

**Cour
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**International
Criminal
Court**

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No. ICC-01/05-01/08 OA 4

Date: 19 November 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 document

Judgment

on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled “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”

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

The Office of Public Counsel for Victims

Ms Paolina Massidda

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “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” of 28 July 2010 (ICC-01/05-01/08-843),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The “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” is reversed.
2. Trial Chamber III is directed to carry out a new review under article 60 (3) of the Statute as to whether Mr Jean-Pierre Bemba Gombo should remain in detention or whether he should be released, with or without conditions, in light of paragraphs 40 to 56 of the present judgment. Until, and subject to, that review, Mr Jean-Pierre Bemba Gombo shall remain in detention.

REASONS

I. KEY FINDINGS

1. A Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must revert to that ruling and determine whether there has been any changes in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute. However, the Chamber should not restrict itself to only considering the arguments raised by the detained person.

2. For each periodic review of detention under article 60 (3) of the Statute, the Prosecutor must make submissions as to whether there has been any change in the circumstances that justified detention previously and must bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber and the Trial Chamber

3. On 20 August 2008, Pre-Trial Chamber III rendered a decision on the first application by Mr Jean-Pierre Bemba Gombo (hereinafter: “Mr Bemba”) for interim release pursuant to article 60 (2) of the Statute.¹ On 16 December 2008,² 14 April 2009³ and 14 August 2009,⁴ the Pre-Trial Chamber reviewed its ruling on Mr Bemba’s detention, as required by article 60 (3) of the Statute. On 18 September 2009, the Presidency transferred the case against Mr Bemba to Trial Chamber III.⁵

4. On 8 December 2009, in its first decision in this respect, Trial Chamber III rendered an oral decision,⁶ reviewing Mr Bemba’s detention and ordering his continued detention. On 1 April 2010, the Trial Chamber again reviewed Mr Bemba’s detention, and ordered his continued detention⁷ (hereinafter: “Review Decision of 1 April 2010”).

5. On 7 July 2010, the Trial Chamber issued the “Order postponing the commencement of the trial”⁸ (hereinafter: “Order of 7 July 2010”). In that same order, the Trial Chamber noted that Mr Bemba’s detention was due to be reviewed before 30 July 2010; accordingly, it instructed the Prosecutor and the participating victims to

¹ “Decision on application for interim release”, ICC-01/05-01/08-73.

² “Decision on Application for Interim Release”, ICC-01/05-01/08-321.

³ “Decision on Application for Interim Release”, ICC-01/05-01/08-403.

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”, ICC-01/05-01/08-475.

⁵ “Decision constituting Trial Chamber III and referring to it the case of *The Prosecutor v. Mr Bemba Jean-Pierre Bemba Gombo*”, ICC-01/05-01/08-534.

⁶ ICC-01/05-01/08-T-18-CONF-ENG, p. 24, line 10, to p. 29, line 17.

⁷ “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-01/05-01/08-743.

⁸ ICC-01/05-01/08-811.

file their submissions in this regard by 15 July 2010, and Mr Bemba to file his observations by 22 July 2010.⁹

6. The Prosecutor and the participating victims filed their respective submissions on 15 July 2010.¹⁰

7. Following the excusal of two judges of the Trial Chamber, the Presidency, by decision dated 20 July 2010 and registered on 21 July 2010, assigned two judges to replace the excused judges, thereby changing the composition of the Trial Chamber.¹¹

8. On 22 July 2010, Mr Bemba filed the “Defence Submission on the Review of Mr Jean-Pierre Bemba Gombo’s Detention”¹² (hereinafter: “Mr Bemba’s Submissions before the Trial Chamber”).

9. On 28 July 2010, the Trial Chamber rendered the “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”¹³ (hereinafter: “Impugned Decision”), ordering Mr Bemba’s continued detention.

B. Proceedings before the Appeals Chamber

10. On 29 July 2010, Mr Bemba filed the “Defence Notice of Appeal Against the Decision of Trial Chamber III of 28 July 2010 entitled *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*”¹⁴ (hereinafter: “Notice of Appeal”).

11. On 4 August 2010, Mr Bemba filed the “Document in Support of the Defence Appeal against the Decision of Trial Chamber III of 28 July 2010 entitled *Decision on the review of the Detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2)*

⁹ Order of 7 July 2010, para. 7.

¹⁰ “Prosecution’s Observations on the Review of the Pre-Trial Detention of Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-828-Conf-Exp, a public redacted version was filed simultaneously as ICC-01/05-01/08-828-Red; and “Observations of the Legal Representative regarding the review of detention of Mr. Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-825.

¹¹ “Decision replacing judges in Trial Chamber III”, ICC-01/05-01/08-837, p. 4.

¹² ICC-01/05-01/08-840-tENG.

¹³ ICC-01/05-01/08-843.

¹⁴ ICC-01/05-01/08-844-tENG (OA 4).

of the Rules of Procedure and Evidence”¹⁵ (hereinafter: “Document in Support of the Appeal”).

12. On 5 August 2010, the Office of Public Counsel for Victims filed, on behalf of the victims it represents in the proceedings (hereinafter: “Victims”), the “Application by the OPCV in its Capacity as Legal Representative of the Victims for Participation in the Interlocutory Appeal Filed by the Defence Challenging the Decision of Trial Chamber III of 28 July 2010”¹⁶ (hereinafter: “Victims’ Application to Participate”), requesting leave to participate in Mr Bemba’s appeal against the Impugned Decision.

13. On 10 August 2010, the Prosecutor filed the “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*’”¹⁷ (hereinafter: “Response to the Document in Support of the Appeal”).

14. On 16 August 2010, the Prosecutor¹⁸ and Mr Bemba¹⁹ filed their respective responses to the Victims’ Application to Participate.

15. On 18 August 2010, the Appeals Chamber rendered the “Decision on the Participation of Victims in the Appeal against the ‘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’ of Trial Chamber III”,²⁰ granting the Victims leave to participate in the appeal.

16. On 24 August 2010, the Victims filed the “Observations of the OPCV as Legal Representative of the Victims on the Defence’s Interlocutory Appeal Against the

¹⁵ ICC-01/05-01/08-847-tENG-Corr (OA 4).

¹⁶ ICC-01/05-01/08-848-tENG (OA 4).

¹⁷ ICC-01/05-01/08-850-Conf (OA 4). A public redacted version of this document was filed as ICC-01/05-01/08-850-Red.

¹⁸ “Prosecution’s response to request by victims to participate in appeal against the ‘*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-01/05-01/08-854 (OA 4).

¹⁹ “Defence Response to the Application by the Office of Public Counsel for Victims (OPCV) of 5 August 2010”, ICC-01/05-01/08-853-tENG (OA 4).

²⁰ ICC-01/05-01/08-857 (OA 4).

Decision on the Continued Detention of the Accused”²¹ (hereinafter: “Observations of the Victims”).

17. On 30 August 2010, Mr Bemba filed the “Defence Response to the Observations of the Office of Public Counsel for Victims on the Defence Appeal against Trial Chamber III’s Decision of 28 July 2010”²² (hereinafter: “Response to the Observations of the Victims”). The Prosecutor did not file a response.

III. MERITS

A. First Ground of Appeal

18. As his first ground of appeal, Mr Bemba submits that the Trial Chamber failed “to conduct a thorough review of the information before it in order to be in a position to rule on the issue of whether or not [Mr Bemba’s] detention was still justified”.²³

1. *Relevant part of the Impugned Decision*

19. After noting the Review Decision of 1 April 2010, in which the Trial Chamber had ordered Mr Bemba’s continued detention, the Trial Chamber stated that, as it had previously indicated, “to order the release of the accused at this stage the Chamber would need to identify either a change in some or all of the facts underlying the previous decision on detention or a new fact satisfying the Chamber that a modification of the Pre-Trial Chamber’s last decision ordering the detention of the accused is necessary”.²⁴ It then rehearsed the grounds in the Statute on which pre-trial detention may be based.²⁵

20. The Trial Chamber reviewed what it said were the three arguments that Mr Bemba put forward as representing a material change in the circumstances since the last review of his detention on 1 April 2010²⁶ and concluded as follows:

In light of the above, the Chamber is satisfied there has been neither a material change of circumstances since the last review of detention nor inexcusable delay attributable to the prosecution, and it is satisfied that the requirements of Article

²¹ ICC-01/05-01/08-862-tENG (OA 4).

²² ICC-01/05-01/08-869-tENG (OA 4).

²³ Document in Support of the Appeal, para. 12.

²⁴ Impugned Decision, para. 31.

²⁵ Impugned Decision, para. 32.

²⁶ Impugned Decision, paras 30-39.

58(1)(b)(i) of the Statute apply. Accordingly, [Mr Bemba] will remain in custody.²⁷

2. *Mr Bemba's submissions before the Appeals Chamber*

21. Mr Bemba submits that in finding that the conditions under article 58 (1) (b) (i) of the Statute continue to be met, the Trial Chamber disregarded established jurisprudence of the Appeals Chamber.²⁸ He argues that the “newly-constituted Trial Chamber III” should have conducted a “thorough review” of the information before it, instead of “purely and simply” endorsing decisions on detention of the “previous Trial Chamber”.²⁹

22. Relying on the Appeals Chamber’s “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”³⁰ (hereinafter: “Judgment in *Katanga* OA 4”), Mr Bemba submits that a Chamber ruling on the detention of an accused must examine and assess the facts itself.³¹ He avers that the fact that one of the Judges who rendered the Review Decision of 1 April 2010 was among the three Judges who rendered the Impugned Decision provides no justification for the adoption of previous factual findings in the latter decision.³² He also recalls the ruling of Trial Chamber I, in the case *Prosecutor v. Thomas Lubanga Dyilo*, to the effect that at the trial level, judicial functions cannot be delegated to a Single Judge.³³

23. Mr Bemba submits that according to the principle set out in article 67 (1) (i) of the Statute, an accused “shall not have imposed on him or her any reversal of the burden of proof”.³⁴ To support his position, he refers to jurisprudence of Pre-Trial

²⁷ Impugned Decision, para. 39.

²⁸ Document in Support of the Appeal, para. 11.

²⁹ Document in Support of the Appeal, para. 12.

³⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 9 June 2008, ICC-01/04-01/07-572 (OA 4).

³¹ Document in Support of the Appeal, paras 13-14.

³² Document in Support of the Appeal, para. 15.

³³ Document in Support of the Appeal, para. 15, referring to Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on whether two judges alone may hold a hearing - and - Recommendations to the Presidency on whether an alternate judge should be assigned for the trial”, 22 May 2008, ICC-01/04-01/06-1349, para. 14 (a).

³⁴ Document in Support of the Appeal, para. 16.

Chamber I in the case *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* and to jurisprudence of the European Court of Human Rights.³⁵

24. Mr Bemba argues that the “newly-constituted Trial Chamber III” should have conducted a *de novo* examination and assessment of the facts before ruling on the continued detention of Mr Bemba and on his application for interim release.³⁶

25. Mr Bemba further contends that it was not sufficient for the Trial Chamber to

note that the three new matters relied on by [Mr Bemba] do not constitute a material change in circumstances, just as it cannot confine itself to citing the requirement of article 58(1)(b), which continues to be met as far as the accused is concerned, in this case the need to ensure appearance at trial. [Footnotes omitted.]³⁷

26. Mr Bemba further submits that the Trial Chamber was obliged to base its conclusion that continued detention was necessary on its own factual analysis.³⁸ He states that he “has no knowledge of the factual findings reached on the sole authority of the Trial Chamber, or relied on by it in the [Impugned Decision] as constituting a need for detention at the present time”, in violation of his human right to fair proceedings.³⁹ He argues that the Chamber can “only base its belief in the need to maintain a warrant of arrest on an examination of the evidence and of the information submitted by the Prosecutor pursuant to article 58 (1)(a) of the Statute”,⁴⁰ and he submits that the Trial Chamber should have specified the evidence and information upon which it relied to determine that detention remained necessary.⁴¹

27. Mr Bemba argues that he cannot mount an effective appeal against the Impugned Decision because he has “no means of knowing or accessing the evidence” on which the Trial Chamber based its decision; thus, he cannot show that the decision “is either based on facts which have not been proved or is the product of a manifest misappreciation of the facts alleged”.⁴² He refers to jurisprudence that holds that a

³⁵ Document in Support of the Appeal, paras 16-17.

³⁶ Document in Support of the Appeal, para. 18.

³⁷ Document in Support of the Appeal, para. 19.

³⁸ Document in Support of the Appeal, paras 19-20.

³⁹ Document in Support of the Appeal, para. 21.

⁴⁰ Document in Support of the Appeal, para. 22.

⁴¹ Document in Support of the Appeal, para. 23.

⁴² Document in Support of the Appeal, para. 24.

decision to maintain an accused person in custody due to a risk of absconding must be based on “concrete and relevant information on the reality of that risk”.⁴³

3. *The Prosecutor’s submissions before the Appeals Chamber*

28. The Prosecutor submits that the Trial Chamber did not commit any error in its assessment of whether the conditions under article 58 of the Statute continue to be met and properly considered the relevant facts for its review of Mr Bemba’s detention under article 60 (3) of the Statute.⁴⁴ The Prosecutor argues that while it is correct that the Trial Chamber was not bound by its previous findings and that it had to assess the relevant facts,⁴⁵

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, there is no need for the Chamber to re-visit its prior assessment and findings. 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. [Footnotes omitted].⁴⁶

29. The Prosecutor argues that the partial change in the composition of the Chamber was irrelevant.⁴⁷ While the Trial Chamber could have revisited the prior findings, “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”.⁴⁸

30. The Prosecutor distinguishes the Judgment in *Katanga* OA 4, on which Mr Bemba relies.⁴⁹ He notes that this judgment concerned the adoption of factual findings by a Single Judge in the first detention hearing pursuant to article 60 (2) of the Statute, and that the Appeals Chamber found that the Single Judge “could not in that context adopt the findings made by *another Single judge* [sic] in *other proceedings*”.⁵⁰

31. The Prosecutor submits that, in its factual analysis, the Trial Chamber considered the new information submitted by Mr Bemba in relation to its previous

⁴³ Document in Support of the Appeal, para. 26.

⁴⁴ Response to the Document in Support of the Appeal, para. 9.

⁴⁵ Response to the Document in Support of the Appeal, para. 12.

⁴⁶ Response to the Document in Support of the Appeal, para. 12.

⁴⁷ Response to the Document in Support of the Appeal, para. 13.

⁴⁸ Response to the Document in Support of the Appeal, para. 13.

⁴⁹ Response to the Document in Support of the Appeal, para. 14.

⁵⁰ Response to the Document in Support of the Appeal, para. 14.

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findings and concluded that there were no new facts that would have affected its previous rulings in relation to the requirements of article 58 (1) (b) (i) of the Statute.⁵¹ In the Prosecutor's view, the Trial Chamber "thus followed an appropriate process".⁵²

32. The Prosecutor argues further that:

[T]he Chamber's reliance on its prior findings on detention did not wrongly shift the burden of proof onto [Mr Bemba] to prove the existence of changed circumstances to justify his release. 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. [Footnote omitted.]⁵³

33. However, the Prosecutor submits that once he has met his burden, he "need not repeatedly re-establish the same underlying facts if these facts continue to apply".⁵⁴ He argues that the wording of article 60 (3) of the Statute suggests that the Trial Chamber does not have to "periodically conduct de novo determinations".⁵⁵

34. The Prosecutor submits:

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. [Footnotes omitted.]⁵⁶

35. As to Mr Bemba's argument that the Impugned Decision did not sufficiently indicate on what evidence it was based, the Prosecutor submits that there is "no ambiguity in [the Trial Chamber's] factual and legal basis for [Mr Bemba's] detention".⁵⁷ The Prosecutor argues that "only where a Chamber deviates from its prior findings may a detailed reasoning be required".⁵⁸

⁵¹ Response to the Document in Support of the Appeal, para. 15.

⁵² Response to the Document in Support of the Appeal, para. 15.

⁵³ Response to the Document in Support of the Appeal, para. 16.

⁵⁴ Response to the Document in Support of the Appeal, para. 16.

⁵⁵ Response to the Document in Support of the Appeal, para. 16.

⁵⁶ Response to the Document in Support of the Appeal, para. 17.

⁵⁷ Response to the Document in Support of the Appeal, para. 18.

⁵⁸ Response to the Document in Support of the Appeal, para. 18.

4. *Observations of the Victims*

36. The Victims indicate that they concur with the Prosecutor's submissions⁵⁹ and largely repeat or further elaborate on arguments made by the Prosecutor in relation to the applicable provisions for a review of detention,⁶⁰ the manner in which the Trial Chamber carried out the review,⁶¹ the change in the composition of the Trial Chamber,⁶² and the alleged insufficient reasoning in the Impugned Decision.⁶³

37. The Victims also argue that, contrary to what Mr Bemba suggests, the criteria in rule 119 of the Rules of Procedure and Evidence regarding conditional release "relate to a different legal regime from that of rule 118 (2)".⁶⁴ Therefore, the Chamber's periodic review under rule 118 (2) of the Rules of Procedure and Evidence "does not include the matters referred to in rule 119 and does not represent the same form of assessment".⁶⁵

38. As for Mr Bemba's argument concerning a reversal of the burden of proof, the Victims submit that "[t]he fact that [Mr Bemba] is obliged to substantiate [his] request in no way constitutes a reversal of the burden of proof to [his] detriment, but rather an obligation as a participant in the proceedings to file well-argued submissions containing the reasons justifying [his] requests".⁶⁶ They argue that

[I]t seems obvious that the Chamber can only assess an alleged change in circumstances in light of the facts presented to it; insofar as [Mr Bemba] is arguing that there are indeed changed circumstances, it is then for [Mr Bemba] to explain them and for the Prosecutor to respond as necessary, since the opposite makes no sense in light of the respective mandates and objectives of the participants in the proceedings.⁶⁷

39. As stated above,⁶⁸ the Prosecutor did not respond to the Observations of the Victims, while Mr Bemba made no submissions on the substance of those observations.

⁵⁹ Observations of the Victims, para. 11.

⁶⁰ Observations of the Victims, paras 12-13.

⁶¹ Observations of the Victims, para. 14.

⁶² Observations of the Victims, para. 16.

⁶³ Observations of the Victims, para. 18.

⁶⁴ Observations of the Victims, para. 15.

⁶⁵ Observations of the Victims, para. 15.

⁶⁶ Observations of the Victims, para. 17.

⁶⁷ Observations of the Victims, para. 17.

⁶⁸ See paragraph 17, above.

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5. *Determination by the Appeals Chamber*

40. Mr Bemba's arguments under the first ground of appeal require the Appeals Chamber to address the scope of the periodic review of a ruling on detention under article 60 (3) of the Statute, read with rule 118 (2) of the Rules of Procedure and Evidence. In particular, the question before the Appeals Chamber is whether a Trial Chamber properly carries out such a periodic review when it restricts its assessment to only the alleged new circumstances raised by the detained person. In addressing this question, it is necessary to consider first, what the Chamber is required to review under article 60 (3) and rule 118 (2), and second, the extent of that review and how it should be carried out.

41. The following provisions have a bearing on the first ground of appeal. Article 58 (1) of the Statute provides:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial;

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

42. Article 60 (2) and (3) provides:

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1 are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to

detention, release or conditions of release, if it is satisfied that changed circumstances so require.

43. Rule 118 of the Rules of Procedure and Evidence provides:

1. If the person surrendered to the Court makes an initial request for interim release pending trial, either upon first appearance in accordance with rule 121 or subsequently, the Pre-Trial Chamber shall decide upon the request without delay, after seeking the views of the Prosecutor.

2. The Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60, paragraph 3, at least every 120 days and may do so at any time on the request of the person or the Prosecutor.

3. After the first appearance, a request for interim release must be made in writing. The Prosecutor shall be given notice of such a request. The Pre-Trial Chamber shall decide after having received observations in writing of the Prosecutor and the detained person. The Pre-Trial Chamber may decide to hold a hearing, at the request of the Prosecutor or the detained person or on its own initiative. A hearing must be held at least once every year.

44. Article 61 (11) further provides that “[o]nce the charges have been confirmed [...] a Trial Chamber [...] may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings”.

45. As to what should be reviewed, article 60 (3) and rule 118 (2) provide that the object of the periodic review is the “ruling on [...] detention”. In this regard, in a judgment rendered in the case of *Prosecutor v. Thomas Lubanga Dyilo*⁶⁹ (hereinafter: “Judgment in *Lubanga* OA 7”), the Appeals Chamber held that:

The ruling that the Pre-Trial Chamber is required to review pursuant to article 60 (3) of the Statute is the determination that it has made in response to an application for interim release pending trial under article 60 (2).⁷⁰

46. The Appeals Chamber thus notes that it is the initial ruling under article 60 (2) of the Statute that establishes the grounds justifying continued detention. However,

⁶⁹ “Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824 (OA 7).

⁷⁰ Judgment in *Lubanga* OA 7, para. 94. This statement was endorsed in *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, ICC-01/05-01/08-631-Conf (OA 2), para. 58. A public redacted version of this judgment was filed as ICC-01/05-01/08-631-Red (OA 2).

given that this ruling may be subsequently modified under article 60 (3) if “changed circumstances so require” it is necessary to construe the “ruling on detention” as being the initial decision made under article 60 (2) of the Statute as well as any potential subsequent modifications made to that decision under article 60 (3) of the Statute.

47. Turning to how the periodic review is to be carried out, the Appeals Chamber notes that, according to its ordinary meaning, a “review” requires a Chamber to revert to the object of the review; in this case, the ruling on detention. How the ruling is to be reviewed has been addressed, to a certain extent, in the Judgment in *Katanga* OA 4, in which the Appeals Chamber explained that:

Article 60 (3) of the Statute binds the Pre-Trial Chamber to review periodically (at the latest within 120 days) any previous ruling on the release or detention of a person in order *to ascertain whether the circumstances bearing on the subject have changed*, and if so, whether they warrant the termination of detention. [Emphasis added, footnote omitted.]⁷¹

48. Similarly, in the judgment in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* of 2 December 2009 (hereinafter “Judgment in *Bemba* OA 2”),⁷² the Appeals Chamber found that:

[T]he review pursuant to article 60 (3) of the Statute makes it incumbent upon the Pre-Trial Chamber *to address anew* its prior ruling on the issue of detention or release in light of the requirements under article 58 (1) of the Statute. [Emphasis added.]⁷³

49. To further clarify what is required in a periodic review of a ruling on detention, the object and purpose⁷⁴ of article 60 (3) must be considered. As the Appeals Chamber stated in the Judgment in *Katanga* OA 4, this provision is one of the

⁷¹ Judgment in *Katanga* OA 4, para. 14.

⁷² “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, ICC-01/05-01/08-631-Conf (OA 2). A public redacted version of this judgment was filed as ICC-01/05-01/08-631-Red (OA 2).

⁷³ Judgment in *Bemba* OA 2, para. 58.

⁷⁴ See article 31 (1) of the *Vienna Convention on the Law of Treaties*, signed on 23 May 1969 and entered into force on 27 January 1980, 1155 United Nations Treaty Series 18232. See also *Situation in the Democratic Republic of the Congo*, Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168 (OA 3), para. 33.

“safeguards against the undue prolongation of the period of detention”.⁷⁵ It takes account of the fact that the circumstances that justified detention for the ruling under article 60 (2) of the Statute may change over time. It is the purpose of the periodic review under article 60 (3) of the Statute to ensure that detention that was ordered in accordance with the Statute does not become unwarranted because of a change of circumstances. Hence, it is an essential procedural safeguard against detention that is not in accord with the Statute⁷⁶ and internationally recognised human rights.⁷⁷ This procedural safeguard must also be seen in the context of the detained person’s right to be presumed innocent.⁷⁸

50. Turning to the context of article 60 (3) of the Statute read with rule 118 (2) of the Rules of Procedure and Evidence, the Appeals Chamber notes that article 60 (2) refers to the “conditions set forth in article 58, paragraph 1”. Under article 58 (1) of the Statute, it is on the basis of the “evidence and other information submitted by the Prosecutor” that the Pre-Trial Chamber will determine whether to issue a warrant of arrest. In respect of periodic reviews of detention under article 60 (3) of the Statute, this indicates that the Prosecutor must also provide information to enable the Chamber to satisfy itself that continued detention is warranted.

51. In his submissions on appeal, the Prosecutor argued that although he bears the burden for establishing that the detention of the person concerned is necessary, once this burden is met, he “need not repeatedly re-establish the same underlying facts if these facts continue to apply”.⁷⁹ In this regard, the Appeals Chamber wishes to clarify that while it is correct that the Prosecutor does not have to re-establish circumstances that have already been established, he must show that there has been no change in those circumstances. The Appeals Chamber recalls that the “requirement of ‘changed circumstances’ [in article 60 (3) of the Statute] imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a

⁷⁵ Judgment in *Katanga* OA 4, para. 14.

⁷⁶ See article 55 (1) (d) of the Statute.

⁷⁷ Article 21 (3) of the Statute provides that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”. In this regard, *see also* article 9 (3) of the *International Covenant of Civil and Political Rights*, 16 December 1966, 999 United Nations Treaty Series 14668, article 9 (3).

⁷⁸ See article 66 of the Statute.

⁷⁹ Response to the Document in Support of the Appeal, para. 16.

Chamber that a modification of its prior ruling is necessary”.⁸⁰ Thus, the Prosecutor must, for each periodic review of detention, make submissions as to whether there has been any change in the circumstances that previously justified detention and he must bring to the attention of the Chamber any other relevant information of which he is aware that relates to the question of detention or release. In this respect, the Appeals Chamber notes that the Prosecutor endeavoured to do so in his submissions before the Trial Chamber.

52. In light of the above, a Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must satisfy itself that the conditions under article 58 (1) of the Statute, as required by article 60 (2) of the Statute, continue to be met.⁸¹ In doing so, the Chamber must revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute. For this reason, the Chamber should not restrict itself to only considering the arguments raised by the detained person. The Chamber must weigh the Prosecutor’s submissions against the submissions, if any, of the detained person. The Chamber must also consider any other information which has a bearing on the subject. Finally, in its decision on review, the Chamber must clearly set out reasons for its findings.⁸²

53. It should, however, be underlined that the periodic review of a ruling on detention under article 60 (3) of the Statute does *not* require the Chamber to make a decision on detention *ab initio*. The Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention. It must, however, look at those circumstances, in the manner described in the preceding paragraph, and determine whether they still exist. Nor does the Chamber have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions. As evidenced by the wording of article 60 (3) of the Statute and previous jurisprudence of the Appeals Chamber, the

⁸⁰ Judgment in *Bemba* OA 2, para. 60.

⁸¹ Judgment in *Bemba* OA 2, para. 60.

⁸² See *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2006, ICC-01/04-01/06-773 (OA 5), para. 20.

emphasis of the review is whether there has been a change in any of the circumstances.

54. Turning to the case at hand, the Appeals Chamber notes that in the Impugned Decision, the Trial Chamber referred to its previous decisions on the review of Mr Bemba's detention, wherein it had stated that:

[T]o order the release of the accused at this stage the Chamber would need to identify either a change in some or all of the facts underlying the previous decision on detention or a new fact satisfying the Chamber that a modification of the Pre-Trial Chamber's last decision ordering the detention of the accused is necessary.⁸³

55. The Appeals Chamber observes, however, that the Trial Chamber did not refer to the circumstances underpinning the ruling on detention and indicate whether these circumstances persist or whether there has been a change. Similarly, while the Trial Chamber summarised the submissions of the Prosecutor and of the participating victims, which included submissions on the question of whether the circumstances justifying detention still pertain,⁸⁴ the Chamber did not analyse these submissions and did not indicate whether it agreed with them. The Trial Chamber merely stated, at the end of the Impugned Decision, that "[i]n light of the above, the Chamber is satisfied that there has been neither a material change of circumstances since the last review of detention nor inexcusable delay attributable to the prosecution, and it is satisfied that the requirements of Article 58(1)(b)(i) of the Statute apply".⁸⁵ The Trial Chamber's consideration and analysis were restricted to what it characterised as the arguments put forward by Mr Bemba to support his request to be released, namely that there had been "a material change in circumstances" because of the postponement of the trial and the purported lack of a valid document containing the charges, and that there had purportedly been an inexcusable delay by the Prosecutor.⁸⁶ In the Appeals Chamber's view, this was insufficient. The Trial Chamber ought to have carried out a proper review of the ruling on detention, as outlined above under paragraph 52.

56. The Appeals Chamber is, however, not persuaded by Mr Bemba's additional argument that the Trial Chamber had to make a decision "*de novo*" as to whether Mr

⁸³ Impugned Decision, para. 31.

⁸⁴ See Impugned Decision, paras 7-11 and 14-16.

⁸⁵ Impugned Decision, para. 39.

⁸⁶ Impugned Decision, paras 34-37.

Bemba should continue to be detained because the composition of the Trial Chamber had changed since the last review of detention.⁸⁷ In the Appeals Chamber's view, the Trial Chamber was competent to carry out the review of the ruling on detention despite changes in its composition. Mr Bemba's reliance on the Judgment in *Katanga* OA 4 is misguided. That case did not concern the review of a ruling on detention under article 60 (3) of the Statute, but the initial decision of a Pre-Trial Chamber under article 60 (2) of the Statute on a request for interim release. It was in this context that the Appeals Chamber found that it is impermissible to adopt the findings of another judge, which had been made in relation to the authorisation of redactions.⁸⁸ The case at hand can thus be distinguished from the situation in *Katanga* OA 4, because the present case concerns a *review* of a previous ruling on detention under article 60 (3) of the Statute, which has a different scope than the initial decision on a request for interim release under article 60 (2) of the Statute.

57. For the reasons stated above, the Appeals Chamber concludes that the Trial Chamber erred when, in carrying out a periodic review under article 60 (3) of the Statute, it failed to revert to the ruling on detention in the manner outlined above at paragraph 52 and, instead, restricted itself to only assessing the alleged new circumstances presented by Mr Bemba.

B. Second Ground of Appeal

58. As his second ground of appeal, Mr Bemba submits that the Trial Chamber erred in dismissing as irrelevant his request for assistance from the Registry to obtain State guarantees of appearance on the basis that there had been "no material change in circumstances since the decision to review detention of 1 April 2010".⁸⁹

1. Relevant procedural history and part of the Impugned Decision

59. In Mr Bemba's Submissions before the Trial Chamber, he asked the Trial Chamber, as his principal request, to order his "immediate and unconditional release",⁹⁰ and in the alternative, to order his conditional release.⁹¹ He requested, "[i]n the further alternative", that the Trial Chamber should order "a more lenient detention

⁸⁷ See Document in Support of the Appeal, para. 18.

⁸⁸ See Judgment in *Katanga* OA 4, para. 26.

⁸⁹ Document in Support of the Appeal, paras 27-28.

⁹⁰ Mr Bemba's Submissions before the Trial Chamber, para. 107.

⁹¹ Mr Bemba's Submissions before the Trial Chamber, paras 108-110.



regime”.⁹² Finally, he requested “in any event” that the Trial Chamber should order the Registry “to assist Mr Jean-Pierre Bemba Gombo’s Defence Team in securing a guarantee that the accused will appear at trial, and in initiating negotiations with States Parties with a view to seeking such guarantee”⁹³ (hereinafter: “Request for Assistance from the Registry”).

60. In the concluding paragraphs of the Impugned Decision, the Trial Chamber addressed the Request for Assistance from the Registry as follows:

In the view of the Chamber, the defence has failed to allege any new facts justifying a change in the detention regime. *Similarly, the defence request concerning guarantees by State Parties is irrelevant, given the Chamber’s finding that there has been no material change since 1 April 2010.* [Emphasis added.]⁹⁴

2. Mr Bemba’s submissions before the Appeals Chamber

61. On appeal, Mr Bemba contends that the purpose underlying the Request for Assistance from the Registry was “precisely to present a material change in circumstances [...] namely a guarantee that Mr Bemba will appear before the International Criminal Court”.⁹⁵ In his view, the Trial Chamber erred in law by applying the criterion of “changed circumstances”, as referred to in article 60 (3) of the Statute, to the Request for Assistance from the Registry.⁹⁶ Mr Bemba submits that the Request for Assistance from the Registry was distinct from his request for interim release and thus independent of any finding of changed circumstances.⁹⁷ He submits that the Request for Assistance from the Registry was made in the alternative and aimed at “securing a guarantee that the accused would appear at trial” on which he could rely for “a future application for release”.⁹⁸

62. Mr Bemba submits that the Trial Chamber erred in law and in fact “in not considering it necessary to order the Registry to provide help and assistance to the Defence in identifying a host state which would provide the requisite guarantees for

⁹² Mr Bemba’s Submissions before the Trial Chamber, para. 111.

⁹³ Mr Bemba’s Submissions before the Trial Chamber, para. 113.

⁹⁴ Impugned Decision, para. 38.

⁹⁵ Document in Support of the Appeal, para. 29.

⁹⁶ Document in Support of the Appeal, para. 33.

⁹⁷ Document in Support of the Appeal, para. 33.

⁹⁸ Document in Support of the Appeal, para. 33.

appearance at trial”.⁹⁹ Mr Bemba submits that pursuant to rule 20 of the Rules of Procedure and Evidence, “the Registry has ‘Responsibilities relating to the rights of the defence’”.¹⁰⁰ He submits that “[h]elp and assistance from the Registry in the present matter is clearly one of the functions required to ensure the principle of a fair trial, the list in paragraph 1 of rule 20 being non-exhaustive”.¹⁰¹ He argues that since he is unable to liaise directly with government organs or with the United Nations, the Registry’s assistance in this regard is essential.¹⁰² Furthermore, Mr Bemba submits that pursuant to article 57 (3) (b) of the Statute, the Trial Chamber may issue any order, “including measures such as those described in article 56”, or seek cooperation under Part 9 of the Statute in order to assist him “in the preparation of his defence in view of his next application for release”.¹⁰³ Referring to enforcement agreements that the Court had signed with certain countries, Mr Bemba submits that if his request were granted, “similar agreements could be signed with States Parties, whereby they could offer a guarantee that [he] would appear at trial if he were to be released to their territories”.¹⁰⁴

3. *The Prosecutor’s submissions before the Appeals Chamber*

63. The Prosecutor submits that the Trial Chamber correctly dismissed Mr Bemba’s Request for Assistance from the Registry as irrelevant.¹⁰⁵ The Prosecutor asserts that the Trial Chamber may only modify a prior ruling on detention if it “is satisfied that changed circumstances so require”.¹⁰⁶ Whether a guarantee is relevant to a determination that there is a change in circumstances is a factor that the Trial Chamber can only consider once Mr Bemba places it before the Chamber and the Prosecutor submits that Mr Bemba failed to identify any such guarantee.¹⁰⁷ Consequently, the Prosecutor submits that Mr Bemba fails to demonstrate an error in the Impugned Decision and his argument must be dismissed.¹⁰⁸

⁹⁹ Document in Support of the Appeal, para. 34.

¹⁰⁰ Document in Support of the Appeal, para. 35.

¹⁰¹ Document in Support of the Appeal, para. 35.

¹⁰² Document in Support of the Appeal, paras 35-37 and 42.

¹⁰³ Document in Support of the Appeal, para. 38.

¹⁰⁴ Document in Support of the Appeal, paras 40-41.

¹⁰⁵ Response to the Document in Support of the Appeal, p. 9.

¹⁰⁶ Response to the Document in Support of the Appeal, para. 22.

¹⁰⁷ Response to the Document in Support of the Appeal, paras 21-22.

¹⁰⁸ Response to the Document in Support of the Appeal, para. 22.

64. Furthermore, the Prosecutor submits that since Mr Bemba was seeking an order from the Trial Chamber for the purposes of future applications, he fails to indicate how the Chamber's ruling on this issue had a material impact on the Impugned Decision, which ordered the continued detention of Mr Bemba.¹⁰⁹ The Prosecutor thus submits that this ground of appeal should be dismissed *in limine*.¹¹⁰

65. Lastly, the Prosecutor submits that Mr Bemba's argument should be dismissed on the ground that the issue "is not automatically appealable under Article 82 (1)(b), which allows appeal from decisions granting or denying release".¹¹¹ The Prosecutor notes that, by Mr Bemba's own acknowledgment, the issue raised under the second ground of appeal is distinct from that of interim release and as such "falls within the category of interlocutory decisions under Article 82 (1)(d) that require leave to appeal by the Chamber issuing the decision".¹¹²

4. *Observations of the Victims*

66. The Victims submit that Mr Bemba's "second ground [of appeal] has no relevant basis in law".¹¹³ They aver that Mr Bemba's Request for sAssistance from the Registry was for the purposes of presenting new evidence in a subsequent application for interim release, which is an indication that "the guarantees to which [he] refers are currently theoretical and [...] represent a rehearsal of arguments already formulated by [Mr Bemba] in the past".¹¹⁴ In their view, such factors do not indicate changed circumstances that ought to have been considered by the Trial Chamber.¹¹⁵

67. In relation to Mr Bemba's argument concerning the Registry's responsibility under rule 20 of the Rules of Procedure and Evidence, the Victims submit that in their view, no such responsibility derives directly from this rule and, if this were the case, it would be for the Chamber to order the Registry to provide such support to Mr Bemba.¹¹⁶

¹⁰⁹ Response to the Document in Support of the Appeal, para. 24.

¹¹⁰ Response to the Document in Support of the Appeal, para. 24.

¹¹¹ Response to the Document in Support of the Appeal, para. 25.

¹¹² Response to the Document in Support of the Appeal, para. 25.

¹¹³ Observations of the Victims, para. 21.

¹¹⁴ Observations of the Victims, para. 21.

¹¹⁵ Observations of the Victims, para. 21.

¹¹⁶ Observations of the Victims, para. 23.

5. *Determination by the Appeals Chamber*

68. Under this ground of appeal, Mr Bemba argues first that the Trial Chamber erred in law when it “applied the criterion of material change [...] to dismiss this request for assistance from the Registry”.¹¹⁷ Mr Bemba submits that the Request for Assistance from the Registry was “distinct from the application for release”, and that the purpose of the request was to present a material change in circumstances, namely a State guarantee on which he could rely in a *future* application for release.¹¹⁸

69. The Appeals Chamber notes that the present appeal, which is brought under article 82 (1) (b) of the Statute, is directed against the decision of the Trial Chamber that Mr Bemba should remain in detention. The Appeals Chamber recalls that “an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.¹¹⁹ The Appeals Chamber agrees with the submissions of the Prosecutor¹²⁰ that Mr Bemba has failed to identify how the alleged error of the Trial Chamber in addressing the Request for Assistance from the Registry could have had an impact on the Trial Chamber’s decision to maintain Mr Bemba’s detention. Mr Bemba does not claim (nor could he reasonably do so) that the request in itself constituted a change in circumstances that should have led to his release. He merely submits that the Trial Chamber erred in the way it responded to the Request for Assistance from the Registry, which he describes as being a “request distinct from the application for release”, and made for future applications for release.¹²¹

70. Furthermore, as argued by the Prosecutor,¹²² the question of whether the Trial Chamber correctly dealt with the Request for Assistance from the Registry for the purposes of future applications for release is not properly before the Appeals Chamber. As stated above, the question on appeal is whether the Trial Chamber

¹¹⁷ Document in Support of the Appeal, para. 33.

¹¹⁸ Document in Support of the Appeal, para. 33.

¹¹⁹ *Prosecutor v. Joseph Kony and others*, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, ICC-02/04-01/05-408 (OA 3), para. 48; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, “Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, 26 October 2010, ICC-01/05-01/08-962-Corr, para. 102.

¹²⁰ See Response to the Document in Support of the Appeal, para. 24.

¹²¹ Document in Support of the Appeal, para. 33.

¹²² See Response to the Document in Support of the Appeal, para. 25.

correctly decided that Mr Bemba should remain in detention. Whether the Trial Chamber correctly dealt with the Request for Assistance from the Registry for future applications for release could, if at all, come before the Appeals Chamber only if leave to appeal had been sought and granted, pursuant to article 82 (1) (d) of the Statute. The fact that Mr Bemba made the Request for Assistance from the Registry for *future* purposes part of his submissions before the Trial Chamber on the question of release does not automatically mean that the Trial Chamber's treatment of the request can be appealed under article 82 (1) (b) of the Statute. If it were otherwise, parties could significantly expand their possibility to appeal a decision without having to seek leave to appeal by attaching requests to their submissions on release or detention and subsequently appealing the matter under article 82 (1) (b).

71. Accordingly, and irrespective of whether the Trial Chamber correctly addressed the Request for Assistance from the Registry, the Appeals Chamber concludes that Mr Bemba has failed to meet the minimum requirements for a consideration of the merits of this ground of appeal. The second ground of appeal is therefore dismissed.

C. Third Ground of Appeal

72. As his third ground of appeal, Mr Bemba submits that the Trial Chamber erred in law by applying articles 58 (1) (b) and 60 (3) of the Statute to his request for a modification of his detention regime, which was contained in Mr Bemba's Submissions before the Trial Chamber, and in rejecting it on the basis that circumstances had not changed.

1. Relevant procedural history and part of the Impugned Decision

73. In Mr Bemba's Submissions before the Trial Chamber, he made a request relating to his detention regime (hereinafter: "Alternative Request"). At paragraph 94, Mr Bemba stated:

At the very least, a more lenient detention regime might be considered, which would involve *release every weekend from Friday morning until Sunday night, subject to conditions and restricted to the territory of the Netherlands.* [Emphasis added.]¹²³

¹²³ Mr Bemba's Submissions before the Trial Chamber, para. 94.



74. At paragraph 100, following submissions that were, *prima facie*, unrelated to the Alternative Request, he added:

Mr Jean-Pierre Bemba Gombo's conditions of detention can be modified by the Chamber, in view of the fact that he is not being held on the basis of the risk that he might obstruct the investigation or proceedings, but solely on the basis of the risk that he might abscond. From this point of view, the Chamber must take into account his right to be treated humanely in accordance with the fundamental principles of respect for his dignity and the presumption of innocence, and on the other hand security requirements. *This might justify his being placed under house arrest on the territory of the Host State, the Netherlands, or at the very least being permitted to spend the weekends there, in full contact with his close family, whilst remaining under surveillance to avoid the risk that he might flee.* [Emphasis added.]¹²⁴

75. His prayer for relief included the following request to the Trial Chamber:

In the further alternative

Ordering a more lenient detention regime for Mr Jean-Pierre Bemba Gombo, *to consist of periods of short-term release every weekend, from Friday morning to Sunday night, restricted to the territory of the Host State, the Netherlands, and permitting him to spend his nights there with his wife and children*, all costs in that connection to be borne entirely by the accused himself. [Emphasis added.]¹²⁵

76. In the Impugned Decision, the Trial Chamber stated, in relation to the Alternative Request:

The defence suggests that if release is not ordered, a modification to the detention regime in order to permit him to leave the detention centre during the weekends is appropriate. However, in the last review of detention, the Chamber held that none of the submissions of the defence 'undermine[d] the critical conclusion that detention remains necessary to ensure the accused's appearance at this trial'. In the view of the Chamber, the defence has failed to allege any new facts justifying a change in the detention regime. [Footnotes omitted.]¹²⁶

2. *Mr Bemba's submissions before the Appeals Chamber*

77. Mr Bemba, in his Notice of Appeal, "challenges the impugned decision with respect to the refusal to modify [his] custody regime"¹²⁷ and requests the Appeals Chamber, in the alternative, "[t]o order a relaxation of [his] custody regime, so as to allow him out of prison every weekend, from Friday morning until Sunday evening,

¹²⁴ Mr Bemba's Submissions before the Trial Chamber, para. 100.

¹²⁵ Mr Bemba's Submissions before the Trial Chamber, para. 111.

¹²⁶ Impugned Decision, para. 38.

¹²⁷ Notice of Appeal, para. 7.

but only within the territory of the Host State, the Netherlands, and to permit him to spend his nights there with his wife and children, entirely at his own expense”.¹²⁸

78. In his Document in Support of the Appeal, Mr Bemba submits that the Trial Chamber erred when it applied articles 58 (1) (b) (i) and 60 of the Statute to the Alternative Request.¹²⁹ In Mr Bemba’s view, these provisions “only govern the principle of the issuance or maintenance of a warrant of arrest, rather than details of the detention regime”.¹³⁰ He submits that he did not seek release from custody,¹³¹ apparently referring to the fact that he mentioned before the Trial Chamber the possibility of being placed under house arrest.¹³² Thus, Mr Bemba contends that the criterion of “changed circumstances” in article 60 (3) of the Statute had no relevance to the Alternative Request and the “Defence should not be required to prove a change in circumstance in support of its request”.¹³³ Mr Bemba relies on the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (hereinafter: “ICTY”), in particular the *Blaškić* case, in which the President of the Tribunal, pursuant to rule 64 of the ICTY Rules of Procedure and Evidence, modified the conditions of Mr Blaškić’s detention to allow him to be detained in a safe house.¹³⁴

79. Furthermore, Mr Bemba avers that the Alternative Request should have been dealt with under the same legal regime employed by the Pre-Trial Chamber when it granted him a twenty-four hour release to attend his father’s funeral.¹³⁵

80. In the alternative, Mr Bemba argues that if the Appeals Chamber finds that the Trial Chamber did not err in law, then the Appeals Chamber would be “compelled to conclude that the Trial Chamber failed to take account of relevant facts in refusing to examine the Defence’s alternative request that [Mr Bemba] be granted permission to receive visits from his family at weekends, subject to conditions”.¹³⁶ Mr Bemba,

¹²⁸ Notice of Appeal, para. 14.

¹²⁹ Document in Support of the Appeal, para. 47.

¹³⁰ Document in Support of the Appeal, para. 47.

¹³¹ Document in Support of the Appeal, para. 48.

¹³² Document in Support of the Appeal, paras 59-60.

¹³³ Document in Support of the Appeal, para. 57.

¹³⁴ Document in Support of the Appeal, para. 56, referring to *Prosecutor v. Tihomir Blaškić*, “Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence”, 3 April 1996, IT-95-14-T, para. 13.

¹³⁵ Document in Support of the Appeal, paras 51-54.

¹³⁶ Document in Support of the Appeal, para. 58.



submits that he made “a pertinent proposal”¹³⁷ before the Trial Chamber, namely, to be placed under house arrest on weekends, which “would obviate the risk that he might abscond”¹³⁸ given that he would be “under surveillance inside a house that is closely watched”.¹³⁹

81. Lastly, in his prayer for relief, Mr Bemba requests in the alternative that the Appeals Chamber order “a modification of the detention regime by allowing [Mr Bemba] to travel to a designated safe house, where he may spend family time with his wife and his five children every weekend from Friday to Sunday night”.¹⁴⁰

3. *The Prosecutor’s submissions before the Appeals Chamber*

82. The Prosecutor submits that the Trial Chamber correctly dismissed the Alternative Request.¹⁴¹

83. The Prosecutor submits that the Trial Chamber’s authority to order a modified form of detention is founded only in articles 58 (1) and 60 (3) of the Statute.¹⁴² The Prosecutor notes that whilst Mr Bemba asserts that the Trial Chamber applied the wrong legal basis to his request, he fails to identify an alternative legal basis that would have allowed the Trial Chamber to grant the Alternative Request.¹⁴³ The Prosecutor also argues that the analogy drawn by Mr Bemba to the practice of the ICTY “fails, since there is no equivalent or comparable legal authority in the ICC Statute, Rules or Regulations”.¹⁴⁴

84. Furthermore, the Prosecutor submits that the Headquarters Agreement between the International Criminal Court and the Host State does not provide for any form of modified detention on the territory of the Host State as contemplated by Mr Bemba.¹⁴⁵ The Prosecutor argues that by the terms of this agreement the Host State shall facilitate the transfer of a released person (whether acquitted, dismissed or released pending trial) to another State, but the agreement does not foresee that a person

¹³⁷ Document in Support of the Appeal, para. 59.

¹³⁸ Document in Support of the Appeal, para. 60.

¹³⁹ Document in Support of the Appeal, para. 61.

¹⁴⁰ Document in Support of the Appeal, para. 66.

¹⁴¹ Response to the Document in Support of the Appeal, p. 12.

¹⁴² Response to the Document in Support of the Appeal, para. 27.

¹⁴³ Response to the Document in Support of the Appeal, para. 27.

¹⁴⁴ Response to the Document in Support of the Appeal, para. 28.

¹⁴⁵ Response to the Document in Support of the Appeal, para. 29.

charged before the Court would be “released into and remain within the territory of the Host State during weekends”.¹⁴⁶

85. As regards Mr Bemba’s argument that the Trial Chamber should have applied the same legal regime as was applied by the Pre-Trial Chamber when it granted him short-term release to attend his father’s funeral, the Prosecutor submits that the decision of the Pre-Trial Chamber does not constitute a precedent for modification of the detention regime.¹⁴⁷ In the Prosecutor’s view, this decision “rested on [the Chamber’s] authority under [a]rticle 60 (3) to modify [its] ruling on detention in order to accommodate an extraordinary need”.¹⁴⁸

86. Lastly, the Prosecutor submits that if, *arguendo*, articles 58 (1) and 60 (3) of the Statute did not apply and the Trial Chamber could have exercised an inherent power to order weekend release, the Trial Chamber still would not have erred legally or factually in rejecting Mr Bemba’s request.¹⁴⁹ This is because it found that there was no change in circumstances warranting a change in the detention regime, and that Mr Bemba had not offered any new facts to establish a diminished risk of flight.¹⁵⁰ The Prosecutor submits that in these circumstances it was reasonable for the Trial Chamber to maintain the detention regime and to reject Mr Bemba’s request.¹⁵¹

4. *Observations of the Victims*

87. The Victims concur with the submissions of the Prosecutor under this ground of appeal. The Victims note that the Alternative Request is unclear and that Mr Bemba fails to inform the Chamber of any concrete guarantees which would “‘obviate the risk that he might abscond’ [...] or would constitute ‘[a] detention regime [...] respond[ing] directly to the issue of the risk of flight’”.¹⁵²

5. *Determination by the Appeals Chamber*

88. Under the third ground of appeal, Mr Bemba challenges the applicability of articles 58 (1) (b) and 60 (3) to the Alternative Request. Having considered Mr

¹⁴⁶ Response to the Document in Support of the Appeal, para. 29.

¹⁴⁷ Response to the Document in Support of the Appeal, para. 30.

¹⁴⁸ Response to the Document in Support of the Appeal, para. 30.

¹⁴⁹ Response to the Document in Support of the Appeal, para. 31.

¹⁵⁰ Response to the Document in Support of the Appeal, para. 31.

¹⁵¹ Response to the Document in Support of the Appeal, para. 31.

¹⁵² Observations of the Victims, para. 25.

Bemba's arguments in support of this ground of appeal as a whole, the Appeals Chamber understands him to be stating that he requested the Trial Chamber to place him under house arrest, and not to release him. Consequently, under this ground of appeal, the issue is whether the Trial Chamber erred in its determination of the Alternative Request in light of Mr Bemba's submissions before it.

89. The Appeals Chamber notes that Mr Bemba's formulation of the Alternative Request before the Trial Chamber was ambiguous. In particular, it was unclear whether he was requesting to be placed under house arrest or simply to be released every weekend onto the territory of the Netherlands, subject to conditions. Although Mr Bemba, in the latter part of paragraph 100 of his submissions, mentioned house arrest, he failed to reiterate this request in the prayer for relief. Instead, Mr Bemba asked the Trial Chamber to order a more lenient detention regime consisting of "short-term release every weekend" subject to conditions. He repeated this request in his Notice of Appeal.¹⁵³ It is only in his Document in Support of the Appeal that Mr Bemba states unambiguously that with the Alternative Request, he was not seeking release from custody as, in his view, he would "still [be] deprived of his liberty".¹⁵⁴

90. In considering the Alternative Request, the Trial Chamber stated:

The defence suggests that if release is not ordered, a modification to the detention regime in order to permit him to leave the detention centre during the weekends is appropriate.¹⁵⁵

91. The Trial Chamber thus construed the Alternative Request as a request for conditional weekend release. The Appeals Chamber considers that the Trial Chamber's approach was reasonable, given Mr Bemba's ambiguous submissions before it and particularly in light of his prayer for relief, which sought "short-term release every weekend".¹⁵⁶

92. The Appeals Chamber is not persuaded by Mr Bemba's argument that the Trial Chamber applied the wrong legal regime to the Alternative Request. As discussed above, the Trial Chamber cannot be faulted for treating the Alternative Request as a

¹⁵³ Notice of Appeal, para. 14.

¹⁵⁴ Document in Support of the Appeal, para. 48.

¹⁵⁵ Impugned Decision, para. 38.

¹⁵⁶ Mr Bemba's Submissions before the Trial Chamber, para. 100.

156

request for conditional weekend release to which articles 60 (3) and 58 (1) (b) of the Statute apply. Therefore, the Trial Chamber, in considering the Alternative Request, correctly resorted to those provisions.

93. In the alternative, Mr Bemba argues that the Trial Chamber, in refusing to examine the Alternative Request, failed to take account of relevant facts. In support of this argument, Mr Bemba submits that since the Trial Chamber's decision to dismiss his application for release was premised on a risk that he might abscond, it should have considered his "pertinent proposal", which would have addressed the Chamber's concerns.¹⁵⁷ In Mr Bemba's view, the Trial Chamber ought to have considered that by placing him "under house arrest at weekends would obviate the risk that he might abscond" since "[i]f the accused remains under surveillance inside a house that is closely watched, the issue of the risk that he might abscond becomes irrelevant".¹⁵⁸ As discussed above, the Trial Chamber cannot be faulted for treating the Alternative Request as a request for conditional weekend release. The facts which the Trial Chamber, in Mr Bemba's view, should have considered, were irrelevant for the determination of this request. The Appeals Chamber is therefore not persuaded by Mr Bemba's argument that the Trial Chamber failed to take account of relevant facts.

94. For these reasons, the Appeals Chamber determines that the Trial Chamber did not err in applying the regime under articles 60 (3) and 58 (1) (b) of the Statute to the Alternative Request, and accordingly, dismisses the third ground of appeal.

¹⁵⁷ Document in Support of the Appeal, para. 59.

¹⁵⁸ Document in Support of the Appeal, para. 61.

IV. APPROPRIATE RELIEF

95. On an appeal pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In view of the findings of the Appeals Chamber under the first ground of appeal, namely that the Trial Chamber did not carry out a proper review of detention, it is appropriate to reverse the Impugned Decision. The matter is remanded to the Trial Chamber for a new review in light of paragraphs 40 to 56 of the present judgment. Until, and subject to, that review, Mr Bemba shall remain in detention.

Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge

Dated this 19th day of November 2010

At The Hague, The Netherlands