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Original: **French** No.**: ICC-01/05-01/08**
Date: **31 August 2009**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Redacted Version

Defence Response to the Prosecutor's Document in Support of the Appeal and to his Request for Suspensive Effect

Source: **Mr Jean-Pierre Bemba Gombo's Defence Team**

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

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Other

Preliminary Observations

Deleted: ¶
Section Break (Continuous)

1. To deprive a person of liberty entails that the condition of article 58(1)(a) of the Statute is met cumulatively with at least one of the conditions set forth in article 58(1)(b).

2. Thus, in order to grant the request for release, it is sufficient for the judge to be satisfied that none of the three conditions of article 58(1)(b) have been met, even if the condition of article 58(1)(a) is met; which is the case here in respect of Jean-Pierre Bemba Gombo.

Chapter I: the issue of the admissibility of the appeal

3. The decision to release Mr Jean-Pierre Bemba Gombo conditionally, taken on 14 August 2009, is the first act in a decision-making process which is still ongoing. It is in fact a preliminary ruling, inasmuch as the Court has decided to order fresh hearings confined to the issue of determining the receiving State and of the conditions to be attached to such release.

4. Therefore, this is not a final decision giving entitlement to a right of appeal to the Appeals Chamber; hence the Prosecutor's appeal is premature, and therefore inadmissible.

5. It is clear that the appeal lodged by the Prosecutor is premature at this stage and should be declared inadmissible *in limine litis*, since the impugned decision is not yet complete.

6. The decision is yet to be finalised in a second phase, once the Pre-Trial Chamber has determined the conditions restricting liberty as provided in rule 119 of the *Rules of Procedure and Evidence*.

7. It is only from notification of the consolidated decision on release that the time limits for appeal start to run. This is particularly so in that the appeal lodged by the Prosecutor raises issues relating to States' guarantees and conditions on which the Pre-Trial Chamber has yet to give a ruling.

8. In any event, it could be considered that time is already running in relation to the decision on the actual principle of release; the Prosecutor's appeal must be declared partially inadmissible insofar as it relates to the conditions to be attached to such release, since these conditions are to be the subject of a later ruling by Pre-Trial Chamber II.

9. The review pursuant to article 60(3) of the Statute ends on completion of a two-tier process: the judge decides whether or not to release, and if so, she then sets out the conditions restricting liberty provided for in rule 119 of the Rules.

Chapter II. The Prosecutor's grounds of appeal and request for suspensive effect should be dismissed *in limine*

10. The Defence submits that the Prosecutor must not only challenge the specific matters relied on by the Chamber; he must also demonstrate that the conditions provided for in article 58(1), more specifically in article 58(1)(b), continue to be met, and also provide proof of the specific matters on which he relies to justify the continued detention of Mr Bemba, rather than making arguments of a general nature not based on any concrete evidence.[1]

11. The Defence notes that, apart from his arguments of a general nature, the Prosecutor has failed to provide even a modicum of concrete evidence to justify the continued detention of Mr Bemba. Thus the Prosecutor has not put forward anything concrete to refute the following arguments of Pre-Trial Chamber II:

[1] ICC-01/05-01/08-475 para. 72.

12. Regarding the risk that the defendant will abscond, and the guarantee that he will appear:

13. The experience of the events of 8 July 2009, when Mr Bemba was allowed out of detention and fully cooperated with the Court. In this regard, the Defence would point out that the Prosecutor never considered the likelihood of Mr Bemba being allowed the opportunity to appear voluntarily. Thus, to call into question his willingness to appear amounts to a completely unfounded personal attack on Mr Bemba on the part of the Prosecutor.

14. Mr Bemba's close ties with his family, particularly his wife and children. This is reflected in the frequency of Mr Bemba's contacts with his family, particularly the frequency of telephone communications and weekly visits. Pre-Trial Chamber II correctly accepted Mr Bemba's personal submission at the hearing of 29 June 2009, when he stated that he could never, ever abandon his family and become a fugitive, sacrificing the lives of those dearest to him, notably his wife and children. Likewise with his eleven-year political career, which, as Mr Bemba told the Chamber, he could never abandon or give up completely, in particular his status as senator and leader of the Congolese opposition, and become a fugitive, losing all credibility in the eyes of both national and international public opinion. Strongly convinced of his innocence, Mr Bemba has reiterated his intention to cooperate with the Court up to the end of the proceedings in order to clear his name and restore his credibility.

15. Regarding the risk of obstructing the Proceedings or intimidating witnesses:

16. The Chamber has noted that, throughout Mr Bemba's detention, it does not appear that Mr Bemba has at any time tried to intimidate witnesses or victims, or to obstruct the normal conduct of the Proceedings. The Chamber has correctly taken note of six reports from the Registrar on the active surveillance of Mr Bemba's non-privileged communications, concluding that Mr Bemba has never tried to intimidate victims or witnesses. Mere criticism of these reports in relation to the date of 14 April

2009 is not a relevant factor for challenging their substance. Having failed to establish on the part of Mr Bemba any conduct amounting to intimidation of witnesses and victims, the Prosecutor's arguments in this regard remain irrelevant. Furthermore, the Prosecutor alleges without concrete evidence that the Defence tried to undermine the integrity of witnesses. The Defence would point out that this was an issue of the **[REDACTED]** Prosecutor **[REDACTED]**. In response to the request to open an investigation into Counsel submitted by the Prosecutor, the Defence has demonstrated that **[REDACTED]** were known to the general public and in the media during the investigation phase well before Mr Bemba was **[REDACTED]**. The Defence has, moreover, appended the **[REDACTED]**, in order to show that the **[REDACTED]** concerned were **[REDACTED]** in January 2008,[2] at a time prior to Mr Bemba's arrest. The Defence explained to the Chamber in this regard that this violation **[REDACTED]** of the said witnesses must have been the work of **[REDACTED]** themselves. Having noted the veracity of the evidence put forward by the Defence, the Prosecutor refrained from applying to the Registry as the Chamber had suggested. It follows that reliance on such an argument in order to show that Mr Bemba intimidated witnesses and victims is totally misconceived.

17. Moreover, the Chamber emphasised that the identities of the victims are not known to the Defence. This precludes any likelihood of intimidation of the victims, as it is impossible in practice to target unknown individuals as potential victims in the Bemba case. However, in his handwritten letter to the Judge dated 22 October 2008,[3] Mr Bemba expressed his compassion for the victims and the need for justice to be done for them.

18. Furthermore, the Chamber noted that, notwithstanding the confirmation of charges under article 28 of the Statute, Mr Bemba's guilt is not so conclusively established that his only means of salvation is to flee. The Chamber reaffirmed that Mr Bemba continues to enjoy a presumption of innocence under article 66 of the

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[2] ICC-01/05-01/08-192-Conf-Anx1.
[3] ICC-01/05-01/08-200-Anx1.

Statute. It is moreover still open to the Defence to establish before the Trial Chamber or the Appeals Chamber that the charges against Mr Bemba under this mode of responsibility are unfounded. Notwithstanding Pre-Trial Chamber II's decision confirming the charges, the Chamber has noted a specific event, namely the exceptional leave to allow Mr Bemba to attend his father's funeral. The Chamber took note of the Registry's report confirming Mr Bemba's full cooperation with the Chamber's instructions before, during and after the ceremony. The Chamber was rightly able to conclude from this that Mr Bemba intended to cooperate with the Court and not to obstruct the proceedings. Mere criticism of this event is not sufficient to show that Mr Bemba will obstruct the proceedings, in particular since his interim release will be subject to conditions imposed at the Judge's discretion in order to ensure that nothing of the kind occurs.

19. Regarding the continued commission of crimes:

20. The Chamber noted the stable situation that currently prevails in the CAR and the absence of any objective evidence whatsoever that might show that Mr Bemba is in a position to perpetrate crimes in the CAR falling within the jurisdiction of the Court. In this regard, the Defence pointed out at the hearing of 29 June 2009 that the armed branch of the MLC no longer exists, having been dissolved and incorporated into the DRC's national army following the signing of the peace agreements.

21. The Defence recalls the objective strategy of Pre-Trial Chamber II, which consists in analysing all of these factors taken together, and not in an isolated or separate manner.[4]

22. The Defence maintains that the Prosecutor has not put forward any element or concrete evidence to establish that the conditions set out in article 58(b) continue to be met, by contrast with the aforementioned reasoning of the Pre-Trial Chamber, which has established, on the basis of concrete material as referred to above, that the

[4] ICC-01/05-01/08-475 para. 61.

conditions set out in rule 58(b) are no longer met. The Defence points out that the argument that most of these factors have already been considered in previous decisions of the Chamber does not deprive the latter of its power to review them as a whole in the light of new circumstances. Notwithstanding the Prosecutor's criticisms, the Chamber acknowledged the existence of two new factors (the permission to leave detention on 8 July 2009 and the reports of several months of monitoring of Mr Bemba's non-privileged telephone communications) which are sufficient justification for a comprehensive review of all of the circumstances already considered, particularly since, at the hearing of 29 June 2009,[5] the Defence reiterated all of its arguments put forward in its previous applications for interim release, thus obliging the Chamber to take them into account for purposes of a fresh review in the light of new circumstances.

23. For this reason, the Defence maintains that the Prosecutor has failed, in light of the specific matters relied on by Pre-Trial Chamber II as stated above, to show that the latter committed a mistake of law or of fact in finding that the conditions of article 58(b) are not met.

24. It follows that the Prosecutor's application for suspensive effect is based essentially on article 58(1)(b), whereas the conditions provided for in that article are no longer met. Therefore, the Prosecutor's application for suspensive effect lacks any legal foundation.

25. Furthermore, in issuing the decision for Mr Bemba's interim release, the Pre-Trial Chamber has deferred its implementation, with a view to seeking the further views, pursuant to rule 119(3), of all parties and participants in the proceedings. Those views will be based on the eight conditions provided for in rule 119(1) and the twenty personal guarantees offered by Mr Bemba. Pre-Trial Chamber II has rightly invited all parties concerned to hearings scheduled for 7 to 14 September 2009. At the close of those hearings, Pre-Trial Chamber II will set out the conditions to be

[5] ICC-01/05-01/08-T-13-CONF-ENG, pp. 14-28.

established to address the possibility of the risks provided for in article 58 of the Statute, and will designate the receiving State responsible for implementing the said decision. Furthermore, the Chamber has invited the Legal Representatives of the Victims and the Victims and Witnesses Unit, in conjunction with the Office of the Prosecutor, to continue monitoring the security situation of the witnesses and victims and to report to the Chamber any changes in their situation.

26. The Defence submits that determination of the conditions restricting interim release does not constitute a prerequisite for granting such release. It is clear from the terms of rule 119(1) that such conditions are left to the discretion of the judge, who may or may not impose them and may modify them whenever he or she considers necessary.

27. It follows that the request for suspensive effect before the Chamber has ruled on the conditions to be attached to the decision on release is premature and without any legal basis. At this stage of the proceedings, since the Prosecutor knows neither the State nor the conditions that will be established by Pre-Trial Chamber II, he is in no position to assert that the risks provided for in article 58(1) continue to exist.

28. The Prosecutor has made a further error of appraisal as a result of the premature nature of his appeal and request for suspensive effect in contending that Pre-Trial Chamber II failed to specify the conditions for Mr Bemba Gombo's interim release and to specify the State that will implement the said decision. The procedure for determining the said conditions is in fact under way, in accordance with the schedule drawn up by the Pre-Trial Chamber pursuant to rule 119(3). This is the main reason for its having deferred implementation of its decision for interim release.

29. Therefore, the assertion that the Pre-Trial Chamber has failed to determine the receiving State and the conditions of release is premature and without any legal basis at this stage of the proceedings. Furthermore, to assert that all the States proposed by

Mr Bemba have refused to receive him is an assertion that is not consistent with the observations of the States concerned. Thus, only the Federal Republic of Germany gave a categorical refusal without providing reasons for its decision; the other States expressed reservations. Pre-Trial Chamber II, exercising its discretionary power under rule 119(1), rightly considered it proper to invite all parties concerned to a face-to-face exchange of views in order to clarify any grey areas and misunderstandings. The Defence also notes that, in its reply of 24 August 2009, it put forward a number of matters designed to assist the Chamber in taking a stance on the observations of the said States.[6]

30. It follows that the request for suspensive effect is premature and without any legal basis, since the conditions laid down in article 58(1)(b) are no longer met, and implementation of interim release has been deferred until the hearings scheduled for 7 to 14 September 2009, at the close of which the Chamber will determine the conditions and the State on whose territory interim release is to be implemented.

<u>Chapter III. The two grounds of appeal relied on by the Prosecutor are without merit</u>

1. <u>The alleged error by the Single Judge in finding that there is a substantial change in circumstances since the decision of 14 April 2009 justifying conditional interim release.</u>

31. The Defence submits that this ground of appeal is unfounded and must be dismissed *in limine*. In order for this ground to succeed, the Prosecutor would have to show that no new circumstances have arisen since the decision of 14 April 2009. Yet the Prosecutor himself concedes that, of the nine matters cited by the Chamber in its paragraphs 58 to 68, two are new, namely: the authorisation resulting in Mr Bemba's transfer from the Detention Centre in The Hague to Brussels in order to attend his

[6] The Defence cites France as an example of a State which justified its objection by the fact that it considered that Mr Bemba did not have any social ties in its country, whereas Mr Bemba has family members resident in France, some of whom have French nationality. The Defence has appended the necessary evidence in support of its contentions (ICC-01/05-01/08-484-Conf and Conf-Anxs A~H).

father's funeral(1); and the six reports by the Registry on the active monitoring of Mr Bemba's non-privileged communications over a period of several months.

32. Irrespective of the merits of these two new factors, the Defence submits that they provide ample reason, by virtue of their very existence, for the Chamber to review its decision on the basis of article 60(3). The Chamber is required to examine them in conjunction with other factors which the Prosecutor describes as pre-existing.

33. Furthermore, these two factors constitute compelling evidence of Mr Bemba's intention to cooperate fully with the Court and not to obstruct the proper conduct of the proceedings by refraining from intimidating or exerting pressure on witnesses or victims.

34. Moreover, concerning the two factors relating to risk of flight which the Prosecutor claims that the Judge failed to take into account, the Defence endorses Pre-Trial Chamber II's view of the matter, and would again point out that these are general assertions, unsupported by any concrete evidence. These general assertions cannot gainsay the following observation, which is real, concrete evidence: after being in detention for more than a year, and despite his political position, his contacts at national and international level and his financial situation, there is no evidence that Mr Bemba has attempted to intimidate witnesses or victims or tried to obstruct the conduct of the proceedings. This observation is a matter of certainty, which no consideration of a general nature can gainsay.

35. Concerning the incidents with witnesses as cited by the Prosecutor, the Defence recalls that they related to **[REDACTED]**. It should be noted that this situation was not caused directly by Mr Bemba. Moreover, as the Defence pointed out in its replies, **[REDACTED]** from January 2008 published **[REDACTED]** in question. This suggests a leak of information by either the **[REDACTED]** or the **[REDACTED]**. Moreover, as regards the victims, the Defence is not aware of their

identities, which precludes any possibility of intimidation on the part of Mr Bemba. It follows that the Prosecutor has failed to produce, beyond his considerations of a general nature, any evidence to establish that Mr Bemba might intimidate witnesses and victims or obstruct the normal conduct of the proceedings.

36. It follows that the two new factors, which the Prosecutor has acknowledged as new, are themselves evidence of the new circumstances justifying Pre-Trial Chamber II's review of its decision in the light of all of the other factors taken together.

2. <u>The fact that the Judge decided to order interim release without determining the conditions, the State to which the defendant will be released or whether the said State is competent to enforce the conditions in question</u>

37. The Defence noted at the outset that this ground of appeal is premature and without any legal foundation. Determination of the conditions to be attached to an order for interim release is not a pre-condition imposed on the judge before he or she can make a ruling on interim release. This procedure is left to the discretion of the judge, who may or may not impose them. This is clear from the terms of rule 119(1), with the use of the verb: […] ***peut*** […] in the French version and […] ***may*** […] in the English version.

38. Moreover, it is clearly apparent from the Judge's Decision that the requisite conditions and the receiving State will be determined after hearings scheduled for 7 to 14 September 2009. This justifies the Single Judge's decision to defer implementation of her decision on interim release.

39. The Defence submits that, at the current stage of the proceedings, the Judge could not rule on the receiving State or on the conditions to be attached to the order for interim release without first clarifying certain grey areas identified in the States' observations. In effect, the Prosecutor's assertion that all of the proposed receiving States for Mr Bemba refused to accept him is incorrect.

40. Thus, in response to Pre-Trial Chamber II's request for observations in the event of interim release being granted, only **[REDACTED]** responded in regard to the twenty conditions proposed. **[REDACTED]** cited **[REDACTED]** their **[REDACTED]** **[REDACTED]**.[7] Another cited Mr Bemba's **[REDACTED]** of **[REDACTED]**.[8] On these points, in its reply of 24 August 2009[9] the Defence threw substantial further light on these States' observations, in particular concerning their **[REDACTED]**, in particular **[REDACTED]**, and on their **[REDACTED]** pursuant to articles 26 and 46(1) of the Vienna Convention of 1969. An analysis of these articles shows that States Parties to the Rome Statute cannot rely on **[REDACTED]** in order to obstruct a **[REDACTED]**, and are under an obligation **[REDACTED]** their national law in order **[REDACTED]** with the Court, as provided in article 88 of the Statute. This means that countries like **[REDACTED]** and **[REDACTED]** must provide the Chamber with further clarification. **[REDACTED]** asserted that Mr Bemba has no **[REDACTED]** in its country, whereas members of his family reside there and some have **[REDACTED]**. **[REDACTED]** must therefore provide Pre-Trial Chamber II with further particulars and clarification. On the basis of these particular instances cited by it, the Defence submits that, pursuant to rule 119(3), it was incumbent on Pre-Trial Chamber II to invite all parties to the proceedings to resolve these ambiguities and, after submission of observations from all the parties involved, to lay down conditions designed to guarantee optimal conditions for implementation of the decision on interim release. This approach should not be seen as a failure to establish the conditions of release or to designate the receiving State responsible for enforcing them. This is a misrepresentation by the Prosecutor of the approach adopted by Pre-Trial Chamber II pursuant to rule 119(3).

41. It follows that this second ground of appeal by the Prosecutor is not only premature but also without any legal basis, since, at the close of the hearings to be held from 7 to 14 September 2009 pursuant to rule 119(3), the Pre-Trial Chamber will

[7] See the observations of, inter alia, **[REDACTED]**, **[REDACTED]** and **[REDACTED]**.
[8] See the observations of **[REDACTED]**.
[9] ICC-01/05-01/08-484-Conf and Conf-Anxs A~H.

determine the conditions of release and designate the State which is to receive Mr Bemba.

Chapter IV: The ruling on change of circumstances within the meaning of article 60(3) of the Rome Statute

42. Pursuant to article 60(3) of the Statute, the Single Judge must review her ruling on the release or continued detention of Mr Bemba every 120 days.

43. Such review means that she must re-examine the matters which provided the basis for the previous decision to continue Mr Bemba's detention, rendered on 14 April 2009. This is consistent with the jurisprudence of the Appeals Chamber in the cases of Thomas Lubanga, Mathieu Ngudjolo Chui and Jean-Pierre Bemba. (For references, see page 17 of the Decision on Interim Release, footnote 90)

44. It should be noted that the previous decision, which, on 14 April 2009, confirmed the warrant of arrest issued against Mr Bemba, relied on two criteria only in order to confirm his continued detention. First, the fact that there were reasonable grounds to believe that he had incurred responsibility in relation to the commission of a crime within the jurisdiction of the Court (article 58(1)(a) of the Statute). Secondly, the decision based itself on the existence of a strong likelihood that he would abscond if released (article 58(1)(b)(i) of the Statute). There was no consideration of the other two criteria set out in subparagraphs (ii) and (iii) of article 58(1)(b) of the Rome Statute.

45. Thus, in reviewing the previous decision that detention be maintained, the Judge must first examine the matters which led her at the time to find that the requirements of article 58(1) were satisfied at that time. She has to consider whether those same matters, re-examined in light of current circumstances, taken together with any new elements submitted to her, still impel her to the same conclusion, or whether they do not call, rather, for a quite different conclusion.

46. It accordingly follows that the issue of new circumstances does not arise in relation to the two criteria which were not considered at the time of the said decision of 14 July 2009, namely the risk that the defendant may obstruct or endanger the court proceedings or the investigation (article 58(1)(b)(ii) of the Statute), or that he may continue with the commission of the crime or a related crime which is within the jurisdiction of the Court and arises out of the same circumstances (article 58(1)(b)(iii) of the Rome Statute). It follows that the Prosecutor's appeal cannot relate to these matters, since the basis of his challenge to the decision of Pre-Trial Chamber II is that it decided to release the defendant on the basis of pre-existing circumstances on which it had already ruled as grounds for continued detention.

47. The examination conducted by the Chamber in relation to these two criteria was in itself a new one, inasmuch as its decision of 14 July 2009 found that it was unnecessary to consider them cumulatively with the first criterion—the risk of flight as referred to in article 58(1)(b)(i) of the Statute— since the latter sufficed to justify Mr Bemba's continued detention.

48. The Prosecutor is wrong when he claims in his first ground of appeal that there has been no change of circumstances since Pre-Trial Chamber II's Decision of 14 April 2009, so that Mr Bemba's release could not, in his view, be justified under the terms of article 60(3) of the Rome Statute.

49. In the first limb of his first ground of appeal, the Prosecutor wrongly contends that the factors cited in the impugned decision do not constitute new circumstances, since they pre-dated the Decision of 14 April 2009 and were mostly addressed in prior decisions as factors in favour of Mr Jean-Pierre Bemba Gombo's continued detention.

50. The Prosecutor himself concedes that there are at least two new factors cited in the impugned decision which constitute changed circumstances, namely the Registry's reports on the monitoring of Mr Bemba's non-privileged telephone calls

and his conduct during his 24-hour release to visit Brussels to attend his father's funeral.

51. The Prosecutor again wrongly contends that the impugned decision erred in finding that the fact that Mr Bemba had not threatened witnesses from the Detention Centre showed that he was unlikely to obstruct the investigation if released.

52. The Appeals Chamber confines itself to considering whether the impugned decision is based on a manifest misdetermination. The impugned decision correctly refers to Mr Bemba's conduct in relation to witnesses whom he could quite plausibly have threatened, either through other persons or by calling them directly, but in fact did not do so. Pre-Trial Chamber II, exercising its power of discretion under article 58 of the Rome Statute, freely determined that there was little likelihood that, if released, Mr Bemba would interfere with witnesses.

53. The Prosecutor is likewise wrong in arguing that the impugned decision should not have taken account of Mr Bemba's conduct during his twenty-four hour release to Brussels, because, according to the Prosecutor, he was under constant escort by the Dutch or Belgian police and it would have been impossible for him to breach the conditions attached to his release.

54. It is, however, clear that the impugned decision did not commit a manifest misdetermination in taking account of the report by the Registry's special services, which has not been disputed by the Office of the Prosecutor, concerning matters dating from July 2009, subsequent to the Decision of 15 June 2009 confirming the charges. This report cites Mr Bemba's good conduct during his twenty-four-hour release to Brussels and his strict respect for all of the conditions imposed on him, without any indication of the slightest incident on his part. Pre-Trial Chamber II was entitled to cite this fact in order to find that there was little likelihood that, if released, Mr Bemba would abscond, which remains inconceivable. The Prosecutor's argument, refusing to give Mr Bemba credit for his good conduct during his twenty-four-hour

release to Brussels, is misconceived. A constant police presence has not prevented detained persons, on numerous occasions, from seizing the slightest opportunity to attempt to escape, which has not been the case for Mr Bemba.[10]

55. Furthermore, the personal conduct of a member of Mr Bemba's Defence team cannot be imputed to Mr Bemba, who has never been accused of having breached the confidentiality of Pre-Trial Chamber II's decision to allow him a twenty-four-hour release to Brussels.

56. The impugned decision does in fact take account of new circumstances having arisen since the Decision of 14 April 2009, and in some cases since the Decision of 15 June 2009 confirming the charges.

57. Jean-Pierre Bemba has conducted himself correctly during his detention, including since the Decision of 15 June 2009 confirming the charges.

58. According to the findings in the six reports on the monitoring, over a period of several months, of his non-privileged telephone conversations, he has not attempted to obstruct the Court proceedings.

59. After the Decision confirming the charges, Jean-Pierre Bemba was permitted to travel to Brussels to attend his father's funeral, and fully cooperated with the Court Registry and with the Dutch and Belgian authorities and complied with all of the conditions laid down by the Single Judge, and returned to the seat of the Court as instructed.

60. He has confirmed his standing willingness to cooperate with the Court and to appear at his trial as and when required.

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[10] http://www.cyberpresse.ca/le-nouvelliste/actualites/200901/15/01-817951-un-detenu-tente-desevader.php and http://www.dhnet.be/dhjournal/archives_det.phtml?id=389206.

61. He has personally addressed the Court for the first time, in order to respond to the Prosecutor's allegations on the risk of his absconding; he referred to his political plans, stating that he had no reason to become a fugitive and wipe out so many years of sacrifice.

62. He has strong ties with his family, as has recently been confirmed, and has been authorised to contact them outside regular hours. His family situation makes the possibility of his absconding less likely.

63. Having conducted its review of the criterion set out in article 58(1)(b) of the Statute, the Pre-Trial Chamber then correctly proceeded to consider in turn the two other criteria:

Regarding the risk of obstruction of the proceedings:

64. The Chamber found that the risk of pressure being brought on witnesses and victims was not substantiated, otherwise than by allegations of a general nature on the part of the Prosecutor and the Office for Victims, and not by any specific identifiable conduct of Jean-Pierre Bemba.

65. The Judge cannot take account of general allegations of misconduct on the part of the Defence, when there has been no initiation of proceedings with the Registry on this account, or even a complaint by the Prosecutor, and hence no evidence.

66. The identity of the victims has not been disclosed to the Defence:

67. As regards the identity of the 21 witnesses, there has been no attempt on the part of Jean-Pierre Bemba, as is confirmed by the Registry's reports, and the Prosecutor cannot show that there has been an error of fact or law in this regard.

68. *Regarding the risk of continued commission of the crimes:*

69. The Judge validly found that the situation in the CAR is stable, and that she is aware of no objective information indicating that there is a threat of a probable intervention by Jean-Pierre Bemba in that country.

70. The absence of such a threat is not disputed by the Office of the Prosecutor.

Chapter V: Whether certain decisive factors were not taken into account

71. In order to decide whether continued detention appears to be necessary, the Single Judge relies on all of the relevant matters taken as a whole, in accordance with the jurisprudence of the Appeals Chamber (ICC-01/05-01/08-323, para. 55). A party is not entitled to raise for the first time before the Appeals Chamber, without having previously argued the point before the Pre-Trial Chamber, the argument that a particular factor was not taken into account by the Single Judge.

72. Regard must be had to what can be learnt from the jurisprudence in the Ngudjolo case (ICC-01/04-01/07-572, para. 21), where the Appeals Chamber explains how the conditions laid down in article 58(1)(b) of the Rome Statute are to be understood. The text of the Statute endows the Pre-Trial Chamber with jurisdiction to determine whether the arrest of Mr Bemba appears necessary in order to ensure that he will appear at his trial, or that he will not obstruct the proceedings or continue to commit crimes. The Appeals Chamber cannot substitute its own evaluation of the facts for that of the Single Judge of the Pre-Trial Chamber; it must confine itself to deciding whether there has been an error of law, in particular whether the impugned decision is founded on an incorrect view of the law. It must also determine whether there may not have been an error of fact, in particular an error in the Pre-Trial Chamber's statement of the facts in light of the content of the official record of the case, or whether there may not have been a manifest misappraisal of those facts.

73. In a second limb of his first ground of appeal, the Prosecutor wrongly argues that the impugned decision failed to take account of circumstances which, in his view, represented evidence of a risk of obstruction to the investigation and of a threat to the security of witnesses.

74. The Prosecutor incorrectly claims that the impugned decision failed to take account of the possibility of Mr Bemba receiving a substantial inheritance following the death of his father, which would provide him with renewed means to influence the investigation or to put pressure on witnesses.

75. It should be noted that the Prosecutor never raised this argument before Pre-Trial Chamber II, and cannot now raise it for the first time before the Appeals Chamber. It was, however, open to him to call for fresh hearings, where he could have raised any new circumstance which he considered relevant to the issue of Mr Bemba's continued detention or release. Moreover, the circumstance which he cites is one that arose in July 2009, between the time when the Judge commenced her deliberation on the issue of Mr Bemba's possible release following the public hearing of 29 June 2009 before Pre-Trial Chamber II and the date when the impugned decision was handed down, 14 August 2009. This improperly presented argument is inadmissible before the Appeals Chamber.

76. It is not open to the Prosecutor to attack the impugned decision on this ground, particularly since he provides no further information in regard to the opening of succession proceedings; nor does he submit, in support of his appeal, any form of objective evidence, or the slightest indication of the alleged size of the inheritance, beyond mere allegations. The Appeals Chamber cannot determine the relevance of this alleged circumstance in the absence of precise particulars.

77. The possible size of the inheritance is irrelevant, since the Prosecutor still retains the power to request the seizure of any assets which Mr Bemba might inherit.

Viewed from this standpoint, the impugned decision did not ignore a decisive factor which it should have taken into account.

78. Furthermore, the Prosecutor is wrong in arguing that the impugned decision failed to take account of the risk of the proceedings being obstructed because the Defence had allegedly interfered with witnesses, whereas, in a previous decision of 16 December 2008, the Pre-Trial Chamber had taken this matter into account. In any event, the Prosecutor's argument on this point is irrelevant, since the allegation concerned not Mr Bemba personally, but a member of his Defence team, the issue being whether the latter **[REDACTED]** Prosecution **[REDACTED]** to **[REDACTED]** after the Prosecutor had disclosed **[REDACTED]**. Moreover, the Defence had pointed out that **[REDACTED]** were known to **[REDACTED]** as a result of indiscretions on the part of certain individuals representing themselves as **[REDACTED]** even before the Prosecutor had disclosed their identities to the Defence. After the lapse of a substantial period of time, the Chamber was entitled to find that the fact there had been no complaint by the Office of the Prosecutor meant that it was no longer possible, in current circumstances, to regard the latter's allegations as evidence of a risk that Mr Bemba might obstruct the proceedings.

Chapter VI: The question of conditional release before the conditions have been specified and the receiving State identified

79. The Prosecutor is incorrect in stating that the impugned decision is flawed because, in his view, the Pre-Trial Chamber cannot order conditional release without first satisfying itself that sufficient conditions exist to address the risks and without identifying a receiving State which would agree to accept Mr Bemba on its territory and would at the same time be capable of enforcing those conditions.

80. It should be noted at the outset that the Prosecutor fails to cite any legal provision allegedly violated by the decision for conditional release.

81. Furthermore, the impugned decision is a preliminary one, the Chamber having itself ordered further hearings, confined to determination of the receiving State and of the conditions to be attached to such release.

82. There is no merit in the Prosecutor's argument that the decision lacks coherence in that it orders conditional release without specifying the relevant conditions or identifying the receiving State. The Pre-Trial Chamber ordered that the decision would not take effect until those conditions had been determined and a receiving State designated.

83. Regarding the existence of sufficient conditions, it should be noted that the international draftsman laid down sufficient conditions in rule 119 of the Rules of Procedure and Evidence — conditions specifically contemplated for cases of conditional release. To rely on the possible absence of sufficient conditions in certain circumstances would be to reverse the principle that liberty is the rule and deprivation of liberty the exception.

84. As to identification of a State which might agree to receive Mr Bemba on its territory, the Prosecutor is wrong in arguing that States can legally interfere freely with the course of justice in agreeing or refusing to accept individuals granted interim release.

85. Nor can the detained person himself make private arrangements with States Parties to the Rome Treaty, as the Prosecutor wrongly appears to argue in paragraph 38 of his Appeal Document.

86. Article 86 of the Rome Statute imposes a general obligation on States to cooperate with the Court. Article 88 of the Rome Statute, however, requires States Parties to adapt their national law so as to permit all of the forms of cooperation with the Court.

87. It should be recalled that, under international law, notably Article 26 of the 1969 Vienna Convention, which deals with the question of the enforcement of international treaties by signatory States: *"Every treaty in force is binding upon the parties to it and must be enforced by them in good faith."* This principle also means that States parties to a treaty cannot rely on impediments under their own internal law in order to evade their international obligations.

88. "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent" (Vienna Convention, article 46(1)).

89. International agreements and treaties signed in good faith bind their signatory States, and the latter cannot derogate from these, in accordance with the operation of the general principle of law, *pacta sunt servanda*.

Chapter VII: Observations on the request that implementation of the decision to release Jean-Pierre Bemba Gombo be suspended

90. The Prosecutor wrongly asks for implementation of the decision to release Mr Bemba to be suspended, citing the risks referred to in 58(1)(b) of the Rome Statute.

91. That request is clearly inadmissible on grounds of mootness, since implementation of the decision has already been suspended by the Pre-Trial Chamber itself.

92. The rule is that a decision is implemented immediately, as soon as the Pre-Trial Chamber has rendered it operative, and the Prosecutor has failed to demonstrate any exceptional circumstances that would justify departing from this rule.

93. In referring generally to the risks of flight or of obstruction of the investigation or the proceedings, or of threats to witnesses – and without citing any new circumstance, having arisen after the impugned decision of 14 August 2009, that would justify such a request – the Prosecutor relies on the conditions laid down in article 58(1)(b), none of which, according to the Pre-Trial Chamber's decision, is now met in the case of Mr Bemba.

94. The case of Thomas Lubanga, where the Appeals Chamber suspended implementation of the decision for his release, is different. That was a release on grounds of unfairness of the proceedings, without any finding by the Pre-Trial Chamber that the article 58(1)(b) conditions were no longer met in his case.

95. The Prosecutor himself accepts, in paragraph 44 of his Appeal Document, that a State's guarantees may be necessary and may weigh favourably in decisions on release. Given that implementation of the decision is suspended pending identification of the receiving State and determination of the conditions, the alleged risks in the event of Mr Bemba being physically released would be covered by the receiving State, particularly since the impugned decision itself states that it will only be implemented following its second phase.

FOR THESE REASONS

96. May it please the Appeals Chamber:

- to adjudge to be premature and without merit the request by the Prosecutor for suspensive effect, and accordingly to dismiss it as inadmissible or at the very least without merit;

- to adjudge the Prosecutor's appeal to be premature and accordingly to dismiss it as inadmissible on grounds of mootness;

- to adjudge to be without merit all of the Prosecutor's submissions on the decision to release Mr Jean-Pierre Bemba Gombo, and accordingly to dismiss them.

[signed]

Nkwebe Liriss
Lead Counsel

Dated this 31 August 2009

At Kinshasa, Democratic Republic of the Congo