

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/05-01/08 OA 7

Date: 19 August 2011

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Redacted Version

Judgment

on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled “Decision on Applications for Provisional Release”

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr Liriss Nkwebe
Mr Aimé Kilolo-Musamba

Legal Representatives of Victims

Mr Assingambi Zarambaud

REGISTRY

Registrar

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on Applications for Provisional Release” of 27 June 2011 (ICC-01/05-01/08-1565-Conf),

After deliberation,

By majority, Judge Ušacka partly dissenting,

Delivers the following

JUDGMENT

1. The “Decision on Applications of Provisional Release” pursuant to rule 118 (2) of the Rules of Procedure and Evidence is reversed to the extent that the Trial Chamber dismissed Mr Jean-Pierre Bemba Gombo’s request for interim release to [REDACTED].
2. The Trial Chamber is directed to reconsider Mr Jean-Pierre Bemba Gombo’s request for interim release to [REDACTED] in light of the present judgment. Until, and subject to, the Trial Chamber’s decision of the matter, Mr Jean-Pierre Bemba Gombo shall remain in detention.
3. The remainder of the appeal is dismissed.

I. KEY FINDINGS

1. If a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber.
2. Depending on the circumstances, the Chamber may have to seek further information from the State if it finds that the State’s observations are insufficient to enable the Chamber to make an informed decision.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

3. On 3 May 2011, Mr Bemba filed the “Application for the interim release of Mr Jean-Pierre Bemba Gombo”¹ (hereinafter: “First Request”) before Trial Chamber III (hereinafter: “Trial Chamber”), in which he requested to be granted interim release to the territory of the Kingdom of Belgium.²

4. On 6 June 2011, Mr Bemba filed the “Additional Request for the interim release of Mr Jean-Pierre Bemba Gombo subsequent to the letter of guarantee by a State provided by [REDACTED]”³ (hereinafter: “Second Request”). Mr Bemba applied for interim release to [REDACTED] both during the judicial recess and for periods of time in which the Chamber would not sit for three consecutive days.⁴ Mr Bemba annexed two letters to the Second Request: one from his lawyer to [REDACTED] regarding his possible interim release to [REDACTED]⁵ (hereinafter: “Mr Bemba’s Letter”), and [REDACTED] response thereto⁶ (hereinafter: “[REDACTED] Letter”).

5. On 8 June 2011, the Trial Chamber issued the “Decision requesting observations on the ‘Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]’”, inviting [REDACTED] to submit its observations on the Second Request⁷ (hereinafter: “Decision Requesting Observations on the Second Request”).

6. On 10 June 2011, Mr Bemba filed the “Extremely urgent application for an exeat from the detention centre to allow Mr Jean-Pierre Bemba Gombo to perform his civic duties in the Democratic Republic of the Congo”⁸ (hereinafter: “Third Request”) in which Mr Bemba requested permission to leave the United Nations Detention Centre for approximately 17 hours to travel to the Democratic Republic of the Congo (hereinafter: “DRC”) to register for the upcoming elections.

¹ ICC-01/05-01/08-1387-Conf-tENG. The “Corrigendum to Application for the interim release of Mr Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-1387-Conf-Corr-tENG, was filed on 3 May 2011. All references in this judgment are to the corrigendum.

² ICC-01/05-01/08-1387-Conf-Corr-tENG, paras 10-24.

³ ICC-01/05-01/08-1479-Conf-tENG.

⁴ Second Request, para. 19.

⁵ Annex B to Second Request, 6 June 2011, ICC-01/05-01/08-1479-Conf-AnxB-tENG, pp. 3-5.

⁶ Annex A to Second Request, 6 June 2011, ICC-01/05-01/08-1479-Conf-AnxA-tENG.

⁷ ICC-01/05-01/08-1492-Conf.

⁸ ICC-01/05-01/08-1501-Conf-tENG.

7. On 20 June 2011, [REDACTED] filed its observations to the Second Request⁹ (hereinafter: “[REDACTED] Observations”).

8. On 27 June 2011, the Trial Chamber rendered the “Decision on Applications for Provisional Release”¹⁰ (hereinafter: “Impugned Decision”), rejecting all three requests for interim release.

B. Proceedings before the Appeals Chamber

9. On 29 June 2011, Mr Bemba filed the “Notification d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 27 Juin 2011 intitulée ‘Decision on Applications for Provisional Release’”¹¹ (hereinafter: “Notice of Appeal”).

10. On 1 July 2011, Mr Bemba filed the “Document in support of Defence Appeal against Trial Chamber III’s decision on Applications for Provisional Release, dated 27 July 2011”¹² (hereinafter: “Document in Support of the Appeal”).

11. On 5 July 2011, the Appeals Chamber invited the victims who wished to participate in the proceedings to file their applications for participation by 7 July 2011.¹³

12. On 7 July 2011, the legal representatives of victims, Mr Assingambi Zarambaud and Ms Douzima-Lawson, applied for leave to participate in the proceedings on behalf of the victims they represent.¹⁴

13. On 11 July 2011, the Prosecutor filed the “Prosecution’s Response to the ‘Document in support of Defence Appeal against Trial Chamber III’s decision on Applications for Provisional Release, dated 27 June 2011’”¹⁵ (hereinafter:

⁹ Annex 2 to “Report of the Registry on the Implementation of Decision ICC-01/05-01/08-1492-Conf”, 20 June 2011, ICC-01/05-01/08-1556-Conf-Anx2-tENG.

¹⁰ ICC-01/05-01/08-1565-Conf.

¹¹ ICC-01/05-01/08-1573-Conf.

¹² ICC-01/05-01/08-1586-Conf.

¹³ “Order on applications for victim participation”, ICC-01/05-01/08-1587-Conf.

¹⁴ “Application of the Legal Representative of Victims, Mr Zarambaud Assingambi, for leave to participate in the appellate proceedings”, ICC-01/05-01/08-1589-Conf-tENG; “Response of the Legal Representative of Victims to the *Order on applications for victim participation*”, ICC-01/05-01/08-1588-Conf-tENG.

¹⁵ “Prosecution’s Response to the ‘Document in support of Defence Appeal against Trial Chamber III’s decision on Applications for Provisional Release, dated 27 June 2011’”, ICC-01/05-01/08-1592-Conf.

“Prosecutor’s Response to the Document in Support of the Appeal”). On the same day, he filed his consolidated response to the applications by the victims for participation submitting that he did not oppose their participation.¹⁶ Mr Bemba did not file a response to the applications.

14. On 14 July 2011, the Appeals Chamber, by majority, granted the victims represented by Mr Assingambi Zarambaud (hereinafter: “Legal Representative of the Victims”) leave to participate in the proceedings but rejected the application filed by Ms Douzima-Lawson.¹⁷

15. On 15 July 2011, the Legal Representative of the Victims filed the “Application for provision of the French version of the Defence’s appeal document and the appeal decision of 14 July 2011, and for an extension of time for the undersigned Legal Representative to file his observations”¹⁸ (hereinafter: “Request for Extension of Time”).

16. On 19 July 2011, Mr Bemba filed a response to the Request for Extension of Time requesting the Appeals Chamber to dismiss the request for failing to establish “good cause” as required by regulation 35 (2) of the Regulations of the Court.¹⁹

17. On that same day, the Appeals Chamber rendered the “Decision on ‘Requête aux fins de communication de la version française du document d’appel de la défense, ainsi que de la décision d’appel du 14 juillet 2011 et subséquemment de prorogation du délai de dépôt des observations du Représentant légal soussigné’”²⁰ (hereinafter: “Decision Rejecting Request for Extension of Time”), rejecting the Request for Extension of Time and reserving its reasons for the judgment. Also on that day, the Legal Representative of Victims filed the “Observations of the Legal Representative, Mr Assingambi Zarambaud, on ‘Document of Defense Appeal against Trial Chamber III’s Decision on Applications of Provisional Release Dated 27 June 2011’ submitted

¹⁶ “Consolidated Prosecution’s response to requests by victims to participate in appeal against the ‘Decision on Applications for Provisional Release’ (ICC-01/05-01/08-1565-Conf)”, ICC-01/05-01/08-1591-Conf.

¹⁷ “Decision on the Participation of Victims in the Appeal against the ‘Decision on Applications for Provisional Release’ of Trial Chamber III”, ICC-01/05-01/08-1597-Conf. Judge Song filed a partly dissenting opinion to the decision on 1 August 2011, ICC-01/05-01/08-1619-Conf.

¹⁸ ICC-01/05-01/08-1602-Conf-tENG, paras 15-16.

¹⁹ “Defence response to the 14 July 2011 application of the Legal Representative of Victims, ICC-01/05-01/08-1602-Conf-Anx OA”, ICC-01/05-01/08-1608-Conf-tENG, para. 12.

²⁰ ICC-01/05-01/08-1607-Conf.

by the Defence for Mr Jean-Pierre Bemba Gombo”²¹ (hereinafter: “Victims’ Observations”).

18. On 26 July 2011, Mr Bemba and the Prosecutor filed their respective responses to the Victims’ Observations.²²

19. On 4 August 2011, the “Transmission of the Registry of the observations of [REDACTED]” was transmitted to the Appeals Chamber, annexing [REDACTED] communication to the Court regarding Mr Bemba’s request for interim release to that country²³ (hereinafter: “Transmission by the Registrar of 4 August 2011”).

III. PRELIMINARY ISSUES

A. Request for abridgment of time and “status conference”

20. In Mr Bemba’s Notice of Appeal, he requested the Appeals Chamber to shorten the time for deciding the appeal by either abridging the time limit for the filing of written submissions or convening a “status conference” for the parties and participants to present oral arguments.²⁴ He submitted that the registration procedure for the elections in the DRC was closing on 7 July 2011 and noted that the Court recess was to begin on 17 July 2011.²⁵ He argued that time limits should be abridged in order for the Appeals Chamber to render a decision on his interim release, if possible, before the beginning of July 2011 or at the latest before the Court’s three-week recess on 17 July 2011, submitting that his right of appeal would otherwise become moot.²⁶

21. Under regulation 35 (2) of the Regulations of the Court, a Chamber may extend or reduce a time limit if good cause is shown. The Appeals Chamber found that Mr Bemba had not established good cause for the abridgment of time in this case. The Appeals Chamber noted that in the Notice of Appeal, Mr Bemba did not substantiate

²¹ ICC-01/05-01/08-1609-Conf-tENG.

²² “Defence response to the ‘Observations du Représentant légal Maître Zarambaud Assingambi sur le «Document of Défense Appeal against Trial Chambre III’s Decision on Applications of Provisional Release Dated 27 June 2011» Présenté par la Défense du Sieur Jean-Pierre Bemba Gombo”, 26 July 2011, ICC-01/05-01/08-1612-Conf; “Prosecution’s Response to the Observations of Victims’ Legal Representative Mr Zarambaud Assingambi to the Defence Appeal Trial Chamber III’s Decision on Applications for Provisional Release (ICC-01/05-01/08-1609-Conf)”, ICC-01/05-01/08-1613-Conf.

²³ ICC-01/05-01/08-1621-Conf, dated 3 August 2011 and registered on 4 August 2011.

²⁴ Notice of Appeal, para 12.

²⁵ Notice of Appeal, para. 9.

²⁶ Notice of Appeal, paras 10, 13.

in any way that the time limit for voter registration in the DRC was 7 July 2011. The Appeals Chamber noted furthermore that the Notice of Appeal requested the interim release to [REDACTED] “for the Court recesses and all periods where the Chamber will not sit for at least three consecutive days, including long weekends”.²⁷ Accordingly, Mr Bemba’s argument that his right of appeal would be rendered moot if a judgment on the appeal was not issued in advance of 17 July 2011 was unpersuasive. For these reasons, the Appeals Chamber decided not to abridge the time limits for the filing of written submissions. For the same reasons, the Appeals Chamber did not consider it necessary to hold an oral hearing in the present appeal.

B. Reasons for Decision Rejecting Request for Extension of Time

22. In its Decision Rejecting Request for Extension of Time, the Appeals Chamber rejected the application by the Legal Representative of Victims to extend the time limit to submit observations in response to the Document in Support of the Appeal.²⁸ The Legal Representative of Victims had requested the Appeals Chamber to (1) grant the Legal Representative of Victims an extension of time to submit his observations on the present appeal; (2) provide a French version of its Decision on the Participation of Victims since this decision states that it was “Done in English and French”; and (3) order Mr Bemba to send a French version of his Document in Support of the Appeal.²⁹

23. The Legal Representative of Victims’ principal request is for an extension of time based on his lack of access to French versions of the Decision on the Participation of Victims and Document in Support of the Appeal. As stated above, regulation 35 (2) of the Regulations of the Court allows the Chamber to extend or reduce a time limit if good cause is shown. In the view of the Appeals Chamber, the Legal Representative of Victims did not establish good cause. The Appeals Chamber noted that he did not provide reasons in support of his request. He merely requested French versions of the aforementioned documents and an extension of time to prepare his appeal submission. His arguments as to why he should receive French translations of the Decision on the Participation of Victims and the Document in Support of the

²⁷ Notice of Appeal, para 15.

²⁸ ICC-01/05-01/08-1607-Conf.

²⁹ Request for Extension of Time, paras 15-16.

Appeal at the time of filing were unpersuasive. The fact that Appeals Chamber's decisions are "[d]one in English and French" does not signify that both versions will be provided at the time of filing but rather that there will be translation into either language. Similarly, in accordance with regulation 39 (1) of the Regulations of the Court, Mr Bemba could file the Document in Support of the Appeal in English or French, the two working languages of the Court (article 50 (2) of the Statute). He decided to file in it English, and was not obliged to also file it in French.

24. For the reasons listed above, the Appeals Chamber rejected the Request for Extension of Time in its entirety.

C. Transmission by the Registrar of 4 August 2011

25. In the Transmission by the Registrar of 4 August 2011, the Registrar transmitted to the Appeals Chamber [REDACTED] communication to the Court regarding the conditions of Mr Bemba's release. This filing was not available to the Trial Chamber at the time of its consideration of Mr Bemba's requests for interim release and the Appeals Chamber has not considered it for the purposes of the present appeal.

IV. MERITS

26. Mr Bemba appeals the Impugned Decision with respect to the Second and Third Requests but does not appeal the Impugned Decision with respect to the First Request. He advances three grounds of appeal.

A. First ground of appeal

27. As his first ground of appeal, Mr Bemba contends that the Trial Chamber misappreciated the meaning of, and weight given to, [REDACTED] Letter and [REDACTED] Observations, and as such, erred in concluding that there was the possibility that he would abscond if granted interim release to that country.³⁰

1. Procedural history and relevant part of the Impugned Decision

28. In Mr Bemba's Letter, he inquired whether it was possible for [REDACTED] to "guarantee his appearance [at trial], specifically through a monitoring system in the

³⁰ Document in Support of the Appeal, para. 3.

event that he is granted release [...] into [[REDACTED]] territory”.³¹ That letter also specifically requested [REDACTED] to confirm its willingness to

(1) do everything in its power to provide for the security and constant monitoring of Mr Jean-Pierre Bemba Gombo during his stay on [its] territory in the event of his interim release, ensuring that he does not evade justice;

(2) inform the International Criminal Court through the appropriate channel whether Mr Bemba has fulfilled any obligation imposed upon him to report in person to the competent authority according to a set schedule;

(3) immediately report to the Court any violation or attempted violation of the conditions governing his release pursuant to rule 119 of the Rules of Procedure and Evidence, and take the necessary measures to effect his return to the United Nations detention centre in The Hague.

(4) ensure that the accused returns to the Netherlands to appear before the International Criminal Court upon an order to this effect by the Court, and transfer the accused into the custody of the Dutch authorities along with his passport and other travel documents.³²

29. In [REDACTED] Letter, [REDACTED] informed Mr Bemba that “the competent authorities of [REDACTED] [had] granted [his] request” and noted that “the practical arrangements that would apply in the event of Mr Bemba’s provisional release will be made known to [Mr Bemba] and to the Court as soon as practicable.”³³

30. In the Decision Requesting Observations on Mr Bemba’s Second Request, the Trial Chamber invited [REDACTED] to submit observations as to whether:

(i) there would be any legal impediment for Mr Bemba to enter and leave the territory of [REDACTED], should he be conditionally released by the Chamber during the duration of the Court’s judicial recess and/or periods where the Chamber does not sit for at least three consecutive days, including long weekends; and

(ii) [REDACTED] would be in a position to impose one or more of the conditions listed in Rule 119 of the Rules, should the Chamber order the interim release of Mr Bemba on the territory of [REDACTED].³⁴

31. In [REDACTED] Observations, [REDACTED] informed the Trial Chamber that

³¹ Mr Bemba’s Letter, p. 4.

³² Mr Bemba’s Letter, pp. 4-5.

³³ [REDACTED] Letter, p. 2.

³⁴ Decision Requesting Observations on Mr Bemba’s Second Request, para. 9 (d).

[T]here is no legal impediment to Mr Bemba's entry into or departure from [REDACTED] territory in the event of his interim release during judicial recess and periods of at least three (3) consecutive days when the Court will not be in session, including long weekends [and that]

[[REDACTED]] is able to implement one or more of the conditions set forth in rule 119 of the Rules in the event the Court decides to order the interim release of Mr Bemba into the territory of [REDACTED];

[A]ccordingly, it does not object to the interim release of Mr Jean-Pierre Bemba Gombo.³⁵

32. In the Impugned Decision, the Trial Chamber found that Mr Bemba remained a "flight risk" and concluded that his detention was necessary to ensure his appearance at trial.³⁶ The Trial Chamber made this finding on the basis of (1) the gravity of the charges against Mr Bemba; (2) the fact that the charges have been confirmed; (3) the potential for a substantial sentence in case of conviction; and (4) the disclosure of incriminatory evidence against him.³⁷ The Trial Chamber also found that Mr Bemba's network of international contacts, his past and present political and financial resources provided him with the means to abscond. The Trial Chamber inferred from the willingness of Mr Bemba's friends and family to cover the costs of his monitoring that, if released, he could muster the resources to abscond.³⁸

33. Regarding [REDACTED] Letter and [REDACTED] Observations, the Trial Chamber found that:

[REDACTED] position [did] constitute a new circumstance bearing on the likelihood of the accused returning to trial [...] However, [REDACTED] brief letter and its equally succinct submission to this Chamber convey little more than a general willingness to accept the accused into [REDACTED] territory and do not specify which of rule 119 (1)'s conditions [REDACTED] would be able to implement.³⁹

34. The Trial Chamber also found that "[c]ritically, [REDACTED] does not guarantee to ensure [Mr Bemba's] return to the seat of the Court if he is released into [REDACTED] territory".⁴⁰ The Trial Chamber weighed [REDACTED] assurances against other factors relevant to Mr Bemba's detention and found that article 58 (1)

³⁵ [REDACTED] Observations, p. 2.

³⁶ Impugned Decision, para. 55, 61.

³⁷ Impugned Decision, para. 55.

³⁸ Impugned Decision, para. 56.

³⁹ Impugned Decision, para. 59.

⁴⁰ Impugned Decision, para. 59.

(b) (i) continued to be met because there was “a meaningful risk that if provisionally released into the territory of the [REDACTED], the accused would not return to complete his trial”.⁴¹

2. Mr Bemba's submissions

35. Mr Bemba avers that the Trial Chamber's findings under article 58 (1) (b) (i) of the Statute should be reversed. He asserts that the Trial Chamber's assessment of [REDACTED] Letter and [REDACTED] Observations was based on a “misapprehension of the extent of the guarantees provided”.⁴² In his submission, the Trial Chamber's conclusion that [REDACTED] Letter and [REDACTED] Observations merely conveyed a “general willingness to accept the accused into [REDACTED] territory, and did not specify which of Rule 119 (1)'s conditions [REDACTED] would be able to implement” was erroneous.⁴³ He states that had the Trial Chamber given appropriate weight to the [REDACTED] assurances, it would not have concluded that he remains a “flight risk”.⁴⁴

36. Mr Bemba further asserts that the Trial Chamber erred by (1) failing to wait for information from [REDACTED] regarding the “practical arrangements” it undertook to put in place in case of Mr Bemba's interim release;⁴⁵ (2) failing to ask the authorities of [REDACTED] for further information pertaining to its guarantees;⁴⁶ (3) failing to consider the credibility of [REDACTED] guarantee;⁴⁷ (4) rejecting his request for a status conference to discuss the possibility of his release to a third state;⁴⁸ and (5) relying on other factors that did not support the Chamber's finding that he was a flight risk.⁴⁹

37. Turning to the other alleged errors in the Impugned Decision, Mr Bemba contends that the factors relied on by the Chamber do not demonstrate that he is a “flight risk” when weighed against other factors which demonstrate a lack of a desire

⁴¹ Impugned Decision, para. 61.

⁴² Document in Support of the Appeal, para. 4.

⁴³ Document in Support of the Appeal, para. 8.

⁴⁴ Document in Support of the Appeal, para. 13.

⁴⁵ Document in Support of the Appeal, para. 12.

⁴⁶ Document in Support of the Appeal, para. 12.

⁴⁷ Document in Support of the Appeal, para. 14.

⁴⁸ Document in Support of the Appeal, para. 12.

⁴⁹ Document in Support of the Appeal, paras 15-19.

to abscond.⁵⁰ First, he submits that the Trial Chamber merely referred to the existence of an international network of contacts without substantiating the existence of such contacts.⁵¹ Second, he argues that it was unreasonable for the Trial Chamber to infer from the willingness of his family and friends to cover the costs of security and monitoring if he were released that he had access to enough resources to abscond.⁵² Lastly, he contends that the Trial Chamber's reliance on his "past and present position" as a means to abscond is undermined by the fact that he has an "apparent desire to live as a public figure rather than as a fugitive".⁵³ Therefore, in his view, the Trial Chamber placed "undue weight on the considerations of [his] unnamed 'international contacts', his ability to 'muster resources' and his 'past and present position' when balanced against other factors negating his risk of flight".⁵⁴

3. *The Prosecutor's submissions*

38. The Prosecutor argues that [REDACTED] Letter and [REDACTED] Observations did not constitute a "State guarantee" since [REDACTED] did not "identify any measure to monitor Mr Bemba's stay in [*sic*] [REDACTED] soil or guarantee his return at trial".⁵⁵ He also asserts that [REDACTED] Observations did not specify any condition that [REDACTED] was willing and able to enforce.⁵⁶ The Prosecutor submits that the Appeals Chamber's jurisprudence indicates that guarantees are effective if States specify conditions and their capacity to enforce them.⁵⁷ Therefore, in his view, the Trial Chamber committed no error because [REDACTED] did not demonstrate its ability to enforce the conditions under rule 119 (1) of the Rules of Procedure and Evidence.⁵⁸ He also avers that the Trial Chamber balanced [REDACTED] assurances against other relevant factors to conclude that there was a risk that Mr Bemba would abscond if released.⁵⁹

39. With regard to the other errors alleged by Mr Bemba, the Prosecutor submits that Mr Bemba's arguments should be dismissed because they merely contest the

⁵⁰ Document in Support of the Appeal, para. 15.

⁵¹ Document in Support of the Appeal, para. 16.

⁵² Document in Support of the Appeal, para. 17.

⁵³ Document in Support of the Appeal, para. 18.

⁵⁴ Document in Support of the Appeal, para. 19.

⁵⁵ Prosecutor's Response to the Document in Support of the Appeal, para. 26.

⁵⁶ Prosecutor's Response to the Document in Support of the Appeal, para. 27.

⁵⁷ Prosecutor's Response to the Document in Support of the Appeal, para. 27.

⁵⁸ Prosecutor's Response to the Document in Support of the Appeal, para. 27.

⁵⁹ Prosecutor's Response to the Document in Support of the Appeal, para. 30.

Trial Chamber's balancing exercise but do not identify any error.⁶⁰ As to Mr Bemba's argument that the Trial Chamber failed to support its factual findings, the Prosecutor recalls the Appeals Chamber's previous jurisprudence⁶¹ and states that the Chamber did not have to take a decision *ab initio* or enter new findings on factors decided in prior rulings or entertain arguments addressed in previous rulings. He contends that the Chamber only had to assess whether the circumstances that applied to prior rulings still existed and weigh them against all relevant information.⁶² Thus, in his view, the Trial Chamber did not err in this respect.

4. Observations of the victims and responses thereto

40. The Legal Representative of Victims argues that the assurances provided by [REDACTED] were inadequate and lacked credibility.⁶³

41. Mr Bemba argues that the Victims' Observations should be dismissed as they do not address the specific errors of law and fact raised in the Document in Support of the Appeal.⁶⁴ Mr Bemba notes that the reference to the alleged trial of a politician living in [REDACTED] has no relevance to the grounds of appeal in the present case.⁶⁵

42. The Prosecutor urges the Appeals Chamber to consider the arguments in the Victims' Observations that the guarantees supplied by [REDACTED] were "insignificant" and should dismiss the appeal.⁶⁶

5. Determination by the Appeals Chamber

(a) Standard of review and applicable law

43. Under the first ground of appeal, Mr Bemba submits that the Trial Chamber's conclusion that there was a possibility that he would abscond if released onto the

⁶⁰ Prosecutor's Response to the Document in Support of the Appeal, para. 33.

⁶¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo 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'", 19 November 2010, ICC-01/05-01/08-1019 (OA 4) (hereinafter: "*Bemba OA 4 Judgment*").

⁶² Prosecutor's Response to the Document in Support of the Appeal, para. 33.

⁶³ Victims' Observations, paras 17-18.

⁶⁴ Defense Response to the Victims' Observations, para. 9.

⁶⁵ Defense Response to the Victims' Observations, para. 11.

⁶⁶ Prosecutor's Response to the Victims' Observations, paras 5, 7.

territory of [REDACTED] was based on “a misapprehension” of the guarantees provided by [REDACTED].⁶⁷

44. Regarding the standard of review for appeals granting or denying release, the Appeals Chamber has previously held that:

[It] will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision.⁶⁸

45. As to what constitutes a clear error of fact, the Appeals Chamber has held that a Chamber commits such an error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues.⁶⁹ In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the Chamber considering the request for interim release.⁷⁰ Therefore, in determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will “defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention”⁷¹ and will intervene “only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”.⁷²

46. As regards the applicable law, article 60 (2) and (3) of the Statute provides:

(2) A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not

⁶⁷ Document in Support of the Appeal, para. 4.

⁶⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), (hereinafter: “*Bemba OA2 Judgment*”), para. 62.

⁶⁹ *Bemba OA2 Judgment*, para. 61 (citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “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”, 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 25).

⁷⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “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”, 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 25.

⁷¹ *Mbarushimana OA Judgment*, para. 17.

⁷² *Mbarushimana OA Judgment*, para. 17.

satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

(3) The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

47. As to the imposition of conditions upon release, the Appeals Chamber has previously held that:

If the [Chamber] is satisfied that the conditions set forth in article 58 (1) of the Statute are not met, it shall release the person, with or without conditions. If, [...] release would lead to any of the risks described in article 58 (1) (b) of the Statute, the Chamber may, pursuant to rule 119 of the Rules of Procedure and Evidence, examine appropriate conditions with a view to mitigating or negating the risk. As the list of conditions in rule 119 (1) of the Rules of Procedure and Evidence indicates, the Chamber may also, in appropriate circumstances, impose conditions that do not, *per se*, mitigate the risks described in article 58 (1) (b) of the Statute. The result of this two-tiered examination is a single unseverable decision that grants conditional release on the basis of specific and enforceable conditions. Put differently, in such circumstances, release is only possible if specific conditions are imposed.⁷³

48. Furthermore, for conditional release to be granted, “a State willing to accept the person concerned as well as enforce related conditions is necessary”.⁷⁴

(b) Alleged misappreciation of [REDACTED] Letter and [REDACTED] Observations

49. In the Impugned Decision, the Trial Chamber concluded that [REDACTED] Letter and [REDACTED] Observations did not sufficiently guarantee Mr Bemba’s appearance at trial, and it is on this basis that Mr Bemba challenges the Trial Chamber’s assessment of the evidence before it. Thus, the question is whether the Trial Chamber misappreciated the extent to which [REDACTED] Letter and [REDACTED] Observations provided sufficient guarantees to enforce conditions of release and to ensure Mr Bemba’s appearance at trial.

50. The Appeals Chamber recalls that the Trial Chamber found that despite [REDACTED] Letter and [REDACTED] Observations, Mr Bemba’s continued

⁷³ Bemba OA 2 Judgment, para. 105.

⁷⁴ Bemba OA 2 Judgment, para. 106.

detention remained necessary under article 58 (1) (b) (i) of the Statute.⁷⁵ In particular, the Trial Chamber found that (1) [REDACTED] Letter and [REDACTED] Observations “convey little more than a general willingness to accept the accused into [REDACTED] territory” and that “[REDACTED] did not specify which of the conditions of rule 119 (1) it would be able to implement” and (2) that, “critically” [REDACTED] did not specifically guarantee Mr Bemba’s return to the seat of the Court if released onto [REDACTED] territory.⁷⁶ Taken together, the Trial Chamber concluded that [REDACTED] submissions did “little to allay the Chamber’s concerns regarding the possibility of the accused absconding”.⁷⁷

51. As to the finding that [REDACTED] Letter and [REDACTED] Observations did not specify the conditions [REDACTED] would be able to implement, the Appeals Chamber finds that the Trial Chamber misappreciated these documents because it did not read them in context with Mr Bemba’s Letter addressed to [REDACTED]. In Mr Bemba’s Letter, he requested [REDACTED] to “guarantee his appearance [at trial], specifically through a monitoring system in the event that he is granted release [...] into [REDACTED] territory”.⁷⁸ That letter also requested [REDACTED] to confirm its willingness to “ensure that [Mr Bemba] returns to the Netherlands to appear before the International Criminal Court upon an order to this effect by the Court, and transfer the accused into the custody of the Dutch authorities along with his passport and other travel documents”.⁷⁹

52. In [REDACTED] Letter, the competent authorities in [REDACTED] stated that they had “granted [Mr Bemba’s] request”.⁸⁰ [REDACTED] also informed Mr Bemba that it would notify the Trial Chamber of the practical arrangements that it would implement if Mr Bemba was released to [REDACTED].⁸¹ Moreover, in [REDACTED] Observations, [REDACTED] informed the Trial Chamber that it will “be able to put in place one or more of the conditions set forth in rule 119 (1) of the Rules in the event that the Court decides to order the interim release of Mr Bemba

⁷⁵ Impugned Decision, para. 61.

⁷⁶ Impugned Decision, para. 59.

⁷⁷ Impugned Decision, para. 59.

⁷⁸ Mr Bemba’s Letter, p. 4.

⁷⁹ Mr Bemba’s Letter, p. 5.

⁸⁰ [REDACTED][REDACTED] Letter, p. 2.

⁸¹ [REDACTED][REDACTED] Letter, p. 2.

into the territory of [REDACTED]”.⁸² Thus, while [REDACTED] Letter and [REDACTED] Observations did not in themselves identify specific conditions [REDACTED] would impose, read together with Mr Bemba’s Letter to [REDACTED], it is at least clear that [REDACTED] considered that it could impose the four specific conditions identified in Mr Bemba’s letter and further that it could impose any of the conditions listed in rule 119 (1) of the Rules of Procedure and Evidence if release were ordered. Thus, the Appeals Chamber finds that the Trial Chamber erred in not considering [REDACTED] Letter and [REDACTED] Observations in context with Mr Bemba’s Letter, thereby resulting in a misappreciation of the facts founding its decision.

53. Further, the Appeals Chamber considers that the Trial Chamber erred when it dismissed [REDACTED] Observations for lack of explicit assurances as to which conditions it would implement.⁸³ Under rule 119 (1) of the Rules of Procedure and Evidence, it is for the Chamber, and not for the receiving State, to impose conditions. These conditions may include, but are not limited to, those enumerated under rule 119 (1) of the Rules of Procedure and Evidence. Accordingly, in a situation where a Chamber has not (yet) identified specific conditions which it considers appropriate to impose, a State willing to accept a detained person can do little more than indicate its general willingness and ability to implement conditions. The Appeals Chamber recalls that in the Decision Requesting Observations on the Second Request, the Trial Chamber inquired whether [REDACTED] “would be in a position to impose one or more of the conditions listed in Rule 119 of the Rules”.⁸⁴ The Trial Chamber did not specify any conditions under rule 119 (1), nor did it request [REDACTED] to guarantee Mr Bemba’s appearance at trial, a condition that is not expressly stated in rule 119 (1). As Mr Bemba notes, [REDACTED] Observations directly responded to the Trial Chamber’s invitation for observations.⁸⁵

54. In this regard, the Appeals Chamber finds the Prosecutor’s reliance on the *Bemba OA 2 Judgment* to support his submission that “in order for the guarantees to be effective, States willing to host a detained person will specify the conditions and its

⁸² [REDACTED] Observations, p. 2.

⁸³ Impugned Decision, para. 59. *See*, Prosecutor’s Response to the Document in Support of the Appeal, para. 27.

⁸⁴ Decision Requesting Observations on the Second Request, para. 9 (d).

⁸⁵ Document in Support of the Appeal, para. 11.

(sic) capability to enforce them”⁸⁶ to be misguided. In the *Bemba OA 2 Judgment*, the Appeals Chamber reviewed the Pre-Trial Chamber’s decision to order Mr Bemba’s conditional release without determining the appropriate conditions or identifying a State to which Mr Bemba would be released.⁸⁷ It was within that context that the Appeals Chamber held that to grant conditional release, a Chamber must impose specific conditions and that a State willing and able to enforce those conditions must be identified.⁸⁸ Thus, the *Bemba OA 2 Judgment* does not stand for the proposition that a receiving State specifies the conditions it is willing and able to impose. On the contrary, it reinforces the point that it is the Chamber, and not the receiving State, that must specify the appropriate conditions of release.

55. In relation to conditional release, the Appeals Chamber recalls that the examination of conditions of release is discretionary and that conditional release is possible in two situations: (1) where a Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it appropriate to release the person subject to conditions; and (2) where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release.⁸⁹ Therefore, in a situation such as the present, where the Trial Chamber has found that detention is necessary to ensure the person’s appearance at trial, the Chamber has the discretion to consider whether the risk of flight can be mitigated by the imposition of conditions and to order conditional release. However, given that a person’s personal liberty is at stake if a Chamber is considering conditional release and a State has indicated its general willingness and ability to accept a detained person and enforce conditions, the Chamber must seek observations from that State as to its ability to enforce specific conditions identified by the Chamber. Depending on the circumstances, the Chamber may have to seek further information from the State if it finds that the State’s observations are insufficient to enable the Chamber to make an informed decision. That is not to say that the Chamber upon receiving observations from the State is obliged to grant conditional

⁸⁶ Prosecutor’s Response to the Document in Support of the Appeal, para. 27. At paragraph 28, the Prosecutor also states that the “Appeals Chamber has required, the practical modalities or concrete conditions, must be specified when requesting the provisional release (and not after) as they are necessary factors that the Chamber must consider in order to make an informed decision.”

⁸⁷ *Bemba OA 2 Judgment*, para. 90.

⁸⁸ *Bemba OA 2 Judgment*, paras 105-106.

⁸⁹ *Bemba OA 2 Judgment*, para.105.

release. It only means that the Chamber must seek information that would enable it to make an informed decision on the matter.

56. In the present case, [REDACTED] indicated that it was able to enforce one or more of the conditions enumerated under rule 119 (1). If the Trial Chamber considered this information to be insufficient for its purposes, it should have sought further information from [REDACTED] regarding the latter's capacity to enforce those conditions or any other conditions that the Trial Chamber considered appropriate to impose.

57. The Appeals Chamber now turns to the Trial Chamber's finding that "[c]ritically, [REDACTED] does not guarantee to ensure the accused's return to the seat of the Court".⁹⁰ In [REDACTED] Letter, [REDACTED] confirmed its willingness to impose the four conditions listed in Mr Bemba's Letter, including ensuring his return to the Netherlands to appear before the Court and his transfer into the custody of the Dutch authorities. In light of Mr Bemba's Letter, the Appeals Chamber cannot discern how the Trial Chamber concluded that [REDACTED] Letter and [REDACTED] Observations did not include a guarantee from [REDACTED] that it would ensure the return of Mr Bemba to the seat of the Court. Thus, by failing to consider [REDACTED] Letter and [REDACTED] Observations in context with Mr Bemba's Letter, the Trial Chamber misappreciated the facts founding its conclusion that [REDACTED] failure to provide a specific guarantee was "critical".⁹¹

58. In sum, the Appeals Chamber finds that Trial Chamber committed a clear error in not considering [REDACTED] Letter and [REDACTED] Observations in context with Mr Bemba's Letter, leading to a misappreciation of the facts founding its decision on interim release.

(c) Other alleged errors in relation to article 58 (1) (b) (i)

59. Mr Bemba alleges that the Trial Chamber committed other errors in its determination of the Second Request. He contends that the factors taken into account by the Trial Chamber to conclude that Mr Bemba is a "flight risk" do not support that

⁹⁰ Impugned Decision, para 59.

⁹¹ Impugned Decision, para. 59.

conclusion.⁹² In his view, the Trial Chamber placed too much weight on considerations of his “unnamed international contacts”, his ability to “muster resources” and his “past and present position” as opposed to other factors negating the risk that he might abscond.⁹³

60. With respect to his international contacts, Mr Bemba argues that the Trial Chamber failed to substantiate the existence of such contacts and how they would make him more likely to flee.⁹⁴ The Appeals Chamber has previously held that when a Chamber conducts a review of release or detention, it “does not have to enter findings on the circumstances already decided upon in the ruling on detention” or “entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”.⁹⁵ In this case, the existence of Mr Bemba’s network of international contacts had already been considered in previous decisions.⁹⁶ The Trial Chamber did not have to re-evaluate this factor in the absence of a suggestion that it had changed or no longer existed. Accordingly, the Trial Chamber did not commit a clear error in relying on Mr Bemba’s network of international contacts in the Impugned Decision without requiring further proof.

61. In relation to his ability to muster resources from family and friends, Mr Bemba submits that it was unreasonable for the Trial Chamber to infer from this that he could also muster funds to abscond. Furthermore, he submits that the finding that his “present and past position” will enable him to abscond is undermined by his “apparent desire to live as a public figure rather than a fugitive”.⁹⁷

⁹² Document in Support of the Appeal, para. 15.

⁹³ Document in Support of the Appeal, para. 19.

⁹⁴ Document in Support of the Appeal, para. 16.

⁹⁵ *Bemba OA 4 Judgment*, para. 53.

⁹⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on application for interim release”, 22 September 2009, ICC-01/05-01/08-73, para. 55; This decision was confirmed on appeal by the Appeals Chamber in “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’”, 16 December 2008, ICC-01/05-01/08-323 (OA), para. 55; “Decision on Application for Interim Release”, 16 December 2008, ICC-01/05-01/08-321, para. 36; “Decision on Application for Interim Release”, 14 April 2009, ICC-01/05-01/08-403, para. 45; “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal and the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa”, 14 August, 2009, ICC-01/05-01/08-475, (hereinafter: “Decision of 14 August 2009”), para. 58; ICC-01/05-01/08-T-18-Conf-ENG, p. 28, line 24, to p. 29, line 14.

⁹⁷ Document in Support of the Appeal, para. 18.

62. The Appeals Chamber has emphasised that it will defer to the inferences drawn and the weight given to evidence by a Chamber considering a request for interim release unless it is established that the Chamber's conclusion was clearly erroneous.⁹⁸ In the present case, Mr Bemba believes the Trial Chamber should have weighed his access to financial resources and his present and past position differently and should have drawn different inferences from the facts before it. However, he has not identified any clear errors in the Trial Chamber's reasoning that resulted in a misappreciation of the facts founding its findings or that rendered the Trial Chamber's conclusion unreasonable. Therefore, his arguments are dismissed.

B. Second Ground of Appeal

63. Regarding the second ground of appeal, Mr Bemba submits that in entering a finding under article 58 (1) (b) (ii) of the Statute that his continued detention was necessary because there "is a risk that if released, the accused may endanger the Court's proceedings by interfering with witnesses",⁹⁹ the Trial Chamber misappreciated the facts and failed to provide sufficient justification for its departure from previous findings on his detention.¹⁰⁰

1. Procedural history and relevant part of the Impugned Decision

64. On 20 August 2008, the Pre-Trial Chamber ruled on Mr Bemba's detention pursuant to article 60 (2) of the Statute and ordered his continued detention on the basis of article 58 (1) (b) (i) and (ii) of the Statute.¹⁰¹ Subsequent reviews of Mr Bemba's detention on 16 December 2008 and 14 April 2009 ordered Mr Bemba's continued detention on these same grounds.¹⁰²

65. On 14 August 2009, in another review of Mr Bemba's detention, Pre-Trial Chamber found that the conditions under article 58 (1) (b) (i), (ii) and (iii) were no longer satisfied. The Pre-Trial Chamber thus ordered Mr Bemba's conditional release

⁹⁸ See above, para.44.

⁹⁹ Impugned Decision, para. 62.

¹⁰⁰ Document in Support of the Appeal, para. 21.

¹⁰¹ "Decision on application for interim release", 20 August 2008, reclassified as public on 22 September 2009, ICC-01/05-01/08-73, paras 55-60 (hereinafter: "Decision of 20 August 2008"), paras 55-58 and 59. This decision was confirmed by the Appeals Chamber in the "Judgment on the appeal of Mr. Jean-Pierre Bema Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08-323 OA.

¹⁰² "Decision on Application for Interim Release", 16 December 2008, ICC-01/05-01/08-321, paras 36-48 "Decision on Application for Interim Release", 14 April 2009, ICC-01/05-01/08-403, para. 44-50 hereinafter: "Decision of 14 April 2009").

but deferred the consideration of appropriate conditions to a later date.¹⁰³ On an appeal lodged by the Prosecutor against the Decision of 14 August 2009, the Appeals Chamber reversed the Pre-Trial Chamber's findings under article 58 (1) (b) (i) of the Statute. The Appeals Chamber did not address the Pre-Trial Chamber's findings under article 58 (1) (b) (ii) and (iii) of the Statute, noting that since the conditions under article 58 (1) (b) (i) were met, it was not necessary to consider the other conditions under article 58 (1) (b).¹⁰⁴

66. On 8 December 2009¹⁰⁵ and 1 April 2010,¹⁰⁶ the Trial Chamber reviewed Mr Bemba's detention and ordered his continued detention on the basis of article 58 (1) (b) (i) of the Statute. Similarly, in the most recent review of Mr Bemba's detention on 17 December 2010 the Trial Chamber ordered his continued detention on the basis of article 58 (1) (b) (i) of the Statute.¹⁰⁷ These decisions did not consider whether the conditions under article 58 (1) (b) (ii) of the Statute applied to Mr Bemba.

67. In the Impugned Decision, the Trial Chamber found that there was the risk that, if released, Mr Bemba would endanger the Court's proceedings by interfering with witnesses in as stipulated under article 58 (1) (b) (ii).¹⁰⁸ The Trial Chamber noted that:

While this factor was not referred to in the December 2010 Decision, the Chamber [believed] that it may consider alternative bases for the accused's detention, particularly in light of the Appeals Chamber's ruling regarding the broad inquiry that the Chamber is required to undertake in the context of detention decisions.¹⁰⁹

68. The Trial Chamber found that the "scope of witness interference" was increased because of (1) the disclosure of the identities of all prosecution witnesses to Mr Bemba; (2) his ability to interfere with witnesses due to his position of influence in the region where many witnesses reside; (3) his network of supporters; and (4) his

¹⁰³ Decision of 14 August 2009 (this decision only addressed the previous findings under article 58 (1) (b) (i) noting that the conditions under article 58 (1) (b) are in the alternative).

¹⁰⁴ *Bemba OA 2 Judgment*, para. 89

¹⁰⁵ ICC-01/05-01/08-T-18-Conf-ENG, p. 25, lines 19-21.

¹⁰⁶ "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", ICC-01/05-01/08-743, para. 33.

¹⁰⁷ "Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010", ICC-01/05-01/08-1088 (hereinafter: "Decision of 17 December 2010").

¹⁰⁸ Impugned Decision, paras 62, 65.

¹⁰⁹ Impugned Decision, para. 62.

ability to muster substantial financial resources.¹¹⁰ The Trial Chamber further observed that one vulnerable witness was yet to be called and it was possible that the Chamber would call additional witnesses at a later stage.¹¹¹ The Trial Chamber also referred to concerns that witnesses testifying before the Chamber had expressed regarding their safety and that of their families.¹¹² The Trial Chamber considered that although the duration of the requested release was short, it did not alleviate its concerns of possible witness interference.¹¹³

2. *Mr Bemba's submissions*

69. Mr Bemba advances two main arguments on this ground. First, he submits that this is the first time that a finding has been entered under article 58 (1) (b) (ii) of the Statute.¹¹⁴ Consequently, in his view, the Trial Chamber erred in entering this finding as there were no “new circumstances, new facts, or new actions” to justify a departure from previous rulings on his detention.¹¹⁵ Second, he avers that the Trial Chamber’s findings under article 58 (1) (b) (ii) were made “*in abstracto* with no identification of any factual basis, identifiable threat or propensity of the accused to intimidate witnesses”.¹¹⁶

3. *Prosecutor's submissions*

70. The Prosecutor asserts that Mr Bemba’s submissions are flawed and grounded on the wrong interpretation of prior decisions, which did not include any finding on article 58 (1) (b) (ii). In his view, the fact that this is the first time that the Trial Chamber has entered a finding under article 58 (1) (b) (ii) does not mean that the Chamber had not previously found that Mr Bemba was not interfering with witnesses. He contends that the Trial Chamber decided to consider alternative bases of Mr Bemba’s detention as a result of arguments advanced by Mr Bemba before the Chamber.¹¹⁷ The Prosecutor also submits that Mr Bemba’s contention that the Trial Chamber made its findings in the abstract is not borne out by its reasoning.¹¹⁸ In his

¹¹⁰ Impugned Decision, para. 63.

¹¹¹ Impugned Decision, para. 64.

¹¹² Impugned Decision, para. 64.

¹¹³ Impugned Decision, para. 63.

¹¹⁴ Document in Support of the Appeal, para. 21.

¹¹⁵ Document in Support of the Appeal, para. 21.

¹¹⁶ Document in Support of the Appeal, para. 22.

¹¹⁷ Prosecutor’s Response to the Document in Support of the Appeal, para. 34.

¹¹⁸ Prosecutor’s Response to the Document in Support of the Appeal, paras 35-37.

view, the Trial Chamber properly considered all the relevant factors and found that there was a possibility of witness interference.¹¹⁹

4. *Determination by the Appeals Chamber*

71. Under article 60 (3) of the Statute, a Chamber may modify its previous ruling on detention, release or conditions of release if changed circumstances so require. The previous ruling under article 60 (3) refers to the “initial decision made under article 60 (2) of the Statute as well as any potential subsequent modifications made to that decision under article 60 (3) of the Statute”.¹²⁰ The Appeals Chamber has previously held that changed circumstances means a “change in some or all the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”.¹²¹ Thus, a Chamber reviewing a person’s detention under article 60 (3) must “revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute”.¹²²

72. In light of the procedural history summarised above, the Appeals Chamber notes that the last time a Chamber made a finding that Mr Bemba’s detention was necessary to ensure that he did not “obstruct or endanger the investigation or the court proceedings” under article 58 (1) (b) (ii) of the Statute was in the Decision of 14 April 2009. Since that decision, article 58 (1) (b) (ii) has not been found to be one of the grounds for Mr Bemba’s detention. Therefore, the current basis for Mr Bemba’s detention is the need “to ensure [his] appearance at trial” under article 58 (1) (b) (i) of the Statute. Indeed, in the Impugned Decision, the Trial Chamber referred to the Decision of 17 December 2010 as the operative decision for its review of Mr Bemba’s detention.¹²³ In that decision, the basis for Mr Bemba’s detention was found to be article 58 (1) (b) (i) of the Statute, that is, the possibility that he would abscond if released. Thus, in order for the Trial Chamber to have found that Mr Bemba’s continued detention was now necessary also under article 58 (1) (b) (ii) of the Statute,

¹¹⁹ Prosecutor’s Response to the Document in Support of the Appeal, para. 35.

¹²⁰ *Bemba OA 4 Judgment*, para. 46.

¹²¹ *Bemba OA2 Judgment*, para. 60.

¹²² *Bemba OA 4 Judgment*, para. 52.

¹²³ Impugned Decision, para. 50.

it would have had to demonstrate a new fact or a change in the circumstances founding the Decision of 17 December 2010.

73. However, although the Impugned Decision identified certain factors as the basis for the finding that there was the possibility that Mr Bemba would interfere with witnesses if released,¹²⁴ the Trial Chamber did not explain why those factors constituted a change in the circumstances since the Decision of 17 December 2010. Thus, the Trial Chamber did not revert to the previous ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling, as it was obliged to do under article 60 (3).

74. For these reasons, the Appeals Chamber finds that the Trial Chamber erred by entering an additional legal basis for Mr Bemba's detention under article 58 (1) (b) (ii) without showing changed circumstances, as required by article 60 (3).

C. Third Ground of Appeal

75. On this ground of appeal, Mr Bemba submits that the Trial Chamber erred in (1) summarily dismissing the Third Request without seeking observations from the DRC¹²⁵ and (2) concluding that there was no legal basis for the request.¹²⁶

1. Procedural history and relevant part of Impugned Decision

76. In his Third Request, Mr Bemba applied for permission to leave the United Nations Detention Unit for approximately 17 hours to travel to the DRC to register to vote.¹²⁷ Mr Bemba asserted that electoral registration required his physical presence in the DRC.¹²⁸

77. The Trial Chamber summarily dismissed the Third Request because in the Chamber's view, there was no legal or factual basis for the request.¹²⁹ The Chamber noted that Mr Bemba had cited no "provision in the Court's Statute, Rules or Regulations in support of the Application, and as far as the Court [was] aware, nothing in the Court's constitutional documents [supported] a grant of release for the

¹²⁴ Impugned Decision, paras 63-64.

¹²⁵ Document in Support of the Appeal, paras 34-35.

¹²⁶ Document in Support of the Appeal, para. 36.

¹²⁷ Third Request, para. 39.

¹²⁸ Third Request, paras 2-3, 10-13.

¹²⁹ Impugned Decision, para. 73.

purposes sought.”¹³⁰ It noted that on previous occasions, Mr Bemba had been granted permission, in exceptional circumstances on humanitarian grounds, to travel to Belgium to attend the funerals of his late father and stepmother.¹³¹ It concluded that although it was “open to permitting the accused to leave detention for humanitarian reasons in ‘exceptional circumstances’ [...] travelling to the DRC to complete one’s electoral registration is not the type of circumstance that warrants such extraordinary relief”.¹³² Further, recalling its finding that Mr Bemba “constitutes a flight risk”, the Trial Chamber considered that the release sought “to a State in which he enjoys considerable power and influence” would even heighten the risk of flight.¹³³ For this reason, the Trial Chamber did not consider it necessary to seek observations from the DRC.¹³⁴

2. Mr Bemba’s submissions

78. Mr Bemba asserts that the Trial Chamber erred in its conclusion that he did not establish the legal basis for the Third Request.¹³⁵ He submits that he was aware that the Court’s legal instruments did not expressly support release for the purposes sought.¹³⁶ Thus, he argues that his request was founded on the Chamber’s “inherent powers” and article 25 of the *International Covenant on Civil and Political Rights*, which falls within “internationally recognised human rights” recognised under article 21 (3) of the Statute.¹³⁷

79. Moreover, Mr Bemba submits that the Trial Chamber erred in law when it dismissed the Third Request *in limine*, without seeking observations from the DRC or the United Nations Stabilisation Mission in the Democratic Republic of Congo (hereinafter: “MONUSCO”).¹³⁸ In his view, had the Trial Chamber sought the views of the DRC before rendering its decision, as is required by rule 119 (3) of the Rules of Procedure and Evidence, sufficient conditions capable of mitigating his risk of flight

¹³⁰ Impugned Decision, para. 68.

¹³¹ “Decision on the Defence’s Urgent Request concerning Mr Jean-Pierre Bemba’s Attendance of his Father’s Funeral”, 3 July 2009, ICC-01/05-01/08-437-Conf, para. 9; “Decision on the Defence Request for Mr Jean-Pierre Bemba to attend his Stepmother’s Funeral”, 7 January 2011, ICC-01/05-01/08-1099-Conf, paras 13, 15.

¹³² Impugned Decision, para. 69.

¹³³ Impugned Decision, para. 71.

¹³⁴ Impugned Decision, para. 71.

¹³⁵ Document in Support of the Appeal, para. 36.

¹³⁶ Document in Support of the Appeal, para. 36.

¹³⁷ Document in Support of the Appeal, para. 36.

¹³⁸ Document in Support of the Appeal, para. 35.

could have been agreed upon.¹³⁹ He further contends that similar arrangements could have been made with MONUSCO and that since none of these options were explored, the Trial Chamber “remained unaware of potential ways of mitigating the alleged risk of flight”.¹⁴⁰

3. The Prosecutor’s submissions

80. The Prosecutor submits that Mr Bemba misrepresents the Impugned Decision on this issue. He argues that although the Trial Chamber dismissed the Third Request because Mr Bemba had cited no provision in the Court’s legal texts, the Trial Chamber considered whether the request constituted “exceptional circumstances” that would allow Mr Bemba’s release on humanitarian grounds.¹⁴¹ He asserts that it was incumbent on Mr Bemba to establish that exceptional circumstances existed in this case, which he failed to do.¹⁴² In his view, the Trial Chamber did not err in summarily dismissing the Third Request.¹⁴³

4. Observations of the victims and responses thereto

81. The Legal Representative of the victims asserts that the Third Request is moot since, according to Mr Bemba, the electoral register closed on 7 July 2011.¹⁴⁴ In response, Mr Bemba argues that the Legal Representative of the Victims has failed to respond to the errors of law and fact raised in respect of the Third Request.¹⁴⁵

5. Determination by the Appeals Chamber

82. The Appeals Chamber finds Mr Bemba’s submissions that the Trial Chamber erred in failing to seek the views of the DRC before dismissing the Third Request to be without merit. The Appeals Chamber notes that rule 119 (3) of the Rules of Procedure and Evidence mandates that a Chamber seeks the view of any relevant state “[b]efore imposing or amending any conditions restricting liberty”. Thus, rule 119 (3) does not apply to requests for interim release generally, but to a situation where a

¹³⁹ Document in Support of the Appeal, para. 35.

¹⁴⁰ Document in Support of the Appeal, para. 35.

¹⁴¹ Prosecutor’s Response to the Document in Support of the Appeal, para. 40.

¹⁴² Prosecutor’s Response to the Document in Support of the Appeal, para. 41.

¹⁴³ Prosecutor’s Response to the Document in Support of the Appeal, para. 40.

¹⁴⁴ Victims’ Observations, para. 14.

¹⁴⁵ “Defence response to the ‘Observations du Représentant légal Maître Zarambaud Assingambi sur le «Document of Défense Appeal against Trial Chambre III’s Decision on Applications of Provisional Release Dated 27 June 2011» Présenté par la Défense du Sieur Jean-Pierre Bemba Gombo”, 26 July 2011, ICC-01/05-01/08-1612-Conf, para. 15.

Chamber is considering the *conditional* release of detained person or the amendment of conditions already imposed. In the present case, the Trial Chamber had found that Mr Bemba's continued detention was necessary under article 58 (1) (b) (i) of the Statute. As stated above, in such a situation the Chamber has the discretion to consider the possibility of conditional release or not to do so.¹⁴⁶ In the Impugned Decision, the Trial Chamber declined to consider conditional release after considering Mr Bemba's wish to participate in the elections in the DRC and balancing this desire against the fact that he is currently standing trial for serious crimes¹⁴⁷ and its finding that Mr Bemba "constitutes a flight risk". The Trial Chamber considered that the release sought "to a State in which he enjoys considerable power and influence" would even heighten the risk of flight.¹⁴⁸ In the view of the Appeals Chamber, no error is apparent in the Trial Chamber's approach. Since conditions of release were not being considered, the Chamber was not obliged to seek views under rule 119 (3) of the Rules of Procedure and Evidence.

83. As to Mr Bemba's assertion that the Trial Chamber erred in its conclusion that Mr Bemba did not provide a legal basis for the Third Request, he submits that he was aware that the Court's legal instruments did not expressly support release for the purposes sought.¹⁴⁹ He submits that his request was based on the Trial Chamber's "inherent powers" and article 25 of the *International Covenant on Civil and Political Rights*, which falls within "internationally recognised human rights" recognised under article 21 (3) of the Statute.¹⁵⁰

84. The Appeals Chamber finds that Mr Bemba's argument that the Trial Chamber dismissed the Third Request simply because he did not cite a provision in the Court's legal texts is not supported by the Chamber's reasoning in relation to the Third Request. In the Impugned Decision, the Trial Chamber stated that it may invoke its inherent powers under article 64 (6) (f) of the Statute to grant an accused person temporary release in "exceptional humanitarian circumstances".¹⁵¹ Therefore, as pointed out by the Prosecutor, although the Trial Chamber stated that there was no

¹⁴⁶ See above, para. 46.

¹⁴⁷ Impugned Decision, paras 70, 72.

¹⁴⁸ Impugned Decision, para. 71.

¹⁴⁹ Document in Support of the Appeal, para. 36.

¹⁵⁰ Document in Support of the Appeal, para. 36.

¹⁵¹ See, Impugned Decision, para. 51

express provision in the Court's legal instruments to support the Third Request, it nevertheless considered, on the basis of previous jurisprudence, whether the request was an exceptional humanitarian circumstance justifying the relief sought. It concluded that it was not. The Trial Chamber thus distinguished Mr Bemba's request the Third Request from the previous occasions when Mr Bemba was granted permission to leave the Detention Centre for humanitarian reasons. It then applied the regime of article 60 (3) of the Statute to the Third Request and rejected it.

85. The Appeals Chamber cannot see any error in this approach. The Appeals Chamber finds that Trial Chamber was right to apply article 60 (3) to the Third Request. Article 60 of the Statute describes the circumstances under which a person subject to a warrant of arrest may be detained or released. Under article 60 (3), a Chamber considering a request for review of detention must consider, in light of article 58 (1) (b) of the Statute, whether there are changed circumstances justifying a person's release. In the present appeal, the Appeals Chamber does not consider it necessary to determine whether a Trial Chamber actually has the power to order release for "humanitarian reasons" outside the framework of article 60 (3) of the Statute. As stated above, having found that there is a risk that Mr Bemba may abscond and having balanced that against Mr Bemba's desire to participate in the elections, the Chamber did not err when declining to consider his conditional release to the DRC.

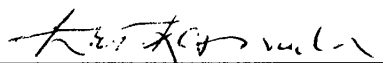
86. Therefore, the Appeals Chamber finds that Mr Bemba's submissions under the third ground of appeal must be dismissed.

V. APPROPRIATE RELIEF

87. On an appeal pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In view of the findings of the Appeals Chamber under the first and second grounds of appeal, it is appropriate to reverse the Impugned Decision to the extent that the Trial Chamber dismissed the Second Request and to remand the matter to the Trial Chamber for new consideration. Until, and subject to, the Trial Chamber's decision on the matter, Mr Jean-Pierre Bemba Gombo shall remain in detention. The remainder of the appeal is dismissed.

Judge Anita Ušacka appends a partly dissenting opinion to this judgment.

Done in both English and French, the English version being authoritative.



Judge Erkki Kourula
Presiding Judge

Dated this 19th day of August 2011

At The Hague, The Netherlands

Partly Dissenting opinion of Judge Anita Ušacka

1. I agree with the Majority to confirm the part of the impugned decision¹ of Trial Chamber III (hereinafter “Trial Chamber”) that rejects the “Extremely urgent application for an exeat from the detention centre to allow Mr Jean-Pierre Bemba Gombo to perform his civic duties in the Democratic Republic of the Congo”.² I also agree with the reasons provided by the Majority relevant to the second ground of appeal. I disagree with the Majority’s analysis of the first ground of appeal. I cannot see merit in the first ground of appeal, and would therefore dismiss this ground and confirm the Trial Chamber’s decision rejecting the urgent “Additional Request for interim release of Mr Jean-Pierre Bemba Gombo subsequent to the letter of guarantee by a State provided by [REDACTED]”³ (hereinafter: “Request for Interim Release to [REDACTED]”).

A. Procedural history

2. Mr. Jean-Pierre Bemba Gombo (hereinafter “Mr Bemba”), repeatedly requested the Court to grant him interim release pending trial. His counsel addressed several states, requesting their agreement, in principle, to accept Mr Bemba onto their territory for a period strictly limited to the duration of his interim release. One of those requests was in a letter to [REDACTED] of 20 September 2010⁴ (hereinafter: “Mr Bemba’s Letter”). The following request was made therein:

Accordingly, Mr Jean Pierre Bemba Gombo has instructed me to request respectfully Your agreement in principle to accept him onto Your territory for a period strictly limited to the duration of his interim release.⁵

3. Mr Bemba’s Letter further enquired whether [REDACTED] could offer

a system to guarantee [Mr Bemba’s] appearance, specifically through a monitoring system in the event that he is granted interim release or, at the very least, is released at weekends into your territory or into the national territory of any other host State.⁶

¹ “Decision on Applications for Provisional Release”, 27 June 2011, ICC-01/05-01/08-1565-Conf.

² 10 June 2011, ICC-01/05-01/08-1501-Conf-tENG.

³ 6 June 2011, ICC-01/05-01/08-1479-Conf-tENG.

⁴ Annex B to Request for Interim Release to [REDACTED], 6 June 2011, ICC-01/05-01/08-1479-Conf-AnxB-tENG, pp. 3-5.

⁵ Mr Bemba’s Letter, p. 4.

⁶ Mr Bemba’s Letter, p. 4.



Mr Bemba's Letter then proposed that [REDACTED] indicate (with a copy to the Registry of the Court) its willingness (1) to provide for the security and constant monitoring of Mr Bemba, (2) to inform the Court about Mr Bemba fulfilling any imposed conditions restricting liberty, (3) to report to the Court any violation or attempted violation of the conditions restricting liberty and (4) finally to ensure that Mr Bemba returns to The Netherlands to appear before the Court and, in this context, to transfer Mr Bemba into the custody of Dutch authorities.⁷

4. [REDACTED] responded to Mr Bemba's counsel by letter dated 26 May 2011⁸ (hereinafter: "[REDACTED] Letter"), as follows:

I would like to inform you that the competent authorities of [REDACTED] have granted your request. The ICC has also been informed. In addition, the practical arrangements that would apply in the event of Mr Bemba's provisional release will be made known to you and to the Court as soon as practicable.⁹

5. On 6 June 2011, Mr Bemba filed before the Trial Chamber his urgent Request for Interim Release to [REDACTED]. It is important to note that at that time, the Trial Chamber had already received Mr Bemba's request dated 3 May 2011 for interim release to the Kingdom of Belgium (hereinafter "Belgium"). The Trial Chamber requested observations from Belgium on 12 May 2011 and granted Belgium's request for an extension of time until 13 June 2011.¹⁰ It is in this context that Mr Bemba's Request for Interim Release to [REDACTED] was received by the Chamber.

6. On 8 June 2011, the Trial Chamber decided to invite submissions from [REDACTED] by 20 June 2011, "[p]ursuant to Rule 119 of the Rules, before deciding upon a request for [Mr Bemba's] interim release".¹¹ The Trial Chamber asked two specific questions, which had, in substance, also been posed to Belgium. The first question was whether there "would be any legal impediment for Mr Bemba to enter and leave the territory of [REDACTED], should he be conditionally

⁷ Mr Bemba's Letter, p. 5.

⁸ Annex A to Request for Interim Release to [REDACTED], 6 June 2011, ICC-01/05-01/08-1479-Conf-AnxA-tENG, p. 2.

⁹ [REDACTED] Letter, p. 2.

¹⁰ "Decision on the 'Report of the Registrar on the execution of decision ICC-01/05-01/08-1398-Conf'", 19 May 2011, ICC-01/05-01/08-1424-Conf, para 5.

¹¹ "Decision requesting observations on the 'Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]'", 8 June 2011, ICC-01/05-01/08-1492-Conf.

released”.¹² Secondly, [REDACTED] was asked whether it “would be in a position to impose one or more conditions listed in Rule 119 of the Rules”.¹³

7. The observations of Belgium of 9 June 2011 were submitted on 16 pages and analyse in detail whether and in which respect Belgium could implement measures restricting liberty imposed under rule 119 (1) of the Rules of Procedure and Evidence.¹⁴ The observations of [REDACTED] of 20 June 2011¹⁵ (hereinafter “[REDACTED] Observations”) consisted of one page, stating:

The Government of [REDACTED] attests that:

- a. There is no legal impediment to Mr Bemba’s entry into or departure from [REDACTED] territory in the event of interim release during judicial recess and period of at least three (3) consecutive days when the Court will not be in session, including long weekends.
- b. It is able to implement on or more of the conditions set forth in article 119 of the Rules in the event the Court decides to order the interim release of Mr Bemba into the territory of [REDACTED].
- c. Accordingly, it does not object to the interim release of Mr Jean-Pierre Bemba Gombo.¹⁶

8. On 27 June 2011, the Trial Chamber issued the “Decision on Applications for Provisional Release”¹⁷ (hereinafter: “Impugned Decision”), rejecting all requests for interim release by Mr Bemba, including the Request for Interim Release to [REDACTED]. The Trial Chamber stated the following with respect to [REDACTED] position:

[REDACTED] brief letter and its equally succinct submissions to this Chamber convey little more than a general willingness to accept the accused into [REDACTED] territory and do not specify which of Rule 119(1)’s conditions [REDACTED] would be able to implement. Critically, [REDACTED] does not guarantee to ensure the accused’s return to the seat of the Court if he is released into [REDACTED] territory. In this regard, [REDACTED] letters do little to allay the Chamber’s concerns regarding the possibility of the accused

¹² ICC-01/05-01/08-1492-Conf, para. 9.

¹³ ICC-01/05-01/08-1492-Conf, para. 9.

¹⁴ “Transmission of the Observations of the Kingdom of Belgium on the Application for Interim Release”, 10 June 2011, ICC-01/05-01/08-1505-Conf-tENG.

¹⁵ Annex 2 to “Report of the Registry on the Implementation of Decision ICC-01/05-01/08-1492-Conf”, 20 June 2011, ICC-01/05-01/08-1556-Conf-Anx2-tENG.

¹⁶ [REDACTED] Observations, p. 2.

¹⁷ ICC-01/05-01/08-1565-Conf.

absconding. This is particularly true given that the accused appears to have no personal or family connections to [REDACTED].¹⁸

9. The Trial Chamber considered, after having evaluated the effects of [REDACTED] Observations to the Chamber and [REDACTED] Letter to Mr. Bemba, many other factors in taking the decision that Mr Bemba remained a “flight risk” if he were to be released on [REDACTED] territory. Paragraph 61 of the Impugned Decision clarifies that the Chamber weighed the concern that Mr Bemba could abscond while in [REDACTED] in light of his being in the possession of the means to abscond and the confirmation of charges and start of trial¹⁹ against other factors militating against the risk of flight ([REDACTED] willingness to accept Mr Bemba, Mr Bemba’s compliant behaviour, his desire to live as a public figure, the fact that release was sought for short periods of time).²⁰ The Trial Chamber found that “[b]alancing these considerations, the Chamber concludes that there is a meaningful risk that, if provisionally released into the territory of [REDACTED], Mr Bemba would not return to complete his trial”.²¹

B. First Ground of Appeal

10. Mr Bemba alleges one main error in his first ground of appeal, namely that the Trial Chamber erroneously evaluated the guarantees provided by [REDACTED] and therefore erred in concluding that there remains a risk that he may abscond.²² In so doing, he specifically raises the following three points. First, he states that the Trial Chamber did not give appropriate weight to [REDACTED] assurances, second, it did not await the information by [REDACTED] on the practical arrangements and third, it did not ask for more information, especially a guarantee.²³

1. Standard of review

11. The alleged error is an error of fact. The standard of review relevant to an error of fact has been confirmed recently by the Appeals Chamber in the Judgment of

¹⁸ Impugned Decision, para. 59.

¹⁹ Impugned Decision, paras 55-56.

²⁰ Impugned Decision, para. 61.

²¹ Impugned Decision, para. 61.

²² “Document in support of Defence Appeal against Trial Chamber III’s decision on Applications for Provisional Release, dated 27 July 2011” 1 July 2011, ICC-01/05-01/08-1586-Conf (hereinafter: “Document in Support of the Appeal”), paras 2-19.

²³ Document in Support of the Appeal, paras 12-14.

14 July 2011 in the case *Prosecutor v. Callixte Mbarushimana*.²⁴ The Appeals Chamber stated:

[It] will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.²⁵

2. The factual evaluation relevant to [REDACTED] Observations, [REDACTED] Letter and Mr Bemba's Letter in the Impugned Decision

12. Reading [REDACTED] Observations and [REDACTED] Letter, the factual findings of the Trial Chamber appear to be rather straightforward:

[REDACTED] brief letter and its equally succinct submissions to this Chamber convey little more than a general willingness to accept the accused into [REDACTED] territory [...].²⁶

13. It also appears to be a reasonable conclusion of the Trial Chamber that [REDACTED] Letter and [REDACTED] Observations "do not specify which of Rule 119(1)'s conditions [REDACTED] would be able to implement".²⁷ The Trial Chamber specifically asked [REDACTED] whether it is in a position to implement one or more measures specified under rule 119 (1) of the Rules of Procedure and Evidence.²⁸ [REDACTED] Observations to the Trial Chamber do not refer in any detail to the measures mentioned in Rule 119 (1) of the Rules of Procedure and Evidence. [REDACTED] Observations also do not take into account Mr Bemba's Letter, in which he proposed a number of conditions restricting liberty that could be imposed under rule 119 of the Rules of Procedure and Evidence, and wherein he asked whether [REDACTED] would be in a position to implement such measures. [REDACTED] Letter to Mr Bemba did not address in any more detail conditions restricting liberty either. Instead, [REDACTED] Letter responded to Mr Bemba's Letter of several pages by stating that [REDACTED] "granted" the request. This

²⁴ "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the "Defence Request for Interim Release"', 14 July 2011, ICC-01/04-01/10-283 (hereinafter: "Mbarushimana OA Judgment").

²⁵ Mbarushimana OA Judgment, para. 1 (key finding), para. 17.

²⁶ Impugned Decision, para. 59.

²⁷ Impugned Decision, para. 59.

²⁸ "Decision requesting observations on the 'Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de [REDACTED]'", 8 June 2011, ICC-01/05-01/08-1492-Conf, para. 9.

response can reasonably be read as only referring to Mr Bemba's overall request, i.e. whether [REDACTED] would, in principle, be willing to accept him on his territory by (generally) agreeing to implement measures restricting liberty.

14. The Trial Chamber continues with the following factual evaluation in the Impugned Decision: "Critically, [REDACTED] does not guarantee to ensure the accused's return to the seat of the Court if he is released into [REDACTED] territory".²⁹ Mr Bemba himself referred to [REDACTED] Letter to his counsel as a guarantee.³⁰ This characterisation of [REDACTED] Letter even became part of the title of his application to the Trial Chamber ("letter of guarantee by a State").³¹ Therefore, it is reasonable that the Trial Chamber addressed the matter of a guarantee in the Impugned Decision. Considering [REDACTED] Observations, it is evident that they do not provide a guarantee. However, Mr Bemba's Letter asked for information as to whether [REDACTED] could offer a "system to guarantee his appearance"³² and whether [REDACTED] would indicate its willingness to ensure the return of Mr Bemba to the Court.³³ Considering the questions posed by Mr Bemba's Letter, [REDACTED] response thereto (in [REDACTED] Letter) would have required the choice of somewhat different wording than the simple statement that the request is "granted". Therefore, it is reasonable to conclude that [REDACTED] Letter does not provide such a guarantee. I cannot discern a factual error in this finding of the Trial Chamber.

15. Mr Bemba argues that the Trial Chamber omitted to await information about practical arrangements by [REDACTED]. [REDACTED] Letter to Mr Bemba stated that "[t]he ICC has also been informed. In addition, the practical arrangements that would apply in the event of Mr Bemba's provisional release will be made known to you and to the Court as soon as practicable".³⁴ However, by the date the Impugned Decision was issued, the Trial Chamber had not received any such information. More importantly, [REDACTED] Observations did not make reference to the prior correspondence between Mr Bemba and [REDACTED], or announce that

²⁹ Impugned Decision, para. 59.

³⁰ Request for Interim Release to [REDACTED], paras 10-11; *see also* Document in Support of the Appeal, wherein reference is made to "[REDACTED] Guarantees".

³¹ Request for Interim Release to [REDACTED], title page.

³² Mr Bemba's Letter, page 4.

³³ Mr Bemba's Letter, page 5.

³⁴ [REDACTED] Letter, page 2.

[REDACTED] would submit shortly more documents and information. Therefore, it is fully reasonable for the Trial Chamber to proceed without awaiting such information.

16. The last error alleged by the Mr Bemba relevant to this matter is that the Trial Chamber omitted to ask for more information, including a guarantee. The question is therefore, whether the Trial Chamber was under an obligation to request more information, or even specifically a guarantee, from a state which shows its general willingness to accept a person from the Court's detention centre on its territory. The Trial Chamber evaluated all the facts before it and concluded under article 58 (1) (b) (i) of the Statute that there remained a risk that Mr Bemba would abscond, should he be released to [REDACTED]. That there was no guarantee provided by [REDACTED] was only one of many considerations in coming to this decision. Considering that there is the need to decide a request for interim release "without delay"³⁵ and that Mr Bemba may ask at any time for interim release under article 60 (3) of the Statute when changed circumstances so require, meaning that his rights are not affected, I cannot find an error in the Trial Chamber's decision to proceed without requesting more information from [REDACTED].

17. Applying the relevant standard of review for alleged factual errors, I can discern how the Trial Chamber came to its conclusion. I cannot therefore determine that there was an error of fact.

3. Other errors alleged under the first ground of appeal

18. Mr Bemba also alleged additional errors with respect to the evaluation of the other facts taken into account by the Trial Chamber when making its decision. I agree in this respect with the discussion and outcome of the evaluation of these errors by the Majority (paragraphs 59 to 62 of the Judgment of the Majority).

C. Appropriate relief

19. As to the appropriate relief, I am of the view that the Impugned Decision should be confirmed. I agree with the Majority that the Trial Chamber erred when finding that Mr Bemba's detention was also necessary under article 58 (1) (b) (ii) of the Statute (second ground of appeal) for the reasons expressed in paragraphs 71 to 74 of

³⁵ See rule 118 (1) of the Rules of Procedure and Evidence.

the Judgment of the Majority. However, in my view, the Trial Chamber did not err when finding that Mr Bemba's detention was necessary under article 58 (1) (b) (i) of the Statute. Therefore, the error relevant to article 58 (1) (b) (ii) of the Statute was inconsequential to the Trial Chamber's decision to reject the Request for Interim Release to [REDACTED].

Done in both English and French, the English version being authoritative.



Judge Anita Ušacka

Dated this 19th of August 2011

At The Hague, The Netherlands