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THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public Redacted version

Prosecution's Response to the "Document in support of Defence Appeal against Trial Chamber III's decision on Applications for Provisional Release, dated 27 June 2011"

Source: Office of the Prosecutor

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Introduction

1. On 27 June 2011 Trial Chamber III issued its “Decision on Application for Provisional Release” (“Decision”), whereby it rejected the three applications for release filed by the Appellant.¹
2. On 1 July 2011 the Appellant sought to appeal the Decision on three grounds (“Appeal Brief”): first, that the Trial Chamber misapprehended the purported guarantees REDACTED; second, that the Chamber erred when it found that he may interfere with witnesses and third, that the Chamber erred when it dismissed his request for a one-day release to DRC to register for vote.²
3. The Appellant’s arguments are grounded on a misrepresentation REDACTED, which do not offer any guarantee to ensure the Appellant’s return at trial or monitor his release; and second, a mere disagreement with the Chamber’s assessment of all relevant factors which have a bearing on the Appellant’s flight risk and the possibility that he will interfere with witnesses if released.
4. In sum, the Appellant has failed to identify any error in the Chamber’s reasoning and findings that would merit the intervention of the Appeals Chamber.³

Procedural Background

5. On 3 July 2008, Mr Jean-Pierre Bemba Gombo (“the Appellant”) was surrendered to the seat of the Court. Since then, he has been detained. The Appellant’s trial commenced on 22 November 2010.
6. On 17 December 2010, the Chamber issued its “Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment on

¹ ICC-01/05-01/08-1565-Conf.

² ICC-01/05-01/08-1586-ConfOA7.

³ Pursuant to Regulation 23bis(2) of the Regulations of the Court, the Prosecution files this document confidentially due to references to information contained in confidential filings. The Appeal Brief was also filed on confidential basis.

19 November 2010" ("December 2010 Decision"), in which the Chamber ruled that the Appellant was to remain in detention.⁴

7. On 3 May 2011, the Appellant filed his "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo" ("First Application"), requesting interim release during the Court's summer judicial recess and weekends, subject to a guarantee from a State Party that he would appear at trial. The First Application asserts that the Appellant should be transferred to Belgium if provisional release was granted.⁵
8. On 3 May 2011, the Appellant requested that the Chamber convened a status conference to allow, inter alia, the Appellant to elaborate on his arguments in support of the First Application.⁶
9. The Prosecution filed its observations on the First Application on 19 May 2011, arguing that the application should be rejected.⁷ The OPCV and the legal representatives filed their observations on the First Application on 23 and 24 May 2011 and also submitted that the First Application should be denied.⁸
10. On 27 May 2011, the Registrar filed the observations of the Netherlands (or "Host State") that indicate that while it would "facilitate the transfer of Mr Bemba to Belgium should he be granted interim release" it also noted that such a "transfer may have a considerable impact on operational resources of the Host State".⁹
11. On 6 June 2011, REDACTED. The Second Application is temporally limited to the Court recess and periods where the Chamber does not sit for at least three consecutive days, including long weekends.¹⁰ REDACTED. The Appellant further notes that he would accept any guarantee that REDACTED and that his friends

⁴ ICC-01/05-01/08-1088.

⁵ ICC-01/05-01/08-1387.

⁶ ICC-01/05-01/08-1388.

⁷ ICC-01/05-01/08-1423-Conf.

⁸ ICC-01/05-01/08-1433-Conf; ICC-01/05-01/08-1435-Conf ; ICC-01/05-01/08-1440-Conf.

⁹ ICC-01/05-01/08-1463-Conf.

¹⁰ ICC-01/05-01/08-1479-Conf.

and family would cover the expenses. Finally, the Appellant requested REDACTED the availability of certain guarantees, such as, inter alia, the safety and monitoring of the Appellant and his return to the seat of the Court.¹¹

12. REDACTED

REDACTED.¹²

13. On 8 June 2011, the Chamber invited the Prosecution, the legal representatives, the OPCV and REDACTED to submit their observations on the Second Application.¹³

14. On 10 June 2011, the Registrar filed the Belgium Observations in relation to the First Application, in which Belgium “categorically opposes the possible interim release of Mr [Bemba] into its territory”.¹⁴

15. On 10 June 2011, the Appellant filed his "Demande d'autorisation de sortie sous le bénéfice de l'extrême urgence pour permettre à M. Jean-Pierre Bemba Gombo d'accomplir ses devoirs civiques en République Démocratique du Congo", requesting that he be permitted to leave the detention centre for approximately 17 hours to travel to the Democratic Republic of the Congo ("DRC") to register for the upcoming elections ("Third Application"). The Appellant asserts that the only way for him to complete his electoral registration is to travel to the DRC and to register in person. The Appellant states that his "family and friends will defray

¹¹ ICC-01/05-01/08-1479-Conf-AnxB.

¹² ICC-01/05-01/08-1479-Conf-AnxA.

¹³ ICC-01/05-01/08-1492-Conf. With respect to REDACTED, it invited REDACTED to submit, by 16,00 on Monday 20 June 2011, observations on the Additional Request for Interim Release, and, in particular, on the issues of (i) whether there would be any legal impediment for Mr Bemba to enter and leave the territory of REDACTED, should he be conditionally released by the Chamber during the duration of the Court's judicial recesses and/or periods where the Chamber does not sit for at least three consecutive days, including long weekends; and (ii) whether REDACTED would be in a position to impose one or more of the conditions listed in Rule 119 of the Rules, should the Chamber order the interim release of Mr Bemba REDACTED.

¹⁴ ICC-01/05-01/08-1505-Conf-Anx2, p.17.

the costs" of the proposed trip and seeks an expedited decision on the Third Application.¹⁵

16. On 16 June 2011, the Appellant replied to the Belgium Observations.¹⁶

17. The legal representatives and the OPCV filed their observations on the Third Application on 16 and 17 June 2011, all of which opposed the Third Application.¹⁷ The Prosecution submitted its views on the Third Application on 17 June 2011, taking the position that "there is neither precedent nor justification for this extraordinary request."¹⁸

18. The legal representatives, the Prosecution, the OPCV and REDACTED submitted their views on the Second Application on 17 and 20 June 2011.¹⁹

19. REDACTED

- REDACTED
- REDACTED
- REDACTED²⁰

20. On 27 June 2011 the Chamber issued its "Decision on Applications for Provisional Release" whereby the Chamber rejected the three Applications.²¹ With respect to the First and Second Application, the Chamber found that the conditions for the Appellant's detention under Article 58(1)(a) and (b) continued to be met and that there had not been an inexcusable delay by the Prosecution resulting in the Appellant being detained for an unreasonable period. In particular the Chamber found that only REDACTED constitute a new circumstance bearing on the

¹⁵ ICC-01/05-01/08-1501-Conf.

¹⁶ ICC-01/05-01/08-1530-Conf, paras.13-33;31-50.

¹⁷ ICC-01/05-01/08-1539-Conf; ICC-01/05-01/08-1540-Conf; ICC-01/05-01/08-1541-Conf.

¹⁸ ICC-01/05-01/08-1542-Conf, para.2.

¹⁹ ICC-01/05-01/08-1543-Conf; ICC-01/05-01/08-1555-Conf; ICC-01/05-01/08-1553-Conf; ICC-01/05-01/08-1552-Conf; ICC-01/05-01/08-1556-Conf.

²⁰ ICC-01/05-01/08-1556-Conf-Anx2.

²¹ ICC-01/05-01/08-1565-Conf (the "Decision").

likelihood of the Appellant returning to trial, if provisionally release. However, the Chamber found that, under Article 58(1)(b)(i), there was meaningful risk that if provisionally released REDACTED the Appellant would not return to complete his trial; and under Article 58(1)(b)(ii), if released, the Appellant may endanger the Court's proceedings by interfering with witnesses. The Chamber also concluded that a Status Conference was not necessary as the parties and participants had had ample opportunity to express their views by way of written submissions. Finally, the Chamber rejected the Appellant's release to travel to the DRC for his electoral registration (Third Application) due to the lack of legal and factual basis and the fact that he remained a flight risk.

21. On 29 June 2011 the Appellant filed the "Notice of Appeal",²² and on 1 July he filed the Document in Support of appeal against the Decision ("Appeal Brief")²³ where he submitted that the Trial Chamber had committed three errors: first, REDACTED; second, the Trial Chamber erred in finding a possibility that, if released, the Appellant may interfere with witnesses; and third, the Trial Chamber erred in summarily denying the application to travel to DRC. The Appellant requests a reversal of the Decision and (1) his release to REDACTED before the commencement of the summer recess on 15 July, and for those periods in which the Chamber will not sit during three consecutive days; (2) travel to DRC for approximately 17 hours to enroll to vote before 21 July 2011.²⁴ The Appellant further requests an expedited schedule for the filing of written observations or, in the alternative, a status conference in order for the parties to make oral submissions.²⁵

22. On 5 July, the Appeals Chamber, Judge San-Hyun Song dissenting, ordered victims wishing to participate in the appeal to file their applications no later than

²² ICC-01/05-01/08-1573-ConfOA7.

²³ ICC-01/05-01/08-1586-ConfOA7.

²⁴ Appeal Brief, pp.17-18.

²⁵ Ibid., para.41.

7 July, and the Appellant and the Prosecution to file their responses, if any, by 11 July 2011.²⁶

23. On 7 July, the legal representatives requested their participation in the instant appeal;²⁷ and on 11 July the Prosecution responded to the latter applications.

Submissions

24. The Prosecution hereby responds and requests the Chamber to dismiss the Appeal Brief and deny both the Appellant's release REDACTED for the summer recess and any other judicial recesses, and the one-day release to DRC to register to vote. The Appellant fails to show any error of law or misappreciation of the facts underpinning the Chamber's reasoning and findings that would merit the intervention of the Appeals Chamber.²⁸ The Appellant's arguments are mainly grounded on, first, a misrepresentation REDACTED, which do not offer any guarantee to ensure the Appellant's return at trial or monitor his release; and second, a mere disagreement with the Chamber's assessment of all relevant factors which have a bearing on the Appellant's flight risk and the possibility that he will interfere with witnesses if released.

²⁶ ICC-01/05-01/08-1587-Conf OA7. The Prosecution understands that the Appeals Chamber has decided to proceed on the basis of written submissions on expedited basis, and has not entertained the alternative request of the Appellant to make oral submissions (see Appeal Brief, para.41).

²⁷ ICC-01/05-01/08-1588-ConfOA7; ICC-01/05-01/08-1589-ConfOA7.

²⁸ The Appeals Chamber has stated the relevant standard of review: "Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub-judice issues." ICC-01/04-01/07-572OA6, para.25; ICC-01/05-01/08-323OA, para.52; ICC-01/05-01/08-631-RedOA2, paras.61-63. "In applying this standard to the findings in the Impugned Decision, the Appeals Chamber will not review the findings of the Pre-Trial Chamber de novo, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision." ICC-01/05-01/08-631-Red, para.62.

First Ground: the Trial Chamber correctly assessed all relevant factors and concluded that the Appellant remains a flight risk

(i) REDACTED

25. According to the Appellant, the Chamber misapprehended the scope of the guarantees and should have read REDACTED together with the Appellant's request - where the Appellant expressly listed certain conditions, including his return to the seat of the Court.²⁹ The Appellant further argues that REDACTED in reply to the Chamber's questions are exhaustive, and that if the Chamber wanted more details it should have asked REDACTED, convey a status conference or wait for REDACTED additional submissions.³⁰

26. The Appellant mischaracterizes the scope and content of REDACTED. The mere fact that the Appellant sent a request REDACTED proposing certain measures – REDACTED – does not constitute a “State guarantee”: REDACTED.³¹

27. Equally, REDACTED cannot be characterized as a “guarantee”: REDACTED.³² The Appeals Chamber has stated that, in order for the guarantees to be effective, States willing to host a detained person will specify the conditions and its capability to enforce them.³³ REDACTED.³⁴ Had REDACTED specified the conditions that it was willing and able to enforce, and detailed its capability and resources to implement them, the Chamber could have properly assessed whether those measures could mitigate the Chamber's concerns.

28. The Appellant also suggests that the Chamber should have been more specific in its questions REDACTED, and that it should have waited REDACTED additional

²⁹ Appeal Brief, paras.5-8.

³⁰ Appeal Brief, paras.9-12.

³¹ Appeal Brief, paras.5-8.

³² Appeal Brief, paras.9-11.

³³ ICC-01/05-01/08-631OA2, paras.104,106, 108-109.

³⁴ Decision, para.59. A contrario Appeal Brief, paras.4,8.

submissions to be provided “as soon as possible” on the practical modalities to host the Appellant “if he was granted provisional release”.³⁵ However, the Appellant cannot reasonably expect that the Chamber identifies the conditions that REDACTED is willing and able to enforce.³⁶ REDACTED.³⁷ As the Appeals Chamber has required, the practical modalities or concrete conditions, must be specified when requesting the provisional release (and not after) as they are necessary factors that the Chamber must consider in order to make an informed decision.³⁸

(ii) The Chamber properly weighted all the factors having a bearing on the Appellant’s detention

29. The Appellant further submits that the Trial Chamber gave insufficient weight to the purported guarantees REDACTED as a means of mitigating the Chamber’s finding that the Appellant remained a flight risk.³⁹

30. This is incorrect. REDACTED. However, the Chamber did consider and weight these materials against other factors bearing on the Appellant’s detention.⁴⁰ First, the Chamber noted REDACTED did constitute a new circumstance bearing on the likelihood of the Appellant returning to trial, were he to be granted provisional release.⁴¹ Then, the Chamber considered both, the factors indicating that there was

³⁵ Appeal Brief, para.12. See REDACTED, quoted in Appeal Brief, para.7.

³⁶ The Prosecution notes that the decisions of the ECtHR and Human Rights Committee cited in para.15 and fns. 22-23 of the Appeal Brief are not applicable to the instant case. *Hill v. Spain* refers to pre-trial detention that was grounded on the sole fact that the petitioner was foreigner; and the Appellant partially quotes and as a result misrepresents para.84 in *Iljiov v. Bulgaria*.

³⁷ The Prosecution notes that the Chamber requested REDACTED to submit observations to the Appellant’s Second Application and at no time limited the scope of REDACTED response. To the contrary the Chamber questions clearly tried to elicit which conditions under Rule 119(3) was REDACTED able to implement should the Chamber order the Appellant’s release. See ICC-01/05-01/08-1492-Conf.

³⁸ ICC-01/05-01/08-631OA2, paras.104,106,108-109. In addition, the Chamber never questioned the REDACTED. The Chamber correctly found that no guarantees had been provided: a contrario, Appeal Brief, para.14.

³⁹ Appeal Brief, para.3. As noted above the Chamber found that the Appellant remains a flight risk on the grounds of (i) the gravity of the charges against him, the confirmation of charges, the potential for a substantial sentence in case of conviction; and (ii) the Appellants’ network of international contacts, his past and present political position and financial resources at his disposal. See Decision, paras.55-56, quoted in Appeal Brief, para.2.

⁴⁰ Appeal Brief, para.60.

⁴¹ Decision, para.59.

a flight risk,⁴² and arguments to sustain the opposite, in particular (i) REDACTED; (ii) the compliant behaviour of the accused during his two travels to Belgium; (iii) the Appellant's desire to leave as a public figure and not as a fugitive; and (iv) the fact that the Appellant is seeking release for short and discrete periods of time.⁴³ The Chamber expressly "balanc[ed] these considerations" to conclude that "there is a meaningful risk that if provisionally released REDACTED, the [Appellant] would not return to complete his trial".⁴⁴ This approach – assessing various factors collectively and not in isolation – is fully consistent with the jurisprudence of the Appeals Chamber.⁴⁵

31. In addition, the Trial Chamber further stated that REDACTED, this would not be dispositive, as such assurances would be considered as part of the total mix of factors bearing on the Appellant's detention.⁴⁶ In other words, REDACTED had specified the conditions that it was willing and able to implement, the Chamber would have in any event assessed those conditions against the backdrop of all relevant information before making a finding.

32. The Appellant also challenges the balancing exercise conducted by the Chamber and the weight given to the different factors that led it to conclude that the Appellant remained a flight risk: first, he argues that "the factors cited by the Appeals Chamber [sic]" when weighted against other factors submitted by the Appellant do not support this conclusion;⁴⁷ second, the Chamber should have indicated the identities of the persons included in the Appellant's network of contacts and their relationship with the Appellant;⁴⁸ third, the Chamber erred when it inferred that the Appellant can muster the funds needed to abscond if his

⁴² Decision, para.61 referring to the concerns outlined in paras.55-56 and 59.

⁴³ Decision, para.61.

⁴⁴ Ibid., para.61.

⁴⁵ ICC-01/05-01/08-323OA, para.55; see also ICC-01/05-01/08-403, para.46; ICC-01/05-01/08-475, para.57 – cited in fn.123.

⁴⁶ Decision, fn.124.

⁴⁷ Appeal Brief, para.15: REDACTED, (i) REDACTED; (ii) the compliant behaviour of the accused during his travels to Belgium; (iii) the Appellant desire to live as a public figure and not as a fugitive, and (iv) the fact that the Appellant is seeking release for short and discrete periods of time; as well as the supposed "consistent conduct of Mr Bemba which demonstrates a lack of desire to abscond".

⁴⁸ Appeal Brief, para.16.

family and friends can cover the costs of his security and monitoring;⁴⁹ and fourth, the Chamber did not give proper weight to the Appellant's desire to live as a public figure rather than as a fugitive.⁵⁰

33. Notably, the Appellant does not assert that the Chamber failed to consider relevant facts when assessing the weight to be given to the factors listed above.⁵¹ The Appellant merely challenges the Chamber's balancing exercise but it does not identify any error⁵² that merits the Appeals Chamber's interference with the Chamber's conclusion that "there is a meaningful risk" of flight should the Appellant be released.⁵³ Only on those grounds, these submissions ought to be dismissed. In addition, the Chamber does not need to make a decision on detention *ab initio*, nor to enter findings on the circumstances already decided in the prior ruling on detention, nor does the Chamber has to entertain submissions by the Appellant that merely repeat arguments that the Chamber has already addressed in previous decisions; to the contrary, the Chamber has to assess whether those circumstances that applied to prior rulings still exist and weigh them against all relevant information.⁵⁴ The Trial Chamber has followed this course of action in the impugned Decision.⁵⁵

Second Ground: the Chamber correctly found that there was a possibility that, if released the Appellant may interfere with witnesses

34. The Appellant contests the Chamber's finding under Article 58(1)(b)(ii) that if released, he may endanger the Court's proceedings by interfering with witnesses.

The Appellant argues that the factors relied upon by the Chamber to reach this

⁴⁹ Appeal Brief, para.17.

⁵⁰ Appeal Brief, paras.18-19.

⁵¹ ICC-01/05-01/08-631OA2, para.83.

⁵² ICC-01/04-01/07-572OA6, para.25; ICC-01/05-01/08-323OA, para.52; ICC-01/05-01/08-631-RedOA2, paras. 61-63.

⁵³ Decision, para.61.

⁵⁴ ICC-01/05-01/08-1019OA4, paras.52-53.

⁵⁵ Decision, paras.60-61.

finding are not new, and therefore there are no reasons “which justify a departure from a previous finding on this question”.⁵⁶ This submissions is flawed and grounded on a wrong interpretation of the Chamber’s prior decisions which did not include any finding on Article 58(1)(b)(ii). The fact that this is the first time that the Chamber has entered a finding on such ground does not mean – as the Appellant appears to understand - that the Chamber had previously found that he was *not* interfering with witnesses. In prior decisions the Chamber had found that detention was warranted because the Appellant remained a flight risk under Article 58(1)(b)(i), and it decided not to enter additional findings on the other limbs of this provision, as it was no necessary for the determination of the Appellant’s release. In this case, the Chamber decided to “consider alternative bases for the [Appellant’s] detention”⁵⁷ in light of the arguments advanced which had an equal bearing on Article 58(1)(b)(ii).⁵⁸

35. In addition, the Appellant erroneously submits that the Chamber’s finding is made *in abstracto* with no identification of factual basis or “identifiable threat or propensity of the accused to intimidate witnesses” that could reverse the purported “demonstrated history of non-interference” of the Appellant.⁵⁹ This is

⁵⁶ Appeal Brief, para.21. Note that the Trial Chamber relied on (i) the Appellant’s knowledge of the identities of all Prosecution witnesses; (ii) the Appellant’s available means to interfere with witnesses by virtue of his position of influence in the region where the witnesses reside, his network of supporters and his ability to muster substantial financial resources. The Chamber also considered the Appellant’s submissions with respect to the limited period of time that he is seeking release for and the fact that the Prosecutor has already called almost all of his vulnerable witnesses (Decision, paras.63-64).

⁵⁷ Decision, para.62. Note that the Trial Chamber refers to ICC-01/05-01/08-1019OA4, para.52 and the broad inquiry that the Chamber is required to undertake in the context of detention decisions.

⁵⁸ See in particular First Application, paras.6-7, 9, where the Appellant submitted that the Prosecution has called almost all of his vulnerable witnesses and that there is no suggestion that vulnerable witnesses have been intimidated by the Defence.

⁵⁹ Appeal Brief, para.22. See also paras.23-24 whereby the Appellant refers to ICTY jurisprudence and DRC 3 decisions that would arguably support his submission. The Prosecution notes that the three decisions cited by the Appellant support the Chamber’s finding that release should not be granted if there is a possibility of witness interference. Note in particular the decision issued in the *Mbarushimana* case (ICC-01/04-01/10-16, para.39 and fn.66): “It is worth recalling that, in relation to the (...) continued detention of the suspect within the meaning of article 58(1)(b) of the Statute, the Appeals Chamber has held that “the question revolves around the possibility, not the inevitability, of a future occurrence”. In addition the facts of the two ICTY decisions differ from the instant case: in the *Brahimaj* decision (*Prosecutor v Haradinaj*, IT-04-08-A, Decision on Lahi Brahimaj’s Application for Provisional Release, 25 May 2009, para.14), Brahimaj was granted release after being sentenced to 6 years because he had already served 2/3 of his sentence. In the *Haradinaj* decision (*Prosecutor v Haradinaj*, IT-04-84-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 6 June 2005), the trial had yet to start and the arguments advanced by the Prosecution differed from the concrete facts that the Chamber relied upon in this case.

incorrect. The Trial Chamber correctly stated that the requirement under Article 58(1)(b)(ii) may be satisfied if there is a “possibility” of witness interference.⁶⁰ Further, the Trial Chamber properly considered the facts before it and relevant to this provision, namely (i) that the Appellant had been informed of the identities of all Prosecution witnesses; (ii) that he had the means available to interfere with witness by virtue of his position of influence in the region where the witnesses reside, his network of supporters and his ability to muster substantial financial resources.⁶¹ The Chamber considered these factors and balanced them against those submitted by the Appellant and concluded that there was a possibility of witness interference.⁶²

36. The Appellant also challenges the factors that the Trial Chamber relied upon to find that there is such a possibility of interference with witnesses.⁶³ First, the Appellant argues that the fact that he is in possession of witness’ identities does not increase the scope for witness interference. He submits that he has known the identities since 6 November 2009 and that no such “increase” of the scope has been found in prior decisions on detention.⁶⁴ The Appellant’s argument is based on the wrong understanding that the Pre-Trial Chamber or the Trial Chamber had previously found that there was no risk of witness interference, and that the Chamber is now departing from this finding. As noted above, although it is the first time that the Chamber rules on Article 58(1)(b)(ii), this does not entail presumption of non-interference with witnesses.

37. The Appellant further submits that the Chamber cannot rely exclusively on his position of influence in the region where witnesses reside and his ability to muster financial resources, as this does not necessarily imply that the Appellant will use those means to interfere with witnesses.⁶⁵ The Prosecution notes that

⁶⁰ Decision, para.65 quoting AC ICC01/05-01/08-323OA, para.67.

⁶¹ Decision, para.63.

⁶² Decision, paras.63-65.

⁶³ Appeal Brief, paras.27-29, 31.

⁶⁴ Appeal Brief, para.27.

⁶⁵ Appeal Brief, para.28.

although the Appellant's mere disposal of means does not automatically involve that he would use them to interfere with witnesses, there is nevertheless a clear *possibility* that he would do so.⁶⁶ In addition, the Chamber did not rely *solely* on the Appellant's position of influence; to the contrary, it assessed this factor jointly with other factors with a bearing on the possibility of the Appellant's interfering with witnesses.⁶⁷

38. The Appellant finally argues that the REDACTED negate the risk that the Appellant will interfere with witnesses.⁶⁸ However, and as noted above REDACTED did neither provide any guarantee, nor identify any condition with a bearing on witness interference that would have required the Chamber to consider.

Third Ground: the Trial Chamber correctly denied the application for travel to the DRC

39. The Appellant submits that the Chamber erred when it dismissed his request for one-day release to DRC (Third Application) on the grounds that he had cited no provision. According to the Appellant, the Chamber should have nevertheless entertained the Application by virtue of its inherent powers, as it had already relied on them when it authorized the Appellant to attend his father's and grandmother's funerals in Belgium.⁶⁹ The Appellant further submits that the Trial Chamber erred when it dismissed the Third Application *in limine* without seeking the views of the Prosecution, the victims and the DRC pursuant to Rule 119(3). According to the Appellant had the DRC authorities been consulted they would have provided sufficient conditions to mitigate and even negate the purported

⁶⁶ In addition, the Chamber is not required to link the fear/ concern of those witnesses with a positive action of the Appellant (a contrario Appeal Brief, para.29); as noted above, a "possibility" that he may do so suffices: ICC-01/05-01/08-323OA, para.67.

⁶⁷ Decision, paras.63-64.

⁶⁸ Appeal Brief, para.30.

⁶⁹ Appeal Brief, para.36.

flight risk.⁷⁰ The Appellant further argues that although it proposed to travel by a private plane, the plane was not his and nothing precluded the Chamber from seeking cooperation from the UN or another international organization for the provision of an aircraft that the Chamber deemed safer.⁷¹

40. The Prosecution notes that the Appellant does not accurately present the impugned Decision. Although the Chamber indicated that no provision had been cited and dismissed the Application, it did consider whether the Appellant's submissions could arguably constitute "exceptional circumstances" that would trigger the Chamber's inherent powers and allow for the Appellant's release under humanitarian grounds:⁷² the Chamber first noted the fundamental nature of the right to participate in a democratic process through voting, but it also stated that this right is not absolute and is subject to reasonable restrictions, as envisaged in Article 25 of the ICCPR and the ECtHR's jurisprudence.⁷³ The Chamber found that in this instance there were no exceptional circumstances, and that the limitation of the Appellant's right to vote was the result of his status as an individual against whom serious charges have been confirmed.⁷⁴ Thus, based on these findings, and the fact that the Appellant remained a risk flight, and absent any other legal basis the Chamber correctly dismissed the Application.⁷⁵

41. The Appellant bears the burden to establish that there are exceptional circumstances and that he will appear for trial.⁷⁶ Failure to do so cannot be amended by shifting the burden to the Chamber and requiring the Chamber to

⁷⁰ Appeal Brief, paras.34-35.

⁷¹ Appeal Brief, para.37.

⁷² Decision, para.69.

⁷³ Decision, para.70. See fn.133.

⁷⁴ Decision, para.72.

⁷⁵ The Prosecution notes that in the two cases where the Trial Chamber granted release on humanitarian grounds (ICC-01/05-01/08-437 and ICC-01/05-01/08-1099-Conf), although it requested observations to the Prosecution, victims and Registry on the logistics of the transfer, it did not rely on Rule 199(3). Hence the Appellant cannot seek both, release on the exercise of the Chamber's inherent powers – which procedure is not expressly regulated in the Statute and Rules, and release under the provisions of the Statute and Rules, namely Article 60(3) and Rule 199.

⁷⁶ *Prosecutor v. Kovacevic*, Decision on Defence Motion for Provisional Release, IT-97-24-PT, 20 January 1998, para.6.

request these guarantees to the DRC as well as the provision of a plane from international organizations.⁷⁷

Conclusion

42. The Prosecution requests the Chamber to entertain the submissions enclosed herein and, for the reasons set out above, to dismiss the Appellant's Document in support of Appeal.



Luis Moreno-Ocampo,
Prosecutor

Dated this 30th day of September 2011

At The Hague, The Netherlands

⁷⁷ The Prosecution notes that the Haradinaj decision cited in para.35 of the Appeal Brief (*Prosecutor v Haradinaj*, IT-04-84-PT, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release) is not applicable to the instant case: first, the facts are completely different as Haradinaj was in pre-trial provisional release and the decision cited expands the conditions, in particular allowing him to engage in public political activities under the monitoring of UNMIK; second, Haradinaj had provided UNMIK's agreement on providing the necessary guarantees to ensure the compliance with the conditions of pre-trial provisional release.