



Original: English

No.: ICC-01/05-01/08 OA4

Date: 10 August 2010

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

**Prosecution response to Defence Document in support of the Appeal against
*“Decision on the review of the Detention of Mr Jean-Pierre Bemba Gombo pursuant
to Rule 118(2) of the Rules of Procedure and Evidence”***

Source: Office of the Prosecutor

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The Office of the Prosecutor

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo-Musamba

Legal Representatives of Victims

Ms Marie Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Jean-Pierre Bemba Gombo (“Appellant”) appeals the Decision of Trial Chamber III (“Chamber”) on the review of his detention pursuant to Article 60(3) and Rule 118, ordering that he remain in custody. The Appellant alleges three errors of fact and law and requests that the Appeals Chamber overturn the Decision.
2. The Prosecution submits that the Chamber properly considered all relevant facts in reviewing detention. It was not required to find the facts anew, it could properly rely on the facts and circumstances previously found, absent any changed circumstances that require a different conclusion. It also correctly dismissed the Appellant’s request that it explore, and direct the Registry to inquire of States Parties, whether there are any States willing and able to allow the Appellant to reside there and guarantee his appearance at trial. Finally, the Chamber correctly dismissed the Appellant’s alternate request for a modification of the detention regime to allow him to leave the detention centre during weekends. Because the Chamber’s resolution of all issues was legally and factually supported, the Decision should be upheld.¹

Procedural Background

3. On 7 July 2010, the Trial Chamber instructed the Prosecution, the Legal Representatives of victims and the Defence to file submissions in connection with the periodic review of the Appellant’s detention pursuant to Articles 60(3), 60(4) and 61(11), as well as Rule 118(2).²
4. On 15 July 2010, the Prosecution urged that the Appellant’s detention be continued (“Prosecution’s Submissions on Detention”).³ The Legal

¹ Pursuant to Regulation 23bis(2) of the Regulations of the Court, the Prosecution files this document confidentially due to references to information that is contained in confidential portions of the record of this case. In particular, the present filing refers to confidential information with respect to the Appellant’s attendance of his father’s funeral. There are no additional reasons for maintaining this classification. A public redacted version is being filed separately.

² ICC-01/05-01/08-811, para. 7.

³ ICC-01/05-01/08-828-Red. The Prosecution’s Submissions on Detention are summarized in the Decision (paras. 7-13).

Representatives filed their submissions on 15 July 2010,⁴ and the submissions of the Appellant followed on 22 July 2010.⁵

5. On 28 July 2010, the Chamber denied release.⁶ In its Decision, the Chamber found that “there has been neither a material change of circumstances since the last review of detention nor inexcusable delay attributable to the prosecution, and [...] the requirements of Article 58(1)(b)(i) apply”.⁷ Accordingly, the Trial Chamber ordered that “the accused will remain in custody”.⁸
6. On 29 July 2010, the Appellant filed an appeal against the Decision.⁹ On 4 August 2010, the Appellant filed his document in support of the appeal against the Decision (“Appeal Brief”).¹⁰
7. The Prosecution hereby submits its response pursuant to Regulation 64(5) of the Regulations of the Court.

Overview of the Appellant’s Grounds of Appeal

8. The Appellant submits that the Trial Chamber made three factual and legal errors:
 - (1) The Trial Chamber erred by not carrying out a review of the facts and elements necessary for making a decision on the legality of the detention and the release of the Appellant and by simply copying the decisions of the Pre-Trial Chamber.¹¹
 - (2) The Trial Chamber erred by considering irrelevant the Defence request concerning guarantees by States Parties or a local UN mission, based on the fact that it had already found that there are no new facts justifying a change in

⁴ ICC-01/05-01/08-825.

⁵ ICC-01/05-01/08-840.

⁶ Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence, ICC-01/05-01/08-843.

⁷ Decision, para.39.

⁸ Decision, para.39.

⁹ ICC-01/05-01/08-844.

¹⁰ ICC-01/05-01/08-847.

¹¹ Decision, para.63(i). For the arguments in support of the First Ground, see Appeal Brief, paras.11-26.

the detention regime and by not ordering the Registry to assist the Appellant in identifying a State that might provide guarantees.¹²

- (3) The Chamber erred in law when rejecting the Accused's proposal that he leave the detention centre during weekends, based on the finding that there is no change in circumstances warranting a change in the detention regime and by considering that Article 60(3) applies to the request for modification of the detention system.¹³

I: The Chamber properly considered all relevant facts for its review of detention pursuant to Article 60(3)

9. The Chamber did not commit any error in assessing, pursuant to Article 60(3), whether the conditions under Article 58(1) continue to be met. It applied the correct process and took into consideration all relevant facts.
10. Article 60(3) provides that a chamber conducting its periodic review of release or detention "may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require". The Appeals Chamber specified that "[t]he requirement of 'changed circumstances' imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary."¹⁴
11. In this instance, the Chamber rejected the Appellant's arguments that facts or circumstances materially changed to justify a change in the detention regime.¹⁵ The Chamber determined that "the requirements of Article 58(1)(b)(i) of the Statute apply",¹⁶ and concluded that "the accused will remain in custody".¹⁷

¹² Decision, paras.63(ii) and (iii); see Appeal Brief, paras.27-45.

¹³ Decision,para.63(iv); see Appeal Brief paras.46-62.

¹⁴ ICC-01/05-01/08-631-RedOA2,paras.1,60.

¹⁵ Decision,para.38.

¹⁶ Decision,para.39.

¹⁷ Decision,para.39. See also para.38: "detention remains necessary to ensure the accused's appearance at trial".

12. Contrary to the contention of the Appellant, the Chamber correctly relied, among other things, on the factors that it had considered during its previous review of detention on 1 April 2010 and that it had identified in its previous findings. It is correct that the Chamber was not bound by the prior findings. It is also correct that the Chamber is obliged to “appraise the facts bearing on *sub judice* matters”.¹⁸ The Appeals Chamber ruled that “the review pursuant to article 60(3) of the Statute makes it incumbent upon the [...] Chamber to address anew its prior ruling on the issue of detention or release in light of the requirements under article 58(1) of the Statute.”¹⁹ However, in the absence of new information which, in the view of the Chamber, could have a bearing on its previous assessment of the facts or its prior findings,²⁰ there is no need for the Chamber to re-visit its prior assessment and findings.²¹ It can be assumed that in the absence of new facts or circumstances, a Chamber would come to the same conclusion when assessing the same facts that were previously before it.²²
13. This applies regardless of the fact that the composition of the Chamber has now partially changed.²³ If the newly composed Trial Chamber had considered that the prior findings should be revisited, it could have done so. However, in this case, and in the absence of relevant new information, it was not necessary that the Chamber expressly re-evaluate and enter new findings with respect to the previously proven facts.
14. This analysis is not diminished in any way by another decision of the Appeals Chamber relied on by the Appellant.²⁴ In that case the Appeals Chamber found it impermissible for a Single Judge of a Pre-Trial Chamber, in the first detention hearing (under Article 60(2)) of Mathieu Ngudjolo after his surrender to the

¹⁸ Appeal Brief, para.13 and fn.8, quoting ICC-01/04-01/07-572OA4, paras.10,26-27.

¹⁹ ICC-01/05-01/08-631-RedOA2, para.58.

²⁰ As stated above, the Appeals Chamber has ruled that “the requirement of ‘changed circumstances’ imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.” ICC-01/05-01/08-631-RedOA2, paras.1,60.

²¹ Appeal Brief, paras.14,18.

²² Reference to those prior findings under these circumstances not only ensures consistency of the Chamber’s approach, but is also in the interest of judicial economy.

²³ Appeal Brief, para.15,18.

²⁴ Appeal Brief, para.13.

Court, to adopt factual conclusions arrived at by another member of the Pre-Trial Chamber acting as a Single Judge in the context of redacting witness statements before disclosing them to Germain Katanga.²⁵ The Appeals Chamber explained that in the Article 60(2) hearing the Single Judge was required to assess the facts pertinent to detention and base a decision on those found facts; the Single Judge could not, in that context adopt the findings made *by another Single judge in other proceedings*.

15. Nor does the Chamber's decision to accept its prior findings mean that it refrained from making a factual analysis.²⁶ To the contrary, in its factual analysis the Chamber looked at all new information provided by the Appellant²⁷ in conjunction with and against the backdrop of its previous findings. It considered the weight of the Appellant's arguments²⁸ and assessed the possible impact that these arguments may have on the prior findings of the Chamber.²⁹ This analysis led to the Chamber's conclusion that there are no new facts that would have an impact on its prior findings regarding the requirements under Article 58(1)(b)(i). The Chamber thus followed an appropriate process.

16. Moreover, the Chamber's reliance on its prior findings on detention did not wrongly shift the burden of proof onto him to prove the existence of changed circumstances to justify his release.³⁰ The Prosecution agrees that it bears the burden under Article 60(2) to establish that the Accused, if released, would present a risk of flight, commission of new crimes, or obstruction of justice.³¹ But once the Prosecution meets that burden, it need not repeatedly re-establish the

²⁵ ICC-01/04-01/07-572OA4, para.26.

²⁶ Appeal Brief, para.20.

²⁷ Decision, paras.33-37.

²⁸ Decision, para.39: "there has been [no] material change of circumstances since the last review of detention".

²⁹ Decision, para.38: "the defence has failed to allege any new facts justifying a change in the detention regime".

³⁰ Appeal Brief, paras.16-17. The Appellant relies on a judgement of the ECHR (*Ilijkov v. Bulgaria*, 33977/96, para. 85), but the facts of that case are not comparable. In *Ilijkov*, the applicant's detention was ordered solely because he was charged with a crime punishable by 10 or more years' imprisonment which, according to domestic law, gave rise to a presumptive risk of flight, re-offending or obstructing the investigation (see para.75). The Rome Statute provides no similar presumption. Indeed, the contrary is true. Since all crimes within the jurisdiction of this Court are punishable by more than 10 years' imprisonment, if the Rome Statute were like Bulgarian domestic law it would simply presume detention. It does not do so, however, instead it requires the Chambers to make detention determinations based on risk of flight, re-offending, or obstruction.

³¹ See ICC-01/04-01/07-330, pp.5-7, referred to in Appeal Brief, fn.10.

same underlying facts if these facts continue to apply. Article 60(3) requires the Chamber to “periodically review its ruling” – suggesting that the ruling continues to have force – not periodically conduct de novo determinations.

17. Thus, in a properly conducted review proceeding under Article 60(3), the Chamber must satisfy itself that the previously-ordered detention (or release) was appropriate, that there are no changed circumstances that warrant a modification of its prior ruling and, if the person is detained, that the requirements of Article 58(1)(b) continue to apply. The Chamber must do so based on all the facts and circumstances before it. If the Appellant raises arguments in relation to changed circumstances, it is upon him to substantiate these allegations. If no changed circumstances exist, Article 60(3) makes it mandatory for the Chamber to confirm its prior ruling.
18. Finally, the Appellant contends that he lacks sufficient knowledge of the reasons underpinning the Decision and the basis for continued detention.³² This argument is unfounded. There is no ambiguity in the factual and legal basis for the Appellant’s detention, based on the Chamber’s prior review of detention on 1 April 2010³³ and the previous decisions on detention.³⁴ According to the Appeals Chamber, even in the first detention decision, in the absence of any relevant arguments or new facts, the pre-trial or trial chamber is not *required* to provide detailed reasons for its conclusion that the requirements under Article 58(1)(b)(i) continue to be met.³⁵ Clearly, then, detailed analysis is not required at periodic

³² Appeal Brief, paras.24-26.

³³ ICC-01/05-01/08-743.

³⁴ See the Chamber’s review of detention on 8 December 2009 (ICC-01/05-01/08-T-18-CONF-ENG p.29, Ins.15-17). See also the Pre-Trial Chamber’s decision on the Appellant’s first challenge of his detention pursuant to Article 60(2) (ICC-01/05-01/08-80-Anx), as well as the Pre-Trial Chamber’s decisions on the review of detention pursuant to Article 60(3) (ICC-01/05-01/08-321; ICC-01/05-01/08-403). Moreover, there are two judgements of the Appeals Chamber dealing with the factual basis of the Appellant’s detention (ICC-01/05-01/08-323 OA; ICC-01/05-01/08-631-Red OA2).

³⁵ Under the Rome Statute, the Pre-Trial Chamber refers to statutory factors under Article 58(1)(b) in determining in an *ex parte* proceeding whether it is necessary to take the suspect into custody, in lieu of issuing a summons to appear. If arrested pursuant to a warrant, the suspect may thereafter request release. The Pre-Trial Chamber considers the same statutory factors upon which the earlier decision to issue an arrest warrant was based. Previously in this case, the Appellant sought release after being arrested. The Pre-Trial Chamber denied release without making specific findings, relying instead on the conclusions supporting issuance of the arrest warrant. On the Appellant’s appeal, this Chamber stated, “[...] it would [...] [be] preferable for the Pre-Trial Chamber to state in more detail [...] the reasons for which it concluded that the conditions of article 58(1)(b)(i)

reviews affirming detention or release rulings; only where a Chamber deviates from its prior findings may a detailed reasoning be required.³⁶

II: The Chamber correctly dismissed the Appellant's request concerning guarantees of appearance as irrelevant

19. In addition to his arguments that there had been a material change of circumstances and that an inexcusable delay can be attributed to the Prosecutor, the Appellant requested that the Chamber order the Registry to assist him in negotiating with States Parties for agreements that, if released to their jurisdiction, they would guarantee his appearance at trial.³⁷ In its Decision, the Chamber found that “the defence request concerning guarantees by States Parties is irrelevant, given the Chamber’s finding that there has been no material change since 1 April 2010”.³⁸

20. The Appellant challenges this finding and argues that the Chamber made a “manifest error of assessment”³⁹ and advances two distinguishable sub-errors. He submits that the Chamber erred (i) by considering irrelevant the assessment of guarantees of appearance that States or a local UN mission would provide when deciding on the application for release [...]; and (ii) by not ordering the Registry to help the Appellant to find a State that would provide the necessary guarantees of appearance.⁴⁰

of the Statute continued to be fulfilled. The Appeals Chamber is nevertheless satisfied that the Pre-Trial Chamber's omission to provide more detailed reasoning did not detract from the correctness and adequacy of its finding on this point. [...]” It continued, “[T]he Pre-Trial Chamber found that ‘in the absence of any relevant argument on the part of the defence to the contrary, the Single Judge finds [these findings and conclusions] still applicable today’ [...]. Again, it would have been preferable to state in more detail why the Pre-Trial Chamber reached this conclusion.” (ICC-01/05-01/08-323OA, paras.53,66). The Prosecution submits, however, that the preference for an explicit and detailed statement of reasons applies to the initial decision on detention, but as a matter of common sense there is no similar preference that the same reasons be repeated every 120 days.

³⁶ When overturning a decision by the Single Judge of the Pre-Trial Chamber to order release based on, *inter alia*, a factor that it had previously considered to support detention, the Appeals Chamber ruled as follows: “The Pre-Trial Chamber does not explain why it considered this factor to represent a changed circumstance or why it no longer weighs in favour of continued detention. In the absence of such an explanation the Appeals Chamber finds that the Pre-Trial Chamber misappreciated this factor” (ICC-01/05-01/08-631 OA2, para.78).

³⁷ ICC-01/05-01/08-840, para.101.

³⁸ Decision, para.38.

³⁹ Appeal Brief, para.27.

⁴⁰ Appeal Brief, paras.63(ii),(iii). The arguments are developed in paras.27-45.

- (i) *The Trial Chamber ordered that the Accused remain in custody based on the facts before it*

21. Although the Appellant submits that the Chamber failed to consider guarantees that would ensure his appearance at trial,⁴¹ he did not identify any such guarantee from a State or a local UN mission that was willing and able to host him and ensure his appearance at trial.⁴²

22. A prior ruling on detention may only be modified pursuant to Article 60(3), if the Chamber is satisfied that changed circumstances so require. A Chamber must satisfy itself based on the arguments and facts before it. In this case, however, the Appellant requested that the Chamber modify its ruling based on hypothetical guarantees by unidentified States.⁴³ Whether a particular guarantee is relevant to determine that there is a change in the circumstances and whether the Accused's appearance at trial can be ensured under Article 58(1)(b)(i) is a factor that the Chamber can only take into consideration once the Appellant places it before the Trial Chamber. As a result, the Appellant fails to demonstrate an error in the Decision and his arguments must be dismissed.

- (ii) *The alleged error has no material impact on the Decision ordering that the Accused remain in custody*

23. The Appellant further submits that the Trial Chamber erred when it denied his request to instruct the Registry to assist him in identifying a State or local UN mission that could provide guarantees.⁴⁴ According to the Appellant "this was a different request from that of release"; thus, he argues, the Chamber erred in considering whether, under Article 60(3), this constituted "changed

⁴¹ Appeal Brief, para.63(ii).

⁴² ICC-01/05-01/08-840.

⁴³ Appeal Brief, para.29.

⁴⁴ Ibid., para.63(iii). In its submissions to the Trial Chamber the Appellant did not indicate any concrete State or organization. Rather his request was phrased in the abstract (ICC-01/05-01/08-840, para.101).

circumstances”.⁴⁵ The Appellant specifies that this request was made so that the Appellant could provide new guarantees in a future request for release,⁴⁶ and provides extensive reasons why he believes that the Registry is obliged to provide this assistance and the relevance of these guarantees.⁴⁷

24. As indicated above, the Trial Chamber did not err in ordering the Appellant’s continued detention on the basis of the facts before it. Having established that there has been no material change since 1 April 2010, the Chamber correctly found it irrelevant to instruct the Registry to “assist the Appellant in finding guarantees” in the backdrop of its review of detention pursuant to Article 60(3). In fact, the Appellant does not draw any link between this alleged error and the Decision. Rather he acknowledges that he was seeking the Chamber’s order (and the Registry’s assistance) for the purpose of future applications.⁴⁸ Hence, the Appellant fails to indicate how the Chamber’s ruling on this issue materially impacts on this Decision ordering that the Accused remain in detention. Consistent with the Appeals Chamber’s jurisprudence, the Appellant’s Second Ground of Appeal should therefore be dismissed *in limine*.⁴⁹

25. In similar fashion, the argument should additionally or alternatively be summarily dismissed on the ground that it is not properly before the Appeals Chamber. The Appellant himself states that “this was a different request from that of release”.⁵⁰ As such, denial of that request is not automatically appealable under Article 82(1)(b), which allows appeal from decisions granting or denying release. Instead, it falls within the category of interlocutory decisions under Article 82(1)(d) that require leave to appeal by the Chamber issuing the decision.

⁴⁵ Ibid., para.33.

⁴⁶ Ibid., paras.33,38.

⁴⁷ Ibid., paras.35-45. It is noteworthy that the reference to the ECtHR case of *Wemhoff v. Germany* is taken out of context (see para.30, fn.17) and its contextual background differs hugely from *Bemba*. The *Wemhoff* case was a financial one and the Court deemed it relevant that security should be provided in monetary terms. This is clearly not the case in *Bemba*.

⁴⁸ Appeal Brief, para.33.

⁴⁹ ICC-02/04-01/05-408OA3, para.51.

⁵⁰ Appeal Brief, para.33.

III: The Chamber correctly dismissed the Appellant's request for a modification of the detention regime

26. Finally, the Appellant argues that the Chamber erred by rejecting his request for a change in the conditions of his detention, specifically in rejecting his request that he be permitted to leave the Detention Centre during weekends.⁵¹ The Chamber rejected this request based on the finding that there is no change in circumstances warranting a change of the detention regime. The Appellant insists that he did not seek conditional release. Rather, he contends he sought only a modification in the conditions under which he would remain in detention (a questionable semantic distinction, since in effect he sought modification to the existing detention regime to allow his periodic release at least on a part-time basis).⁵² Therefore, he argues, it was an error to consider this request under Articles 58(1) and 60(3).⁵³ Instead, the Chamber had some inherent power, derived from the same unspecified authority that the Pre-Trial Chamber exercised when it allowed the Appellant to attend the funeral of his father.⁵⁴

27. There is no merit to the Appellant's claim. While the Appellant argues that the Chamber should not have assessed his request under Articles 58(1) and 60(3),⁵⁵ he does not provide any alternative legal basis that would have allowed the Chamber to grant his request. The Prosecution submits that the Chamber's authority to order a modified form of detention lies only under Articles 58(1) and 60(3).

28. The Appellant also argues that an analogy can be drawn to the practice of the International Criminal Tribunal for the former Yugoslavia ("ICTY") where the President considered house arrest under Rule 64 of the ICTY Rules of Procedure

⁵¹ Appeal Brief, paras.46-62; Decision, para.38.

⁵² Appeal Brief, para.48.

⁵³ Appeal Brief, paras.50-51,57,63(iv).

⁵⁴ Appeal Brief, paras.51-54.

⁵⁵ Appeal Brief, paras.50-51,57,63(iv).

and Evidence.⁵⁶ According to that provision, the President “may, on the application of a party, request modification of the conditions of detention of an accused.” The analogy fails, since there is no equivalent or comparable legal authority in the ICC Statute, Rules, or Regulations. Nor may the Chamber exercise some unarticulated inherent power to order part-time release or house arrest without adhering as well to the mandatory language in Articles 58(1) and 60.

29. To the extent that the Appellant’s request contemplated weekend release within The Netherlands, whether conditioned by house arrest or any other arrangement, it would also be incompatible with the “Headquarters Agreement between the International Criminal Court and the Host State”.⁵⁷ This agreement does not provide for any form of modified detention on the territory of the Host State as suggested by the Appellant. To the contrary, the Agreement provides that the Host State shall facilitate the transfer of a released person (whether acquitted, dismissed, or released pending trial) to another State.⁵⁸ Under no circumstance does this Agreement foresee that a person facing charges before the International Criminal Court would be released into and remain within the territory of the Host State during weekends.

30. The Pre-Trial Chamber’s decision to authorize the Appellant to attend his father’s funeral in Belgium does also not constitute a precedent for modification of the detention regime.⁵⁹ In that case, the Single Judge found the [REDACTED].⁶⁰ The Prosecution submits, however, that the Single Judge’s decision [REDACTED] rested on her authority under Article 60(3) to modify her ruling on detention in order to accommodate an extraordinary need. [REDACTED].⁶¹ Thus, [REDACTED] can in no way be regarded as support for,

⁵⁶ Appeal Brief, paras.55-56.

⁵⁷ ICC-BD/04-01-08.

⁵⁸ *Ibid*, Articles 47(1) and 48(1).

⁵⁹ Appeal Brief, paras.51-54.

⁶⁰ ICC-01/05-01/08-437-Conf, para. 9.

⁶¹ ICC-01/05-01/08-631-Conf OA2, para.83.

much less to require, the Chamber's exercise of inherent authority to allow the Accused to leave the Detention Centre every weekend.

31. Finally, even if, *arguendo*, it was not mandatory for the Chamber to apply Articles 58(1) and 60(3) and the Chamber has some other inherent power to order weekend release, the Chamber did not err legally or factually when rejecting the request.⁶² The Chamber found that there was no change in circumstances warranting a change of the detention regime.⁶³ The Appellant offered no new facts to establish that the risk of his flight diminished on Saturdays and Sundays, and thus that the conditions of his detention should be relaxed every weekend. As a result, it was not unreasonable for the Chamber to maintain the detention regime in place and to reject the Appellant's request.

Remedy

32. For the above reasons, the Prosecution requests the Appeals Chamber to reject the Appeal in its entirety and to uphold the Decision.



Luis Moreno-Ocampo, Prosecutor

Dated this 10th day of August 2010

At The Hague, The Netherlands

⁶² Appeal Brief, paras.58-60.

⁶³ Decision, para.38.