



Original: **French**

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

Date: **14 September 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

**Defence Response to the Observations of the Legal Representatives of Victims on
the Prosecutor's Document in Support of the Appeal**

Source: Mr Jean-Pierre Bemba Gombo's Defence Team

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Mr Nkwebe Liriss
Mr Karim A.A. Khan
Mr Aimé Kilolo Musamba
Mr Pierre Legros

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Belgium
Portugal
France
Germany
Italy
The Netherlands
South Africa

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 14 August 2009, Pre-Trial Chamber II issued the decision on Mr Jean-Pierre Bemba Gombo's interim release.¹
2. That same day, the Prosecutor lodged an appeal against the aforementioned decision of Pre-Trial Chamber II.²
3. On 24 August 2009, the Prosecutor filed the document in support of his appeal of 14 August 2009.³
4. On 31 August 2009, the Defence filed its response to the Prosecutor's document in support of the appeal.⁴
5. On 3 September 2009, the Appeals Chamber authorised the Legal Representatives of Victims to submit their observations on the Prosecutor's document in support of the appeal.⁵ It granted the Defence and the Prosecution leave to respond to the observations of the Legal Representatives of Victims by 14 September 2009.
6. On 7 September 2009, the Legal Representatives of Victims submitted their observations⁶ in accordance with the aforementioned order of the Appeals Chamber.

II. Preliminary Observations

7. The Defence submits that the two grounds of appeal raised by the Prosecutor against the Decision of Pre-Trial Chamber II on Mr Jean-Pierre Bemba Gombo's interim release, as supported by the Legal Representatives of Victims,⁷ are without merit and must be dismissed, since the Prosecution has failed to demonstrate the

¹ ICC-01/05-01/08-475.

² ICC-01/05-01/08-476.

³ ICC-01-05-01/08-483-Conf-Exp and ICC-01/05-01/08-485.

⁴ ICC-01/05-01/08-503-Conf-AnxA-tENG.

⁵ ICC-01/05-01/08-500 OA2, 03.

⁶ ICC-01/05-01/08-507-Corr-Anx-tENG.

⁷ Idem, para.13.

legal and factual errors on the basis of which it claims that the aforementioned Decision of Pre-Trial Chamber II is flawed. In this respect, the Defence reiterates its arguments of 31 August 2009.⁸

8. The decision to release Mr Jean-Pierre Bemba Gombo conditionally, taken on 14 August 2009, is the first act in a decision-making process which is still ongoing. It is in fact a preliminary ruling, inasmuch as the Court has itself decided to order fresh hearings, confined to the issue of determining the receiving State and the conditions to be attached to such release.

9. The review pursuant to article 60(3) of the Statute ends on completion of a two-tier process: the judge decides whether or not to release, and if so, she then sets out the conditions restricting liberty provided for in rule 119 of the Rules of Procedure and Evidence.

10. The Defence submits that the Legal Representatives of Victims and the Prosecutor must not only challenge the specific matters relied on by Pre-Trial Chamber II; the Prosecutor must also demonstrate that the conditions provided for in article 58(1), more specifically in article 58(1)(b), continue to be met, and he must also provide proof of the specific matters on which he relies in order to justify the continued detention of Mr Jean-Pierre Bemba, rather than making arguments of a general nature not based on any concrete evidence.⁹

11. The Defence agrees with the Prosecution and concedes that, pursuant to article 60(3) of the Statute, the Pre-Trial Chamber may only modify its ruling as to detention, release or conditions of release, **if it is satisfied** that changed circumstances so require.

12. The burden of satisfying the Judge that the circumstances have remained unchanged lies with the Prosecution.

⁸ ICC-01/05-01/08-503-Conf-AnxA-tENG.

⁹ ICC-01/05-01/08-475, para. 72.

13. The Defence has no inverse obligation to prove that there has been no such change in circumstances, and to satisfy the Chamber to that effect.

14. However, in its observations in support of its appeal, the Prosecution confines itself to stating that the conditions set out in article 58(1)(b) have remained unchanged, thus calling on the Single Judge and the Defence to prove that this is not the case.

15. The Prosecution criticises the Single Judge for having taken into account seven factors which had already been considered in the previous decision of 14 April 2009 in order to deny the application for interim release.

16. That decision of 14 April 2009 referred, in turn, to the factors cited in the decision of 10 June 2008 ordering the issue of a warrant of arrest for Mr Jean-Pierre Bemba.

17. This criticism is unfounded and based on an erroneous interpretation of article 60(3) of the Statute.

18. That provision (like paragraph 2 of the same article, moreover) does not contemplate a review of the legality or validity of the decision authorising a person's arrest.

19. On the contrary, it provides for the Pre-Trial Chamber, basing itself on article 58(1), to take a new decision, stating whether a person may or may not be granted interim release on the basis of the criteria set out in the said article 58(1) of the Statute.

20. In such a case, in accordance with article 60(2) and (3) detention is reviewed anew, *ab initio*, and the Pre-Trial Chamber's decision under article 60(2) and (3) must

be based on the material available to it, not on that available to the Chamber which issued the warrant of arrest or previously ordered continued detention.¹⁰

21. Hence the criticism that the impugned decision did not take into account the decision of 14 April 2009 – itself based on the grounds for the warrant of arrest of 10 June 2008 – is irrelevant.

22. And the Appeals Chamber has indeed stated that the power of the Pre-Trial Chamber is not conditioned by its previous decision authorising detention.

It must enquire anew into the existence of facts justifying the person's detention.

23. The latter is at liberty to put before the Chamber facts bearing on the legitimacy of its decision.¹¹

24. In any event, and following the Prosecutor's reasoning, there has in fact been a significant change, since he acknowledges the existence of two new factors:¹²

- a. Mr Jean-Pierre Bemba's brief trip to attend his father's funeral; and
- b. the six Registry reports on the active monitoring of Mr Jean-Pierre Bemba's non-privileged communication over several months.

25. The Defence submits that, while the Prosecution has a right to criticise the specific matters relied on by the Chamber, it nevertheless has a legal obligation to show that the conditions set out in article 58(1), more specifically in article 58(1)(b), continue to be met, and to produce evidence of the specific matters on which it relies in order to justify the continued detention of Mr Jean-Pierre Bemba. Arguments of a general nature, not supported by specific evidence, are in no case sufficient.

¹⁰ Case of *The Prosecutor v. Katanga and Ngudjolo* of 9/06/08, para. 12.

¹¹ Appeals Chamber, Case of KATANGA & NGUNDJOLO of 10 June 2008, para. 10, ICC-01/04-01/07-572.

¹² Prosecutor's submissions, para. 25, ICC-01-05-01/08-483-Conf-Exp.

26. The Defence submits that, beyond his general arguments, the Prosecutor has failed to provide any specific evidence whatsoever to warrant Mr Jean-Pierre Bemba Gombo's continued detention.

III. The two grounds of appeal relied on by the Prosecutor and supported by the Legal Representatives of Victims are without merit

1. The alleged error by the Single Judge in finding that, since the decision of 14 April 2009, there has been a substantial change in circumstances justifying conditional interim release

27. The Defence submits that this ground of appeal is unfounded and must be dismissed. In order for this ground to succeed, the Prosecutor would have to show that no new circumstances have arisen since the decision of 14 April 2009. Yet the Prosecutor himself concedes that, of the nine matters cited by the Chamber in its paragraphs 58 to 68, only two are new, namely: the authorisation resulting in Mr Bemba's transfer from the Detention Centre in The Hague to Brussels in order to attend his father's funeral; and the six reports by the Registry on the active monitoring of Mr Bemba's non-privileged communications over a period of several months.

28. The Defence submits that, even if the seven other factors were to be disregarded (which is not the case), the two remaining factors provide ample reason for the Chamber to review its decision on the basis of article 60(3). That provision requires the Chamber to examine them as a whole,¹³ taken together with other factors which the Prosecutor describes as pre-existing.

29. These two factors are 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.

¹³ ICC-01/05-01/08-475, paras. 61 and 72.

30. Moreover, concerning the two factors relating to risk of flight which the Prosecutor claims that the Single Judge failed to take into account, the Defence endorses Pre-Trial Chamber II's view of the matter, and would again point out that these are general assertions, unsupported by any concrete evidence or probability.¹⁴ These general assertions cannot gainsay the following fact, which is a clear, concrete reality: after being in detention for more than a year, and despite his political position, his contacts at national and international level and his financial situation, there is no evidence whatever that Mr Bemba has attempted to intimidate witnesses or victims or tried to obstruct the conduct of the proceedings. This is a certain fact, which no consideration of a general nature can gainsay.

31. On this issue, the Prosecutor gives no indication of why considerations relating to those contacts and financial resources are to be regarded as reasons to suggest that Mr Jean-Pierre Bemba will not appear at trial.

32. Nor does he state the process of reasoning which brings him to that conclusion.

33. It is not enough to allege numerous international contacts and connections in order to conclude that there is a likelihood of flight; instead, it should be explained why these factors would necessarily militate in favour of escape rather than in favour of increased cooperation with international justice.

34. States' reluctance to receive Mr Jean-Pierre Bemba on their territories is symptomatic of the little impact of the "numerous contacts" or power wrongly attributed to him.

35. As for the Prosecution's allegations concerning the disclosure of the identities of witnesses submitted by the Prosecutor, it should be noted that this situation cannot be ascribed to Mr Jean-Pierre Bemba personally. Moreover, as the Defence

¹⁴ ICC-01/05-01/08-475, para. 72.

pointed out in its replies, press [REDACTED] [REDACTED] 2008¹⁵ published [REDACTED] as witnesses prior to their disclosure. This suggests a leak of information by either the investigators or the witnesses themselves. Moreover, as regards the victims, the Defence is not aware of their identities, which precludes any possibility of intimidation on the part of Mr Bemba. It follows that the Prosecutor has failed to produce, beyond his considerations of a general nature, the slightest evidence capable of showing that there is a risk of Mr Bemba intimidating witnesses and victims or obstructing the normal conduct of the proceedings.

36. It follows that the two factors which the Prosecutor has acknowledged as new are in themselves evidence of the new circumstances justifying Pre-Trial Chamber II's review of its decision in light of all of the other factors taken together.

37. In any event, in his first ground of appeal the Prosecutor has not indicated any actual error of law or of fact.

1.1. Determination of a change of circumstances within the meaning of article 60(3) of the Rome Statute

38. Pursuant to article 60(3) of the Statute, the Single Judge must review her ruling on the release or continued detention of Jean-Pierre Bemba Gombo every 120 days.

39. Such review means that she must re-examine the matters which provided the basis for the previous decision to continue Mr Bemba's detention, rendered on 14 April 2009. This is consistent with the jurisprudence of the Appeals Chamber in the cases of Thomas Lubanga, Mathieu Ngudjolo Chui and Jean-Pierre Bemba.¹⁶

¹⁵ ICC-01/05-01/08-192-Conf-Anx1.

¹⁶ ICC-01/05-01/08-475, footnote 90: "Appeals Chamber, 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'", ICC-01/05-01/08-824; *ibid.*, Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2007 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", ICC-01/04-01/07-572; *ibid.*, Judgment on the appeal

40. It should be noted that the previous decision, which, on 14 April 2009, confirmed the warrant of arrest issued against Mr Jean-Pierre Bemba Gombo, relied on two criteria only in order to confirm his continued detention. First, the fact that there were reasonable grounds to believe that he had incurred individual and direct responsibility in relation to the wilful commission of a crime within the jurisdiction of the Court (article 58(1)(a) of the Statute). Second, the decision based itself on the existence of a strong likelihood that he would abscond if released (article 58(1)(b)(i) of the Statute). There was no consideration of the other two criteria set out in subparagraphs (ii) and (iii) of article 58(1)(b) of the Rome Statute.

41. Thus, in reviewing the previous decision that detention be maintained, the Judge must first examine the matters which led her at the time to find that the requirements of article 58(1) were satisfied at that time. The Judge has to consider whether those same matters, re-examined in light of current circumstances, taken together with any new elements submitted to the court, still impel her to the same conclusion.

42. It accordingly follows that the issue of new circumstances does not arise in relation to the two criteria which were not considered at the time of the said decision of 14 July 2009, namely the risk that the defendant may obstruct or endanger court proceedings or the investigation (article 58(1)(b)(ii) of the Statute), or that he may continue with the commission of the crime or a related crime which is within the jurisdiction of the Court and arises out of the same circumstances (article 58(1)(b)(iii) of the Rome Statute). It follows that the Prosecutor's appeal cannot relate to these matters, since the basis of his challenge to the decision of Pre-Trial Chamber II is that it decided to release the defendant on the basis of pre-existing circumstances on which it had already ruled as grounds for continued detention.

of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application of interim release', ICC-01/05-01/08-323; *ibid.*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo', ICC-01/04-01/06-1487.

43. The examination conducted by the Chamber in relation to these two criteria was in itself a new one, inasmuch as its decision of 14 July 2009 found that it was unnecessary to consider them cumulatively with the first criterion—the risk of flight as referred to in article 58(1)(b)(i) of the Statute—, since the latter sufficed to justify Mr Bemba’s continued detention.

44. The Prosecutor is wrong when he claims in his first ground of appeal that there has been no change of circumstances since Pre-Trial Chamber II’s decision of 14 April 2009, so that Mr Bemba’s release could not, in his view, be justified under the terms of article 60(3) of the Rome Statute.

45. In the first limb of his first ground of appeal, the Prosecutor wrongly contends that the factors cited in the impugned decision do not constitute new circumstances, since they pre-dated the decision of 14 April 2009 and were mostly addressed in prior decisions as factors in favour of Mr Jean-Pierre Bemba Gombo’s continued detention.

46. The Prosecutor himself concedes that there are at least two new factors cited in the impugned decision which constitute changed circumstances, namely the Registry’s reports on the monitoring of Mr Bemba’s non-privileged telephone calls and his conduct during his 24-hour release to visit Brussels to attend his father’s funeral.

47. The Prosecutor again wrongly contends that the impugned decision erred in finding that the fact that Mr Bemba had not threatened witnesses from the Detention Centre showed that he was unlikely to obstruct the investigation if released.

48. The Appeals Chamber confines itself to considering whether the impugned decision is based on a manifest misdetermination. The impugned decision correctly refers to Mr Bemba’s conduct in relation to witnesses whom he could quite plausibly have threatened, either through other persons or by calling them directly, although

he in fact did not do so. Pre-Trial Chamber II, exercising its power of discretion under article 58 of the Rome Statute, freely determined that there was little likelihood that, if released, Mr Bemba would interfere with witnesses.

49. Furthermore, the Prosecutor is likewise wrong in arguing that the impugned decision should not have taken account of Mr Bemba's conduct during his 24-hour release to Brussels, because, according to the Prosecutor, he was under constant escort by the Dutch or Belgian police and it would have been impossible for him to breach the conditions attached to his release.

50. It is, however, clear that the impugned decision did not commit a manifest misdetermination in taking account of the report by the Registry's special services, which has not been disputed by the Office of the Prosecutor, concerning matters dating from July 2009 and subsequent to the decision of 15 June 2009 on the confirmation of the charges. This report cites Mr Bemba's good conduct during his 24-hour release to Brussels and his strict respect for all of the conditions imposed on him, without any indication of the slightest incident on his part. Pre-Trial Chamber II was entitled to rely on this fact in order to find that there was little likelihood that, if released, Mr Bemba would abscond. The Prosecutor's argument, refusing to give Mr Bemba credit for his good conduct during his 24-hour release to Brussels, is misconceived. There have been a number of instances where a constant police presence has not prevented detained persons from seizing the slightest opportunity to attempt to escape.¹⁷

51. Furthermore, the personal conduct of a member of Mr Bemba's Defence team cannot be imputed to Mr Bemba, who has never been accused of having breached the confidentiality of the Pre-Trial Chamber's decision to allow him a 24-hour release to Brussels.

¹⁷<http://www.cyberpresse.ca/le-nouvelliste/actualites/200901/15/01-817951-un-detenu-tente-desevader.php> and http://www.dhnet.be/dhjournel/archives_det.phtml?id=389206.

52. The impugned decision in fact also takes account of new circumstances having arisen since the decision of 14 April 2009, and in some cases since the decision of 15 June 2009 on the confirmation of charges, namely the following:

- i. Mr Jean-Pierre Bemba has conducted himself correctly during his detention, including since the decision of 15 June 2009 on the confirmation of charges.
- ii. According to the findings in six Registry reports on the monitoring, over a period of several months, of his non-privileged telephone conversations, he has not attempted to obstruct the Court proceedings.
- iii. After the decision confirming the charges, Jean-Pierre Bemba was permitted to travel to Brussels to attend his father's funeral, and fully cooperated with the Court Registry and with the Dutch and Belgian authorities and complied with all of the conditions laid down by the Single Judge, and returned to the seat of the Court as instructed.
- iv. He has confirmed his standing willingness to cooperate with the Court and to appear at his trial as and when required.
- v. He has personally addressed the Court for the first time, in order to respond to the Prosecutor's allegations on the risk of his absconding; he referred to political plans, stating that he had no reason to become a fugitive and wipe out so many years of sacrifice.
- vi. He has strong ties with his family, as confirmed by his being authorised to contact them outside regular hours. His family situation makes the possibility of his absconding less likely.

53. Having conducted its review of the criterion set out in article 58(1)(b) of the Statute, the Pre-Trial Chamber then correctly proceeded to consider in turn the two other criteria:

Regarding the risk that the proceedings might be endangered:

54. The Chamber found that the risk, even probable risk, of pressure being exerted on witnesses and victims was not substantiated, otherwise than by allegations of a general nature on the part of the Prosecutor and the Legal Representatives of Victims, and not by any specific identifiable conduct of Mr Jean-Pierre Bemba.

55. The Judge cannot take account of unproven allegations of misconduct on the part of the Defence, when no proceedings have been initiated with the Registry on this account, or even a complaint by the Prosecutor.

56. The identity of the victims has not been disclosed to the Defence.

57. As regards the identity of the 21 witnesses, there has not been the slightest attempt on the part of Mr Jean-Pierre Bemba, as is confirmed by the Registry's reports. Moreover, the Prosecutor has failed to show that the Chamber committed any error of law or of fact in ruling that this was the case.

Regarding the risk of continued commission of the crimes:

58. The Judge committed no error in finding that the situation in the CAR is stable, and that she is aware of no objective information indicating that there is a threat of a probable intervention by Mr Jean-Pierre Bemba in that country.

59. The absence of such a threat is not disputed by the Office of the Prosecutor.

1.2. Whether decisive factors were not taken into account

60. In order to decide whether continued detention appears to be necessary, the Single Judge relies on all of the relevant matters taken as a whole, in accordance with the jurisprudence of the Appeals Chamber.¹⁸ A party is not entitled to raise for the

¹⁸ ICC-01/05-01/08-323, para. 55.

first time before the Appeals Chamber, without having previously argued the point before the Pre-Trial Chamber, the argument that a particular relevant factor was not taken into account by the Single Judge.

61. Regard must be had to what can be learnt from the jurisprudence in the Ngudjolo case,¹⁹ where the Appeals Chamber explains how the conditions laid down in article 58(1)(b) of the Rome Statute are to be understood. The text of the Statute endows the Pre-Trial Chamber with jurisdiction to determine whether the arrest of Mr Bemba appears necessary in order to ensure that he will appear at his trial, or that he will not obstruct the proceedings or continue to commit crimes. The Appeals Chamber cannot substitute its own evaluation of the facts for that of the Single Judge of the Pre-Trial Chamber; it must confine itself to deciding whether there has been an error of law, in particular whether the impugned decision is founded on an incorrect view of the law. It must also determine whether there may not have been an error of fact, in particular an error in the Pre-Trial Chamber's statement of the facts in light of the matters contained in the official record of the case, or whether there may not have been a manifest misappraisal of those facts.

62. In a second limb of his first ground of appeal, the Prosecutor wrongly argues that the impugned decision failed to take account of decisive factors which, in his view, represented evidence of a risk of obstruction to the investigation and of a threat to the security of witnesses.

63. The Prosecutor incorrectly claims in this regard that the impugned decision failed to take account of the possibility of Mr Bemba receiving a substantial inheritance following the death of his father, which might provide him with renewed means to influence the investigation or to put pressure on witnesses.

64. The argument concerning the inheritance allegedly acquired by Mr Jean Pierre Bemba following the death of his father lies in any case at the limits of what is decent.

¹⁹ ICC-01/04-01/07-572, para. 21.

65. In short, we are being asked to conclude that the mere fact of being wealthy constitutes an aggravating circumstance militating in favour of continued detention.

66. Moreover, the Prosecutor provides no evidence of his knowledge of the Congolese law on succession, such as would permit the conclusion that it is Mr Jean Pierre Bemba who will inherit from his father; nor does he show what this inheritance consists of, or its size or value.

67. This is an argument *ad personam*: it is in any event not underpinned by any legal text.

68. In any case, it is not a matter of supposing, but of showing, by means of credible evidence, that the late Mr Bemba's inheritance would encourage his son to abscond.

69. It should be noted that the Prosecutor never raised this argument before Pre-Trial Chamber II, and now raises it for the first time before the Appeals Chamber. It was, however, open to him to call for fresh hearings, where he could have raised any new circumstance which he considered relevant to the issue of Mr Bemba's continued detention or release, particularly in view of the fact that the circumstance which he cites is one that arose in July 2009, between the time when the Judge commenced her deliberation on the issue of Mr Bemba's possible release following the public hearing of 29 June 2009 before Pre-Trial Chamber II and the date when the impugned decision was handed down, 14 August 2009. This improperly taken point is inadmissible before the Appeals Chamber.

70. Furthermore, the Prosecutor is wrong in arguing that the impugned decision failed to take account of the risk of the proceedings being obstructed because the Defence had allegedly interfered with witnesses, whereas, in a previous decision of 16 December 2008, the Pre-Trial Chamber had taken this matter into account. The Prosecutor's argument on this point is irrelevant, since the allegation concerned not

Mr Bemba personally, but a member of his Defence team, the issue being whether a member of the Defence team had [REDACTED] Prosecution [REDACTED] after their identities had been disclosed. In this connection, the Defence had pointed out that [REDACTED] the general public and had been circulated [REDACTED] as a result of [REDACTED] of certain individuals representing themselves as Prosecution witnesses, even before the Prosecutor had disclosed their identities to the Defence. After the lapse of a substantial period of time, the Chamber was entitled to find that the fact there had been no complaint by the Office of the Prosecutor meant that it was no longer possible, in current circumstances, to regard the latter's allegations as evidence of a risk that Mr Bemba might obstruct the proceedings.

2. The fact that the Judge decided to order interim release without determining the conditions, the State to which the defendant will be released, or whether the said State is competent to enforce the conditions in question

71. The Defence submits at the outset that this ground of appeal is premature and without any legal foundation. Determination of the conditions to be attached to an order for interim release is not a pre-condition imposed on the judge before he or she can make a ruling on interim release. This procedure is left to the discretion of the judge, who may or may not impose them. This is clear from the terms of rule 119(1), which uses the verb: [...] *peut* [...] in the French version and [...] *may* [...] in the English version, thus providing for a mere option.

The Defence submits that this logic is readily perceivable from the French version of rule 119(1) of the Rules, which provides: "*La Chambre préliminaire peut imposer à la **personne mise en liberté** une ou plusieurs conditions restrictives [...]*". ["The Pre-Trial Chamber may set one or more conditions restricting liberty [...]"]. From an analysis of this provision, it can be seen that the person has, already at this point, been granted release, as is reflected in the words: ... *personne mise en liberté...* [*person released*] (and not: *personne qui sera mise en liberté* [*person to be released*]); and the release has restrictive measures attached to it after the said decision to release has been taken.

It follows that the conditions which may be attached to the decision to release do not constitute pre-conditions for the granting of release; those conditions are left to the discretion of the Pre-Trial Chamber, which may or may not impose them; and this is reflected in the words: ... *la Chambre peut...[the Chamber may] (and not: la Chambre Préliminaire doit [the Pre-Trial Chamber must])*.

72. Moreover, it is clearly apparent from the Judge's decision that the requisite conditions and the receiving State were intended to be determined after the hearings scheduled for 7 to 14 September 2009. The Defence would emphasise that the decision to defer those hearings, pending the decision by the Appeals Chamber,²⁰ cannot be interpreted as a failure by the said Pre-Trial Chamber to determine those conditions and to designate the receiving State. In granting suspensive effect to the Prosecutor's appeal, the Appeals Chamber implicitly recognised that this in no way affected the procedures envisaged by Pre-Trial Chamber II for purposes of determining the conditions and receiving State applicable to Mr. Bemba. The Appeals Chamber moreover acknowledged the subsidiary character of those conditions, stating: "*Thus, parts (b) through (m) of the dispositive are related not to the release of Mr Bemba per se, but rather to ascertaining the conditions, if any, of release once implemented.*"²¹ The Appeals Chamber thus made it quite clear that said conditions are not a pre-condition for a decision on interim release, but are, on the contrary, subsidiary measures designed to strengthen the grant of a decision on release when that decision comes to be implemented. It follows that it is premature to argue at this stage of the proceedings that Pre-Trial Chamber II has failed to determine those conditions or to identify the receiving State, particularly since the Appeals Chamber's decision accepted that suspensive effect applies only to matters covered by point (a), which are founded on article 58 (1);²² while the other matters under points (b) to (m), which address the conditions to be attached to the decision

²⁰ ICC-01/05-01/08-502.

²¹ ICC-01/05-01/08-499, para. 14.

²² ICC-01/05-01/08-499, para. 7: "For the following reasons, the Appeals Chamber has decided to grant the request for suspensive effect to the extent that the Impugned Decision grants conditional release of Mr Jean-Pierre Bemba Gombo (dispositive, operative paragraph (a))".

on release and determination of the receiving State, are not concerned by the Appeals Chamber's said decision on suspensive effect.²³ Thus the decision by Pre-Trial Chamber II unilaterally to postpone those hearings, notwithstanding the decision by the Appeals Chamber and the Defence's Observations, cannot be construed as a failure to determine the conditions for interim release and to identify the receiving State. It is clear that, once the Appeals Chamber has given its ruling on the procedure under point (a), which relates to article 58(1) of the Statute, the Pre-Trial Chamber will set new dates for the said hearings.

73. At the current stage of the proceedings, the Defence submits that the Judge could not rule on the receiving State, or on the conditions to be attached to the order for interim release, without first clarifying certain grey areas identified in the observations requested of States. Thus the Prosecutor's assertion that all of the proposed receiving States for Mr Bemba have refused to accept him is incorrect.

74. In effect, in response to Pre-Trial Chamber II's request for observations in the event of interim release being granted, only [REDACTED] addressed the twenty proposed conditions. Other States cited [REDACTED] their [REDACTED] [REDACTED] and the Statute.²⁴ Another cited Mr Bemba's lack of social ties with its territory.²⁵ In its reply of 24 August 2009²⁶ the Defence correctly threw substantial light on these States' observations: on their obligations under the Rome Statute, in particular articles 86 and 88 thereof, as well as on their international obligations pursuant to articles 26 and 46(1) of the Vienna Convention of 1969. An analysis of these articles shows that States Parties to the Rome Statute cannot rely on their national law in order to obstruct a request for cooperation from the Court, and are under an obligation to amend their national law in order to ensure all forms of cooperation with the Court, as provided in article 88 of the Statute. This means that countries like [REDACTED] and [REDACTED] must provide the Chamber with further clarification.

²³ Idem.

²⁴ See the observations of, inter alia, [REDACTED], [REDACTED] and [REDACTED].

²⁵ See the observations of [REDACTED].

²⁶ ICC-01/05-01/08-484-Conf and Conf-Anxs A-H.

[REDACTED] asserted that Mr Bemba has no [REDACTED] in its country, whereas members of his family reside there and some have [REDACTED] nationality. [REDACTED] must therefore provide Pre-Trial Chamber II with further particulars and clarification. On the basis of these particular instances cited by it, the Defence submits that, pursuant to rule 119(3), it was incumbent on Pre-Trial Chamber II to invite all parties to the proceedings to resolve these ambiguities and, after submission of observations from all the parties involved, to lay down conditions designed to guarantee optimal conditions for implementation of the decision on interim release. This approach should not be seen as a failure to establish the conditions of release or to designate the receiving State responsible for enforcing them. That is a misrepresentation by the Prosecutor of the approach adopted by Pre-Trial Chamber II pursuant to rule 119(3).

75. It follows that this second ground of appeal by the Prosecutor is not only premature but also wholly without merit, since Pre-Trial Chamber II had scheduled hearings for 7 to 14 September 2009 in order to determine the above conditions and to designate the receiving State;²⁷ moreover, the Appeals Chamber recognised the need for those hearings not to be discontinued,²⁸ and Pre-Trial Chamber II considered that they should be held once the Appeals Chamber had terminated its review of the conditions set out in article 58(1)(b) of the Statute.²⁹ At that time, Pre-Trial Chamber II, acting pursuant to rule 119(3), will determine the conditions of release and designate the State which is to receive Mr Bemba.

76. The Prosecutor is incorrect in stating that the impugned decision is flawed because, in his view, Pre-Trial Chamber II cannot order conditional release without satisfying itself that sufficient conditions exist to address the risks and without identifying a receiving State which would agree to accept Mr Bemba on its territory and would at the same time be capable of enforcing those conditions.

²⁷ ICC-01/05-01/08-475.

²⁸ ICC-01/05-01/08-499, para. 7.

²⁹ ICC-01/05-01/08-502.

77. The Defence notes that the Prosecutor fails to cite any legal provision allegedly violated by the decision to release the defendant without determining the conditions attaching to such release.

78. The Defence would point out that the conditions enumerated in rule 119(1) do not include the requirement that a receiving State provide the Chamber with express guarantees. Nor is it for the suspect or the accused to present guarantees emanating from a possible receiving State.

79. According to the ICTY, that is not a pre-condition for release.³⁰

80. Furthermore, the impugned decision is a preliminary one, the Chamber having itself ordered fresh hearings, confined to the issues of determination of the receiving State and of the conditions to be attached to such release.

81. There is no merit in the Prosecutor's argument that the decision is illogical in that it orders conditional release without specifying the relevant conditions or identifying the receiving State. The Pre-Trial Chamber ordered that the decision would not take effect until those conditions had been determined and the receiving State designated. This *modus operandi* was accepted by the Appeals Chamber, which refused to accord suspensive effect to the second limb of the Pre-Trial Chamber's decision, the object of which is to determine the conditions and the receiving State, for purposes of implementation of the decision for the interim release of Mr Jean-Pierre Bemba Gombo.

82. Regarding the existence of sufficient conditions, it should be noted that the international legislator laid down sufficient conditions in rule 119 of the Rules of Procedure and Evidence — conditions specifically contemplated for cases of conditional release. To cite the possible absence of sufficient conditions in certain

³⁰ ICTY, Appeal Decision on the Request by Dragan Jokic for Provisional Release, 18 April 2002, paras. 7-8.

circumstances would be to reverse the principle that liberty remains the rule and deprivation of liberty the exception.

83. As to identification of a State which might agree to receive Mr Bemba on its territory, the Prosecutor 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.

84. Nor can the detained person himself make private arrangements with States Parties to the Rome Treaty, as the Prosecutor wrongly appears to argue in paragraph 38 of his Appeal Document.³¹

85. Article 86 of the Rome Statute imposes a general obligation on States to cooperate with the Court. To that end, article 88 of the Rome Statute requires States Parties to adapt their national law so as to permit all **forms of cooperation with the Court**.

86. It should be recalled that, under international law, notably article 26 of the 1969 Vienna Convention, which deals with the question of the enforcement of international treaties by signatory States: *“Every treaty in force is binding upon the parties to it and must be enforced by them in good faith.”* This principle also means that States parties to a treaty cannot rely on impediments under their own internal law in order to evade their international obligations.

87. “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent” (Vienna Convention, article 46(1)).

³¹ ICC-01-05-01/08-483-Conf-Exp.

88. International agreements and treaties signed in good faith bind their signatory States, and the latter cannot derogate from these, in accordance with the operation of the general principle of law, *pacta sunt servanda*.

FOR THESE REASONS

89. May it please the Appeals Chamber:

- to adjudge to be without merit the arguments of the Legal Representatives of Victims and of the Prosecutor, and accordingly to dismiss them;
- to confirm the Decision of Pre-Trial Chamber II ordering the interim release of Mr Jean-Pierre Bemba.

[signed]

Aimé Kilolo Musamba
Associate Counsel

[signed]

Nkwebe Liriss
Lead Counsel

Dated this 14 September 2009

At Brussels, Belgium