

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08 OA10

Date: 13 March 2012

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Redacted Document

Prosecution's Response to the "Defence Appeal Brief against the Trial Chamber III's decision of 6 January 2012 entitled 'Decision on the Defence's 28 December 2011 *Requête de mise en liberté provisoire de M Jean-Pierre Bemba Gombo*'"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel Support Section
Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

Legal Representatives of Victims

Ms Marie Edith Douzima-Lawson
Mr Assingambi Zarambaud

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. On 6 January 2012 Trial Chamber III issued its “Decision on the Defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’”, whereby it rejected the application for release filed by the Appellant (“the Decision”).¹
2. On 10 January 2012 the Appellant appealed the Decision on three grounds: first, the Appellant argued that the Trial Chamber erred when it found that the latest letter provided by [REDACTED] (“27 December Letter”)² does not contain new elements which warrant a modification of the existing decision on detention; second, that the Chamber erred in law when it misapplied the legal concept of “risk of flight”; and third, that the Chamber infringed the principles of individual liberty, presumption of innocence and right to a fair trial when it refused the Appellant’s release on the grounds of four factors, namely (i) the final dismissal of the Appellant’s challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed; (iii) the potential substantial sentence in case of conviction; and (iii) the Appellant’s financial and material support.
3. The Decision is correct. First, the Chamber correctly found that the [REDACTED] 27 December Letter was a *verbatim* repetition of prior undertakings provided by [REDACTED] and that, therefore, it did not constitute a changed circumstance that warranted a revision of the Appellant’s detention. Second, the Appellant advances an erroneous test to determine whether he poses a risk of flight which has no basis in the legal texts or in the jurisprudence of this Court. Third, the Chamber made no error when it relied on the four factors listed above to justify his detention. The Chamber correctly reverted to its prior decision on detention, and based on the information before it, it correctly concluded that there was no change in the circumstances underpinning the Appellant’s necessary detention to ensure his presence at trial.

¹ ICC-01/05-01/08-2034-Conf.

² ICC-01/05-01/08-2029-Conf-AnxA.

Procedural Background

4. 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. Prior to and after the start of trial, the Appellant made several requests for release.
5. 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 19 November 2010" ("December 2010 Decision"). In that decision, the Chamber identified four factors: (i) the final dismissal of the Appellant's challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed against the accused; (iii) the potential substantial sentence in case of conviction; and (iv) the financial and material support from which the accused benefits. Based on those factors, the Chamber ruled that if released there was a sufficient risk that the Appellant would flee, and therefore it was required to detain the Appellant.³
6. On 6 June 2011, the Appellant filed an application for provisional release to [REDACTED] during Court recesses, long weekends, or other periods when the Chamber does not sit for at least three consecutive days.⁴
7. On 8 June 2011, the Chamber invited [REDACTED] to submit observations on the application ("8 June Order").⁵ [REDACTED] provided in response a letter dated 20 June 2011 ("20 June Letter").⁶
8. On 27 June 2011 the Chamber issued its "Decision on Applications for Provisional Release", whereby the Chamber found that the Appellant's detention was necessary under article 58(1)(b)(i) and 58(1)(b)(ii) and rejected the Appellant's application for release ("June 2011 Decision").⁷

³ ICC-01/05-01/08-1088.

⁴ ICC-01/05-01/08-1479-Conf.

⁵ ICC-01/05-01/08-1492-Conf.

⁶ ICC-01/05-01/08-1556-Conf-Anx2-tENG.

⁷ ICC-01/05-01/08-1565-Red. The Decision also rejected two other applications for release: on 3 May 2011, the Appellant requested release to Belgium or any other State during the Court's judicial recesses and weekends (ICC-01/05-01/08-1388-Conf), and on 10 June 2011, the Appellant requested to travel to the DRC to register for the upcoming elections (ICC-01/05-01/08-1501-Conf).

9. The Appellant appealed the June 2011 Decision.⁸ On 19 August 2011, the Appeals Chamber, by Majority, reversed the June 2011 Decision in part and remanded the matter to the Trial Chamber for new consideration (*Bemba OA7 Judgment*).⁹
10. On 29 July 2011, while the appeal of the June 2011 Decision was pending, [REDACTED] provided additional information, in the form of two letters, one dated 9 June 2011 ("9 June Letter") and one dated 28 July 2011 ("28 July Letter"),¹⁰ on the measures it could take were the Appellant to be released into its territory. The letters were not available and could not be considered by the Trial Chamber at the time it issued the June 2011 Decision or by the Appeals Chamber for the purposes of the OA7 appeal.
11. On 24 August 2011, the Appellant asked again for temporary release to allow him to travel to the Democratic Republic of the Congo ("DRC") to register as candidate in the upcoming presidential and parliamentary elections.¹¹ On 2 September, the Chamber rejected this application on the grounds that the Appellant posed a flight risk if he was to be released in the DRC.¹² The Appellant also appealed this decision,¹³ which was confirmed by the Appeals Chamber on 9 September 2011 (*Bemba OA8 Judgment*).¹⁴
12. On 26 September 2011, the Trial Chamber issued its decision following the OA7 Appeal's Judgment and rejected the Appellant's Application ("September 2011 Decision").¹⁵ The Chamber concluded that there were no changed circumstances subsequent to the Chamber's December 2010 Decision¹⁶ and that the factors demonstrating a risk of flight cited by the Chamber in that decision¹⁷ continued to apply. Thus, the Chamber found that the Appellant's detention continued to be necessary under article 58(1)(b)(i)¹⁸ to ensure his appearance at trial. It also found that detention was necessary under article 58(1)(b)(ii) to avoid the Appellant's interference with witnesses.¹⁹

⁸ ICC-01/05-01/08-1586-RedOA7.

⁹ ICC-01/05-01/08-1626-RedOA7.

¹⁰ ICC-01/05-01/08-1621-Conf-Anx1-tENG.

¹¹ ICC-01/05-01/08-1639-Conf-tENG.

¹² ICC-01/05-01/08-1691-Red.

¹³ ICC-01/05-01/08-1702OA8.

¹⁴ ICC-01/05-01/08-1722OA8.

¹⁵ ICC-01/05-01/08-1789-Red.

¹⁶ ICC-01/05-01/08-1088.

¹⁷ See para. 5 above.

¹⁸ September 2011 Decision, paras.19-26.

¹⁹ September 2011 Decision, paras. 27-33.

13. On 3 October 2011, the Appellant appealed against the September 2011 Decision.²⁰ On 23 November 2011, the Appeals Chamber confirmed the September 2011 Decision insofar as it was based on a risk of flight under article 58(1)(b)(i). The Appeals Chamber however found that the Trial Chamber made a procedural error when it found that the detention was also justified because of the risk of witness intimidation under article 58(1)(b)(ii) without seeking submissions from the Appellant (*OA9 Bemba Judgment*).²¹
14. On 12 December 2011, the Appellant sought again his provisional release to [REDACTED] during judicial recesses, weekends, and any periods during which the Chamber does not sit for at least three consecutive days.²² This application was based upon a third letter from [REDACTED] dated 5 December 2011 (“5 December Letter”), in which [REDACTED] (i) reiterated its willingness to accept the Appellant onto its territory if provisional release is granted; (ii) specified the location where the accused would stay while in [REDACTED]; and (iii) stated that “ten police officers or gendarmes” will be made available to monitor the Appellant while in [REDACTED].²³ The Appellant argued that the “additional safeguards contained in these letters constitute a significant change in circumstances, in the sense that they are aimed at completely removing any risk of flight”.²⁴
15. On 19 December 2011, the Trial Chamber denied the Appellant’s application on the grounds that the 5 December Letter did not have a bearing on whether the Appellant continued to pose a flight risk and did not alter the four factors upon which the Chamber based its article 58(1)(b)(i) findings in the September 2011 Decision (“December 2011 Decision”).²⁵ Specifically, the Chamber found that while the Letter focused solely on the modalities of the proposed monitoring regime in [REDACTED] and provided some new detail in this regard, its offer did not suffice to overcome the risk that the Appellant could abscond, and thus did not address the issue whether the Appellant constitutes a flight risk or the four factors listed in the September 2011 Decision.²⁶ The Chamber then concluded that the Appellant’s continued detention “within a detention regime overseen by the

²⁰ ICC-01/05-01/08-1812-ConfOA9.

²¹ ICC-01/05-01/08-1937-Red2OA9.

²² ICC-01/05-01/08-2000-Conf.

²³ ICC-01/05-01/08-2000-Conf-AnxB.

²⁴ ICC-01/05-01/08-2000-Conf, para.3.

²⁵ ICC-01/05-01/08-2022-Red, paras.11-13.

²⁶ December 2011 Decision, para.12.

Court” was necessary to ensure his appearance at trial.²⁷ The Chamber further declined to consider whether detention was also warranted under article 58(1)(b)(ii).²⁸

16. On 28 December 2011, the Appellant filed another application for interim release again seeking provisional release to [REDACTED] during judicial recesses, weekends, and any periods during which the Chamber will not sit for at least three consecutive days.²⁹ The application was based upon a fourth letter from [REDACTED] (“27 December Letter”), in which [REDACTED] confirmed its previous undertakings regarding the Appellant’s proposed provisional release into the territory of [REDACTED]. In particular, [REDACTED] reiterated undertakings contained in its 28 July 2011 Letter to (i) “immediately arrest the accused in the event of any violation or attempted violation of the conditions laid down by the Chamber” pursuant to Rule 119; (ii) “inform the Chamber immediately of any violation or attempted violation of the conditions and take the necessary steps to return the accused to the Court’s detention centre in The Hague”; and (iii) “ensure that the accused returns to The Netherlands to appear at trial as soon as the Chamber so orders”.³⁰ [REDACTED] also reiterated its undertaking in its 5 December Letter to make 10 police officers or gendarmes available to monitor the Appellant, asserting that this “will prevent [him] from escaping from [REDACTED]”.³¹

17. On 6 January 2012, the Trial Chamber denied the Appellant’s application on the grounds that the 27 December 2011 Letter was largely a *verbatim* repetition of the undertakings contained in the 28 July and 5 December 2011 Letters (the “Decision”).³² Accordingly, the Letter contained no new factual information bearing on the Appellant’s risk of flight and could not be seen as a “changed circumstance” warranting a modification of the December 2011 Decision, the last decision on detention. In sum, the Chamber concluded that the Appellant’s detention continued to be necessary to ensure his appearance at trial under article 58(1)(b)(i).³³

18. On 9 January 2012, the Appellant filed his notice of appeal.³⁴ On 10 January, the Appellant filed an addendum to this notice requesting the Appeals Chamber to shorten the

²⁷ Ibid, paras.13, 21.

²⁸ Ibid, para.14.

²⁹ ICC-01/05-01/08-2029-Conf.

³⁰ ICC-01/05-01/08-2029-Conf-AnxA, whereby the Appellant expressly refers to the 28 July 2011 Letter.

³¹ ICC-01/05-01/08-2029-Conf-AnxA.

³² ICC-01/05-01/08-2034-Conf.

³³ Ibid., paras.9-10.

³⁴ ICC-01/05-01/08-2037-ConfOA10.

time limit for the Prosecutor to respond so the Appeals Chamber could decide before 19 January.³⁵

19. On 11 January 2012, the Appellant filed his document in support of appeal, arguing three purported errors of the Chamber (“Appeal Brief”).³⁶ The Appellant filed the Appeal on urgent basis and reiterated his request to reduce the time limit for the Prosecutor and other participants to respond.³⁷

Confidentiality Level

20. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the Prosecution files this document confidentially as it is responding to a document with the same level of confidentiality and contains references to information enclosed in confidential filings and references to [REDACTED] which, according to the Appeals Chamber, have to be redacted.³⁸ No further reasons underline the confidentiality of the filing.

Standard of Review

21. In its recent Judgment OA9, rendered in this same case, the Appeals Chamber reiterated that under the applicable standard of review for appeals against decisions on release it “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.”³⁹
22. The Appeals Chamber further stated that “the appraisal of evidence lies, in the first place, with the Chamber considering the request for interim release”⁴⁰ and “in determining whether [the] Trial Chamber has misappreciated facts in a decision on interim release the

³⁵ ICC-01/05-01/08-2039-ConfQA10.

³⁶ ICC-01/05-01/08-2041-ConfOA10. If the Appeals Chamber were to reverse the Decision, the Appellant requests that he be released immediately, since no witness is presently scheduled to testify between 20 and 31 January.

³⁷ Ibid, para.35.

³⁸ ICC-01/05-01/08-1781-ConfOA7- whereby the Appeals Chamber ordered to redact all reference to [REDACTED] and any identifying information.

³⁹ ICC-01/05-01/08-1937-Red2OA9, para.47 quoting ICC-01/05-01/08-631-RedOA2,para.61.

⁴⁰ ICC-01/05-01/08-1937-Red2OA9, para.48 quoting ICC-01/04-01/06-572OA4,para.25.

Appeals Chamber ‘will defer or accord a margin of appreciation both to the inferences [that [...] the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention’⁴¹ and ‘will interfere only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.’⁴²

Submissions

23. The Appellant puts forward three grounds of appeal, one claiming a procedural and factual error (First Ground) and two alleging legal errors (Second and Third Grounds). The Prosecution submits that the Appellant fails to show any error that would warrant the corrective intervention of the Appeals Chamber.

First Ground: the Trial Chamber correctly assessed the guarantees provided by [REDACTED]

24. The Appellant argues that the Chamber erred in concluding that [REDACTED]’s 27 December Letter contains no new guarantees sufficient to warrant a modification of the existing decision on detention. According to the Appellant, [REDACTED] added a new fact relevant to its ability to prevent the Appellant’s flight:⁴³ “the ten policemen or gendarmes that [REDACTED] will devote to the monitoring of Mr. Bemba during all his stay, when traveling and at his place of residence in the territory of [REDACTED], will be able to prevent his escape from [REDACTED]”.⁴⁴

25. There is no error in the Chamber’s reasoning and findings. First, the Chamber compared the text of the 27 December 2011 Letter with the 28 July and 5 December Letters⁴⁵ and correctly concluded that the former “is largely a *verbatim* repetition” of the guarantees

⁴¹ ICC-01/04-01/-1937-Red2OA9, para.48 quoting ICC-01/04-01/10-283OA,para.17.

⁴² Ibid.

⁴³ Appeal Brief, paras.5-9.

⁴⁴ Appeal Brief, para.10. Note that the Appellant, in the application for release, incorrectly translated “dizaine” as “dozen” (See ICC-01/05-01/08-2029-Conf-Anx1, para.7).

⁴⁵ Decision, fn.25 where the Chamber compares the 27 December Letter (ICC-01/05-01/08-2029-Conf-AnxA) with the 28 July Letter (ICC-01/05-01/08-1621-Conf-AnxA) and 5 December Letter (ICC-01/05-01/08-2000-Conf-AnxB). Note that the Chamber erroneously refers to Anx1 instead of AnxA with respect to the 28 July Letter.

already provided by [REDACTED] in its previous letters.⁴⁶ A plain reading of the three documents confirms this conclusion.

26. Second, the Chamber correctly found that the 27 December Letter did not alter the four factors underpinning the Chamber's prior decision on detention. Nor did the Letter change the Chamber's prior conclusion that the Appellant posed a risk of flight. [REDACTED], in the 27 December Letter, merely stated its view that the measures already offered in the previous letters would prevent the Appellant from escaping [REDACTED]. However, this wording does not constitute a "changed circumstance" that would materially change the prior circumstances and warrant a revision of the prior decision on detention.⁴⁷
27. The Appellant confuses the undertakings that [REDACTED] proposes to address the Appellant's risk of flight (or witness intimidation) identified by the Chamber, with the risk itself. The existence of a risk is independent of the possibility of attenuating such risk through imposition of certain conditions. In addition, it is the Chamber's task (and not that of [REDACTED] or the Appellant) to determine whether the undertakings provided by [REDACTED] (jointly considered with all relevant information) can mitigate or eliminate the Appellant's risk of abscondment.
28. In sum, the Appellant has failed to show any error in the Chamber's Decision and the First Ground of Appeal should be dismissed.

Second Ground: the Chamber correctly applied the legal concept of risk of flight

29. The Appellant argues that the Trial Chamber erred in law in finding that the Appellant posed a flight risk pursuant article 58(b)(1)(i). According to the Appellant, the test to determine whether such a risk exists requires two findings: (1) that the Appellant has the means to flee, and (2) that he has the predisposition or intention to escape. The Appellant states that the four factors upon which the Chamber relied are inadequate to meet the test,⁴⁸ that the Chamber did not establish that the Appellant possessed a predisposition or intention to flee,⁴⁹ and that the Trial Chamber imputed such intention to the Appellant

⁴⁶ Decision, para.9.

⁴⁷ Ibid.

⁴⁸ Appeal Brief, para.20.

⁴⁹ Ibid, paras.21-22,24.

without indicating any concrete factual circumstances.⁵⁰ The Appellant further adds that the Decision contains “no evidence” of the Appellant’s plans to escape due to the prospects of a long prison term or that he has the means and financial support to escape.⁵¹

30. The Appellant’s submissions are wrong. First, the Appellant advances - for the first time in these proceedings - a purported test for determining risk of flight which has no basis in the basic texts or in the jurisprudence of this Court. Second, the Chamber is not required to make a fresh determination on detention each time an accused applies for provisional release.

(i) The Appellant’s test to determine the risk of flight has no basis in the basic texts or jurisprudence of this Court

31. The Appeals Chamber has clarified that Chambers of the Court must satisfy themselves that the conditions under article 58(1)(b) are met based on the submissions of the accused persons, those of the Prosecutor and any other information which has a bearing on the subject.⁵²

32. In order to determine whether an accused poses a flight risk, it suffices that the Chamber, based on the available evidence, finds that there is a *possibility* that the person would escape. As the Appeals Chamber stated, “the question revolves around the possibility, not the inevitability, of a future occurrence”.⁵³ The Chamber has to weigh the available evidence and “on that basis, make a prediction as to the likelihood of future events”.⁵⁴

33. Further, the Chamber does not need to establish that the Appellant has the intention and the means to flee to determine whether there is such possibility of abscondment. These factors do not need to be cumulative; to the contrary, it suffices to establish that the Appellant has the intention or the resources to escape. In that regard, the Appeals Chamber stated that “access to international contacts could provide the means to enable a suspect to abscond, whether or not there was evidence that the suspect would actually utilize such contacts”.⁵⁵ Thus, the Chamber may conclude that the Appellant poses a risk

⁵⁰ Ibid, para.25.

⁵¹ Ibid., para.23.

⁵² ICC-01/05-01/08-1019OA4, para.52.

⁵³ ICC-01/04-01/07-572OA6, para.21.

⁵⁴ ICC-01/04-01/10-283OA, para.60.

⁵⁵ ICC-01/04-01/10-283OA, para.25, referring to ICC-01/04-01/06-824OA7, para.137.

of flight if he has the resources to escape and need not further find that he affirmatively intends to do so.

34. Therefore, the Appellant's arguments with respect to this purported test should be dismissed.

(ii) *The Chamber does not need to make a fresh decision on detention*

35. The Appellant erroneously argues that the Decision contains "no evidence" of the Appellant's plans to escape to avoid a long prison term or of his means and financial support to escape.⁵⁶ However, the Chamber does not have to establish that the Appellant has both affirmative intention and demonstrable resources to flee; it suffices that, based on the available information, there is a possibility that he can escape.

36. In addition, a Chamber does not need to make a fresh decision on detention and enter findings on the circumstances already decided upon in prior decisions each time an accused applies for provisional release.⁵⁷ The standard is not *de novo* factual and legal review at each instance. Instead, the Chamber must consider the submissions of the parties and the available information and determine if the circumstances that, to date, justified detention still exist or if there has been a change. Nor does the Chamber have to revisit legal (or factual) arguments already addressed by it in prior decisions.⁵⁸ The Trial Chamber did exactly so when in the Decision it reverted to its prior ruling on detention (19 December 2011 Decision) and after considering the submissions of the parties and the information before it, it concluded that the Appellant still benefits from financial and material support and that there is no new fact or changed circumstance that indicates the contrary.⁵⁹

37. The Prosecution further notes that the Appellant has already challenged the Trial Chamber's findings on his resources and risk of abscondment in the OA7 and OA9 appeals. In the *OA7 Judgment*, the Appeals Chamber deferred to and confirmed the Trial Chamber's findings since the Appellant failed to demonstrate any error in the Chamber's reasoning.⁶⁰ In the *OA9 Judgment*, the Appeals Chamber noted that the Appellant was

⁵⁶ Ibid., para.23.

⁵⁷ ICC-01/05-01/08-1019OA4, para.53.

⁵⁸ ICC-01/05-01/08-1019OA4, para.53.

⁵⁹ Decision, paras.8-10.

⁶⁰ ICC-01/05-01/08-1626-RedOA7, paras.61-62.

reiterating the same arguments as in OA7 without providing any new arguments. On these grounds, the Appeals Chamber summarily dismissed the Appellant's argument.⁶¹ The Prosecution notes that this is precisely what the Appellant is arguing in this case in relation to his criticism of the Trial Chamber's findings pertaining to his disposal of financial and material resources to flee. These submissions should be therefore dismissed for the same reasons.

38. Finally, the Trial Chamber concluded in the impugned Decision that the Appellant's detention was necessary under article 58(1)(b)(i) "because there do not appear to have been any other changes in circumstances in the brief period [18 days] since the December 2011 Decision that bear on the accused's risk of flight".⁶² While the 18-day interval here is unusual even for this Appellant, nonetheless he has made numerous applications for provisional release since his initial arrest.⁶³ His personal circumstances thus have been considered and reviewed, extensively and repeatedly, by the Pre-Trial, Trial, and Appeals Chambers. In particular, the Trial Chamber repeatedly considered whether [REDACTED]'s proposal to monitor the Appellant's movements or post a retinue of guards outside his residence would suffice to prevent flight and repeatedly determined that the [REDACTED] proposals were inadequate to address the Appellant's risk of abscondment. Therefore, there is no error in the Chamber's decision when it found that the factors justifying the Appellant's detention were still applicable.

Third Ground: the Chamber did not infringe any of the Appellant's rights

39. The Appellant argues that the Chamber's reliance on four factors to determine the existence of a flight risk - (i) the final dismissal of the Appellant's challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed against the accused; (iii) the potential substantial sentence in case of conviction; and (iv) the financial and material support from which the accused benefits –

⁶¹ ICC-01/05-01/08-1937-Red2OA9, para.50.

⁶² Decision, para.10 (emphasis added).

⁶³ The Prosecution has identified twelve applications for provisional release filed by the Appellant since July 2008. See: ICC-01/05-01/08-49; ICC-01/05-01/08-200; ICC-01/05-01/08-333-Conf-Corr; ICC-01/05-01/08-430-Conf; ICC-01/05-01/08-1092-Conf; ICC-01/05-01/08-1387-Conf-Corr; ICC-01/05-01/08-1479-Conf; ICC-01/05-01/08-1501-Conf-tENG; ICC-01/05-01/08-1639-Conf; ICC-01/05-01/08-2000-Conf; ICC-01/05-01/08-2029-Conf; ICC-01/05-01/08-T-13-ENG, p.22, lns.2-6 and p.31, lns.5-8.

is unreasonable and contrary to the Statute as it infringes the Appellant's presumption of innocence, the principle of freedom, and the right to a fair trial.⁶⁴ The Appellant further argues that these four factors apply to all persons accused before the Court and constitute a "standard formula" that, if relied upon, would deprive all accused from interim release.⁶⁵

40. These submissions are wrong. First, the Appellant appears to suggest that the four factors, would apply to all accused persons, thus disregarding the Appellant's particular circumstances. This claim is not correct. Certainly, the first three factors are likely to be present – albeit to widely varying degrees, depending on the individual circumstances – in most cases before the Court. This institution's purpose, after all, is to prosecute the most serious crimes and the persons of greatest responsibility; those same factors also can require a severe sentence upon conviction and thereby provide a strong incentive to flee. Yet Chambers, as shown in two Darfur cases and in the Kenya cases,⁶⁶ do not reflexively order detention based upon them. To the contrary, the Chambers have consistently undertaken case-by-case analyses, looking at the persons' individual circumstances and making predictive determinations of intent based on a balanced assessment of each person's particular circumstances.

41. Moreover, the fact that a person has an incentive and predictive intent to flee need not be enough to justify detention if conditions for release can be fashioned that would suffice to prevent flight. The fourth factor identified by the Appellant – his financial and material support – is relevant because it addresses his particular ability to escape even if conditions were imposed on his release. Here, the Appellant has himself established his access to substantial support and resources. For example, and while consistently denying reports that he has substantial financial resources of his own, the Appellant proposed that he would fly to the DRC in a private jet to be made available to him by friends or family, whose costs also would be borne by friends or family.⁶⁷ Similarly, when the Appellant applied for interim release either in Belgium or in a safe house in The Netherlands, he proposed that all related expenses would be paid by friends and family.⁶⁸

⁶⁴ Appeal Brief, paras.28-32.

⁶⁵ Appeal Brief, paras.33-34.

⁶⁶ In particular, the *Abu Garda* and *Banda and Jerbo* cases (Darfur) and *Ruto, Kosgey and Sang* and *Muthaura, Kenyatta and Ali* cases (Kenya) where the Pre-Trial Chamber never exercised its authority to issue warrants of arrest instead of summons to appear requested by the Prosecutor, as it had done in the *Hussein and Kushayb* case.

⁶⁷ ICC-01/05-01/08-1501-Conf-tENG, para.17; ICC-01/05-01/08-1639-Conf-tENG, para.27

⁶⁸ ICC-01/05-01/08-1068-tENG, paras.53-54; and ICC-01/05-01/08-1387-Conf-Corr-tENG, para.17.

42. In the Appellant's case, the competent Pre-Trial and Trial Chambers in all their decisions on detention conducted careful and detailed analyses (which have been in most cases reviewed by the Appeals Chamber⁶⁹) and considered the submissions and all available information before determining whether the circumstances that previously justified the Appellant's detention remain in place and whether any changed circumstance justified a new decision.⁷⁰ The Trial Chamber's analyses have been conducted in light of the particular circumstances of the Appellant's case and carefully considering his submissions. In addition, that Chamber has not relied in any of those four factors in isolation, but it has reached its conclusions on the basis of all relevant factors taken together.⁷¹
43. The Appeals Chamber also has, on numerous occasions, established the validity of these factors to determine whether the circumstances under article 58(1)(b) are met. For instance, the Appeals Chamber has referred to the gravity of the crimes,⁷² the confirmation of charges,⁷³ the length of sentence that an accused may serve if convicted,⁷⁴ the accused's "past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources"⁷⁵ as indicators that an accused person might want, and would also have the ability, to abscond.
44. Therefore, the Appellant has no basis to argue that the Chamber's rulings violate his right to a fair trial or presumption of innocence. Chambers of this Court – as the Appellant himself notes⁷⁶ – are well aware of the importance of the decisions on detention and that the presumption is against deprivation of a person's liberty when release can be accomplished without jeopardizing the prosecution or risking the commission of further crimes. The Chamber's decisions are no exception to this rule and are not "standard formula" but the result of careful and thorough assessments of the circumstances applicable specifically to this Appellant.

⁶⁹ See: ICC-01/05-01/08-323 OA; ICC-01/05-01/08-631-Red OA2; ICC-01/05-01/08-1019OA4; ICC-01/05-01/08-1626-RedOA7; ICC-01/05-01/08-1722 OA8; ICC-01/05-01/08-1937-Red2OA9.

⁷⁰ ICC-01/05-01/08-1019OA4, paras.52-53. Note that several rulings of the Chamber have been conducted after and following the intervention of the Appeals Chamber.

⁷¹ ICC-01/05-01/08-323OA, para.55.

⁷² ICC-01/04-01/06-824OA7, para.136. See also ICC-01/04-01/07-572OA6, paras.21,24; ICC-01/05-01/08-323OA, para.55; ICC-01/05-01/08-631-RedOA2, para.67; ICC-01/04-01/10-283OA, para.21.

⁷³ ICC-01/05-01/08-631-RedOA2, para.70, see also paras.67-69.

⁷⁴ Ibid.

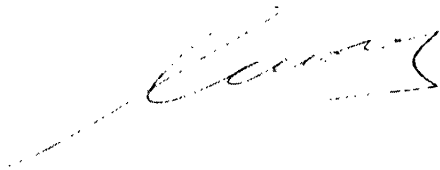
⁷⁵ ICC-01/05-01/08-323OA, paras.53,55. On the relevance of the accused financial status, see also ICC-01/05-01/08-631-RedOA2, para.74.

⁷⁶ Appeal Brief, fn.6. See decisions cited therein.

45. In sum, the Appellant's third ground of appeal should be dismissed as he has failed to show any error in the Chamber's reasoning and conclusions that would merit intervention by the Appeals Chamber.

Conclusion

46. For the reasons set out above, the Prosecution requests the Appeals Chamber to dismiss the Appellant's Document in support of Appeal.



Luis Moreno-Ocampo, Prosecutor

Dated this 13th day of March 2012
At The Hague, The Netherlands