Cour Pénale Internationale

International Criminal Court

Original: **English**

No.**: ICC-01/05-01/08 OA9**
Date: **20 December 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

Prosecution's Response to the "Document in support of Defence Appeal against Trial Chamber III's decision of 26 September 2011 entitled '*Decision on the accused's application for provisional release in light of the Appeals Chamber's judgement of 19 August 2011*'"

Source: **Office of the Prosecutor**

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

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Introduction

1. On 26 September 2011 Trial Chamber III issued its "Decision on the accused's application for provisional release in light of the Appeals Chamber's judgement of 19 August 2011" ("Decision"), whereby it rejected the application for release filed by the Appellant.[1]

2. On 3 October 2011 the Appellant appealed the Decision on three grounds. First, the Appellant argues that the Trial Chamber failed to identify the conditions that [REDACTED] should implement - if the Appellant was to be released in its territory, to seek further submissions from [REDACTED], and to request observations from [REDACTED] on its willingness and ability to implement other measures than those described in rule 119. Second, the Appellant argues that the Chamber committed an error of fact when it found that the conditions imposed by [REDACTED] did not eliminate the Appellant's risk of flight. And third, the Appellant submits that the Chamber also erred in fact when it found that the conditions proposed by [REDACTED] are not sufficient to eliminate the risk of intimidation of witnesses. [2]

3. The Appellant's arguments are grounded on a misrepresentation of the Chamber's Decision and relevant Appeals Chamber's jurisprudence. The Trial Chamber adequately considered the guarantees provided by [REDACTED] in order to determine whether there was a change in the circumstances justifying the Appellant's detention. It concluded that there was none; although the guarantees might make it harder for the Appellant to abscond they did not sufficiently reduce the risk or adequately prevent Appellant's interference with witnesses. Hence the Appellant's detention was still necessary under article 58(1)(b)(i) and (ii). The Chamber also found that it did not need to request further submissions from [REDACTED], as the proposed guarantees were clear, specific and no additional information was needed for the Chamber to issue an informed decision on the Appellant's release. This ruling is in full compliance of the relevant Appeals Chamber's jurisprudence, in particular the *Bemba OA7* and *OA8* Appeals Judgments.

4. In sum, the Appellant has failed to identify any error in the Chamber's reasoning and findings that would merit reversal by the Appeals Chamber.

[1] ICC-01/05-01/08-1789-Red.
[2] ICC-01/05-01/08-1812-ConfOA9.

Procedural Background

5. On 3 July 2008, Mr Jean-Pierre Bemba Gombo ("the Appellant") was surrendered to the seat of the Court. Since then, he has been detained. The Appellant's trial commenced on 22 November 2010.

6. On 17 December 2010, the Chamber issued its "Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment on 19 November 2010" ("December 2010 Decision"), in which the Chamber ruled that the Appellant was to remain in detention.[3]

7. On 6 June 2011, the Appellant filed an application for his provisional release to [REDACTED] during Court recesses, long weekends, or other periods when the Chamber does not sit for at least three consecutive days (the "Application"). [4]

8. On 8 June 2011, the Chamber invited [REDACTED] to submit observations on the Application ("8 June Order").[5] [REDACTED] provided in response a letter dated 20 June 2011 ("20 June Letter").[6]

9. On 27 June 2011 the Chamber issued its "Decision on Applications for Provisional Release", rejecting the Application ("June 2011 Decision).[7] The Chamber found that the Appellant's continued detention was warranted under article 58(1)(b)(i), as there was meaningful risk that if provisionally released into the territory of [REDACTED] the Appellant would not return to complete his trial. Detention was also required under article 58(1)(b)(ii), since if released, the Appellant might endanger the Court's proceedings by interfering with witnesses.

10. The Appellant appealed the June 2011 Decision.[8] The Appeals Chamber, by Majority, reversed the June 2011 Decision in part, identifying three errors in the Chamber's analysis of the Application, and remanded the matter to the Trial Chamber for new consideration.[9]

[3] ICC-01/05-01/08-1088.
[4] ICC-01/05-01/08-1479-Conf.
[5] ICC-01/05-01/08-1492-Conf.
[6] ICC-01/05-01/08-1556-Conf-Anx2-tENG.
[7] ICC-01/05-01/08-1565-Red.
[8] ICC-01/05-01/08-1586-RedOA7.

11. On 29 July 2011, while the appeal of the June 2011 Decision was pending, [REDACTED] provided additional information, in the form of two letters, one dated 9 June 2011 ("9 June Letter") and one dated 29 July 2011 ("29 July Letter"),[10] on the measures it could take were the Appellant released into its territory. Both letters were notified on 3 August 2011.[11] The letters were not available and could not be considered by the Trial Chamber at the time it issued the June 2011 Decision or by the Appeals Chamber for the purposes of the OA7 appeal.

12. The 9 June Letter makes three representations: (i) "[REDACTED] is willing to receive Mr Jean Pierre Bemba Gombo on its territory in the event of his release"; (ii) "[REDACTED] agrees to set up a system to protect Mr Jean Pierre Bemba's safety fully and to monitor him around the clock during his temporary stay on its national territory"; and (iii) "[REDACTED] guarantees Mr Jean Pierre Bemba Gombo's return to the Netherlands to appear at his trial immediately [whenever] the International Criminal Court so requests".[12]

13. The 29 July Letter explains in more detail the measures that [REDACTED] would be willing and able to implement if the Appellant were to be released into its territory. [REDACTED] indicated that a police officer assigned to the police station nearest to the Appellant's residence would be responsible, *inter alia*, to ensure that the Appellant reports to the police station every week; to make unannounced visits to the Appellant's residence; and to ensure the Appellant's return to The Hague or to arrest him in the event of a violation or attempt to violate the conditions of his interim release. [13]

14. On 26 September the Trial Chamber issued its decision following the OA7 Appeal's Judgment and rejected the Appellant's Application ("the Decision").[14] The Trial Chamber found that it did not need to seek further observations from [REDACTED], as the 9 June and 29 July Letters were specific and provided sufficient information allowing the Chamber to make an informed decision.[15] The Chamber then concluded that there was no changed circumstances with respect to the Chamber's prior ruling on detention – namely

[9] ICC-01/05-01/08-1626-RedOA7.
[10] ICC-01/05-01/08-1621-Conf-Anx1-tENG.
[11] ICC-01/05-01/08-1621-Conf.
[12] ICC-01/05-01/08-1621-Conf-Anx1-tENG, p.4.
[13] ICC-01/05-01/08-1621-Conf-Anx1-tENG, pp.2-3.
[14] ICC-01/05-01/08-1789-Red.
[15] Decision, paras.15-18.

the 17 December 2010 Decision[16] - and found that the Appellant's detention continued to be necessary to ensure his appearance at trial under article 58(1)(b)(i)[17] and to avoid the Appellant's interference with witnesses under article 58(1)(b)(ii).[18] The Chamber concluded that the proposed [REDACTED] guarantees did not eliminate or sufficiently mitigate the risk of abscondment[19] and interference with witnesses.[20]

15. On 27 September the Appellant filed the notice of appeal,[21] and on 3 October, he filed the document in support of the appeal ("Appeal Brief").[22] The Prosecution hereby responds to the Appeal Brief.

Confidentiality Level

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

Standard of Review

17. In its recent Judgment OA7, rendered in this same case, the Appeals Chamber reiterated the standard of review for appeals against decisions on release and held that the Chamber "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."[24]

[16] ICC-01/05-01/08-1088.
[17] Decision, paras.19-26.
[18] Decision, paras. 27-33.
[19] Decision, paras.34-38.
[20] Decision, paras.39-41
[21] ICC-01/05-01/08-1793-Red.
[22] ICC-01/05-01/08-1812-ConfOA9.
[23] ICC-01/05-01/08-1781-ConfOA7- [REDACTED].
[24]; ICC-01/05-01/08-1626-RedOA7, para.44 quoting ICC-01/05-01/08-631-RedOA2,para.62.

18. The Appeals Chamber also set the standard of review for factual errors raised in such appeals and 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."[25] The Appeals Chamber underlined that "the appraisal of evidence lies, in the first place, with the Chamber considering the request for interim release"[26] and "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'[27] 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.'"[28]

Submissions

19. The Appellant puts forward three grounds of appeal; one mixed legal and procedural error (First Ground) and two factual errors (Second and Third Ground). [29] However, he fails to show any error of law, procedural error or misappreciation of the facts underpinning the Chamber's reasoning and findings that would merit the intervention of the Appeals Chamber. The Appellant's arguments are mainly grounded on a misrepresentation of the relevant jurisprudence, in particular the OA7 Appeals Judgement, and only express disagreement with the Chamber's assessment of all relevant factors which have a bearing on the Appellant's flight risk and the possibility that he will interfere with witnesses if released.

20. Accordingly, the Prosecution requests the Chamber to dismiss the Appeal Brief and deny the Appellant's release to [REDACTED] during judicial recesses.

[25] ICC-01/05-01/08-1626-RedOA7, para.45 quoting ICC-01/05-01/08-631-RedOA2,para.61.
[26] ICC-01/05-01/08-1626-RedOA7, para.45 quoting ICC-01/04-01/06-572OA4,para.25.
[27] ICC-01/05-01/08-1626-RedOA7, para.45 quoting ICC-01/04-01/10-283OA,para.72.
[28] ICC-01/05-01/08-1626-RedOA7, para.45 quoting ICC-01/04-01/10-283OA,para.72.
[29] ICC-01/05-01/08-1812-ConfOA9.

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

21. The Appellant argues that the Chamber has committed five procedural and legal sub-errors, namely: (a) the Chamber did not identify the appropriate conditions of release which [REDACTED] should implement in the event of provisional release; (b) it also limited [REDACTED] observations to rule 119; (c) it did not invite [REDACTED] to provide information on its willingness and ability to implement additional conditions outside rule 119; (d) it did not invite [REDACTED] to provide information on its willingness and ability to implement additional conditions beyond those proposed by [REDACTED]; and finally (e) the Chamber erred when it considered the [REDACTED] letters as containing final and definitive details as to all practical steps that [REDACTED] is able to take, since details of security arrangements were not contained in correspondence notified to the parties.[30]

22. The Prosecution notes that the aforementioned sub-grounds could be summarized on the following three purported errors: (a) the Chamber's failure to specify conditions of release to [REDACTED] or seek [REDACTED] submissions on those conditions; (b) the Chamber's failure to seek [REDACTED] submissions on other conditions than those described in rule 119 and beyond those proposed by [REDACTED]; and (c) the Chamber's failure to realize that [REDACTED] did not detail security arrangements because those are supposed to be discussed *ex parte*.

(i) [REDACTED] *guarantees were specific and clear, and additional submissions were not necessary for the Chamber to issue an informed decision*

23. The Appellant argues that the Chamber has the discretion to assess whether conditions can minimize or eliminate the risks of flight and intimidation of witnesses, but that "once provisional release has been granted" the Chamber has the obligation to identify the necessary conditions and to seek information from the State as to its willingness and

[30] Appeal Brief, para.7.

capacity to enforce them.[31] Accordingly, the Chamber should have identified a concrete list of conditions and requested submissions from [REDACTED] on its willingness and ability to implement them.[32]

24. The Appellant's understanding of the relevant jurisprudence is erroneous on two fundamental aspects: first, with respect to the Chamber's examination to decide whether detention is necessary or release should be granted; and second, regarding the Chamber's obligation to identify conditions that pursuant to rule 119 could mitigate or eliminate any risk under article 58(1)(b).

25. First, in cases where the detention does not appear necessary under article 58(1), the Chamber must release the person. If that is not the case, i.e. release would create any of the risks described in article 58(1)(b) and conditions cannot be fashioned to mitigate the risks, the Chamber must order the continued detention of the person. Where, however, release would create any of the risks but conditions might exist to minimize or eliminate the risks under rule 119, the Chamber may consider whether conditions reasonably could be fashioned.[33] In that event, the Chamber may impose conditions listed in rule 119(1) or propose measures outside that non-exhaustive list.[34] As the Appeals Chamber has indicated "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."[35] Thus, the Appeals Chamber has already stated that there is no unconditional right to conditional release, there is only the right to release if conditions can be fashioned to mitigate the risks that would follow from release.

26. Second, the Appeals Chamber has stated that the Chamber considering release must only seek observations from a particular State as to its ability to enforce specific conditions identified by the Chamber in certain instances, namely when (a) a State has indicated its general willingness and ability to accept a detained person and enforce conditions; (b) the

[31] Appeal Brief, paras.8-9, citing ICC-01/05-01/08-1626-RedOA7, para.53.
[32] Appeal Brief, para.10, also citing ICC-01/05-01/08-1626-RedOA7, para.53.
[33] ICC-01/05-01/08-1626-RedOA7, paras.1,55.
[34] ICC-01/05-01/08-631-Red OA2, para. 105 – cited in ICC-01/05-01/08-1626-RedOA7, paras.47,55.
[35] ICC-01/05-01/08-631-Red OA2, para. 105. Recalled in ICC-01/05-01/08-1626-RedOA7, para.47.

Chamber is considering conditional release;[36] and (c) the Chamber finds that the "State's observations are insufficient to enable the Chamber to make an informed decision"[37] and specific conditions have yet to be identified.[38] The Appeals Chamber expressly indicated that the Chamber does not have a general obligation to request further observations whenever it rejects the adequacy of submissions by a State in relation to interim release.[39]

27. In this particular case the Trial Chamber was mindful of the relevant jurisprudence and correctly applied it.[40] It noted the fact that the Appeals Chamber did not impose a general obligation on the Chamber to seek observations in instances of interim release and that observations were only required if the Chamber was considering conditional release, the State conditions were not specific and the submissions were necessary so the Chamber could issue an informed decision on the defence request.[41] In the instant case, the 9 June and 29 July Letters contained an extensive and comprehensive list of measures that [REDACTED] was willing and able to implement. In addition, the [REDACTED] authorities explicitly acknowledged that they were willing to implement "*specific measures* […] in accordance with the conditions set forth at rule 119".[42] Hence, the Chamber correctly concluded that further observations from [REDACTED] were not necessary, as the conditions that [REDACTED] was willing and able to impose were clear and specific. Therefore, the Chamber was in a position to issue an informed decision on the Appellant's provisional release to [REDACTED].[43]

(ii) The Chamber has discretion to identify and propose the conditions of release

28. The Appellant argues that the 9 June and 28 July [REDACTED] Letters did not constitute an exhaustive list of all conditions that [REDACTED] was able to implement. According to the Appellant, [REDACTED] was never asked by the Chamber to provide a complete

[36] ICC-01/05-01/08-1626-RedOA7, paras.1,55. See also ICC-01/05-01/08-1722OA8, para.38.
[37] ICC-01/05-01/08-1626-RedOA7, paras.2,55-56.
[38] ICC-01/05-01/08-1626-RedOA7, para.53, a contrario: the Chamber does not need to identify conditions if the State guarantees are specific enough.
[39] ICC-01/05-01/08-1722OA8, para.38.
[40] See Decision, para.16.
[41] Decision, para.16 citing ICC-01/05-01/08-1626-RedOA7, para.55; ICC-01/05-01/08-1722OA8, para.38.
[42] Decision, para.17, quoting a sentence of the 29 July Letter.
[43] Decision, para.18.

list of the conditions that it was willing and able to provide.[44] The Appellant further submits that the 29 July Letter was a response to the 8 June Order of the Chamber, which did not ask for conditions others than those set out in rule 119. According to the Appellant, the Chamber should have identified other conditions – beyond those contained in the rule - and request observations.[45]

29. The Appellant's submissions are flawed. First, as mentioned above, the Appeals Chamber "in no way indicated a general obligation on the Trial Chamber to seek observations in the case of doubt as to submissions by a State in relation to interim release",[46] Second, the Appeals Chamber jurisprudence clearly indicates that if the conditions under article 58(1)(b) are met and the detention therefore appears necessary, it falls within the discretion of the Chamber to assess and consider alternative measures.[47] It follows that it also falls within the Chamber's discretion to decide which measures within or beyond the list enclosed in rule 119(1) appear adequate to address the identified risks and to request submissions from the State, if necessary.[48]

30. In addition, in this case the Chamber *did* ask for submissions on "whether the [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 the [REDACTED]".[49] If the Appellant considered that the Order was deficient, it should have sought remedial action at the time, for instance by requesting a supplementary order from the Chamber. It could have also raised this alleged error in its prior OA7 appeal. However, the Appellant never availed himself of these opportunities. It is not appropriate for the Appellant to belatedly raise it in the instant appeal for the first time.

31. The Prosecution further submits that, the Prosecution having demonstrated that release would entail a risk of flight under article 58(1), it is the Appellant's burden, as the party seeking release, to establish that there exist conditions that will guarantee his appearance

[44] Appeal Brief, paras.11-12
[45] Appeal Brief, para.15.
[46] ICC-01/05-01/08-1722-Conf OA8, para.38.
[47] ICC-01/05-01/08-1626-RedOA7, paras.1,55.
[48] The Appeals Chamber jurisprudence only indicates that the conditions that the Chamber may impose "may include, but are not limited to, those enumerated under rule 119 (1) of the Rules of Procedure and Evidence." ICC-01/05-01/08-1626-RedOA7, para.53.
[49] 8 June Order.

for trial.[50] The Appellant had no impediment to make his own inquiries further with the [REDACTED] authorities. In the event that such autonomous inquiry was not fruitful, the Appellant could still make a request to the Chamber, indicating specific areas of additional inquiry that the Appellant considered necessary. Failure to do any of this cannot be amended by shifting the burden to the Chamber and requiring that the Chamber enter into an endless consultation with the State on every possible hypothetical condition. The *OA7 Bemba* Appeals Judgment cannot logically be interpreted as imposing such an obligation upon the Trial Chamber.

(iii) The conditions of release have to be discussed inter partes

32. The Appellant argues that the Chamber could have not expected that [REDACTED] would communicate all details of security measures in the correspondence filed before the parties as those matters are supposed to be discussed *ex parte*.[51] The Appellant provides as example the meetings between the Belgian authorities and the Registry during the two instances when Belgium assumed his custody so that he could attend the funerals of his relatives.[52]

33. The Appellant confuses the identification and selection of measures to mitigate or eliminate risks under article 58(1)(b) with the subsequent discussions about the effective implementation of the identified measures and the related logistics. While the former have to be discussed before the parties, the latter may be discussed *ex parte* among the organs involved in effecting the implementation of the measures. The meetings between the Registry and the Belgian and Dutch authorities related only to the latter. In addition, the Appellant fails to specify which concrete measures [REDACTED] failed or could have failed to mention and had to be discussed without his being privy of such information.

[50] *Prosecutor v.Kovacevic*, Decision on Defence Motion for Provisional Release, IT-97-24-PT, 20 January 1998, para.6; *Prosecutor v.Strugar*, Decision on Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro, IT-01-42-A, 16 December 2005.
[51] Appeal Brief, paras.16,21.
[52] Appeal Brief, para.20.

Second Ground: the Chamber correctly concluded that the [REDACTED] **guarantees do not eliminate or adequately address the Appellant's risk of flight**

34. The Appellant argues that the Trial Chamber erred in its assessment of the guarantees provided by [REDACTED] and also by failing to consider the guarantees as a changed circumstance that would arguably address the risk of his abscondment.[53]

35. The Appellant's submissions are wrong. The Trial Chamber correctly noted the facts underlying the December 2010 Decision and concluded that they remained unaltered[54] and that the [REDACTED] guarantees – a "lone factual development"[55] – did not "mitigate the [Appellant's] risk of flight to an acceptable degree".[56] Hence, it found that the Appellant's detention under article 58(b)(i) still remains necessary.

36. The Trial Chamber noted the factors relied upon by the Chamber in the December 2010 Decision to conclude that the Appellant's detention was necessary to ensure his appearance at trial, in particular (a) the final dismissal of the Appellant's challenge to the admissibility of the case and the commencement of the trial; (b) the gravity of the charges confirmed against the accused; (c) the potential substantial sentence in case of conviction; and (d) the financial and material support from which the Appellant benefits.[57] The Chamber then explained why those four factors remained unchanged.[58]

37. The Chamber further noted two factors that could constitute a change of circumstances bearing on the Appellant's detention: first, his undertaking to return voluntarily to The Netherlands and not to attempt to intimidate witnesses or victims if granted provisional release;[59] and second, the guarantees offered by [REDACTED].[60] The Chamber concluded that the Appellant's undertaking did not warrant a modification of the December 2010 Decision as it could not alter the objective facts underpinning that decision.[61] Similarly, the Chamber noted that the measures proposed by [REDACTED] were aimed at

[53] Appeal Brief, paras.24-25,27.
[54] Decision, paras.21-26.
[55] Decision, para.34
[56] Decision, paras.35-38.
[57] Decision, para.22 referring to December 2010 Decision, paras.32,36,40.
[58] Decision, para.23. Note that the Appellant only refers to three out of the four factors: Appeal Brief, para.23.
[59] Decision, paras.24-25.
[60] Decision, para.34.
[61] Decision, para.26.

monitoring the Appellant's physical location while in [REDACTED], his compliance with the Chamber's conditions and return to the Court, but they did not address the Chamber's central concern, namely that the Appellant might abscond if given the opportunity as he has the motive and the means to flee. Hence, while the guarantees may increase the difficulty of absconding, they do not eliminate nor reduce the risk to an acceptable degree.[62]

38. This conclusion is sound and reasonable and no identifiable error can be identified in it. In addition, the Chamber's finding that the Appellant may use the available resources of his "family members and friends" if conditionally released is also a reasonable one. If persons close to the Appellant are willing to cover the costs of his private transport to any country that the Chamber chooses, they may well provide those same funds to ensure that the Appellant does not return to the seat of the Court.[63] Moreover, the Appellant rehearsed unsuccessfully this same argument in prior applications. See, for instance, the December 2011 Decision whereby the Trial Chamber stated that "the financial and material support from which the accused still benefit are, in the Chamber's view, still in existence and increase the risk of non-appearance at trial in particular now that the trial has started".[64] Thus, as the Appeals Chamber has stated, the Chamber does not need to enter findings on circumstances already decided in the prior ruling on detention, nor does the Chamber has to entertain submissions by the Appellant that merely repeat arguments that the Chamber has already addressed in previous decisions.[65]

Third Ground: the Trial Chamber correctly found that [REDACTED] **guarantees do not adequately reduce the risk of witness intimidation**

39. The Appellant argues that the Chamber's conclusion that the conditions proposed could not mitigate or neutralize the risk of witness interference posed by the Appellant's hypothetical release was flawed because (a) the Chamber did not have a proper factual basis for that conclusion; (b) the Appellant was not given a proper opportunity to make

[62] Decision, paras.36-38.
[63] Decision, para.23. Appeal Brief, para.26.
[64] December 2010 Decision, para.40.
[65] ICC-01/05-01/08-1019OA4, para.53.

submissions on the issue; and (c) the Chamber did not properly assess the extent of [REDACTED] commitment.[66] The Prosecution will address each of these allegations below.

(i)The alleged lack of a proper factual basis

40. The Appellant essentially claims that the Trial Chamber failed to indicate any proper basis for its inference that some of the threats may have originated from individuals who support the accused. In particular, the Appellant claims that there is no evidence that he sought, "either through himself or through others" to intimidate witnesses.[67] In addition, the Appellant claims that the Chamber failed to consider an alternative hypothesis as to the source of the threats.[68]

41. The Appellant misconstrues both the Decision and the applicable standard of proof for a determination under article 58(1)(b)(ii). In particular, although the Appellant acknowledges that under a "possibility" of witness interference suffices for the purposes of article 58(1)(b)(ii), he effectively requires a determination bordering on certainty as to the existence of the interference and its attribution to him and his associates.

42. The Appeals Chamber has clearly stated that "[w]hat may justify arrest (and, in this context, continued detention) under article 58(1)(b) of the Statute is that it must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence."[69] The duty on the Trial Chamber was to evaluate the facts and circumstances of the case and determine, in a reasoned manner, whether there was indeed a "possibility" that if released the Appellant could pose a risk of witness interference. Contrary to the Appellant's contention, the Chamber considered all relevant factors and reached a reasonable and well-founded conclusion: it examined the incidents that had been reported since July 2011 involving threats against Prosecution witnesses in connection with their testimony;[70] it also took into consideration that the identities of Prosecution

[66] See Appeal Brief, paras.28-43.
[67] Appeal Brief, paras.30-33.
[68] Appeal Brief, para. 34.
[69] ICC-01/04-01/07-572 OA6, para.21.
[70] Decision, para.29.

witnesses had been revealed notwithstanding the protective measures ordered by the Chamber;[71] and it then concluded that it was a reasonable inference that some of the threats may have originated from individuals who support the Appellant. After noting that the threats appear to have surged at precisely the moment in which the Prosecution's case had moved to the presentation of "witnesses whose testimony relates directly to the question of the accused's criminal responsibility, which has the potential to be outcome determinative in this case", the Chamber stated that, in the particular context, it was "reasonable to conclude that releasing the accused would increase his ability to interfere with witnesses or to cause others to do the same".[72] Hence, the standard under article 58(1)(b)(ii) had been clearly satisfied and the Chamber concluded that witness interference had moved "from a hypothetical 'possibility' into a reality".[73]

43. The applicable standard of review set out by the Appeals Chamber requires that, for the Appellant to succeed, he must demonstrate that the Chamber's reasoning was flawed and that its conclusions are plainly unreasonable, i.e. it is not possible to discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[74] The Appellant fails to meet this burden. His submissions are confined to an unsubstantiated assertion that the Chamber's conclusions are speculative or lacking any evidentiary support.[75] There is no indication why it was unreasonable for the Chamber, on the basis of the facts before it, to infer that individuals who support the Appellant (and not the Appellant himself or his associates, as the Appellant wrongly claims) may have been the source of some of the threats. The Appellant misconstrues the Decision and further demands a showing of direct evidence that the Appellant and his associates were involved in instances of witness intimidation, which is plainly not required for a finding under article 58(1)(b)(ii).[76] The existing of plausible alternative inferences, such as those offered by the Appellant, is equally immaterial: what is required is *a* possibility that the Appellant

[71] Decision, para.30.
[72] Decision, para.31.
[73] Decision, para.32. See the standard set out in paras.17 - 18 above.
[74] ICC-01/04-01/10-283OA, para.17.
[75] Appeal Brief, paras.32-33.
[76] Appeal Brief, para.33.

may interfere with witnesses if released, not that the possibility be the *only* available one.[77]

44. The arguments advanced by the Appellant are thus incapable of demonstrating any factual error vitiating the Decision. Contrary to the Appellant's claims, the Trial Chamber's factual conclusions are perfectly reasonable and find ample support in the information before the Chamber at the time of the Decision.

(ii) The alleged lack of an opportunity to make submissions on the issue of witness interference

45. The Appellant claims that he was never invited to make submissions on the allegations of witness intimidation. He also claims that while he was aware of the concerns raised in relation to Witness 0173, the Appellant had been informed by the Chamber that there was no implication that the Defence was involved, an assertion that the Appellant claims is incompatible with the Chamber's finding in the Decision that there was a reasonable inference that some of the threats may have originated from individuals who support the Appellant.[78] Both contentions are misplaced.

46. First, the Appellant's claim that he was never "invited" to make submissions on the issue of witness interference overlooks the background to the Decision and the critical fact that the Appellant was on notice at least since the Chamber's June 2011 Decision of the Chamber's views on the issue and on its impact on the Appellant's release.[79] On 19 August the Appeals Chamber subsequently overturned that ruling and remanded the matter for a new determination, including on the issue of witness interference.[80] Thus, the Appellant was perfectly aware of the fact that the Trial Chamber, pursuant to the Appeals Chamber's directions, was bound to consider anew the issue of witness interference and

[77] The Prosecution notes that in relation to inferences for the purposes of establishing reasonable grounds under Article 58(1)(a), the Appeals Chamber has stated that "requiring that the existence of genocidal intent must be the only reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt. If the only reasonable conclusion based on the evidence is the existence of genocidal intent, then it cannot be said that such a finding establishes merely 'reasonable grounds to believe'. Rather, it establishes genocidal intent 'beyond reasonable doubt'." ICC-02/05-01/09-73OA, para.33.
[78] Appeal Brief, para.35 et seq.
[79] ICC-01/05-01/08-1626-RedOA7, paras.49-58 and 71-74 (27 June 2011).
[80] ICC-01/05-01/08-1626-RedOA7, para.87.

its impact on the Appellant's continuing detention or release. Yet, the Appellant refrained from taking any step in order to influence that new decision: the Appellant did not make any request to, nor file any submissions before the Trial Chamber on the issue, despite having ample opportunity to do so.[81]

47. It was the Appellant's choice to remain passive instead of seeking to influence the Chamber's decision-making process. Whatever the reason behind that choice, the fact is that the Appellant cannot now claim that the process was unfair because he was not "invited" to make submissions.[82]

48. Finally, the Appellant misconstrues the assurances provided by the Presiding Judge: the Presiding Judge only told counsel for the Appellant that at that point in time the Chamber saw "no reason to infer *any interference of the Defence* with the witness".[83] This is perfectly compatible with the Chamber's subsequent conclusion that some of the threats may have originated *from individuals who support the accused*, i.e. from a group of persons different from the Defence. The Appellant thus misrepresents the Decision, which at no point determined that the Defence was involved in any threats to Prosecution witnesses.

(iii)The alleged failure to properly assess [REDACTED] *commitment*

49. The Appellant finally claims that the Trial Chamber erred by failing to consider that [REDACTED] commitment to cooperate with the Court "would extend to the possibility of the [sic] providing to the Registrar on a daily basis the transcripts of the private communications of the accused", which would have allowed the Registrar to detect "any confidential information concerning vulnerable witnesses".[84] The Appellant again misrepresents the Decision.

[81] The Appeals Chamber's ruling is from 19 August 2011 and the Trial Chamber did not make a new ruling until 26 September 2011.
[82] The Prosecution further notes that the Appellant was further put on notice on the importance of the issue of witness interference through the letter from Witness 169, to which the Appellant initially had access in full form, and then in redacted form. Decision, para.30 and footnote 55.
[83] ICC-01/05-01/08-T-149-CONF-ENG, 29 August 2011, p.47(emphasis added)
[84] Appeal Brief, paras.41-42.

50. First, the Chamber *did* consider that [REDACTED] was undertaking to implement "a monitoring and surveillance system", including the monitoring of the Appellant's telephone calls.[85] It did even recognize that, in relation to the risk of witness interference, the monitoring of the phone and electronic communications might, "in principle" mitigate the risk of witness intimidation.[86] However, the Chamber correctly concluded that the issue was not simply "a matter of monitoring calls and visits", but rather that the communications had to be "examined with an eye to the sensitive issues in the case and the witnesses who may be vulnerable to interference", which requires "knowledge of the identities of protected witnesses and, in certain circumstances, their location, family situation and the substance of their testimony".[87] Since [REDACTED] lacks this knowledge, its ability to assess any risk and take measures was seriously limited.[88]

51. The Prosecution submits that this was a perfectly reasonable exercise of the Chamber's discretion, and in particular one mindful of the Trial Chamber's protective duties under Article 68 of the Statute vis-à-vis witnesses.[89] The Appellant's arguments only express a disagreement with this exercise of discretion but fail to demonstrate that it is vitiated by the consideration of irrelevant circumstances or the failure to consider relevant ones. The Appellant's only claim appears to be that the Chamber failed to consider the possibility of a system whereby records of monitored conversations could be transmitted to the Registry for the purposes of their analysis. The Prosecution firstly notes that this is a mere hypothesis advanced by the Appellant that cannot amount to a relevant factor that the Chamber was bound to consider. Secondly, it is apparent that in a context of demonstrated threats to witnesses, a system whereby the Court not only loses control over the accused and his communications and but also must, for the purposes of accessing the necessary information to assess whether there are new risks to vulnerable witnesses, rely on cooperation from national authorities is neither efficient nor desirable. It was thus perfectly appropriate for the Chamber to determine that the most efficient manner to neutralize the risk of witness interference was through the continued detention of the Appellant.

[85] Decision, para.36 and 40.
[86] Decision, para.40.
[87] Ibid.
[88] Ibid.
[89] Decision, para.33.

Conclusion

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

Luis Moreno-Ocampo, Prosecutor

Dated this 20th day of December 2011
At The Hague, The Netherlands