an appeal pursuant to Article 82(1)(b), Rule 154(1), and Regulation 64(1).⁵ The Prosecution hereby files its Document in Support of its appeal, pursuant to Regulation 64(5). The Prosecution files this document confidentially and partly *ex parte* due to references to confidential *ex parte* portions of the record of this case. A public redacted version is being filed separately.

Request for suspensive effect

7. According to numerous previous decisions in this case, the Accused's detention is necessary to ensure his appearance at trial and to ensure he does not obstruct or endanger the investigation, the court proceedings, and the safety of witnesses and others at risk on account of their interaction with the Court.⁶ The Appealed Decision reversed these findings. Therefore, if the Accused is released and absconds, even if the Appeals Chamber subsequently overturns the Appealed Decision the exercise of the Court's jurisdiction could be irreversibly frustrated.
8. The Prosecution requests that suspensive effect be attached to this appeal in order to avoid pre-empting the subject of the appeal and rendering its outcome moot.⁷ The Appeals Chamber has recognised that suspensive effect may be appropriate when an appeal is lodged against a decision releasing a suspect or accused.⁸

⁵ ICC-01/05-01/08-476.

⁶ ICC-01/04-01/08-14-tENG, 10 June 2008; ICC-01/05-01/08-73-Conf 20 August 2008 (a public redacted version thereof was issued on 26 August 2008 - ICC-01/05-01/08-80-Anx); ICC-01/05-01/08-323 OA, 16 December 2008; ICC-01/05-01/08-321, 16 December 2008; ICC-01/05-01/08-403, 14 April 2009 Decision.

⁷ Decisions on suspensive effect are left to the discretion of the Chamber, which should "consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances." (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1290 OA11, 22 April 2008, para. 7). In determining whether to exercise such discretion, it has been stated that the "guiding principle in the exercise of the discretion of the Court lies in the evaluation of the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber, could have on the proceedings before the first instance court." (*Prosecutor v. Lubanga*, ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 9).

⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1444 OA12, 27 July 2008, paras.9-10. In light of the previous findings that the detention of the Accused is necessary, the interests of the Accused to be released immediately do not outweigh the reasons in favour of granting the Prosecution's request for suspensive effect. Ibid. Chambers of the *ad-hoc* Tribunals similarly have ordered stay or suspension of the implementation of release decisions "to preserve the status quo of the Appeal" (*Prosecutor v. Haradinaj*, IT-04-84-AR65.1, Stay of "Decision on Defence Motion of Ramush Haradinaj to Request Reassessment of conditions of Provisional Release Granted 6 June 2005", 16 December 2005), to "preserve the object of the Prosecution's appeal against the provisional release" (*Prosecutor v. Prlic et al.*, IT-04-74-AR65.1, IT-04-74-AR65.2, and IT-04-74-AR65.3, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 15), or finding that "failure to grant the requested stay would effectively exclude the Prosecution's ability to challenge the Trial Chamber's ... order" (*Prosecutor v. Simic et al.*, IT-95-9-PT, Decision on Prosecutor's Motion for Stay, 4 April 2000. In this case, the Prosecution's motion for stay concerned an order on defence requests for judicial assistance for the production of information. See also *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Order, 25 November 1999; and *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Order, 8 December 1999).

Statement of Facts

9. The Accused, a national of the Democratic Republic of the Congo (DRC), is a businessman, former Commander-in-chief and still President of a military and political movement (the Movement for the Liberation of the Congo, hereafter MLC) in the DRC, and a vice-president of the transitional government in the DRC between July 2003 and December 2006. He unsuccessfully ran for President of the DRC in 2006. In 2007 he left the DRC to live in exile in Portugal. He is alleged to have continued his father's business and acquired substantial assets through business and other activities. Portuguese authorities froze and seized, on request by this Court, assets of the Accused [REDACTED].⁹ The Accused asserts that he has additional properties and bank accounts in other countries, including in Belgium;¹⁰ to the best of the Prosecution's knowledge, these assets have not been frozen. His father, Jeannot Bemba Saolona, a wealthy politician and entrepreneur, died on 2 July 2009. He was the Minister of Economy during the Mobutu's regime, one of the most well-known Congolese businessmen, once said to be the richest man in the DRC.¹¹
10. *The First Order Denying Release.* The Accused first sought release soon after his arrest. On 20 August 2008, Hans-Peter Judge Kaul acting as Single Judge found, in pertinent part, that the prior judicial findings regarding the Accused's past and present political position, his international contacts, his financial and professional background, and his available network and financial resources, required his continued detention.¹² Judge Kaul also noted the seriousness of the charges and the prospect of a lengthy prison sentence as factors bearing on the risk that the Accused would flee to avoid prosecution. Finally, he rejected as factually unfounded the Accused's assertions that he did not flee previously despite awareness of the pending investigation and that he had been willing to present

⁹ ICC-01/05-01/08-149-Conf, para. 14.

¹⁰ ICC-01/05-01/08-T-13-ENG ET, 29 June 2009, p. 22, lines 7-11 ; see also ICC-01/05-01/08-432, 2 July 2009, paras. 58 and 60.

¹¹ Congo News Agency, 3 July 2009, at <http://www.congoplanet.com/article.jsp?id=45261449> (last accessed 23 August 2009); see also <http://www.congonewsagency.com> (last accessed 23 August 2009).

¹² In initially authorizing arrest, the Pre-Trial Chamber noted the Accused'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" to enable him to abscond; the fact that the Accused could locate the victims and witnesses, which "places them at particular risk"; that the Accused's position as President of the MLC would enable him to influence witnesses; and his past behavior indicates that he might influence witnesses in this case. (ICC-01/05-01/08-73-Conf; a public redacted version thereof was issued on 26 August 2008 (ICC-01/05-01/08-80-Anx, paras. 55-58).)

himself to the Court. Judge Kaul found that the Accused's claim to present himself to the Court "is of a hypothetical nature and ... is not supported by any concrete evidence".¹³

11. *The Second Order Denying Release.* In November 2008 the Accused sought release to Belgium or Portugal. The Chamber invited views from those countries and the Netherlands. On 16 December 2008, following party and participant submissions and views from Belgium and the Netherlands, Single Judge Trendafilova denied the application.
12. In pertinent part, she found that the circumstances relied on by Judge Kaul were unchanged and, combined with the gravity of the alleged charges, "the risk of absconding becomes a real possibility." She rejected, as inadequate considerations, the Accused's offer to surrender travel documents and to abide by the Court's orders. Weighing all the factors, she concluded that she "cannot reach a finding other than that there would be an inevitable risk that [the Accused], if released, would not appear at the confirmation of charges hearing and by implication at trial." She also agreed with Judge Kaul that continued detention of the Accused was necessary to prevent him from obstructing or endangering the investigation or the Court's proceedings.¹⁴ In that regard, she noted not simply his ability to identify and pressure or otherwise affect witnesses, but also specific alleged incidents of witness interference. For those reasons, she ordered that the Accused continue to be detained.
13. *The Appeals Chamber's Affirmance of the 20 August 2008 Decision Denying Release.* The same day that Judge Trendafilova denied the Accused's second application, this Chamber affirmed Judge Kaul's finding that the circumstances of this case justified continued detention and the underlying factors on which it was based.¹⁵ It rejected as "hypothetical" and of "little weight" the Accused's claim that he would have appeared voluntarily to answer the charges.¹⁶ It also upheld Judge Kaul's findings that the witnesses and victims are easily identifiable, the Accused has the means to influence witnesses, and his previous behavior indicated that he might use those means.¹⁷
14. *The Third Order Denying Release.* Single Judge Trendafilova denied the Accused's third application for interim release on 14 April 2009. Explaining the applicable standard that

¹³ Ibid, para. 58. Judge Kaul also noted that the Accused had been planning to go to the United States, a non-State party, where he would potentially be beyond the reach of the Court.

¹⁴ ICC-01/05-01/08-321, 16 December 2008, paras 38-42.

¹⁵ These included the Accused's "past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources" (decision para. 53) and the seriousness of the charges and severity of the punishment (decision, para. 55).

¹⁶ Decision, para. 56.

¹⁷ Decision, para. 67.

“the revision of a decision on release or detention of a person depends on the criteria ‘*changed circumstances*’ as set out in article 60(3)” (emphasis added), she concluded that “there has been no substantial change in the circumstances warranting a modification of her previous ruling” that the Accused might abscond.¹⁸

15. *The 29 June Hearing and subsequent submissions.* Over the Prosecution’s objections,¹⁹ the Accused again requested interim release to Belgium, Portugal, or France. Single Judge Trendafilova reminded the parties that the chamber may modify its prior detention rulings if “changed circumstances so require”²⁰. Accordingly, the Accused enumerated the “changed” factors that, in his view, warranted release: the absence of financial resources and the confirmation of a “significantly reduced” and less serious set of charges. He also reiterated that (a) he had offered to cooperate with and assist the Prosecution but his overtures were rejected; (b) he will not abscond out of fear of being assassinated; (c) he wants to clear his name and maintain his political viability; and (d) he is willing to go to prison. He argued that he cannot be held in custody to prevent him from threatening witnesses or obstructing the case simply because he has influence, absent a “high level of evidence” that he would do so. With respect to the selection of a State willing to take him, he admitted that it would have been better if the Defence had negotiated with States Parties in advance but claimed he lacked financial resources to pay his lawyers to do that. Absent that step, he argued that States Parties are obligated to accept him and that the Chamber should inquire of his preferred States whether they will protect him, enforce the Court’s conditions, and return him to the seat of the Court if he violates the conditions.

16. Following the hearing, the Single Judge invited a first round of submissions from Belgium, France, Portugal, Germany, Italy and South Africa, the States proposed by the Accused. Each was unwilling to take the Accused.²¹

17. *The 14 August Decision Granting Conditional Release.* Following a “two-tier approach”,²² Judge Trendafilova found that “the continued detention of [the Accused]

¹⁸ The Single Judge explained that “the charges that [the Accused] is facing are various and of such gravity that they may result in multiple convictions leading to an overall lengthy sentence.” She noted “his ties, international contacts and political position, which may provide him with the means to flee.” And she noted that the imminence of the confirmation decision renders more likely the risk of flight. Additionally, no country appeared willing to accept the Accused and guarantee his appearance at trial if he were conditionally released. Finally, she noted that the Accused’s offer to adhere to restrictions on liberty were irrelevant and inadequate, particularly in the absence of a State willing to provide guarantees. She concluded: “in considering all factors collectively, the Single Judge cannot reach a finding other than that there would be a possible risk that [the Accused], if released, would not return to appear at trial [...]” (ICC-01/05-01/08-403, 14 April 2009, paras. 45-50).

¹⁹ ICC-01/05-01/08-T-13-ENG WT, 29 June 2009, pp. 31-37.

²⁰ ICC-01/05-01/08-T-13-ENG WT, 29 June 2009, p.4, lines 10-14 (citing Art. 63(3) [sic]).

²¹ Appealed Decision, para. 90.

²² Appealed Decision, para.43.

does not appear necessary to ensure his appearance at trial” and “is not necessitated by” the other considerations in Article 58(1)(b)(ii) and (iii).²³ She also determined that the decision on release is separate from a determination as to what conditions should be imposed.²⁴ Accordingly, she decided that the Accused “shall therefore be released, albeit under conditions”.²⁵ The Decision will be implemented following further submissions and hearings to which various States have been invited, to consider how those States might agree to take the Accused, implement conditions, and enforce the Accused’s personal guarantees.²⁶

18. On the need for detention, she “examine[d] anew whether changed circumstances warrant a modification of her previous ruling” denying release.²⁷ She adhered to prior findings that the Accused maintains his political and professional position and benefits from international contacts and ties, and agreed that he faces conviction on serious charges resulting in a long sentence. She also rejected the Defence argument that the mode of liability – command responsibility – diminished the seriousness of the charges.²⁸
19. She also cited the Defence argument that the Accused had previously been willing to surrender voluntarily, which had previously been rejected and even disbelieved,²⁹ but concluded that it now was a relevant factor.³⁰ Similarly, she noted his purported lack of financial resources that, he claimed, eliminated the risk of flight, and agreed that financial capacity was relevant, but did not address whether he lacked or possessed (as was found in prior decisions) assets that would enable him to flee.³¹
20. In addition, she noted that he “has shown good behaviour in detention and has not tried to interfere with the proceedings before this Court in any way” and that he “cooperated fully” and “returned to the seat of the Court” when allowed to attend his father’s funeral.³² She accepted his professed willingness to cooperate and to appear voluntarily at trial and his statement that he would not set aside his “years of sacrifice” for his political career.³³ Finally, she noted his strong family ties.³⁴

²³ Appealed Decision, para. 77.

²⁴ Appealed Decision, paras. 79, 83.

²⁵ Appealed Decision, para. 77.

²⁶ Ibid, paras. 92-98.

²⁷ Ibid, para. 51.

²⁸ Ibid, paras. 48-49.

²⁹ 20 August 200-8 Decision, paras. 58-59.

³⁰ Ibid, paras. 60, 61.

³¹ Ibid, para. 62; see also 14 April Decision...

³² Ibid, paras. 63-65.

³³ Ibid, paras. 66-67.

³⁴ Ibid, para. 68.

21. Having “considered all factors collectively,” Judge Trendafilova concluded that the Accused did not present a flight risk.³⁵ Turning next to the possibility that if released the Accused would threaten witnesses, she rejected the reference to prior pressure on witnesses, noting that these allegations – which she had cited in December 2008 as a basis for denying release³⁶ – were not substantiated or pursued through the Registry.³⁷ She noted as well that while in custody the Accused had not attempted to contact or threaten the witnesses known to him.³⁸ Finally, she concluded that the situation in the CAR is stable and there was no information suggesting that the Accused would interfere or commit crimes in the CAR.³⁹
22. She accordingly ruled that the Accused should be conditionally released. She did so, however, expressly without deciding “which set or type of conditions restricting liberty are deemed appropriately to be imposed on [the Accused] and in which State he may be conditionally released”.⁴⁰ Asserting that the States Parties’ obligation to cooperate in an investigation and prosecution required States to admit a released Accused, she invited States identified by the Accused to attend hearings in September 2009 to provide observations and views “regarding [the Accused’s] release onto their territory”.⁴¹ Implementation of the Appealed Decision accordingly is deferred pending resolution of the conditions and identification of a State to which the Accused shall be released.

The Prosecution’s Grounds of Appeal

23. The Prosecution submits that the Single Judge made two errors in the Appealed Decision:⁴²

³⁵ Ibid, para. 69

³⁶ 16 December 2008 Decision, para. 42.

³⁷ Appealed Decision, para. 73. Though the Single Judge “rejected the Prosecutor’s request to open an inquiry into the circumstances of the allegations” of attempted witness interference (16 December 2008 Decision, para. 42), in the Appealed Decision she declined to consider this allegation because the Prosecutor had not initiated complaint proceedings with the Registry.

³⁸ Ibid, para. 74

³⁹ Ibid, paras. 75-76

⁴⁰ Ibid, para. 83

⁴¹ Ibid, para. 95

⁴² The applicable standard of review for the appeal at hand has been defined by the Appeals Chamber as follows: “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 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” (ICC-01/04-01/07-572, para. 25; Bemba Appeal Decision, para. 52).

- (1) The Single Judge erred by finding “a substantial change of the circumstances since the issuance of the 14 April 2009 Decision” sufficient to justify the Accused’s conditional release;
- (2) The Single Judge erred in ordering conditional release without considering the conditions and specifying a State willing and able to enforce them.

The First Ground of Appeal – the Single Judge erred in finding that a substantial change of the circumstances permits the Accused’s conditional release

24. According to Article 60(3), “changed circumstances” constitute the key criterion for modifying a prior ruling denying provisional release of an accused. In this case, the Single Judge found a “substantial change of circumstances since the issuance of the 14 April 2009 Decision”⁴³ that now purportedly justifies the Accused’s conditional release. That conclusion is wrong.
25. First, at least seven of the nine factors she considered are not changed circumstances. Second, the Single Judge discounted at least two factors relevant to the potential for risk, one of which had been previously considered to be a significant indicator of risk to the investigation. Third, the Single Judge discounted the potential risk to witnesses, though a prior decision relied at length on the factors that bore on that risk.
26. *The pre-existing Factors that are not changed circumstances.* The Single Judge based her decision to allow conditional release on nine factors outlined in paragraphs 58-68 of the Appealed Decision.⁴⁴ Seven of them are not changed circumstances. The facts underlying these considerations pre-date the 14 April 2009 Decision and none of the underlying facts have changed. Moreover, these factors were addressed in one or more of the prior decisions denying interim release, mostly as factors in favour of continued detention.⁴⁵
- The pending charges may result in conviction with an overall lengthy sentence.⁴⁶ All prior decisions in this case noted that the gravity of the charges make “the risk of [the Accused] absconding [...] more likely”.⁴⁷ The Appeals Chamber specifically

⁴³ Appealed Decision, para. 69.

⁴⁴ See Appealed Decision, para. 69.

⁴⁵ The Single Judge has previously found that “repeated findings [in relation to the conditions of Article 58(1)(b)(i) and concluded that these findings were ‘still valid’ [...] did not detract from the correctness and adequacy of [the Pre-Trial Chamber’s] findings” (14 April 2009 Decision, para. 45).

⁴⁶ Appealed Decision, para. 59.

⁴⁷ 14 April 2009 Decision, para. 47. See also 20 August 2008 Decision, para. 56.

agreed.⁴⁸ Since those decisions, moreover, the Chamber confirmed charges of crimes against humanity and war crimes. In that sense, the pendency of grave charges is a changed circumstance as well, but the change is not one that supports pre-trial release. Instead, the Accused is now closer to trial and, if convicted, subject to a potentially lengthy sentence.⁴⁹ The confirmation decision increases the incentive to flee and to obstruct the prosecution. It also increases the capacity to harm witnesses, since the Accused knows the identity of the witnesses and will continue to discover essential prosecution evidence.⁵⁰ Nonetheless, addressing this situation – the confirmation of grave charges –, the Single Judge merely stated that it “*could* constitute an incentive” (emphasis added) to abscond but alone cannot justify detention.⁵¹

- The Accused “maintains his political and professional position” and continues to “benefit[...] from international contacts and ties”.⁵² All prior decisions identified these as factors indicating a risk of flight.⁵³ The Appealed Decision refers as well to these facts but pointedly does not attribute any significance to them.
- The Accused’s financial situation and resources.⁵⁴ All prior decisions noted the Accused’s access to significant financial resources and cited those as factors that would enable him to abscond.⁵⁵ The Single Judge noted the Defence claim, which also has been previously made, that he lacks resources. She made no finding on that allegation, however, nor on the ability of the Accused to use his assets to flee or subvert the prosecution. Instead, she stated only that her analysis cannot be “confined to this specific factor”.⁵⁶ As to the accuracy of his claim, the record reflects that the Accused alluded to property and accounts in other countries;⁵⁷ he declined, when seeking assistance in paying his lawyers, to cooperate with the Registry by providing information to confirm his claimed lack of financial resources;⁵⁸ and he stated that family members can finance the costs of protection and surveillance.⁵⁹ The demise of

⁴⁸ Bemba Appeals Decision, para. 55.

⁴⁹ Appealed Decision, paras. 45-48. The Single Judge had previously found that the proximity to the confirmation of charges increased the risk the Accused absconding (14 April 2009 Decision, para. 47).

⁵⁰ Ibid, para. 74.

⁵¹ Appealed Decision, para. 59.

⁵² Appealed Decision, para. 58.

⁵³ 20 August 2008 Decision, para. 55; 14; Bemba Appeal Decision, para. 55; 14 April 2009 Decision, para. 48.

⁵⁴ Appealed Decision, para. 62.

⁵⁵ 20 August 2008 Decision, para. 55; 16 December 2008 Decision, paras. 36, 43; 14 April 2009 Decision, para. 45; Bemba Appeal Decision, para. 55.

⁵⁶ Appealed Decision, para. 62.

⁵⁷ ICC-01/05-01/08-T-13-ENG ET, 29 June 2009, p. 22, lines 7-11 ; see also ICC-01/05-01/08-432-tENG, 2 July 2009, paras. 58 and 60.

⁵⁸ ICC-01/05-01/08-76, 25 August 2008, pp. 5-7.

⁵⁹ 14 August Decision, para. 95(c)(10).

his father and the possibility of a considerable inheritance was not considered at all by the Single Judge.

- The Accused's purported offer to surrender at some time prior to his arrest.⁶⁰ This claim was raised repeatedly and rejected by both Single Judges expressly on the ground that it was hypothetical and lacking any concrete evidence. The Appeals Chamber also upheld that determination and found the claim to be "of little weight".⁶¹ In the Appealed Decision, the Single Judge explained that "she cannot build her findings solely on a hypothetical argument. But, bearing in mind some developments related to the present proceedings, [...] it could be assessed with all other relevant factors of the case taken together".⁶²
- The Accused's professed willingness to cooperate and appear voluntarily.⁶³ He has been asserting this from the outset.⁶⁴ Indeed, the Single Judge describes this by explaining that the Accused "renewed his continuous offer to cooperate". Like the prior claim, this is hypothetical, self-serving, and unproved. The Registry also noted the Accused's refusal to cooperate.⁶⁵
- The Accused's unwillingness to set aside his "years of sacrifice" by becoming a fugitive, which would end his political aspirations.⁶⁶ The Prosecution submits that the political endeavours of the Accused is not a new fact or circumstance. In his First Application for Interim Release, the Accused argued that he "has more to lose by fleeing than by standing trial. Not only does [the Accused] want to defend himself but his main aim in life is to win the elections in the DRC in 2011".⁶⁷ In addition, prior decisions consistently cited the Accused's political background as a factor supporting detention.⁶⁸

⁶⁰ Appealed Decision, paras. 60-61.

⁶¹ 20 August 2008 Decision, para. 58; Bemba Appeals Decision, para. 56. In this context, the single judge also noted that the accused was planning travel to the non-State Party, where he would potentially be beyond the reach of the Court. The Appeals Chamber observed that it is not erroneous to note such travel plans (Bemba Appeals Decision, para. 55).

⁶² Appealed Decision, para. 61.

⁶³ Appealed Decision, para. 66.

⁶⁴ See 16 December 2008 Decision, para. 37; 14 April 2009 Decision, para. 50.

⁶⁵ The Registry found that the Accused has been *non-cooperative* in refusing to identify his assets to enable the Registry to determine his claimed need for assistance to pay his lawyers (ICC-01/05-01/08-76, 25 August 2008, pp. 5-7).

⁶⁶ Appealed Decision, para. 67.

⁶⁷ First Application for Interim Release, para. 30.

⁶⁸ 20 August 2008 Decision, para. 55; 16 December 2008 Decision, para. 36; 14 April 2009 Decision, para. 45.

- The Accused's strong family ties and the serious impact of his detention on the lives of his wife and children.⁶⁹ The Accused cited his family ties, his desire to spend time with his family⁷⁰ and allegations regarding the impact that his detention has on the life of his family from the outset.⁷¹ Nor does this circumstance provide a disincentive for flight. It is equally a reason to abscond, to live with his family in a State that is not a Party and that would decline to surrender the Accused.

27. *The changed circumstances, arising after 14 April 2009, do not justify release.* Only two factors cited by the Single Judge arguably arose after 14 April 2009, the last detention decision.

28. The first is the Registry's report on the Accused's good behavior in custody.⁷² Though the 14 August Decision identified this as a new circumstance, the majority of the Registry reports on his conduct in custody pre-date the 14 April 2009 Decision.⁷³ In any event, the prison regime, including passive monitoring, is established in part to maintain order and deter wrongful conduct by persons in custody. If the detained person is well-behaved and does not threaten witnesses from the detention center, the regime works, but it does not mean that the person should be released as a reward or can be released without risk. Nor does the fact that the person is courteous and obedient in detention affect the potential risk of flight or obstruction of justice outside of detention.

29. The second is the Accused's conduct during his 24 hour release from prison on 8 July 2009.⁷⁴ The Single Judge emphasized in the Decision that the Accused was transferred, without incident, to and from Belgium to attend his father's funeral, during which time he "respected all conditions set by the Single Judge and returned to the seat of the Court".⁷⁵ At all times he was in custody: [REDACTED].⁷⁶ Given that, it is hardly remarkable that he "returned to the seat of the Court", and certainly not probative of the likelihood that if released he will not flee or obstruct the pending case. [REDACTED].⁷⁷ [REDACTED]⁷⁸ [REDACTED].

⁶⁹ Appealed Decision, para. 68.

⁷⁰ First Application for Interim Release, para. 33; Third Application for Interim Release, paras. 65, 69 and 70.

⁷¹ See for instance ICC-01/05-01/08-81-Conf-tENG, 26 August 2008, paras. 26-27.

⁷² Appealed Decision, para. 64.

⁷³ See ICC-01/05-01/08-346-Conf annexes 1-10; and ICC-01/05-01/08-375-Conf annexes 1-3 referred to in footnote 111 of the Appealed Decision.

⁷⁴ Appealed Decision, para. 65.

⁷⁵ Appealed Decision, para. 65.

⁷⁶ ICC-01/05-01/08-437-Conf, 3 July 2009, p. 5; ICC-01/05-01/08-439-Conf, 7 July 2009, para. 5; and ICC-01/05-01/08-440-Conf, 7 July 2009, para. 2.

⁷⁷ ICC-01/05-01/08-437-Conf, 3 July 2009, p. 6.

⁷⁸ ICC-01/05-01/08-441-Conf, 7 July 2009.

30. *The Single Judge wrongly appraised a previous circumstance demonstrating the possibility of obstructing justice.* In the earlier decision, the Single Judge noted multiple factors indicating a risk to victims and witnesses. They included some of the factors also identified in connection with a risk of flight – the Accused’s position as President of the MLC, his authority, and his network.⁷⁹ In the Appealed Decision, the Single Judge dismissed the allegations concerning prior interference with witnesses, solely on the basis that, after the Single Judge refused to authorize a judicial inquiry into the allegations,⁸⁰ the Prosecution did not initiate complaint proceedings with the Registry.⁸¹ However, the Single Judge herself had previously noted specific allegations of Defence interference with Prosecution witnesses, which she stated justified concerns that the Accused might use his authority to exert pressure to “obstruct and endanger” the Court’s proceedings.⁸² These findings were based on the same evidence rejected by the Single Judge in the Appealed Decision. The Single Judge further ignored that the Accused continues to exercise authority over a network that he has previously relied on to locate and influence witnesses.⁸³ The Prosecution notes that the Single Judge’s conclusion that she “is not convinced that Jean-Pierre Bemba would interfere with witnesses and victims”⁸⁴ has generated confusion and concerns on the part of victims and witnesses.⁸⁵
31. In conclusion, the determination that “changed circumstances” required the Accused’s release is unsound, it is based on circumstances that are not changed, and it distorts the weight that the single judges of the Pre-Trial Chamber and the Appeals Chamber previously accorded to the pre-existing circumstances

⁷⁹ 16 December 2008 decision, para. 38, citing 10 June 2008 Decision, para. 89, and 20 August 2008 Decision, paras. 24-25, 59.

⁸⁰ Ibid, para. 42

⁸¹ Appealed Decision, para. 73.

⁸² 16 December 2008 decision, paras. 41-42. This conclusion directly contradicts the Single Judge’s finding in the Appealed Decision that the Accused “has not tried to contact or threaten any of [the witnesses] or even attempted to obstruct or endanger the investigation or court proceedings during the entire year of pre-trial detention” (Appealed Decision, para. 74; see also 16 December 2008 Decision, para. 38).

⁸³ These factors were considered previously in the context of a finding that the condition of Article 58(1)(b)(ii) was met (see 20 August Decision, paras. 24 and 59; 16 December 2008 Decision, para. 38).

⁸⁴ Appealed Decision, para. 74.

⁸⁵ For a publicly available example of the expression of such concerns, see open letter dated 19 August 2009, addressed to the President of the ICC by Euphrasie Wanfiyo Goungaye, the widow of Nganatouwa Wanfiyo Goungaye, former legal representative of victims in the case the Prosecutor vs. Jean-Pierre Bemba. The content of this open letter is confirmed by other communications received by the Prosecution.

The Second Ground of Appeal: The Single Judge erred in ordering conditional release without also deciding the conditions, knowing to which State the Accused will be released, and determining that the State is competent to enforce the conditions

32. In a self-described “two-tiered approach”,⁸⁶ the Single Judge ordered the Accused’s “conditional release”⁸⁷ and recognized that conditions are appropriate,⁸⁸ but failed to (1) identify the essential conditions that would guarantee that he appears for trial and does not obstruct the case, (2) determine which State will accept him, and (3) satisfy herself that the chosen State can enforce the conditions. She thus ordered release without resolving the essential core elements that both justify and enable it. In the words of the Appeals Chamber, the Decision is “flawed on account of [procedural] law [...] a disregard of relevant facts”.⁸⁹
33. When considering an accused’s application for release, a Chamber has three options: continued detention, unconditional release, or release with conditions. The viability of release depends on the fact-based assessment whether release of that person could create a risk of flight, obstruction of justice including affecting the witnesses and others at risk on account of their interaction with the Court, or continuation of criminal activity. If any of those risks could result from release, the Chamber must make a second fact-based inquiry to determine if reasonably enforceable conditions can mitigate the risk.⁹⁰
34. The Single Judge misapprehended the process when she explained that linking conditional release to the appropriate conditions would wrongly “give the impression of pre-determination”.⁹¹ The rationale appears to be predicated on an erroneous assumption that the Court can, and must, determine the person’s right to conditional release regardless whether conditions may be fashioned to minimize risks from that release. However, there is *no* right to conditional release; once the Court determines

⁸⁶ Ibid, para. 43.

⁸⁷ The Single Judge “decides that Jean-Pierre Bemba Gombo be granted conditional release” (Appealed Decision, *dispositif*, (a); see also para. 77 - “the Single Judge decides that Mr Jean-Pierre Bemba shall therefore be released, albeit under conditions”), and “deems it appropriate that conditions be imposed on Mr Jean-Pierre Bemba” (para. 80); see also paras. 78, 82 (“the conditions to be imposed”), 83 and 92 (seeking views on “the set of conditions restricting liberty to be imposed on Mr Jean-Pierre Bemba”). See also para. 93 (“this decision on conditional release”, and para. 99 (“the conditional release of Mr Jean-Pierre Bemba”).

⁸⁸ Ibid, para. 80.

⁸⁹ ICC-01/05-01/08-323 OA, 16 December 2008, para. 52; quoting ICC-01/04-01/07-572, 9 June 2008, para. 25.

⁹⁰ Rule 119(3) recognises that release with conditions may be granted in situation where there is some risk (for example of interference with victims) - “Before imposing or amending any conditions restricting liberty, the Pre-Trial Chamber shall seek the views of [...] victims that have communicated with the Court in that case and whom the Chamber considers could be at risk as a result of a release or conditions imposed” (emphasis added). Helen Brady, “Protective and Special Measures for Victims and Witnesses”, in R.S.Lee (ed), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, New York 2001), p.435, footnote 27.

⁹¹ Appealed Decision, para. 82.

that unconditional release would pose risks of flight or damage to the proceedings, there is only a right to release if sufficient conditions are available to mitigate such risks. To decide that there is a right to conditional release under the particular circumstances in a case, the conditions that would mitigate the risks cannot be hypothetical or speculative, but instead must be identified and enforceable.⁹²

35. Thus, though the “approach” underlying conditional release is “two-tiered”, the decision itself cannot be. The Court first must determine if the person’s release poses a risk; and if it does, it then must consider whether and which conditions can be fashioned and enforced to effectively mitigate the risk. The decision must be a single one that can only be entered once all the prerequisites are satisfied. Otherwise the Court may find itself having authorized release of a person under conditions that cannot or will not serve their purpose. The Single Judge’s two-tiered approach, ordering that the Accused be released before considering what conditions render release feasible, was mistaken.
36. When done correctly, then, the Court’s first step is to consider whether release of the person could pose any of the risks identified in Article 58(1)(b). If the Court concludes that risks could result, the second step is to determine if particular conditions can sufficiently manage the risks, and whether there is certainty that the specified conditions are enforceable.
37. The determination of enforceability requires, first and foremost, that the Judge determines a responsible national authority willing to accept the accused. In this case the Single Judge consulted with six States and all of them refused to accept the Accused in their territory.⁹³
38. The ICTR faced similar situations in which accused persons sought pre-trial release to various States without their agreement, and in each case denied the request. As it explained, “expression of the mere wish to reside in a given country is not sufficient to meet the requirements for provisional release. The Defence must provide at least *prima facie* evidence that the country in question agrees or would agree to accept the Accused

⁹² See e.g. *Prosecutor v. Boskoski*, IT-04-82-PT, Decision on Defence Motion of Ljube Boskoski for Provisional Release, 18 July 2005, para. 25 (“*Boskoski* Provisional Release Decision”): “In making a decision regarding provisional release, the Trial Chamber must consider the particular circumstances of the case.” Also *Prosecutor v. Lukic & Lukic*, IT-98-32/1-PT, Decision on Sredoje Lukic’s Motion for Provisional Release, 13 December 2006, para 22 (“*Lukic* Provisional Release Decision”); *Prosecutor v. Prlic*, IT-04-74-PT, Order on Provisional Release of Jadranko Prlic (“*Prlic* Provisional Release Order”), 30 July 2004, para 17; *Prosecutor v. Popovic et al.*, IT-05-88-T, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovcanin Provisional Release, 1 March 2007, para. 16 (“*Popovic* Second Provisional Release Appeal”).

⁹³ The Single Judge noted that the six states concerned that provided observations on the interim release and possible conditions to be imposed have all expressed objections or concern to host the Accused on their territory, if released (Appealed Decision, para. 90).

on its territory.”⁹⁴ “[G]enerally speaking, a request for provisional release by an accused person which is unsubstantiated by supporting documentation from the proposed host state [in that case Canada] may be denied from the outset.”⁹⁵

39. Consequently, identifying a State is essential.⁹⁶ As the Single Judge correctly noted in her 14 April Decision, the Court “lacks the direct means to re-arrest a suspect/accused if he/she has absconded, and depends primarily on the cooperation of States”⁹⁷ to assure all relevant parties, participants, States Parties and observers that the released person will not endanger witnesses, obstruct justice, or abscond before trial.⁹⁸
40. The State must not only be willing to accept the Accused, but must also be willing to enforce the Court’s conditions. The willingness of a State to enforce conditions,⁹⁹ including arresting the person if necessary,¹⁰⁰ “must be determined in relation to the circumstances which arise in the particular case”.¹⁰¹ Thus, the selection of a State for the purposes of conditional release must look at the circumstances of the particular State,¹⁰² including the Accused’s nexus with that particular State,¹⁰³ its legal system, its ability to

⁹⁴ *Prosecutor v. Rukundo*, ICTR-2001-70-I, Decision on Defence Motion to Fix a Date for the Commencement of the Trial of Father Emmanuel Rukundo or, in the Alternative, to Request his Provisional Release Rule 65, Rule 65 bis and Rule 73 bis, 18 August 2003, para. 22. The ICTR Trial Chamber went on to hold that “The Defence is obliged to provide such guarantees upon application for provisional release, not at a later date.”

⁹⁵ *Prosecutor v Nshogoza*, ICTR-07-91-PT, Decision on Defence Motion for Review of Provisional Measures or, alternatively, for Provisional Release, 17 November 2008, para. 21.

⁹⁶ See e.g. *Lukic* Provisional Release Decision, para 23; *Popovic* Second Provisional Release Appeal, para. 16; *Prosecutor v Popovic et al.*, IT-05-88-AR65.2, Decision on Defence Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovcanin Provisional Release, 30 June 2006, para. 36 (“*Popovic* First Provisional Release Appeal”); *Prosecutor v Mrksic*, IT-95-13/1-AR65, Decision on Appeal against Refusal to Grant Provisional Release, 8 October 2002, para.9 (“*Mrksic* Provisional Release Appeal”); *Boskoski* Provisional Release Decision, para. 18.

⁹⁷ 14 April 2009 Decision, para. 49.

⁹⁸ Indeed, the Single Judge sought and considered the views of States regarding conditions in earlier decisions on interim release, See e.g. ICC-01/05-01/08-334, 23 December 2008, p. 6 (dispositif); 14 April 2009 Decision, paras 9, 11, and before allowing the Accused to leave the detention center to attend his father’s funeral in Belgium, see ICC-01/05-01/08-446, 13 July 2009, para. 11 and p. 6 (dispositif). The Defence acknowledged the significance of obtaining sufficient guarantees from the prospective States, including a guarantee that the person will not abscond. ICC-01/05-01/08-T-13-ENG ET, 29 June 2009, pp. 50, 52.

⁹⁹ For example, “the availability and effectiveness of monitoring of the Accused by the Host State” is another factor to consider “before a decision to release is reached” – *Prosecutor v Halilovic*, IT-01-48, Order of the President on the renewed Defence Motion concerning Conditions of Detention during trial, 24 January 2005, para. 15 (emphasis added). See also *Prlic* Provisional Release Order, para 17 (“The Tribunal must also rely on the co-operation of States for the surveillance of accused who have been released”).

¹⁰⁰ *Prosecutor v Tolimir et al.*, IT-04-80-AR65.1, Decision on Interlocutory Appeal against Trial Chamber’s Decision Granting PR, 19 October 2005, para. 20; *Mrksic* Provisional Release Appeal, para.9.

¹⁰¹ See e.g. *Popovic* First Provisional Release Appeal, para. 36; citing *Mrksic* Provisional Release Appeal, para. 9. See also *Popovic* Second Provisional Release Appeal, para. 16.

¹⁰² “Among the factors which are considered relevant to the provisional release inquiry are: [...] (d) the degree of cooperation given by the authorities of the State to which the accused seeks to be released; (e) the guarantees offered by those authorities [...]; (f) the likelihood that, in the case of breach of the conditions of provisional release, the relevant authorities will re-arrest the accused if he declines to surrender” (*Boskoski* Provisional Release Decision, para. 22; citing *Prosecutor v Sainovic and Ojdanic*, IT-99-37-AR65.2, Decision Refusing Ojdanic Leave to Appeal, 23 June 2003, p. 4).

¹⁰³ *Boskoski* Provisional Release Decision, para. 41; *Prosecutor v. Boskoski*, IT-04-82- AR65.2, Decision on Ljube Boskoski’s Interlocutory Appeal on Provisional Release, 28 September 2005, paras. 16-18.

implement its legal assistance obligations to this Court, and other practical considerations.¹⁰⁴

41. As the ICTY has held,

“[a]n accused provisionally released by a Chamber will be under the jurisdiction of the State to which he or she is released. Therefore the questions of that State’s willingness to ensure the Accused’s return to the Tribunal and his non-contact with victims and Prosecution witnesses while released, and the extent to which the Tribunal can confidently rely on the effective support of the State, are of importance in satisfying a Chamber that the requirements of Rule 65 are met.”¹⁰⁵

42. Thus, finally, the Court must consider the capacity of the State to ensure compliance with conditions. It is not enough that the Accused, as here, offers personal guarantees. It is the State that must ensure that the Accused complies with his personal guarantees and that Court-ordered conditions can also be carried out. It follows that all conditions, including the Accused’s personal promises, must be assessed in light of the ability of the said State to monitor and enforce compliance.¹⁰⁶

43. Furthermore, the nature of the conditions that can be imposed and enforced will depend on the particular laws and regulations of the State that will accept the Accused. In this regard, Rule 119(5) requires the Chamber to ascertain the relevant provisions of the national law when it considers whether to issue a summons subject to conditions.¹⁰⁷ The same principles necessarily apply when the Chamber considers conditional release.

44. The Single Judge noted in an earlier decision that the unwillingness of a State to enforce conditions or provide guarantees of the Accused’s conduct or return for trial is a factor that “weigh[ed] heavily” against provisional release.¹⁰⁸ That analysis was correct and consistent with existing jurisprudence that recognizes that State guarantees are often

¹⁰⁴ See e.g. *Boskoski* Provisional Release Decision, para. 43; *Prosecutor v Halilovic*, IT-01-48-T, Decision on Motion for Provisional Release, 1 September 2005, p.4. See also ICC-01/05-01/08-T-13-ENG ET, 29 June 2009, p. 22.

¹⁰⁵ *Lukic* Provisional Release Decision, para.23

¹⁰⁶ See e.g. *Prosecutor v Norman et al*, SCSL-04-14-AR65, Fofana Appeal against Decision Refusing Bail, 11 March 2005, para. 43: the personal guarantees offered by the accused had to be assessed “against a background of police claims that they would be unable to monitor his behaviour notwithstanding the proffered reporting conditions.”

¹⁰⁷ While this provision formally applies to the issuance of a summons, the obligation has also been described in general terms (see Friman, “Investigation and Prosecution”, in Lee (ed) *The International Criminal Court: Elements of Crimes & Rules of Procedure & Evidence* (2001)), and in any event is evidences a general principle that the national legal system of the proposed receiving state is a factor which must be considered when a Chamber decides that the imposition of conditions will enable a suspect or accused to remain at liberty.

¹⁰⁸ 14 April 2008 Decision, paras. 48-50.

necessary¹⁰⁹ and, at a minimum, “may carry considerable weight” in decisions on release.¹¹⁰ For example, the ICTR has stated that “according to the settled practice of the International Tribunal, it is the State into the territory of which the accused will be released, as guarantor of public safety and order in that territory, that must provide the International Tribunal with guarantees that the accused will not flee and that if he does so, he will be arrested, that is, that if released he will appear for trial”.¹¹¹

45. The Appealed Decision’s new course is incorrect. It not only ordered conditional release absent a finding that any State is prepared to accept the Accused, it also held that the inability of a State to offer guarantees of enforcement of conditions “cannot weigh heavily against the Accused’s release” because such guarantees only provide assurance to the judge.¹¹² To the contrary, it is a critical and indispensable factor of conditional release that the Judge first identifies a State ready, willing, and able to accept the Accused and enforce the conditions and guarantees, to ensure that the person does not flee and the Accused does not pose a threat to witnesses, victims, and the integrity of the proceedings.
46. The Single Judge accordingly erred in ordering conditional release without specifying conditions, identifying a State that is willing to accept the Accused, and satisfying herself that the State is willing and capable of ensuring compliance with the conditions,

¹⁰⁹ Although not a formal pre-requisite, “Frequently, the production of a guarantee from the relevant governmental body is imposed as [] a condition” – see e.g. *Popovic* First Provisional Release Appeal, para. 36; *Prosecutor v Nshogoza*, ICTR-07-91-PT, Decision on Defence Motion for Review of Provisional Measures or, alternatively, for Provisional Release, 17 November 2008, para. 16.

¹¹⁰ See e.g. *Popovic* Second Provisional Release Appeal, para.16; *Popovic* First Provisional Release Appeal, para. 36; *Prosecutor v Tolimir et al.*, IT-04-80-AR65.1, Decision on Interlocutory Appeal against Trial Chamber’s Decision Granting PR, 19 October 2005, para. 9; *Prosecutor v Blagojevic et al.*, IT-02-53-AR65, Decision on Application by Dragan Jokic for Provisional Release, 28 May 2002, p.2; *Prosecutor v Blagojevic et al.*, IT-02-53-AR65, Decision on Application by Dragan Jokic for Leave to Appeal, 18 April 2002, paras.7-8.

¹¹¹ *The Prosecutor v Nsengimana*, ICTR-01-69-AR65, Decision on Application by Nsengimana for Leave to Appeal the Trial Chamber’s Decision on Provisional Release, 23 August 2005, p. 4. Regardless of whether a formal “guarantee” is required, the finding that the State – as the authority which “has police and immigration powers” and which is the “guarantor of public safety and order in that territory” – must agree to host the Accused is indisputable. Thus, the willingness of another organisation to host a person was insufficient as it “cannot substitute the state which alone has police and immigration powers.”

¹¹² Decision, para. 88, citing *Prlic* Provisional Release Order, para. 31. Nor is *Prlic* supportive of the Single Judge’s ultimate conclusion. That case concerned a situation where two States were willing to accept the accused and had given guarantees of his good conduct and return, and the Chamber prescribed two pages of detailed conditions in its decision on release. The question was not the absence of State guarantees, but the sufficiency of such guarantees– a situation far removed from the present case.

Relief Sought

47. For the above referred reasons, the Prosecution requests that the Appeals Chamber:

- a) suspend enforcement of the Appealed Decision pending its decision in this case; and
- b) reverse the Appealed Decision and order the continued detention of the Accused.



Luis Moreno-Ocampo,
Prosecutor

Dated this 24th day of August 2009
At The Hague, The Netherlands