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International
Criminal
Court

Original: **English** | No.**: ICC-01/05-01/08 OA**
Date: **28 July 2016**

THE APPEALS CHAMBER

Before: **Judge Christine Van den Wyngaert, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Chile Eboe-Osuji
Judge Piotr Hofmanski

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO

Public Redacted Document

Public redacted version of "Prosecution's Response to the Defence Document in Support of Appeal against the 'Decision on application for interim release'", 1 September 2008, ICC-01/01-05/08-83-Conf

Source: **Office of the Prosecutor**

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

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Introduction

The Prosecution herewith responds to Jean-Pierre Bemba's document in support of the appeal filed against the Single Judge's 20 August 2008 "Decision on application for interim release". The Prosecution submits that the Appellant has failed to meet its burden of demonstrating that the Single Judge's conclusions are flawed on account of a misdirection on a question of law or a misappreciation of the facts founding his decision, a disregard of relevant facts, or that the Single Judge took into account facts extraneous to the *sub judice* issues. Absent such a showing, as required by the jurisprudence of this Appeals Chamber, deference to the Single Judge's findings is warranted, and accordingly the decision should be confirmed.

Procedural Background

1. On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest[1] for Jean-Pierre Bemba ("the Appellant").[2] The Appellant was transferred from the detention centre of Saint-Gilles in Brussels to the ICC Detention Centre in The Hague on 3 July 2008, and had his initial appearance before the Pre-Trial Chamber on 4 July 2008.[3]
2. On 23 July 2008, the Defence for Jean-Pierre Bemba submitted an Application for interim release.[4]
3. Pursuant to an order of the Single Judge of Pre-Trial Chamber III,[5] the Prosecution filed its response to that Application for release on 11 August 2008.[6]
4. On 20 August 2008, the Single Judge issued the "Decision on application for interim release" ("the Decision").[7]

[1] ICC-01/05-01/08-1.
[2] The Pre-Trial Chamber also issued a "*Demande d'arrestation provisoire de M. Jean-Pierre Bemba Gombo addressée au Royaume de Belgique*" (ICC-01/05-01/08-3) requesting the provisional arrest and detention of Bemba by Belgian authorities.
[3] ICC-01/05-01/08-T-3-ENG ET WT
[4] ICC-01/05-01/08-49.
[5] ICC-01/05-01/08-60,
[6] ICC-01/05-01/08-65-Conf. The Defence sought leave to reply to this Response (ICC-01/05-01/08-70-Conf, 15 August 2008), however the Single Judge denied this application in the Decision (see Decision, paras. 39-40)
[7] ICC-01/05-01/08-73-Conf. A public redacted version of the Decision was issued on 27 August 2008 - ICC-01/05-01/08-80-Anx.

5. The Appellant filed an appeal against the Decision pursuant to Article 82(1)(b) on 22 August 2008.[8] On 26 August 2008, the Appellant filed their Document in Support of Appeal ("Appeal Brief").[9]
6. The Prosecution hereby files its Response to the Appeal Brief.
7. The Prosecution requests that this Response be received as confidential as the Appeal Brief to which it is responding has been filed as confidential. Once a public version of the Appeal Brief has been filed, the Prosecution will file a public version of this Response as soon as practicable.

Overview of Appeal and Standard of Review

8. The Prosecution submits that the Appeal Brief fails to demonstrate any error in the Decision which would justify the intervention of the Appeals Chamber. The Appeal Brief is largely confined to expressing the Appellant's disagreement with various aspects of the Decision – in many cases repeating submissions made before the Pre-Trial Chamber[10] or making submissions on an issue for the first time[11] – and does not identify or demonstrate any appellable error.
9. The Appeals Chamber has recently set out the standard for reviewing a decision on interim release, namely that

> "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

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[8] ICC-01/05-01/08-74.
[9] ICC-01/05-01/08-78-Conf.
[10] See e.g. Appeal Brief, paras. 10-11.
[11] See e.g. Appeal Brief, para. 18. See further para. 29, below.

relevant facts, or taking into account facts extraneous to the *sub judice* issues."[12]

10. In this case, the Decision applied the appropriate legal standard. The Appeals Chamber has stated that under Articles 58(1) and 60(2), the detention of the person "must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence."[13] The Single Judge correctly applied this standard.[14]

11. The Single Judge also did not misappreciate any of the facts upon which the Decision is founded, and the factors considered therein were all relevant and consistent with the jurisprudence of this Court. In this context, the Prosecution recalls that the relevant question is not whether any one factor by itself warrants the continued detention of a person, but rather whether the factors taken <u>together</u> raise the possibility of that person absconding or seeking to obstruct or endanger the investigation. The Appellant has finally failed to demonstrate that there is any relevant factor which the Single Judge failed to consider.

12. The Decision was thus reasonable and consistent with the jurisprudence of this Chamber. The Appellant has provided no basis on which the Appeals Chamber may interfere with the Single Judge's assessment.

13. However even if the Appeals Chamber considers that the Single Judge may have erred in specific findings under Article 58(1)(b)(i) or (ii), this would not lead to overturning the Decision. As stated by the Appeals Chamber, "the reasons for detention pursuant to article 58(1)(b)(i) to (iii) of the Statute are in the alternative".[15] Hence, as long as the Single Judge correctly found that the

[12] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25. See further submissions in *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-393 OA4, 14 April 2008, paras. 11-12 and authorities cited therein.
[13] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-572 OA6, 9 June 2008, para. 21. The Appeals Chamber has also stated that "any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction" – *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para.137.
[14] Decision, para. 53. This standard was also recognised by the Defence – see Application for interim release, para. 23.
[15] *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 139. See also Application for Interim Release, para. 22.

continued detention of the Appellant was justified on the basis of either Article 58(1)(b)(i) or Article 58(1)(b)(ii), the question of whether or not his continued detention appears necessary under the other requirement is ultimately not decisive for the present appeal.

The Single Judge made no error in the conclusions under Article 58(1)(a) (Appeal Brief, paras. 10-11)

14. The Appellant has raised no arguments in his appeal capable of impugning the Single Judge's finding that the requirements in Article 58(1)(a) are met in this case. The Appeal Brief repeats submissions made by the Appellant before the Pre-Trial Chamber, expressing dissatisfaction with the manner of proceeding, without identifying any appellable error.

15. The Pre-Trial Chamber had previously made detailed findings upon which it held that there are reasonable grounds to believe that the Appellant has committed various crimes within the jurisdiction of the Court.[16] The decision containing these findings was available to the Appellant, putting him in an adequate position to make submissions before the Single Judge regarding the grounds to believe that he had committed the crimes in question. However in the Application for Interim Release, the Appellant did not provide the Single Judge with "any material fact or argument to rebut these grounds".[17] In the absence of any basis on which to alter its assessment, or any factor indicating that the circumstances or bases of its previous assessment may have changed,[18] the Prosecution submits that the Single Judge was entirely correct to hold that there remained reasonable grounds to believe that the Appellant has committed the crimes in question.

[16] ICC-01/05-01/08-14-tENG, 10 June 2008, paras. 23-84. These findings had been made less than three months before the Decision on interim release.
[17] Decision, para. 59.
[18] As the Appeals Chamber has stated, the obligation upon the Chamber is to "address anew the issue of detention in light of the material placed before it" - *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-572 OA6, 9 June 2008, para. 12 (emphasis added), see also para. 10.

The Single Judge made no error in the conclusions under Article 58(1)(b)(i) (Appeal Brief, paras. 12-17)

16. The Single Judge considered a range of factors in determining that the continued detention of the Appellant was necessary to ensure his appearance at trial, pursuant to Article 58(1)(b)(i).[19] The Prosecution submits that this determination was reasonable and was firmly founded on the relevant provisions of the Statute and the jurisprudence of the Court. The Appellant has not demonstrated that any of the factors considered in the Decision were irrelevant; nor that the Single Judge failed to consider any relevant factor. The appeal in respect of this portion of the Decision must therefore fail.

17. The Appellant first seeks to challenge the Single Judge's consideration of the position, contacts and financial means of the Appellant; and of the serious nature of the crimes with which he is charged.[20] In challenging these factors, the Prosecution submits that the Appellant has misconstrued, or misstates, the manner in which they were considered by the Single Judge : each factor was not considered in isolation or independently to warrant continued detention;[21] rather, the Single Judge properly considered a range of factors, in combination, in finding that the Appellant's continued detention appeared necessary.

18. As noted in the Decision, the seriousness of the crimes with which the person is charged[22] has been held by the Appeals Chamber to be one relevant factor in assessing an application for interim release.

19. The Appeals Chamber has also held that the fact that the person has the connections and means to be able to flee the jurisdiction of the Court[23] is a

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[19] Decision, paras. 54-58.
[20] Appeal Brief, paras. 12-13.
[21] See Appeal Brief, paras. 12 ("This finding has no <u>independent</u> relevance") and 13 ("<u>only</u> the seriousness of the crime and the fact that the accused might face a lengthy prison sentence is insufficient") (emphasis added).
[22] "If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond" - *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 136. "Evading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail" - *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-572 OA6, 9 June 2008, para. 21; see also para. 24.

relevant factor in such a decision. The Decision further identifies additional jurisprudence of the European Court of Human Rights ("ECHR"), which also confirms the propriety of considering such factors in determining whether detention is necessary to ensure a person's appearance at trial.[24]

20. Furthermore, and contrary to the Appellant's reference to "concrete evidence available that [his position and contacts] would be used to flee",[25] the Appeals Chamber has previously confirmed that such evidence is not required, and that the availability of international contacts and the means to flee remains a relevant consideration.[26] In this context, the Prosecution recalls that the Appellant himself highlighted that he "is an important politician man who often travels within Europe to maintain his contacts."[27]

21. The Appellant's reference to the ECHR case of *Smirnova*[28] only serves to support the Decision and the relevance of the factors considered: the Decision here was not based "solely on the […] severity of the sentence", but this was "assessed with reference to a number of other relevant factors", amongst them the person's "assets, his links with the State in which he is being prosecuted and his international contacts".[29]

22. The Appellant secondly challenges the Single Judge's treatment of his assertions that the Appellant knew that he was under investigation and "did

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[23] In considering an application by Mathieu Ngudjolo Chui for interim release, Pre-Trial Chamber I held *inter alia* that the person "has established numerous contacts nationally and internationally, which can provide him with the connections and means to flee" in the context of denying (ICC-01/04-01/07-345, 27 March 2008, p. 8). Reviewing that decision, the Appeals Chamber held that "[t]he other two grounds lending support to the same possibility are also relevant to the issue; there is nothing to demonstrate that the Pre-Trial Chamber attached to them greater weight than they deserved." (ICC-01/04-01/07-572 OA6, 9 June 2008, para. 24). See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 137.
[24] Decision, footnote 80.
[25] Decision, para. 12.
[26] *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 137: "Furthermore, the Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the international contacts of the Appellant because there had been no evidence before that Chamber that the Appellant actually would make use of these contacts to abscond. The Appeals Chamber notes that any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction" (emphasis added).
[27] Application for Interim Release, para. 27.
[28] Appeal Brief, para. 13; Application for Interim Release, para. 18.
[29] All quotations from Application for Interim Release, para. 18. In relation to the assets of the person, the Decision considers *inter alia* his "financial resources" (Decision, para. 55). In this context, the Prosecution notes that the Registrar has recently determined that Bemba is provisionally not to be considered as indigent for the purposes of legal aid (ICC-01/05-01/08-76, 25 August 2008).

not escape despite the fact that the investigations against him had been going on for more than a year".[30] The Prosecution submits that the Decision correctly dismissed this argument of the Appellant.[31] There was no material before the Single Judge to suggest that the Appellant had knowledge of the fact that he was personally subject to investigations by the Court. In fact, the only relevant piece of information suggests that the Appellant believed that he was not subject to any investigations by the Court.[32] The Single Judge's assessment of this argument was appropriate, and did not constitute any error.

23. The Appellant refers to information purporting to show that he was aware that he was subject to investigations by the Court and that this was common knowledge in the DRC and the CAR.[33] At the outset, the Prosecution notes that none of this information was before the Single Judge, or forms part of the record on this appeal. The Prosecution submits that as a general rule, a party cannot introduce additional evidence before the Appeals Chamber without providing a justification for its failure to produce such evidence before the Single Judge, and bringing a proper application to introduce such additional evidence.[34] The Prosecution thus submits that arguments based on such new material should not be considered by the Appeals Chamber.

24. In the event that the Appeals Chamber considers the additional evidence presented by the Appellant and the arguments based upon it, the Prosecution submits that this still does not demonstrate any error. The Appeal Brief, even taken on its face and read together with the evidence that <u>was</u> before the Single Judge, does not establish that the Appellant knew that he was subject to investigations by the Court. The Appeal Brief ignores that no individual person may be referred to the ICC, and that any referral, including the referral made by the CAR Government can only be treated in relation to a situation,

[30] Appeal Brief, para. 14.
[31] Decision, para. 57.
[32] Decision, paras. 10 and 57.
[33] Appeal Brief, para. 14 and footnote 9.
[34] Regulation 62. See further submissions in *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-194, 14 February 2008, para. 27; *Prosecutor v Lubanga*, 1CC-01/04-01/06-736, 29 November 2006, para. 20.

namely crimes committed in the territory of the Central African Republic after the 1st of July 2002. [35] In accordance with its statutory obligations, the Prosecution has consistently and publicly reaffirmed at the opening of the investigation that no suspect had yet been identified; the information referred to by the Appellant includes a statement to that effect made by an official of the Prosecution.[36]

25. The Decision also contains no error in disregarding the Appellant's submissions regarding his alleged willingness to present himself to the Court.[37] In the absence of concrete evidence of an intention to surrender, such assertions must be considered as hypothetical, and should not be considered as relevant to the Decision.[38] The Appellant presented no concrete evidence of his alleged intention to surrender,[39] and the Appellant has not demonstrated that the Single Judge erred by failing to consider it as a relevant factor.

26. In relation to the observations of the Single Judge regarding the Appellant's planned travel to the United States of America,[40] the Appellant has again failed to demonstrate any appellable error. This factor was not a central element in the determination of flight risk: it was an additional point which the Single Judge noted as further supporting his decision not to consider the Appellant's alleged willingness to present himself to the Court.[41] The burden

[35] See official website of the Court: http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html.
[36] Appeal Brief, footnote 9 (third paragraph on p. 8).
[37] Decision, para. 58; contrast Appeal Brief, paras. 14, 15. Similarly to the situation at hand, according to the practice of the ICTY, in cases where an indictment remained confidential until the day of arrest, the absence of an opportunity by the accused to voluntarily surrender to the Tribunal is not given any weight for the purposes of sentencing (see *Prosecutor v. Vasiljevic*, IT-98-32-T, Judgement, 29 November 2002, para. 298; see also *Prosecutor v. Obrenovic*, IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para. 136).
[38] See e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 138.
[39] Beyond the argument that Bemba had not already fled the jurisdiction of the Court (see paras. 22-24, above), the Defence merely asserted that "When Mr Jean-Pierre Bemba was arrested in Belgium material was seized from which appears that he was willing to present himself to the ICC" (Application for Interim Release, para. 30), without identifying the material or explaining how such an inference could be drawn.
[40] Appeal Brief, para. 16.
[41] Decision, para. 58: "In the view of the Single Judge, the claim of Mr Jean-Pierre Bemba that he was willing to present himself to the Court can equally not be accepted because it is of a hypothetical nature and it is not supported by any concrete evidence. <u>In this context, the Single Judge also notes</u> that Mr Jean-Pierre Bemba was planning travel to the United States of America, a country that has not ratified the Statute, where he would potentially be beyond the reach of the Court" (emphasis added). Given the Single Judge's characterisation of the situation as putting Mr Bemba "<u>potentially</u> […] beyond the reach of the Court" (emphasis added), the Prosecution submits that the Appellant's arguments regarding the manner in which the United States might treat a request for arrest and surrender (i.e. on a case by case basis) are irrelevant.

on the Appellant is to demonstrate that the Single Judge made an error by considering an irrelevant factor in the Decision. The Prosecution submits that, especially in light of the context in which the Single Judge mentioned the Appellant's travel plans, the Appellant has failed to demonstrate any appellable error. To the contrary, it was appropriate for the Single Judge to consider, in the limited manner the he did in this Decision, an intended travel to a non-State Party.

27. Finally, the Appellant has not demonstrated that the Single Judge was obliged to take into account the willingness of two States to accept him on their territory if the Court ordered his interim release. The obligation on the Appellant is to demonstrate the existence before the Single Judge of a relevant factor which the Judge erred by failing to consider. The Prosecution notes that the two States have not indicated an open willingness to host the Appellant on their territory, as implied in the Appeal Brief: [REDACTED][42] and [REDACTED].[43] The Prosecution submits that the Single Judge could not be required to draw from these reactions any inference that the Appellant "is a well respected and trustworthy person". Thus the responses of these two States, in the context of their obligations to cooperate with the Court, was not a relevant factor which the Single Judge was required to consider in the manner asserted by the Appellant.

The Single Judge made no error in the conclusions under Article 58(1)(b)(ii) (Appeal Brief, para. 18)

28. In its Application for Interim Release, the Appellant did not make any arguments in relation to Article 58(1)(b)(ii). The Appellant merely stated that "[t]here is no indication whatsoever of any attempt on Mr Jean-Pierre Bemba's behalf to obstruct Justice or any investigations".[44] As a result, the Single Judge

[42] [REDACTED].
[43] [REDACTED].
[44] Application for Interim Release, para. 31.

recalled the findings of the Pre-Trial Chamber in its decision of 10 June 2008 "which in the absence of any relevant argument on the part of the defence to the contrary, the Single Judge finds still applicable today".[45]

29. As a general rule, an appellant cannot raise new arguments for the first time before the Appeals Chamber where he had a reasonable opportunity to raise them before the Pre-Trial Chamber but failed to do so.[46] The purpose of an appeal is not to remedy an oversight or tactical failing of a party before the first instance chamber.[47] The Prosecution thus submits that these arguments relating to Article 58(1)(b)(ii), raised for the first time on appeal,[48] should be dismissed for that reason alone. However to the extent that the Appeals Chamber considers that any of the arguments raised by the Appellant in relation to this issue are properly before it, the Prosecution nevertheless submits that the Appellant has equally failed to establish any appellable error, as demonstrated below.

30. The Pre-Trial Chamber's initial findings in relation to Article 58(1)(b)(ii) are not only based on the facts that "Mr. Jean-Pierre Bemba was and is a powerful man and that he could easily locate victims and witnesses".[49] The Pre-Trial Chamber also took into consideration that many of the victims and witnesses are financially destitute and that their place of residence makes them particularly susceptible to being located and that this puts them at particular risk.[50] In addition, the Pre-Trial Chamber specified that the Appellant may still rely on the MLC's network and on his former soldiers to influence the witnesses in his case, and found that "his past behaviour indicates that he will

[45] Decision, para. 59.
[46] See e.g. *The Prosecutor v. Kambanda*, ICTR 97-23-A, Appeal Judgement, 19 October 2000, paras. 25-27; *The Prosecutor v Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 361; *Prosecutor v. Blaskic*, IT-95-14-A, Appeal Judgment, 27 September 2006 para. 222; *Prosecutor v. Blagojevic*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team, 7 November 2003, para. 10.
[47] See e.g. *Prosecutor v Kupreskic*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 408; *Prosecutor v Delalic et al*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 724; *The Prosecutor v Akayesu*, ICTR-96-4-A, Appeal Judgement, 1 June 2001, para. 408.
[48] Appeal Brief, para. 18.
[49] Appeal Brief, para. 18.
[50] ICC-01/05-01/08-14-tENG, 10 June 2008, para. 88.

do so".[51] Hence, the Appellant's argument pertaining to the factual basis of the Pre-Trial Chamber's conclusion adopted by the Single Judge must be dismissed.

31. In addition, as stated above,[52] the applicable standard for justifying arrest or continued detention under Article 58(1)(b) is that "it must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence."[53] In accordance with this standard, it is not necessary for the Prosecution to establish that the Appellant has taken "current and concrete actions [against] anonymous victims or witnesses", as suggested by the Appellant.[54] The applicable standard requires that in the circumstances of the case, there is a possibility that the Appellant may obstruct or endanger the investigation or the court proceedings, and that as a result the detention of the person appears necessary to avert this possibility.

32. When challenging the Single Judge's findings in relation to Article 58(1)(b)(ii), the Appellant also relies on a decision of a Trial Chamber of the ICTY in the case *Prosecutor v. Momir Talic*.[55] This decision does not support the arguments of the Appellant in this appeal. In the case *Prosecutor v. Momir Talic*, the Trial Chamber of the ICTY was seized of an application by the accused for provisional release on humanitarian grounds, namely on the grounds of ill health. The Trial Chamber found that the accused in that case was suffering from an incurable and inoperable locally advanced carcinoma with a rather unfavourable prognosis of survival even on short term.[56] The Trial Chamber further explicitly stated that the humanitarian basis made the application before it distinct from most of the other applications considered and decided by the ICTY, and in particular from cases where provisional release was sought during the pre-trial phase and where there was no critical state of

[51] ICC-01/05-01/08-14-tENG, 10 June 2008, para. 89.
[52] See para. 10, above.
[53] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-572 OA6, 9 June 2008, para. 21.
[54] Appeal Brief, para. 18.
[55] See Defence Appeal, para. 18 and footnotes 15 and 16.
[56] *Prosecutor v. Brdjanin and Talic*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002.

health involved. For those reasons, the Trial Chamber concluded that the case before it could not be considered and dealt with in the same manner as that adopted by the ICTY in any of the above mentioned cases.[57]

33. Finally, the Appellant submits that he has not yet been provided with full discourse of the identity of the Prosecutor's witnesses or victims, and that therefore he is not in a position to approach them.[58] While the Appellant has not received the materials which must be provided to him pursuant to Rules 76 and 77, as well as Article 67(2), the Prosecution recalls that the Pre-Trial Chamber recently issued its "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties".[59] In this decision, the Pre-Trial Chamber ordered the Prosecution, among other things, "to disclose to the defence through the Registry all evidence under rule 76 of the Rules as soon as possible".[60] Although this order is "subject to any ruling of the Chamber pursuant to rules 81 and 82 […] and the implementation of any protective measures for witnesses, victims and other persons at risk",[61] the Appellant may be provided with the identity of many of the Prosecution's witnesses in the period leading up to the confirmation hearing. The Single Judge was therefore not required to take into consideration the present lack of disclosure of the identities of victims and witnesses, as asserted by the Appellant, and no error can be found in the Decision on this ground.

[57] *Ibid*.
[58] Appeal Brief, para. 18. The Prosecution also notes that a person's specific knowledge of the identity of witnesses and victims is not a pre-requisite for his or her ability to obstruct or endanger the investigation or court proceedings. To the contrary, a person without knowledge of individual identities, but a knowledge of the case, could still take such actions, for example by retaliating against groups of victims or likely witnesses in order to intimidate witnesses and discourage people from cooperating.
[59] ICC-01/05-01/08-55, 31 July 2008.
[60] *Ibid*, p. 24.
[61] *Ibid*, pp. 23-24.

Relief Requested

34. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber dismiss the appeal and uphold the Decision.

Fatou Bensouda, Prosecutor

Dated this 28th Day of July 2016

At The Hague, The Netherlands