Cour Pénale Internationale

International Criminal Court

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No**: ICC-01/05-01/08**
Date: **4 August 2010**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. Jean-Pierre Bemba Gombo

Public Document

Document in Support of the Defence Appeal against the Decision of Trial Chamber III of 28 July 2010 entitled *Decision on the review of the Detention of Mr Jean-Pierre Bemba Gombo pursuant to rule 118(2) of the Rules of Procedure and Evidence*

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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Introduction

1. By Order of 7 July 2010,[1] Trial Chamber III invited the Parties to submit their observations on the review of Mr Jean-Pierre Bemba Gombo's detention.

2. On the same day the Chamber rendered an order postponing the commencement of the trial to an unspecified date.

3. On 15 July 2010, the Prosecutor[2] and the Representatives[3] of the alleged victims filed their observations on the review of Mr Jean-Pierre Bemba Gombo's detention.

4. On 22 July 2010, the Defence also filed its observations and submitted three requests to the Chamber:[4] 1) As principal request, to release Mr Jean-Pierre Bemba Gombo with or without conditions, 2) In the alternative, to modify Mr Jean-Pierre Bemba Gombo's detention regime so as to allow him to spend his weekends on release at a location within the Netherlands, 3) In any case to order the Registrar to assist Mr Jean-Pierre Bemba Gombo's Defence Team in obtaining a guarantee that the accused will appear at trial and initiating negotiations with States Parties in order to seek such guarantee.

5. On 28 July 2010, Trial Chamber III rendered its Decision entitled *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence*, whereby it decided to keep him in custody.[5]

[1] ICC-01/05-01/08-811.
[2] ICC-01/05-01/08-828-Red.
[3] ICC-01/05-01/08-825.
[4] ICC-01/05-01/08-840.
[5] ICC-01/05-01/08-843.

6. On 29 July 2010, the Defence appealed that decision under article 82(1)(b) of the Rome Statute.[6]

7. Pursuant to regulation 64(5) of the Regulations of the Court, the Defence submits this document in support of the appeal.

8. The impugned decision rendered by Trial Chamber III undeniably derives from a error of law and a manifest misappreciation of the facts.

9. The case law of the Appeals Chamber holds that**:**

> "The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice issues."[7]

10. Accordingly, the Defence hereby submits that Trial Chamber III made one or more errors of law or fact which come within with the definition given by the Appeals Chamber and which, as stated in article 83(2), "materially affected" the decision rendered.

First ground

11. The impugned decision wholly disregards the solidly established precedents in the case law of the Appeals Chamber of the International Criminal Court in holding that the conditions under article 58(1)(b)(i) continue to be met as far as Mr Jean-Pierre Bemba Gombo is concerned.

12. The newly-constituted Trial Chamber III should not have purely and simply endorsed the decisions rendered on the detention and interim release of Mr Jean-Pierre Bemba Gombo by the previous Trial Chamber. The Chamber was

[6] ICC-01/05-01/08-844 OA4.

[7] Appeals Chamber in the case of G. Katanga and M. Ngudjolo, *Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release*, ICC-01/04-01/07-572, 9 June 2008, para. 25.

under a duty to conduct a thorough review of the information before it in order to be in a position to rule on the issue of whether or not Mr Jean-Pierre Bemba Gombo's detention was still justified.

13. The Appeals Chamber in the *Ngudjolo* case was quite clear in this regard:

> "What is missing is the evaluation of the relevant facts by the Single Judge in the present proceedings. In this case the Singe Judge adopted the findings made by another Single Judge in other proceedings; this is impermissible. A judge, the Single Judge in this case, is duty-bound to appraise facts bearing on sub judice matters, determine their cogency and weight and come to his/her findings, as the Single Judge was bound to do in this case but failed to do.
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> 27. The Single Judge was not relieved of that duty because another judge within the context of the proceedings made an appraisal of the facts, nor was any evaluation made in such proceedings binding on the Chamber charged with the determination of a sub judice issue. It was the responsibility of the judge in this case to assess the facts pertinent to her decision, and found her judgment thereupon."[8]

14. Consequently, a court called upon to rule on the detention of a suspect or accused person cannot be "relieved" of its obligation to examine and assess the facts in order to draw its own conclusion.

[8] Appeals Chamber, case of G. Katanga and M. Ngudjolo, *Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release*, ICC-01/04-01/07-572, 9 June 2008, paras. 26-27. See also para. 10 of the same decision: "10. In logical order, the first issue to be addressed is that of bias. The aphorism "justice must not only be done but must appear to be done" is deeply rooted in the norms of justice; in fact it is a pre-requisite for ministering justice. The absence of bias, real or apparent, is what legitimises a judicial body to administer justice. The power of the Pre-Trial Chamber is not conditioned by its previous decision to direct the issuance of a warrant of arrest. The Pre-Trial Chamber must inquire anew into the existence of facts justifying detention. The person participates in the proceedings and is at liberty to put before the Chamber facts bearing on the legitimacy of his detention. There is nothing to suggest that the earlier decision of the Pre-Trial Chamber involving the issuance of a warrant of arrest played any part in the discharge of the Single Judge's duties. She assumed jurisdiction in the context of the assignment of the case against the appellant to Pre-Trial Chamber I, invested with jurisdiction to deal with every issue relating to the case up to and including the confirmation hearing. It is implicit in the provisions of articles 58(1), 60(1) and 60(2) of the Statute that the same Pre-Trial Chamber is vested with jurisdiction to deal with: a) the issuance of a warrant of arrest, b) receiving the arrestee on his first appearance before the Chamber, and c) any application for interim release. All three provisions of the law refer to "the Pre-Trial Chamber" signifying thereby the Pre-Trial Chamber assigned to deal with the case concerning the arrested person. A reasonable onlooker acquainted with these facts could not discern or perceive bias on the part of the Chamber that dealt with the application of the appellant for interim release."

15. Moreover, the fact that one of the judges from the previous Trial Chamber is now part of the present Chamber cannot be considered reason enough for that Chamber to adopt the findings of its predecessor. Trial Chamber I concluded in this regard that:

> "Although by articles 61(11) and 64(6)(a) of the Statute, the Chamber may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in the proceedings, it is impossible to read into these provisions a power by which the Chamber may appoint one of the three judges to act as a single judge. As set out above, article 39(2)(b)(ii) provides "[t]he functions of the Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence". If the drafters of the Statute had intended both Divisions to have the same power to delegate work to a single judge, this would have been spelt out in article 39. The difference between the provisions reflects a clear intention to restrict the opportunity to appoint a single judge to the Pre-Trial Chamber alone."[9]

16. The Defence would remind the Chamber of the principle set out in article 67(1)(i), whereby the accused shall not have imposed on him or her any reversal of the burden of proof. The applicability of this principle to the examination of the legality of the detention and the application for release was reiterated by the Single Judge in the *Katanga and Ngudjolo* case.[10]

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[9] Trial Chamber I, *Thomas Lubanga* case, *Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial*, ICC-01/04-01/06-1349, 22 May 2008, para. 14a).

[10] Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the powers of the Pre-Trial Chamber to review* proprio motu *the pre-trial detention of Germain Katanga*, ICC-01/04-01/07-330, 18 March 2008, p.5 et seq.: "CONSIDERING that the Prosecution and the Defence for Germain Katanga agree that the Prosecution has the burden of proof in relation to the initial existence of the conditions set forth in article 58(1) of the Statute for the pre-trial detention of a person; CONSIDERING that, in the Second Prosecution Observations, the Prosecution seems to agree with the Defence for Germain Katanga in that the Prosecution has the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention;12 and that therefore the Prosecution seems to have changed its position as put forward in the "Prosecution's Observations on the Defence's Application for Interim Release"13 filed on 22 February 2008;14
[…]
CONSIDERING that, according to article 60(2) of the Statute, a person subject to a warrant of arrest shall continue to be detained only if "the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1 are met;" and that therefore the Single Judge is of the view that, according to the ordinary meaning of article 60(2) of the Statute, the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention lies with the Prosecution.
(…)

17. The Defence notes that the European Court of Human Rights stated the following: "[...] defence is not required to prove that there has been a change in circumstance which would justify the defendant's release – to do so would shift the burden onto the defendant, and defeat the principle that liberty should be the rule and detention the exception."[11]

18. The newly-constituted Trial Chamber III thus committed a error of law in failing to conduct *de novo* the aforesaid examination and assessment of the relevant facts before ruling on the legality of prolonging the detention of Mr Jean-Pierre Bemba Gombo and on his application for interim release.

19. It is not sufficient for the court to note that the three new matters relied on by the Defence do not constitute a material change in circumstances,[12] just as it cannot confine itself to citing the requirement of article 58(1)(b), which continues to be met as far as the accused is concerned, in this case the need to ensure appearance at trial.[13]

20. On the contrary, insofar as the court arrives at the conclusion that detention is necessary in order to ensure that Mr Jean-Pierre Bemba Gombo appears at trial, it must justify this conclusion by supporting it with its own factual analysis, which it has failed to do here.

CONSIDERING that the conclusion that the Prosecution has the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention is also consistent with the interpretation of article 60(2) of the Statute in light of its object and purpose insofar as this provision aims at making sure that a person is subject to – pre-trial detention only for the period of time during which the conditions set forth in article 58(1) of the Statute continue to be met;
CONSIDERING that, in the view of the Single Judge, this interpretation of article 60(2) of the Statute is consistent with the case law of the Human Rights Committee17, the Inter-American Court of Human Rights18 and the European Court of Human Rights.19"

[11] *Ilijkov v. Bulgaria*, No. 33977/96, 26 July 2001.
[12] ICC-01/05-01/08-843, paragraphs 34 to 37.
[13] ICC-01/05-01/08-843, paragraph 39.

21. The Defence thus has no knowledge of the factual findings reached on the sole authority of the Trial Chamber, or relied on by it in the decision of 22 July 2010 as constituting a need for detention at the present time. This failure moreover constitutes a violation of the fairness of the proceedings, contrary to Article 6 of the European Convention on Human Rights and to Article 14 of the International Covenant on Civil and Political Rights.

22. In effect, the court may only base its belief in the need to maintain a warrant of arrest on an examination of the evidence and of the information submitted by the Prosecutor pursuant to article 58(1)(a) of the Statute.

23. The court must thus specify the evidence and the information whose examination has led it to conclude that detention remains necessary in order to ensure appearance at trial, which it has failed to do here.

24. In the impugned decision, there is no reference to the evidence submitted by the Prosecutor to the Chamber as the purported objective basis for the need for continued detention. If no such evidence is produced, it is impossible for the Defence to mount an effective, properly informed challenge to the impugned decision. The Defence is unable to demonstrate that the impugned decision is either based on facts which have not been proved or is the product of a manifest misappreciation of the facts alleged, if it has no means of knowing or accessing the evidence on which that decision is founded.

25. Thus the Human Rights Committee of the United Nations Commission has held that a legal decision to keep an accused person in custody on the basis of the risk that they might abscond cannot be based on mere conjecture.[14]

26. Jurisprudence thus holds that a court cannot keep an accused person in custody solely on the basis of the risk that he or she might abscond, without

[14] *Hill and Hill v. Spain* 526/93, para. 12.3.

basing its decision on concrete and relevant information on the reality of that risk.[15]

Second ground

27. The impugned decision is the result of a manifest misappreciation, in that it regards as irrelevant the Defence request seeking an order for the Registry to assist Mr Jean-Pierre Bemba Gombo's Defence Team.

28. The only argument invoked by the Trial Chamber to dismiss this request is the fact that there has been no material change in circumstances since the decision to review detention of 1 April 2010.[16]

29. Yet the purpose of the Defence's request is precisely to present a material change in circumstances to the Trial Chamber. The Defence seeks to present new evidence of such change to Trial Chamber III, namely a guarantee that Mr Bemba will appear before the International Criminal Court.

30. The European Court of Human Rights has held that when the only ground for detaining an accused is the risk that he or she might abscond, the accused must be released if he or she can provide guarantees that he or she will appear before the Court.[17]

31. The Defence has already identified that guarantee of appearance, which will come from a State Party to the Rome Treaty or from an international organisation, in this case a local UN mission.

[15] *Ilijkov v. Bulgaria*, para. 84.
[16] ICC-01/05-01/08-843, paragraph 38 *in fine*.
[17] *Wemhoff v. Germany*, judgment of 27 June 1996, Series A, N°7, para. 15; *Letellier v. France*, judgement of 26 June 1991, Series A N°207, p.19, para. 46.

32. Assistance from the Registry is required for the purposes of securing such guarantee from one of these bodies and then submitting it to the Trial Chamber. To deny the Defence such assistance is tantamount to refusing it permission to submit evidence that it cannot obtain through contact with government organs or with the United Nations without the assistance of the Registry.

33. The decision of Trial Chamber III derives from a error of law whereby it applied the criterion of material change as referred to in article 60(3) of the Statute in order to dismiss this request for assistance from the Registry, which is a request distinct from the application for release, so that, even if there is no material change in circumstances, that cannot render the Defence request irrelevant. The specific request in the application was not for the release of Mr Jean-Pierre Bemba Gombo, but, as a further alternative, for assistance from the Registry with a view to securing a guarantee that the accused would appear at trial, which the Defence could effectively rely on before the Court in a future application for release, since, currently, the sole raison d'être for the accused's detention is to guarantee his appearance at trial. And this is particularly pertinent in that, under Article 9 of the International Covenant on Human and Political Rights and Article 5 of the European Convention on Human Rights, liberty remains the rule whilst deprivation of liberty is the exception.

34. The Chamber made a further error of law and fact in holding that it was unnecessary to order the Registry to provide help and assistance to the Defence in identifying a host state which would provide the requisite guarantees for appearance at trial.

35. Pursuant to rule 20, the Registry has "Responsibilities relating to the rights of the defence". Help and assistance from the Registry in the present matter is clearly one of the functions required to ensure the principle of a fair trial, the

list in paragraph 1 of rule 20 being non-exhaustive. Furthermore, the Registry is a party to the cooperation agreements signed by the Court with States Parties for hosting convicted persons pursuant to article 87(5)(a). Agreements to host persons granted interim release may therefore arguably be included in the functions of the Registry under rule 20.

36. The Defence is not in a position on its own to make contact with official government representatives and to conduct negotiations and discussions of this kind. It is for a representative organ of the Court to perform this task. The Registry is responsible for securing agreements of this nature, failing which the principle of a fair trial and the right of a person to have the legality of his or her detention properly examined could not be effective and "feasible", as noted by the Appeals Chamber in its judgment of 2 December 2009.

37. In this regard, unlike the Office of the Prosecutor, the Defence is not an organ of the International Criminal Court. It does not have the power to negotiate with States or sign agreements with them. On the basis of this consideration, the ad hoc tribunals have stated the following: "that the International Tribunal must interpret the principle of equality of arms more broadly than do domestic courts and that the parties must enjoy all the measures which may be granted so as to help them present their case".[18]

38. Under article 57(3)(b) of the Statute, the Chamber may, independently of the other functions afforded to it under the Statute, issue any such order, including measures such as those described in article 56, or seek any such cooperation pursuant to Part 9, as may be necessary to assist Mr Jean-Pierre Bemba Gombo in the preparation of his defence in view of his next application for release.

[18] *Order On The Motions Of Momir Talic And Radoslav Brdanin For Access To Confidential Information In The Cases* The Prosecutor v. Tadic *And* The Prosecutor v. Kovacevic, 11 September 2000, http://www.un.org/icty/brdjanin/trialc/order-e/00911AC413795.htm.

39. In view of the array of guarantees available, the assistance of the Registry will serve to provide the Defence with the practical means to secure a guarantee that Mr Jean-Pierre Bemba Gombo will appear at trial.

40. Thus, on 1 June 2010 the International Criminal Court signed agreements on the enforcement of sentences with Belgium, Denmark and Finland. The International Criminal Court had already signed such agreements with the Republic of Austria in 2005 and with the United Kingdom in 2007.[19]

41. If the Defence's request were granted, similar agreements could be signed with States Parties, whereby they could offer a guarantee that Mr Jean-Pierre Bemba Gombo would appear at trial if he were to be released to their territories. Several possible systems could be used for the operation of this guarantee, with the detailed arrangements being negotiated with the Registry, as, for example, the electronic tag system operated in Belgium under the aegis of US security company ELMOTECH on behalf of the Ministry of Justice of the Kingdom of Belgium.

42. Under the cooperation agreement signed on 4 October 2004 between the International Criminal Court and the United Nations Organization, the Registry could assist the Defence in securing a guarantee of appearance at trial from the United Nations Organization Stabilization Mission in the Congo. Thus the agreement between the two Organisations provides that they shall, in view of their respective mandates, cooperate closely together on administrative and judicial matters and consult each other on issues of mutual interest.[20]

[19] The ICC signs enforcement agreements with Belgium, Denmark and Finland, http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr533.
[20] UN and International Criminal Court sign cooperation agreement, http://www.un.org/apps/news/story.asp?NewsID=12118&Cr=icc&Cr1=&Kw1=ICC&Kw2=&Kw3

43. The United Nations Organization Stabilization Mission in the Congo (MUNOSCO) could, as indicated by several precedents in international law, implement concrete arrangements for the protection and surveillance of Mr Jean-Pierre Bemba Gombo whilst also ensuring his appearance before the Court. The Registry could also consider an agreement with the Democratic Republic of the Congo, where there is already a presidential decree assigning 12 police officers to protect Mr Jean-Pierre Bemba Gombo in his capacity as a former vice-president.

44. Without the assistance of the Registry, only accused persons who have special relations with their home country or with the local United Nations Mission would be able to secure a guarantee for their appearance at trial, which would be contrary to the principle of fairness in the proceedings.

45. The Registry could also consider an agreement with Portugal, since the country has already established a permanent police and surveillance protection system at Mr Jean-Pierre Bemba Gombo's home there, and for all his travel arrangements. Portugal could provide a guarantee of appearance at trial, in particular by reactivating the policing arrangements which were already in place.

Third Ground:

46. The Trial Chamber made a error of law when it held that the Defence, in its request seeking a less stringent detention regime, "has failed to allege any new facts justifying a change in the detention regime."[21]

47. The impugned decision derives from an error in applying the relevant legal texts, in that its refusal to allow the detention regime to be temporarily

[21] Impugned decision ICC-01/05-01/08-843, para. 38.

modified is based on articles 58(1)(b)(i) and 60 of the Statute, whereas those provisions only govern the principle of the issuance or maintenance of a warrant of arrest, rather than details of the detention regime.

48. The Defence's alternative request for a modified detention regime does not involve release from custody. In this case the accused is still deprived of his liberty; the aim is solely to modify the detention regime.

49. In relying for its decision on modification of the detention regime on a particularly stringent criterion, envisaged by the Statute only for the question of maintenance of detention or release, Trial Chamber III made an error of law.

50. It is clear, as the Trial Chamber itself acknowledged in paragraph 32 of the impugned decision, that articles 58 and 60(3) of the Statute only regulate the actual principle of arrest and detention.

51. The Trial Chamber erred when it purported to found its decision on the afore-mentioned provisions, which require that, in order to terminate detention, the Chamber must identify a material change in the circumstances on which the previous decision ordering detention was based, or a new fact which justifies amending the previous decision depriving the person of their liberty. Applications for a modification of the detention regime are in no way governed by articles 58 and 60 of the Rome Statute, as the Prosecutor acknowledged in his observations when the Defence sought temporary release for Mr Jean-Pierre Bemba Gombo to attend the funeral of his late father, who died in Brussels in July 2009.[22] On that occasion, the Prosecutor raised the issue of the legal vacuum in the principal legal texts which govern the International Criminal Court in relation to the application for interim release submitted by the Defence.

[22] ICC-01/05-01/08-434.

52. The decision taken by the Pre-Trial Chamber was in fact to grant him a twenty-four-hour release to allow him to travel to Brussels and attend the ceremonies organised by his family following the death of his late father. When the decision to grant him a short-term release was taken, the conditions stipulated in both article 58(1)(b)(i) and article 58(1)(b)(ii), which required that he remain in custody, still obtained as far as he was concerned by virtue of the previous decision reviewing detention, which at that point was the decision of 14 April 2009.[23]

53. The jurisprudence flowing from this unappealed decision of the International Criminal Court granting the short-term release of 1 July 2009 did not call into question the previous detention order of 14 April 2009, since it was not until 14 August 2009 that the Pre-Trial Chamber ruled on the detention review after the period of 120 days had expired.

54. The Defence's alternative request should clearly have been dealt with under the same legal regime as that submitted by it on 2 July 2009, when it sought a short-term release for Mr Jean-Pierre Bemba Gombo.[24]

55. Furthermore, in the *Blaskic* case, the Presiding Judge of the International Criminal Tribunal for the Former Yugoslavia drew a clear distinction between applications for a more lenient detention regime similar to that submitted by Mr Jean-Pierre Bemba Gombo and applications for interim release. They held that such measures could constitute intermediate measures, and that house arrest was still a form of detention:

> "It should be pointed out that house arrest is not provided for either in the Tribunal's Statute or in the Rules of Procedure and Evidence. However, it is also true that nothing in the Statute or the Rules prevents or prohibits such house arrest as an alternative to pre-trial incarceration (or for that matter, to imprisonment to serve a sentence). If this concept is upheld by the Tribunal, it would constitute a middle-of-

[23] ICC-01/05-01/08-403.
[24] ICC-01/05-01/08-430-Conf.

> the road measure between what is regarded by the Rules as the norm, namely detention on remand (Rule 64) and the exception, i.e., provisional release (Rule 65). It would be an intermediate measure only because it would be milder than incarceration, whilst it would be harsher than provisional release, for house arrest is a form of detention."[25]

56. The ad hoc tribunals have often used the system of safe houses in situations where it was not possible to secure a government guarantee for the accused to appear at trial.[26]

57. The Trial Chamber is not entitled to apply the criterion set out in article 60(3) of the Statute, whereby a Chamber may modify its ruling as to detention or release "if changed circumstances so require". This criterion is not relevant to the Defence's alternative request for modification of the detention regime. Consequently, the Defence should not be required to prove a change in circumstance in support of its request. Furthermore, to rule otherwise would place far too heavy a burden on the Defence and impose conditions which are far too strict, and in breach of the principle set out in article 67(1)(i) of the Statute.

58. If by some unlikely chance the Appeals Chamber were to hold that the Trial Chamber did not make an error of law as argued above, it would then be compelled to conclude that the Trial Chamber failed to take account of relevant facts in refusing to examine the Defence's alternative request that Mr

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[25] Judge A. Cassese, *The Prosecutor v. Blaskic*, *Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence*, IT-95-14-I, 3 April 1994, para. 13. The Defence wishes to point out that this decision was rendered by the Presiding Judge at a time in the existence of the Tribunal when interim release was still considered to be an exception. See also: *The Prosecutor v. Plavsic*: *Order of the President on the Defence Request to Modify the Conditions of Detention of the Accused*, dated 18 January 2001.

[26] *Prosecutor v. Ntagerura, Bagambiki*, Case No. ICTR-99-46-T, *Decision On The Prosecutor's Request Pursuant To Rule 99(B)*, 26 February 2004:
"DIRECTS the Registrar to release immediately André Ntagerura and Emmanuel Bagambiki, when satisfied that… the necessary practical arrangements have been made, including required consultations with the relevant national and international authorities, as well as any other organization deemed relevant for such practical arrangements to be made. In the interim, the Registrar is requested to ensure that André Ntagerura and Emmanuel Bagambiki are placed in a safe house."

Jean-Pierre Bemba Gombo be granted permission to receive visits from his family at weekends, subject to conditions.

59. The Trial Chamber bases its decision to dismiss the application for release on the fact that there is a risk that Mr Jean-Pierre Bemba Gombo might abscond. Yet, in declining to rule on the Defence's alternative request, the Chamber failed to take into account a pertinent proposal by the Defence which would address the Chamber's concerns.

60. As an alternative to detention, placing Mr Jean-Pierre Bemba Gombo under house arrest at weekends would obviate the risk that he might abscond, on which the Chamber relies in order to dismiss the application for interim release of the accused.

61. If the accused remains under surveillance inside a house that is closely watched, the issue of the risk that he might abscond becomes irrelevant. This was acknowledged in the *Blaskic* decision before the ICTY. The President of the Tribunal, Judge Cassese, gave permission for Blaskic to reside in a safe house, since the government of the Netherlands felt that, if he were to be released, he would pose a threat to public order.[27] The detention regime thus adopted responded directly to the issue of the risk of flight.

62. In view of this, the Trial Chamber should have called upon the Registry and the authorities in the Netherlands to express their views on the possibility of implementing the Defence's alternative request for modification of the detention regime.

[27] Judge A. Cassese, *The Prosecutor v. Blaskic*, *Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence*, IT-95-14-I, 3 April 1994.

For these reasons,

63. The Defence respectfully calls upon the Appeals Chamber to find that the *Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the rules of Procedure and Evidence* rendered by Trial Chamber III on 28 July 2010 is the product of several errors of fact and law, in:

i. failing to examine the facts and information necessary in order to render a decision on the legality of the detention and interim release of Mr Jean-Pierre Bemba Gombo, and simply restating the decisions rendered by the previous Trial Chamber;

ii. regarding consideration of the guarantees of appearance at trial that might be provided by a host state or local UN Mission as irrelevant when ruling on an application for interim release, particularly in view of the fact that the Chamber identifies the risk that the accused may abscond as the sole potential ground for extending detention.

iii. failing to order the Registry to provide help and assistance to the Defence in identifying a country offering guarantees of the accused's appearance at trial;

iv. holding that the criterion of a material change in circumstances as laid down in article 60(3) of the Statute applies to a request for modification of the detention regime.

And consequently,

<u>As principal request:</u>

64. To refer the case back to Trial Chamber III for a fresh ruling in accordance with the terms of your decision.

In the alternative:

65. To order the immediate release of Mr Jean-Pierre Bemba Gombo with or without conditions in accordance with rule 119 of the Rules of Procedure and Evidence; Or, alternatively:

66. To order a modification of the detention regime by allowing Mr Jean-Pierre Bemba Gombo to travel to a designated safe house, where he may spend family time with his wife and his five children every weekend from Friday to Sunday night.

In the further alternative:

67. To order the Registry to assist Mr Jean-Pierre Bemba Gombo's Defence Team in securing a guarantee that the accused will appear at trial and in initiating negotiations with States Parties with a view to seeking such guarantee.

[signed]

Aimé Kilolo Musamba

Associate Counsel

Dated this 4 August 2010
At The Hague, The Netherlands