

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/05-01/08

Date: 27 September 2011

**TRIAL CHAMBER III**

**Before:** Judge Sylvia Steiner, Presiding Judge  
Judge Joyce Aluoch  
Judge Kuniko Ozaki

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

**Public Redacted Version of the 26 September 2011 Decision on the accused's  
application for provisional release in light of the Appeals Chamber's  
judgment of 19 August 2011**

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

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Competent authorities of the Republic  
[REDACTED]

**Amicus Curiae**

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**Victims Participation and Reparations Section**

**Other**  
Appeals Chamber

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* issues the following Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011.

## I. Background

1. This decision constitutes the Chamber’s review of the accused’s request for provisional release into the territory of the Republic of [REDACTED], as ordered by the Appeals Chamber in its 19 August 2011 Judgment (“Appeals Judgment”).<sup>1</sup> The relevant facts are as follows.

### *The Chamber’s June 2011 Decision and the Appeals Judgment*

2. On 6 June 2011, the defence filed an application for the accused’s provisional release to [REDACTED] during Court recesses and periods when the Chamber does not sit for at least three consecutive days, including long weekends (“Application”).<sup>2</sup> The Application was supported by a 26 May 2011 letter from [REDACTED] (“26 May Letter”), which states that (i) “the competent authorities of [REDACTED] have granted” the defence’s 20 September 2010 request for [REDACTED]’s agreement to accept the accused into [REDACTED]’s territory (“Defence Request”);<sup>3</sup> and (ii) “the practical arrangements [ . . . ] will be made known to you and to the Court as soon as practicable”.<sup>4</sup>

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<sup>1</sup> 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”, 19 August 2011, ICC-01/05-01/08-1626-Conf. A public redacted version was filed on 12 September 2011: 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”, 12 September 2011, ICC-01/05-01/08-1626-Red.

<sup>2</sup> Requête ampliative de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo suite à la lettre de garantie étatique émanant de République du [REDACTED], 6 June 2011, ICC-01/05-01/08-1479-Conf and confidential annexes. An English translation was filed on 7 July 2011: Additional request for the interim release of Mr Jean-Pierre Bemba Gombo subsequent to the letter of guarantee by a State provided by the Republic of [REDACTED], 7 July 2011, ICC-01/05-01/08-1479-Conf-tENG, paragraphs 1 and 19.

<sup>3</sup> ICC-01/05-01/08-1479-Conf-AnxB-tENG, page 4.

<sup>4</sup> ICC-01/05-01/08-1479-Conf-AnxA-tENG.

3. The Chamber invited [REDACTED] to submit observations on the Application,<sup>5</sup> which [REDACTED] provided via a letter dated 20 June 2011 ("20 June Letter").<sup>6</sup> The 20 June Letter makes three representations: (i) that "there is no legal impediment to Mr Bemba's entry into or departure from [REDACTED] territory in the event of his interim release"; (ii) 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"; and (iii) that [REDACTED] "does not object to the interim release of Mr [Bemba]".<sup>7</sup>
4. On 27 June 2011, the Chamber issued its Decision on Applications for Provisional Release ("June 2011 Decision"), in which it ruled on the Application and two other requests for provisional release.<sup>8</sup> The June 2011 Decision denied the Application, ruling that the accused's continued detention was warranted under Article 58(1)(b)(i) of the Rome Statute ("Statute") because the accused remained a flight risk,<sup>9</sup> and under Article 58(1)(b)(ii) of the Statute because there was a risk of the accused interfering with witnesses if released.<sup>10</sup>

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<sup>5</sup> 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, paragraph 9.

<sup>6</sup> Report of the Registry on the Implementation of Decision ICC-01/05-01/08-1492-Conf, 21 June 2011, ICC-01/05-01/08-1556-Conf-Anx2. An English translation was filed on 11 August 2011: Annex 2, 11 August 2011, ICC-01/05-01/08-1556-Conf-Anx2-tENG.

<sup>7</sup> ICC-01/05-01/08-1556-Conf-Anx2-tENG.

<sup>8</sup> Decision on Applications for Provisional Release, 27 June 2011, ICC-01/05-01/08-1565-Conf. A public redacted version was filed on 16 August 2011: Public Redacted Version of the "Decision on Applications for Provisional Release" of 27 June 2011, 16 August 2011, ICC-01/05-01/08-1565-Red.

<sup>9</sup> ICC-01/05-01/08-1565-Red, paragraphs 55-61.

<sup>10</sup> ICC-01/05-01/08-1626- Red, paragraphs 62-65.

5. The defence appealed the June 2011 Decision.<sup>11</sup> By majority, the Appeals Chamber reversed the June 2011 Decision in part, identifying three errors in the Chamber's analysis of the Application.<sup>12</sup>
6. *First*, the Appeals Chamber held that "the Trial Chamber misappreciated [the 26 May and 20 June Letters] because it did not read them in context with" the Defence Request.<sup>13</sup>
7. *Second*, the Appeals Chamber held that "the Trial Chamber erred when it dismissed [REDACTED]'s Observations for lack of explicit assurances as to which conditions [under Rule 119] it would implement".<sup>14</sup> On this point, the Appeals Chamber stated:

[...] 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.<sup>15</sup>

8. On the basis of this reasoning, the Appeals Chamber held that the Chamber had erred in not requesting further information from [REDACTED] on the conditions it could implement if the accused were released into its territory.<sup>16</sup> The Appeals Chamber went on to state:

That is not to say that the Chamber upon receiving observations from the State is obliged to grant conditional release. It only means that the Chamber must seek information that would enable it to make an informed decision on the matter.<sup>17</sup>

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<sup>11</sup> 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", 29 June 2011, ICC-01/05-01/08-1573-Conf.

<sup>12</sup> ICC-01/05-01/08-1626- Red, paragraphs 49-58 and 71-74.

<sup>13</sup> ICC-01/05-01/08-1626- Red, paragraph 51.

<sup>14</sup> ICC-01/05-01/08-1626- Red, paragraph 53.

<sup>15</sup> ICC-01/05-01/08-1626- Red, paragraph 55.

<sup>16</sup> ICC-01/05-01/08-1626- Red, paragraph 56.

<sup>17</sup> ICC-01/05-01/08-1626-Red, paragraph 55.

9. *Third*, the Appeals Chamber held that the Chamber erred in concluding that witness interference concerns constituted an alternative basis for the accused's continued detention under Article 58(1)(b)(ii) of the Statute.<sup>18</sup> Noting that the Chamber's most recent detention decision did not address the issue of witness interference, the Appeals Chamber held that Article 58(1)(b)(ii) of the Statute could not be used as a basis for the accused's continued detention unless "a new fact or a change of circumstances" occurred since the Chamber's previous decision.<sup>19</sup>
10. The Appeals Chamber reversed the June 2011 Decision to the extent it dismissed the Application, and remanded the matter to the Chamber for new consideration.<sup>20</sup>

*New Information Not Considered in the June 2011 Decision or the Appeals Judgment*

11. On 29 July 2011, while the appeal of the June 2011 Decision was pending, [REDACTED] provided additional information on the measures it could take were the accused released into its territory.<sup>21</sup> This took the form of two letters, one dated 9 June 2011 ("9 June Letter") and one dated 29 July 2011 ("29 July Letter").<sup>22</sup> Both were notified on 3 August 2011.<sup>23</sup> As such, the letters were not available to the Chamber at the time it issued the June 2011 Decision and the Appeals Chamber did not consider them for the purpose of the appeal.<sup>24</sup>

<sup>18</sup> ICC-01/05-01/08-1626- Red, paragraphs 71-74.

<sup>19</sup> ICC-01/05-01/08-1626- Red, paragraphs 72-73.

<sup>20</sup> ICC-01/05-01/08-1626- Red, paragraph 87.

<sup>21</sup> Transmission of the Registry of the observations of the Republic of [REDACTED], 3 August 2011, ICC-01/05-01/08-1621-Conf and confidential annex. Translations of the Transmission and its annex were filed on 17 August 2011 and 8 August 2011 respectively: Transmission par le Greffe des observations de la République du [REDACTED], 17 August 2011, ICC-01/05-01/08-1621-Conf-tFRA; English Translation of Annex 1 : Transmission of the Registry of the observations of the Republic of [REDACTED], 8 August 2011, ICC-01/05-01/08-1621-Conf-Anx1-tENG.

<sup>22</sup> ICC-01/05-01/08-1621-Conf-Anx1-tENG.

<sup>23</sup> ICC-01/05-01/08-1621-Conf.

<sup>24</sup> ICC-01/05-01/08-1626-Red, paragraph 25.

12. The 9 June Letter makes three representations: (i) that “[REDACTED] is willing to receive Mr Jean Pierre Bemba Gombo on its territory in the event of his release”; (ii) that “[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) that “[REDACTED] guarantees Mr Jean Pierre Bemba Gombo’s return to the Netherlands to appear at his trial immediately the International Criminal Court so requests [sic]”.<sup>25</sup>

13. The 29 July Letter explains in further detail the measures that [REDACTED] would be willing to implement were the accused released into its territory:

[...] the relevant services of the Police ([REDACTED]) will be detailed to select the residence where the accused will be accommodated. Mr Bemba’s place of residence in [REDACTED] will be in a neighbourhood appropriate to round-the-clock monitoring. To this end, a police officer assigned to the police station nearest to Mr Bemba’s place of residence during his stay in [REDACTED] will be responsible for:

- informing the Registry of the Court through appropriate means whether the accused has complied with his obligation to report in person to the said police station every week;
- regularly verifying that the accused has complied with the conditions laid down by the Chamber for his interim release, and making unannounced visits to his place of residence in order to verify his presence there;
- maintaining a log of such visits, to be attached to the weekly report submitted to the Court;
- ensuring, to the extent possible, Mr Bemba’s safety during his presence in [REDACTED], and immediately notifying the Registry of the Court of any threat to his safety during such time, stating the outcome of any investigations into the matter;
- immediately arresting the accused in the event of any violation or attempt to violate the conditions laid down by the Chamber for his interim release;
- notifying the Chamber immediately of any such violation or attempted violation, and taking the necessary steps to ensure his return to the United Nations Detention Centre in The Hague;
- ensuring that the accused returns to the Netherlands to appear at trial immediately the Chamber so orders;
- ensuring that he is escorted by designated police officers from [REDACTED] to the designated airport in the Netherlands;

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<sup>25</sup> ICC-01/05-01/08-1621-Conf-Anx1-tENG, page 4.

- ensuring that the accused is handed over to the Dutch authorities with his passport and other travel documents;
- in the event of Mr Bemba attempting to escape, arresting and detaining him until his transfer to the United Nations Detention Centre;
- facilitating communication and cooperation between the parties and, in this respect, maintaining the confidentiality of information exchanged.

The Government of [REDACTED] further undertakes to:

- take all necessary steps to prevent the accused from influencing or attempting to intimidate any witnesses whatsoever, either in [REDACTED] or elsewhere;
- take, in this respect, appropriate steps to ensure the proper monitoring of any telephone calls made and received by the accused.<sup>26</sup>

## II. Relevant provisions

14. In accordance with Article 21(1) of the Statute, the Chamber has, in ruling on the Application, considered Articles 58(1), 60(3), 64 and 68(1) of the Statute and Rules 118 and 119 of the Rules of Procedure and Evidence (“Rules”).

## III. Analysis

*There Is No Need To Seek Additional Observations from [REDACTED]*

15. As explained above, the Appeals Judgment held that the Chamber erred in not requesting further information from [REDACTED] on the conditions it could implement were the accused released into its territory.<sup>27</sup> The Appeals Judgment was based on the material before the Chamber when it issued the June Decision – namely, the 26 May and 20 June Letters.<sup>28</sup> Since then, [REDACTED]’s 9 June and 29 July Letters have been received. The question is whether, in light of those letters, the Chamber is required to seek further observations from [REDACTED]. For the reasons that follow, the Chamber concludes that it is not.

<sup>26</sup> ICC-01/05-01/08-1621-Conf-Anx1-tENG, pages 2-3.

<sup>27</sup> ICC-01/05-01/08-1626-Red, paragraph 56.

<sup>28</sup> ICC-01/05-01/08-1626-Red, paragraph 25.



16. The Appeals Judgment states that a Chamber must seek additional information from a State only if “the State’s observations are insufficient to enable the Chamber to make an informed decision” on whether to release the detainee to that State.<sup>29</sup> It therefore follows that if the information received from the State is sufficient for the Chamber to make an informed decision, the Chamber may rule on the basis of that information and need not seek additional observations. As the Appeals Chamber stated in a subsequent ruling, the Appeals Judgment “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”.<sup>30</sup> Rather, the key is to identify the “specific conditions the State was willing or able to impose”.<sup>31</sup>

17. In the Chamber’s view, the 9 June and 29 July Letters, which, as stated above, were not available to the Chamber when it issued the June 2011 Decision, satisfy this requirement. The Letters contain an extensive and comprehensive list of the measures that [REDACTED] is willing to implement if the accused is released into its territory, including the steps that would be undertaken in relation to the accused’s monitoring and safety in [REDACTED], as well as his travel to and from The Netherlands. The 9 June and 29 July Letters also appear to constitute an exhaustive list of the measures that [REDACTED] is willing to implement if the accused is released into its territory. In this respect, the sentence in the 29 July Letter preceding the bullet point list of measures is instructive: “the Ministry wishes to inform the Court of the specific measures which [REDACTED] will implement, in accordance with the conditions set forth at

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<sup>29</sup> ICC-01/05-01/08-1626-Red, paragraph 55.

<sup>30</sup> ICC-01/05-01/08-1722-Conf, paragraph 38.

<sup>31</sup> ICC-01/05-01/08-1722-Conf, paragraph 38.

rule 119 of the Rules [...]” (emphasis added).<sup>32</sup>

18. Simply put, the 9 June and 29 July Letters contain the detail that was absent from [REDACTED]’s brief 26 May and 20 June Letters. As such, the Letters provide the Chamber with a sufficient basis to rule on the Application. In light of this conclusion, the Chamber does not consider it useful to invite [REDACTED] to make additional observations. It is now clear “what specific conditions [[REDACTED] is] willing or able to impose”,<sup>33</sup> which “enable[s] the Chamber to make an informed decision” on whether to grant the accused provisional release to [REDACTED].<sup>34</sup>

*The Starting Point for The Chamber’s Review is its December 2010 Decision*

19. Article 60(3) of the Statute provides that a Chamber may modify an earlier order relating to a person’s detention only “if it is satisfied that changed circumstances so require”.<sup>35</sup> As the Appeals Chamber has held, “the ‘requirement of changed circumstances [in Article 60(3) of the Statute] imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary.’”<sup>36</sup> In undertaking its inquiry, “the Chamber must revert to the [earlier] ruling on detention to determine whether there has been a change in circumstances that have a bearing on the conditions under article 58(1) of the Statute.”<sup>37</sup>

<sup>32</sup> ICC-01/05-01/08-1621-Conf-Anx1-tENG, page 2; *see also* ICC-01/05-01/08-1621-Conf-Anx1, page 2 [REDACTED].

<sup>33</sup> ICC-01/05-01/08-1722-Conf, paragraph 38.

<sup>34</sup> ICC-01/05-01/08-1626-Red, paragraph 55.

<sup>35</sup> Article 60(3) of the Statute.

<sup>36</sup> 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 OA4, paragraph 51 (quoting 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 OA2, paragraph 60).

<sup>37</sup> ICC-01/05-01/08-1019 OA4, paragraph 52.

20. As the Application acknowledges,<sup>38</sup> the starting point for the Chamber's review is its decision of 17 December 2010 ("December 2010 Decision"),<sup>39</sup> which is discussed in further detail below.

*Because The Factual Basis of The Chamber's December 2010 Decision Is Unaltered, The Accused's Detention Remains Necessary Under Article 58(1)(b)(i) of The Statute*

21. The legal basis for the December 2010 Decision was Article 58(1)(b)(i) of the Statute.<sup>40</sup> Under that provision, the Chamber found that the accused's continued detention was necessary to ensure his appearance at trial.<sup>41</sup> The question for the Chamber now is whether there is "a relevant change in circumstances" that alters the factual underpinning of the December 2010 Decision to such an extent that its modification is warranted under Article 60(3) of the Statute.<sup>42</sup>

22. To answer this question, it is first necessary to review the factors the Chamber relied upon in the December 2010 Decision to conclude that the accused's detention was necessary to ensure his appearance at trial. The Chamber based that finding on four factors: (i) the final dismissal of the defence's challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed against the accused; (iii) the potential substantial sentence in case of conviction; and (iv) the financial and material support from which the accused benefits.<sup>43</sup>

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<sup>38</sup> ICC-01/05-01/08-1479-Conf-tENG, paragraph 5.

<sup>39</sup> Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment on 19 November 2010, 17 December 2010, ICC-01/05-01/08-1088. A French translation was filed on 28 January 2011: *Décision relative au réexamen de la détention de Jean-Pierre Bemba Gombo en exécution de l'arrêt du 19 novembre 2010*, ICC-01/05-01/08-1088-tFRA.

<sup>40</sup> ICC-01/05-01/08-1088, paragraph 46.

<sup>41</sup> ICC-01/05-01/08-1088, paragraphs 32-41.

<sup>42</sup> [REDACTED].

<sup>43</sup> ICC-01/05-01/08-1088, paragraphs 32, 36, 40.

23. In the Chamber's view, the above four factors remain unchanged as of today's date. As was the case in December 2010, the accused's trial is ongoing, which creates an obligation for him to attend hearings regularly. The gravity of the charges against the accused has not changed. Nor has the related possibility of a substantial sentence if convicted. Finally, there is no suggestion that the accused's access to financial and material support has lessened. On the contrary, on at least three occasions since the December 2010 Decision, the defence has represented to the Chamber that the costs of charter flights, security and monitoring would be borne by the accused's "family members and friends" if provisional release were granted.<sup>44</sup> If the accused can summon sufficient funds for those purposes, it is a proper inference that he can also muster the funds he would need to abscond.

24. Since the Application was filed, the accused has provided the Chamber with an undertaking to return voluntarily to The Netherlands and not to attempt to intimidate witnesses or victims if granted provisional release.<sup>45</sup> The undertaking was provided in the context of a request for release to the Democratic Republic of the Congo rather than [REDACTED].<sup>46</sup> While the accused's undertaking post-dated the Application and was therefore not discussed therein, the Appeals Chamber has held that "the Chamber

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<sup>44</sup> Corrigendum to Application for the interim release of Mr Jean-Pierre Bemba Gombo, 3 May 2011, ICC-01/05-01/08-1387-Conf-Corr-tENG, paragraph 17; 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, 10 June 2011, ICC-01/05-01/08-1501-Conf-tENG, paragraph 17; Application for the interim release of Mr Jean-Pierre Bemba Gombo to allow him to perform his civic duties in the Democratic Republic of Congo, 24 August 2011, ICC-01/05-01/08-1639-Conf-tENG, paragraph 27.

<sup>45</sup> Annex C to Application for the interim release of Mr Jean-Pierre Bemba Gombo to allow him to perform his civic duties in the Democratic Republic of Congo, 24 August 2011, ICC-01/05-01/08-1639-Conf-AnxC.

<sup>46</sup> Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d'accomplir ses devoirs civiques en République Démocratique du Congo, 24 August 2011, ICC-01/05-01/08-1639-Conf and four confidential annexes. An English translation was filed on 26 August 2011: Application for the interim release of Mr Jean-Pierre Bemba Gombo to allow him to perform his civic duties in the Democratic Republic of Congo, ICC-01/05-01/08-1639-Conf-tENG.

should not restrict itself to only considering the arguments raised by the detained person” when undertaking a review under Article 60(3) of the Statute.<sup>47</sup> Thus, the Chamber will consider the accused’s undertaking in the context of the present review.

25. Although the undertaking was submitted in a different context, the Chamber nevertheless considers it to be a “changed circumstance” under Article 60(3) of the Statute. This is because the undertaking speaks to the accused’s willingness to return to complete his trial if granted provisional release, which bears on the issue of his risk of flight.

26. However, for the same reasons given in the Chamber’s 2 September 2011 Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo”,<sup>48</sup> the Chamber concludes that the undertaking does not warrant a modification of the December 2010 Decision. The undertaking does not alter the facts underpinning the December 2010 Decision and its veracity is uncertain.<sup>49</sup> For these reasons, and for those discussed above in paragraph 23, the Chamber concludes that the accused’s detention continues to be necessary to ensure his appearance at trial and is therefore warranted under Article 58(1)(b)(i) of the Statute.

*The Accused’s Detention Is Necessary Under Article 58(1)(b)(ii) of the Statute*

27. The Appeals Judgment held that the Chamber erred in relying on Article

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<sup>47</sup> ICC-01/05-01/08-1019 OA4, paragraph 52.

<sup>48</sup> Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo”, 2 September 2011, ICC-01/05-01/08-1691-Conf, paragraphs 18-23. A public redacted version was filed on 6 September 2011: Public Redacted Version of the Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo” of 2 September 2011, 6 September 2011, ICC-01/05-01/08-1691-Red.

<sup>49</sup> ICC-01/05-01/08-1691-Red, paragraph 22.

58(1)(b)(ii) of the Statute as a basis for denying the Application without “explain[ing] why those factors [the Chamber identified as creating a possibility of witness interference] constituted a change in circumstances since the Decision of 17 December 2010”.<sup>50</sup> That suggested error is remedied below.

28. As the Appeals Chamber has held, the Chamber must not limit itself to the arguments of the parties when considering a request for interim release; it “must also consider any other new information which has a bearing on the subject”.<sup>51</sup> As part of this broad inquiry, the Chamber has considered the witness interference concerns that have been raised since the December 2010 Decision.

29. Several incidents have been reported since July 2011 in which threats have allegedly been made against prosecution witnesses and their families in connection with their testimony at the Court.<sup>52</sup> These incidents have in large part been raised with the Chamber on an *ex parte* basis.<sup>53</sup> Because of the sensitivity of the information, the Chamber is of the view that *ex parte* treatment is appropriate at this stage. For the purpose of this decision, however, the Chamber will rely only on information to which the defence has access.

30. This information suggests that the identities of prosecution witnesses have been revealed in situations where the Chamber has granted protective

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<sup>50</sup> ICC-01/05-01/08-1626-Red, paragraph 73.

<sup>51</sup> ICC-01/05-01/08-1019 OA4, paragraph 52.

<sup>52</sup> Decision on the prosecution's application regarding a letter dated 6 August 2011, 9 September 2011, ICC-01/05-01/08-1727-Conf, paragraph 9.

<sup>53</sup> ICC-01/05-01/08-1623-Conf-Exp; ICC-01/05-01/08-1727-Conf; transcript of hearing on 26 August 2011, ICC-01/05-01/08-T-148-CONF-EXP-ENG ET, page 8, line 22 to page 14, line 14; page 17, line 6 to page 18, line 14; page 19, line 25 to page 20, line 23; transcript of hearing on 7 September 2011, ICC-01/05-01/08-T-155-CONF-EXP-ENG ET, page 6, lines 2 to 21; page 15, lines 11 to 18; page 20, lines 1 to 3.

measures to protect their identities. For example, [REDACTED] testified on [REDACTED] that the fact of his testimony had been disclosed, notwithstanding the protective measures ordered by the Chamber.<sup>54</sup> Similarly, the Chamber was provided with a letter from [REDACTED], which suggests that his identity and the fact of his testimony have been revealed, and in which [REDACTED] reports receiving death threats directed at him and his family as a result of his cooperation with the Court.<sup>55</sup> This is of particular concern given that [REDACTED] testified in closed session.<sup>56</sup>

31. The Chamber is not in a position at this stage to reach conclusions on who is responsible for the alleged incidents of witness interference. It is a reasonable inference, however, that some may have originated from individuals who support the accused. In this respect, the Chamber notes with concern that the threats against witnesses appear to have surged at precisely the moment when the prosecution's case has shifted from so-called crime base witnesses to 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. In this context, it is reasonable to conclude that releasing the accused would increase his ability to interfere with witnesses or to cause others to do the same.

32. While the Chamber recognises that the risk of witness interference involves an element of prediction, the Appeals Chamber has held that Article 58(1)(b)(ii) of the Statute may be satisfied if there is a "possibility" of witness interference.<sup>57</sup> That standard is clearly satisfied here. The

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<sup>54</sup> [REDACTED].

<sup>55</sup> [REDACTED].

<sup>56</sup> [REDACTED].

<sup>57</sup> ICC-01/05-01/08-323 PT OA, paragraphs 55 and 67.

information currently before the Chamber indicates that witness interference has moved from a hypothetical “possibility” into a reality. Therefore, the Chamber concludes that Article 58(1)(b)(ii) of the Statute constitutes an alternative basis for the accused’s continued detention.

33. In reaching this conclusion, the Chamber is mindful of its duty under Article 68 of the Statute to “take appropriate measures to protect the safety, physical and psychological well-being [. . .] of witnesses”. It is self-evident that witnesses’ well-being would be adversely affected by threats or physical harm resulting from their cooperation with the Court. Thus, if a detainee’s release would increase the risk of such interference, the Chamber’s duties under Article 68 are implicated. While Article 58(1)(b) of the Statute is the provision on which this decision is based, the Chamber considers that its decision to deny the Application – based in part on witness interference grounds – is consistent with its duty to protect the well-being of witnesses.

*Because The Proposed Conditions of Release Do Not Mitigate The Risks Identified Under Article 58(1)(b) of The Statute to an Acceptable Degree, Conditional Release Is Not Appropriate*

34. The Application is based upon a lone factual development: [REDACTED]’s willingness to accept the accused into its territory and to implement conditions pursuant to Rule 119 of the Rules. The question is whether the conditions that [REDACTED] is willing to implement would mitigate the risks identified under Article 58(1)(b) of the Statute to such an extent that conditional release would be appropriate pursuant to Rule 119 of the Rules.



35. In answering this question, the Chamber notes the Appeals Chamber's pronouncement that a grant of conditional release under Rule 119 of the Rules is a matter of discretion for the Chamber.<sup>58</sup> In exercising this discretion, the Chamber has weighed the conditions that [REDACTED] is willing to implement against the risks identified under Article 58(1)(b) of the Statute to determine whether and to what extent the proposed conditions would mitigate those risks. The Chamber has then considered whether the degree of mitigation warrants a grant of conditional release in the Chamber's discretion.
36. In its 9 June and 29 July Letters, [REDACTED] undertakes, *inter alia*, to verify on a regular basis that the accused is complying with conditions set down by the Chamber through a reporting system, unannounced visits to the accused's residence, the monitoring of his telephone calls and by arresting the accused and returning him to The Hague if he attempts to escape or violates the conditions of his release.<sup>59</sup> In essence, [REDACTED] agrees to implement a monitoring and surveillance system. While this is a significant undertaking, the Chamber is not persuaded that it mitigates the risks identified under Article 58(1)(b) of the Statute to such an extent that a grant of conditional release is warranted.
37. In relation to the risk under Article 58(1)(b)(i) of the Statute, the monitoring regime proposed by [REDACTED] does not allay the Chamber's central concern – that the accused, if given the opportunity, may well abscond. As this Chamber and the Pre-Trial Chamber have concluded on several occasions,<sup>60</sup> and as the Appeals Chamber has

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<sup>58</sup> See, e.g., ICC-01/05-01/08-1626-Red, paragraphs 55 and 82; ICC-01/05-01/08-631-Red, paragraph 105.

<sup>59</sup> ICC-01/05-01/08-1621-Conf-Anx1-t-ENG, pages 2-3.

<sup>60</sup> Decision on application for interim release, 20 August 2008, ICC-01/05-01/08-73, paragraphs 55-58; Decision on Application for Interim Release, 16 December 2008, ICC-01/05-01/08-321, paragraphs 36-37; Decision on Application for Interim Release, 14 April 2009, ICC-01/05-01/08-403, paragraphs 45-47; transcript

confirmed,<sup>61</sup> the accused has the motive and the means to flee. This renders him a flight risk and makes release on his own recognisance inappropriate. This conclusion holds true despite the monitoring measures proposed by [REDACTED]. While the measures that [REDACTED] has agreed to implement may increase the difficulty of absconding, they do not eliminate that risk. Nor, in the Chamber's view, do they reduce it to an acceptable degree.

38. The measures proposed by [REDACTED] are not designed to prevent the accused from absconding. Rather, they are aimed at monitoring the accused's physical location while in [REDACTED], determining whether he complies with the conditions imposed by the Trial Chamber, reporting any violation of those conditions to the Court, and returning the accused to the Court's custody in the event of such a violation. The problem is that the proposed measures are unlikely to prevent the accused from absconding if he chooses to do so. For this reason, the Chamber concludes that the proposed conditions do not mitigate the risk of flight to an acceptable degree.

39. In relation to the risk of witness interference under Article 58(1)(b)(ii) of the Statute, it is self-evident that the accused's ability to interfere with witnesses or to cause others to do so would increase if released. While in custody in the Court's detention centre, the accused's ability to communicate with persons outside the detention centre is subject to

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of hearing on 8 December 2009, ICC-01/05-01/08-T-18-CONF-ENG ET, page 25, line 22 to page 29, line 18; ICC-01/05-01/08-1088, paragraphs 32-41.

<sup>61</sup> 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, paragraphs 53-58; 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, paragraphs 66-88.

several restrictions, which may be increased if deemed necessary to prevent, *inter alia*, witnesses intimidation or interference with the administration of justice.<sup>62</sup> Should the accused be granted conditional release to [REDACTED], these restrictions would be significantly lessened.

40. [REDACTED] expresses a willingness to monitor “any telephone calls made and received by the accused” and to take “all necessary steps to prevent the accused from influencing or attempting to intimidate any witnesses.”<sup>63</sup> The Chamber agrees that telephone monitoring and other “necessary steps” such as the monitoring of cellular telephone and email communication and the logging of visitors may, in principle, mitigate the risk of witness intimidation. However, it is not simply a matter of monitoring or recording calls and visits. Those communications must be examined with an eye to the sensitive issues in the case and the witnesses who may be vulnerable to interference at a given stage of proceedings. This requires knowledge of the identities of protected witnesses and, in certain circumstances, their location, family situation and the substance of their testimony. [REDACTED] does not have access to this confidential information. In the circumstances of this case, and at this stage of the proceedings, [REDACTED]’s lack of specific information regarding witness protection issues would limit its ability to properly assess the risk of witness interference and to take steps to minimise this risk.

41. This leads the Chamber to conclude that (i) the proposed provisional release would meaningfully increase the accused’s ability to interfere with witnesses or to cause others to do so; and (ii) the measures that [REDACTED] is willing to implement would not mitigate that risk to an

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Regulations 168, 169, 174, 175, 179, 180, 183 and 184 of the Regulations of the Registry (“RoR”).  
CC-01/05-01/08-1621-Conf-Anx1-tENG, page 3.

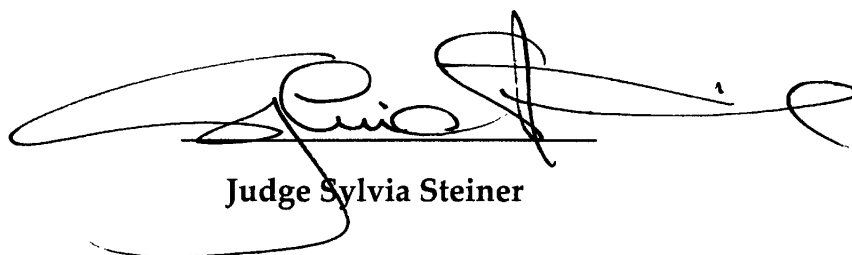
acceptable degree.

42. For the reasons explained above in paragraphs 35 to 41, the Chamber declines to exercise its discretion to grant the accused conditional release to [REDACTED].

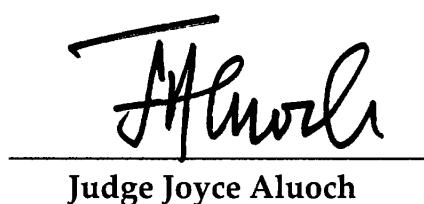
#### IV. Conclusion

43. In these circumstances, the Chamber denies the Application.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 27 September 2011

At The Hague, The Netherlands